





# Terms of reference

## Review of the adversarial system of litigation

I, MICHAEL LAVARCH, Attorney-General of Australia, HAVING REGARD TO:

- the need for a simpler, cheaper and more accessible legal system;
- the Justice Statement; and
- recent and proposed reforms to courts and tribunals,

REFER to the Law Reform Commission for inquiry and report under the *Law Reform Commission Act 1973* the following matters:

- (a) the advantages and disadvantages of the present adversarial system of conducting civil, administrative review and family law proceedings before courts and tribunals exercising federal jurisdiction;
- (b) whether any changes should be made to the practices and procedures used in those proceedings; and
- (c) any related matter.

The Commission shall consider, among other matters:

- civil litigation and administrative law procedures in civil code jurisdictions
- the procedures and case management schemes used by courts and tribunals to control the conduct of proceedings that come before them
- the relationship between courts and tribunals
- mechanisms for identifying the issues in dispute
- means of gathering, testing and examining evidence
- the use of court-based and community alternative dispute resolution schemes
- the significance of legal education and professional training to the legal process
- the training, functions, duties and role of judicial officers as managers of the litigation process
- appellate court processes.

IN PERFORMING its functions in relation to this Reference the Commission shall

- (i) consult widely among the Australian community and with relevant bodies, and particularly with
  - the High Court of Australia, the Federal Court of Australia, the Family Court of Australia and other courts and tribunals exercising federal jurisdiction;

- the Law Council of Australia, law societies, bar associations, legal aid commissions, community legal centres and national groups representing business and consumers; and
- (ii) in recognition of work already undertaken, have regard to relevant reports, and any steps taken by governments and courts to implement their recommendations.

IN MAKING ITS REPORT the Commission will also have regard to its function in accordance with s6(1)(d) of the Law Reform Commission Act to consider and present proposals for uniformity between the laws of the Territories and laws of the States.

THE COMMISSION IS REQUIRED to make

- preliminary recommendations on the conduct of civil litigation not later than 30 September 1997
- a final report on the conduct of civil, administrative review and family law not later than 30 September 1998.

Dated 29 November 1995

Michael Lavarch  
Attorney-General

# Altered terms of reference

## Review of the Adversarial System of Litigation

I, DARYL WILLIAMS, AM QC, Attorney-General of Australia, HAVING REGARD TO:

- the reference entitled 'Review of the adversarial system of litigation' (the reference) given to the former Law Reform Commission on 29 November 1995 by the then Attorney-General, the Hon Michael Lavarch;
- the transfer of the reference to the Australian Law Reform Commission ('the Commission') by s 10 of the *Australian Law Reform Commission (Repeal, Transitional and Miscellaneous) Act 1996*;
- a request by the Commission to extend the time for the carrying out of the reference;

ALTER, under s 20 of the *Australian Law Reform Commission Act 1996*, the terms of the reference so that the operative terms of the reference are to be

The matters REFERRED to the Commission for inquiry and report are the following:

- (a) the advantages and disadvantages of the present adversarial system of conducting civil, administrative review and family law proceedings before courts exercising federal jurisdiction and Commonwealth tribunals, except for issues relating to:
  - the structure and management of federal merits review tribunals;
  - the breadth, type, coverage and nature of decisions in merits review of federal administrative decisions;
  - the possible establishment, structure and jurisdiction of a federal magistracy;
  - the organisation and provision of family counselling services;
  - the structure of the Family Court and its relationship to the Federal Court of Australia,
- (b) whether any changes should be made to the practices and procedures used in those proceedings other than changes of a kind that would or might require amendment of the Constitution; and
- (c) any related matter.

The Commission shall consider, among other matters:

- the causes of excessive costs and delay, including economic factors

- civil litigation and administrative law procedures in civil code jurisdictions
- the procedures and case management schemes used by courts and tribunals to control the conduct of proceedings that come before them
- the relationship between courts and tribunals
- mechanisms for identifying the issues in dispute
- means of gathering, testing and examining evidence
- the use of court-based and community alternative dispute resolution schemes
- the significance of legal education and professional training to the legal process
- the training, functions, duties and role of judicial officers as managers of the litigation process
- appellate court processes.

The Commission shall, in relation to federal civil litigation, focus its attention on:

- the causes of excessive costs and delay, including economic factors;
- case management;
- alternative dispute resolution;
- pleadings and other court processes;
- expert evidence and expert witnesses; and
- unrepresented litigants.

IN PERFORMING its functions in relation to this reference the Commission shall

- (i) consult widely among the Australian community and with relevant bodies, and particularly with
  - the High Court of Australia, the Federal Court of Australia, the Family Court of Australia, other courts exercising federal jurisdiction and Commonwealth tribunals;
  - the Law Council of Australia, law societies, bar associations, legal aid commissions, community legal centres and national groups representing business and consumers; and
- (ii) in recognition of work already undertaken, have regard to relevant reports, and any steps taken by governments and courts to implement their recommendations.

IN MAKING ITS REPORT the Commission will also have regard to its function to consider and report on proposals for uniformity between laws of the Territories and laws of the States.

THE COMMISSION IS REQUIRED to

- issue a discussion paper not later than 31 August 1998

- a final report on the conduct of civil, administration review and family law proceedings not later than 30 April 1999\*.

Dated 2 September 1997

Daryl Williams  
Attorney-General

NOTE

\* In a letter dated 10 November 1999, the Attorney-General extended the deadline for reporting to 14 January 2000.

# Executive summary

## Introduction

*Managing justice: A review of the federal civil justice system* (ALRC 89) represents the culmination of a major four year inquiry, which commenced with terms of reference directing the Commission to consider 'the need for a simpler, cheaper and more accessible legal system'. The Commission was asked to focus particular attention on issues relating to the causes of excessive costs and delay, case management, alternative dispute resolution (ADR), pleadings and other court processes, expert evidence and unrepresented litigants.

As this is a review of federal jurisdiction, the Commission examined the Federal Court of Australia (Federal Court), the Family Court of Australia (Family Court) and the Administrative Appeals Tribunal (AAT), and to a lesser extent those other federal review tribunals set for amalgamation with the AAT in the proposed new Administrative Review Tribunal (ART) – the Migration Review Tribunal (MRT), the Refugee Review Tribunal (RRT) and the Social Security Appeals Tribunal (SSAT). In this report, the Commission uses the term 'federal civil justice system' to refer not only to the courts and tribunals, but also to the full array of judicial, administrative review, and community and court based ADR schemes found in federal civil jurisdiction.

The work of the Commission on this inquiry was supported by an Advisory Group comprising eminent judges, lawyers, and others. The Commission also established a number of expert working groups to provide detailed advice and assistance in such areas as Federal Court, Family Court and federal tribunal practice and procedures costs, ADR processes, information technology, and training and education. The Commission held numerous consultations across the country, and received assistance from a wide variety of individuals and organisations, including some 400 written submissions.

ALRC 89 follows publication of a discussion paper, six issues papers, six background papers and a series of research reports detailing the major empirical research effort undertaken by the Commission and its consultants – the largest and most comprehensive empirical study of case files and case cost information from the Federal and Family Courts and the AAT.

In Discussion Paper 62, *Review of the federal civil justice system* (DP 62), published in August 1999, the Commission documented numerous concerns about the federal civil justice system, but suggested that the flaws were reparable and that it was not helpful to speak of the system being 'in crisis'. As the Commission notes in chapter 1, it is difficult to find a civil justice system in the world which does *not* have problems relating to cost and delay, concerns about levels of access,



representation and resourcing, and questions about the management of disputes and litigation.

This report contains 138 recommendations, covering a wide range of issues and current problems, aimed at the variety of participants and institutions which influence the general quality, and the particular practices and procedures, of the federal civil justice system. The Commission's call for a collaborative and holistic approach to tackling civil justice reform is directed to the federal government and government departments and agencies, parliamentary committees, the federal courts and tribunals, the legal profession, legal aid commissions, educational institutions, and others.

In chapter 1, the Commission sets out the history of the reference, and discusses the philosophical and methodological approaches the Commission has taken to its inquiry into reform of the federal civil justice system. The Commission notes in particular the critical need for further empirical and applied research, so that reform and analysis can proceed from a platform of empirical reality rather than anecdote and impression. The Commission also notes that reform of the federal civil justice system must not discount the role of courts and tribunals beyond adjudication or review. The Family Court, for example, deals with real and distressing family problems which impact through society. The Court has been described as a 'front line institution to resolve family violence'. The Federal Court plays a pivotal role in relation to various sectors of economic activity — a role applauded and supported by corporations and corporate counsel consulted by the Commission. Corporate lawyers and inhouse counsel were of the view that effective judicial management of commercial cases make Australian legal services a key export, and are part of what makes Australia competitive in the Asia-Pacific region and beyond. The Federal Court in its jurisdiction creates and maintains formal and informal rules which keep business transaction costs low, defines and protects rights (for example, intellectual property rights), gives force to contracts, influences private dispute resolution, ensures the security of property, helps to regulate markets and ensure competition, and scrutinises the behaviour of public officials.

## **Education, training and accountability**

Chapter 2 is devoted to matters of legal, professional and judicial education, and judicial accountability. The Commission's view is that education plays an essential role at different stages in shaping the 'legal culture', and in determining how well the civil justice system operates in practice. While it is of the utmost importance to get the structures, practices and procedures of civil justice right, systemic reform and the maintenance of high standards of performance also require a healthy professional culture — one that values lifelong learning, takes ethical concerns seriously, and embraces a 'service ideal'.

Accordingly, the Commission has developed a set of recommendations expressly intended to highlight the role and lift the standard of legal education in Australia. These include

- increasing the emphasis at university law schools on teaching legal ethics and professional responsibility, as well as professional skills such as dispute resolution
- developing a regime for quality assurance of legal education programs and calling for another national discipline review
- ensuring the regular participation of legal practitioners in continuing professional development programs
- establishing an Australian Academy of Law to promote a more active collegial relationship among judges, lawyers, legal academics and law students, in aid of higher standards of conduct and learning
- establishing an Australian Judicial College, to enhance judicial studies federally and nationally
- ensuring appropriate education and training for members of federal review tribunals.

These recommendations move away, in some respects, from the approach taken in DP 62. For example, in chapter 2 the Commission discusses its decision not to proceed with a proposal for a national authority to accredit law school courses, believing that an attempt to do so at this time would risk ossifying curriculum development, rather than promoting quality and innovation.

In relation to judicial accountability, the Commission also has moved away from a proposal in DP 62 to establish a standing national judicial commission to receive and investigate complaints against federal judges. The conclusion reached by the Commission, following further research, consultations and submissions, is that the establishment of such a body would be problematic under chapter III of the Constitution.

The Commission recognises that there already exist a number of important formal and informal checks on judicial performance — the fact that judges operate in open courts and provide written reasons for decisions, which generally are subject to appellate review, peer pressure, and external scrutiny by Parliament, the media and academic commentators. Nevertheless, the Commission believes that current expectations about the transparency and accountability of public institutions are no less applicable to the courts.

Working within the boundaries of constitutional constraint, and in recognition of the importance of judicial independence as a cornerstone of our justice system, the Commission recommends that to ensure judicial accountability in the public interest

- each federal court develop a transparent internal system of complaints handling, consistent with the prevailing Australian Standards in this regard, including annual reporting of complaints and outcomes
- both Houses of federal Parliament develop rules or a protocol designed to ensure the smooth transfer and certain handling of the rare complaints against federal judges of sufficient seriousness and substance to merit consideration of whether to remove the judge from office.

## **Towards uniform national professional practice standards**

Chapter 3 considers lawyers' professional conduct and ethical standards, particularly areas directly relevant to the federal civil justice system. The chapter also discusses the 'model litigant rules' which regulate how the federal government – a significant, repeat litigant in court and tribunal proceedings – conducts itself as a party to proceedings.

The Commission recommends that legal professional associations and regulatory bodies should give priority to developing and implementing national model professional practice rules, with special responsibility given to the Law Council of Australia to facilitate and coordinate this effort. There are no national professional practice rules currently in force, although the Law Council of Australia and the Australian Bar Association have model rules which they have sought to have adopted on a national basis. The Commission supports the development of a national profession and harmonised regulatory arrangements for legal practice, and encourages States and Territories to cooperate to facilitate this result.

Practice rules should be clear and accessible; provide a basis for education and guidance; set attainable and agreed standards; reflect continuing and emerging ethical issues; engender respect; and be enforceable. The rules should take into account the challenges presented by a diverse, increasingly competitive and dynamic legal practice. Among the changes noted by the Commission are: an increase in the volume, complexity and range of legislation; greater use of alternative models of dispute resolution; the application of competition policy to the delivery of legal services; privatisation and corporatisation of the public sector; the impact of information technology on legal work; the changing organisation of legal work, with the development of 'mega firms' of solicitors, 'boutique' practices, multi disciplinary partnerships, inhouse corporate law offices, and increasing specialisation; and the trend towards national – indeed, international – legal practice and litigation.

While the context of legal practice has changed dramatically, the paradigm reflected in the traditional rules of legal ethics is rooted in an earlier era, and assumes a smaller, more provincial, generalist legal profession and a civil justice system in which litigation is the dominant mode of dispute resolution.

Accordingly, the Commission recommends the development of a number of new rules directed to the full array of advisory and representational roles undertaken by lawyers. For example, the Commission recommends that practitioners expressly should be obliged to act in good faith when engaged in negotiations or involved in ADR processes. Noting a range of concerns about the

conduct of lawyers in litigation, raised in submissions, consultations and recent cases, the Commission also makes recommendations for the development of national model professional practice rules that expressly restrict lawyers from making any allegations not supported by evidence; increase the obligations imposed on lawyers to be candid with the court; and prohibit lawyers from encouraging or assisting litigation with little or no substance, and those practices intended as a stratagem to win time or harass an opponent. Certain of these issues have been addressed in recent amendments to New South Wales Bar Association Rules and the Commission commends and supports these changes.

Given the particular problems involved in practising in family jurisdiction, the Commission also recommends the development of practice rules specifically relating to family law practice and to practitioners representing children. In order to meet the concern expressed by the Family Court and others about the standard of proficiency of lawyers acting in this jurisdiction – especially lawyers who only occasionally handle family law matters – the Commission recommends the establishment of a mentoring system utilising experienced family law practitioners who make themselves available on a rotating basis to advise and provide guidance to less experienced practitioners.

The Commission notes the significant development giving explicit legislative force to the federal government's 'model litigant rules'. These rules set down the standards of fair play to be followed by government agencies and lawyers. These rules apply to numbers of private practitioners who act for the Commonwealth under the new arrangements, as well as government lawyers. The Commission recommends giving the model litigant rules additional force, expressly stating the sanctions for breach, such as termination of the contract to supply legal services. As a major 'repeat player' in the federal courts and tribunals, the federal government is in a good position to set the tone for lawyer conduct by creating the expectation of high standards of ethical behaviour, and enforcing these standards.

Finally, the Commission makes recommendations in relation to the content and presentation of practice standards. Australian legal professional associations generally provide a set of rules specifying ethical obligations. The Commission proposes that the rules be supplemented by commentary and explanation – an approach favoured in several overseas jurisdictions. The Commission believes this would allow fuller exposition of the underlying purposes and spirit of the rules, the provision of examples from different practice areas, and assist in teaching legal ethics and professional responsibility at all levels. The Law Council of Australia is asked to convene a broadly based working group to develop this commentary.

## **Legal costs**

Chapter 4 identifies the issues which impact on legal costs and explores the causes of high costs for legal services. The Commission's empirical research showed that the complexity of cases, the number of court or tribunal case events and lawyers' charging practices were the most significant influences in determining the amount of private costs. It follows that a reduction or control on legal costs requires a collaborative approach from lawyers, government, courts and tribunals.

Practice rules and legislation impose guidelines and restrictions on the charging practices of lawyers. In most jurisdictions, lawyers are required to disclose to clients the basis upon which costs are to be calculated, and in some States lawyers are required to provide an early estimate of costs. The Commission recommends that all States and Territories enact uniform legislation requiring lawyers (solicitors and barristers) to provide estimates of costs to their clients early, and on an ongoing basis. Legal professional associations also should develop a practice rule that indicates the factors relevant to a determination of whether fees charged by lawyers are taken to be 'reasonable'.

The government has a limited capacity to influence directly private legal costs; however, the complexity of and repeated changes to legislation impact on those costs. The Commission recommends that Senate Committees scrutinising bills and regulations be required to have particular regard to the likely impact of the proposed legislation on litigation – whether in generating increased litigation or increasing legal costs to parties.

Consumers do not have ready access to costs information in what is not yet a true, competitive market for legal services. The Commission makes recommendations to increase the amount of information available to consumers relating to the provision of legal services, and the range of fee rates charged by lawyers.

A report by Professor Phillip Williams recently proposed changes to the scales of fees set by federal courts for costs awards. These scales set charges for particular items of legal work and determine the costs awarded to successful parties in the litigation, which are to be paid by the unsuccessful party. These scales also influence lawyers' charging practices with their clients. Under the proposal by Professor Williams, court fee scales will be changed from charges for particular items, such as photocopying or drafting documents to 'event based scales', with charges fixed for work at particular stages of the process. Such charges will be set at varying complexity for different case types. The new scale will not reward practices such as photocopying and can provide greater certainty about costs for clients. The Commission considers that the Williams report provides a useful model for the reform of fee scales, and has recommended the introduction

of event based fee scales in the Federal Court and Family Court with some refined features.

Governments also set court and tribunal fees which parties pay on filing a matter, or proceeding with matters in courts and tribunals. These fees have a direct and obvious impact on the cost of litigation. The Commission recommends the abolition of the existing distinction between the fees charged to corporations and those charged to individuals – which appears to operate unfairly in relation to small businesses. Instead, the Commission recommends that court fees be set on a graduated basis, increasing according to the length of hearings and the parties' usage of court and tribunal processes. Parties who initiate repeat applications or have long hearings would pay higher fees under the Commission's proposal. The discretion to waive court fees for parties suffering financial hardship should be maintained.



## Legal assistance

Many of the parties involved in legal disputes are unable to pay the full costs of the legal advice and representation they require. They frequently receive assistance from lawyers for less than the market cost of their services, for no cost (pro bono) or on a deferred or delayed charge basis. The lawyer and client may agree there is no charge if the case is unsuccessful or set a fee uplift (a set percentage increase) which is generally drawn from the client's award if successful, or other contingency fee arrangement. There are some restrictions on contingency fee arrangements. The Commission found these arrangements, and significant pro bono work from the legal profession, were common practices in federal jurisdiction. In some case types, lawyers carry much of the financial risk and provide considerable low cost assistance in litigation. The Commission commends and supports such practices.

Parties involved in legal disputes also receive assistance from government funded legal aid schemes. This assistance may be advice or full representation. The Commission analysed in detail the way in which legal aid schemes deliver their services and selected the parties who qualify to receive full representation. The Commission's recommendations address the efficiency and effectiveness of delivery systems, the optimal use and coordination of limited resources, and the need for data to show who is receiving legal assistance, their case costs and case outcomes. The Commission's recommendations aim to

- evaluate and improve the intake and application assessment procedures of legal aid commissions and the assignment of legal aid cases
- address quality and funding issues regarding the use of private practitioners in legal aid cases
- enhance funding and funding guidelines for family law legal aid cases, with a focus on early resolution of such cases
- review the legal aid guidelines regarding family law property cases and develop a legal aid self-funding arbitration scheme for family property disputes
- increase the availability of legal aid for early advice, assistance and evidence gathering, and the resolution of certain administrative law cases
- secure better coordination of the various legal assistance providers to improve initial advice and referral – to prevent a 'referral roundabout' with clients being passed from one advice agency to another
- clarify the conflict of interest rules where parties are represented by legal aid commission lawyers, and develop procedures to minimise such conflicts
- expand the Court Network support scheme in family law matters.

## General issues in practice, procedure and case management

Chapter 6 examines general issues relevant to practice and procedure and the design and evaluation of case management systems in federal courts and tribunals. Case management concerns the arrangements implemented by courts and tribunals to process cases from filing to finalisation. The Commission focusses on the role of the judge in case management, the use of technology, ADR, controls on processes such as discovery and expert evidence, the diversity of litigants in federal jurisdiction, and the need for government dispute prevention and dispute management plans.

While there is no single, perfect case management model applicable to the variety of federal courts, the Commission identified features associated with successful case management such as judicial commitment and leadership, court consultation with the legal profession, early assessment of the issues and settlement prospects of cases, and close supervision of case progress. The Commission's submissions and consultations emphasised these requirements.

Case management is well established in federal courts and tribunals. There are now 'second generation' problems and issues identified in established case management systems including those relating to the design of information systems and performance monitoring. The Commission analyses these issues, which have significance for federal courts and tribunals.

Standardisation across all registries may be undesirable – local practices can promote innovation and flexible, well adapted case procedures. This is relevant in particular to the Family Court which has sought to have a scripted, consistent processing of cases in all registries. There was much criticism of these inflexible practices in the course of the inquiry. The Commission's consultations stress the value of more flexible, better adapted practices.

The Commission acknowledges the importance of ADR as a tool in resolving cases quickly, less expensively and to the satisfaction of parties. However, the Commission also cautions against uncritical acceptance of ADR as a panacea for all ills of litigation, much in the same way that tribunals were intended to provide the 'solution' to litigation problems in the 1970s. The Commission makes some targeted recommendations aimed at ensuring that the benefits of ADR are realised but it is not taken to substitute for appropriate adjudication.

The Commission analyses court control of the discovery process in litigation and suggests customised orders directed to the facts of the case.

The Commission also makes recommendations concerning expert witnesses and expert evidence. Such evidence is often part of the tactical play of litigation and can add significantly to costs. A major problem arises where experts become identified as a partisan 'applicant' or 'respondent' expert. This is a problem

in certain administrative law cases. Accordingly, the Commission makes a number of recommendations aimed at clarifying the role of expert witnesses and facilitating the use of expert evidence including

- in accordance with guidelines drafted by the Federal Court, emphasising the primary obligation of expert witnesses to the court or tribunal, rather than to the client
- encouraging prehearing conferences and other contact between experts
- requiring experts, with the leave of the court or tribunal, to prepare for and answer questions prior to hearing
- requesting the Australian Council of Professions to develop a generic set of ethical practice standards for experts
- federal courts and tribunals encouraging, as a matter of course, the use of experts agreed between the parties and
- encouraging expert evidence to be presented, as in some Federal Court cases, in a panel format, with all experts able to hear and comment on the evidence of the others.

A wide variety of litigants appear in federal civil jurisdiction, ranging from government, and well resourced and experienced large corporations to inexperienced, 'one off' litigants of limited or modest means. Case management arrangements have to take account of the skills and resources of litigants.

## **Practice, procedure and case management in the Federal Court**

Chapter 7 considers practice, procedure and case management in the Federal Court, in particular, its individual docket system (IDS). In consultations and submissions the Commission heard consistent high praise about the quality judging and effective management of the Federal Court. In the Court the same judge deals with and manages a case from start to finish. The benefits of continuing judicial oversight include

- discouraging unnecessary court appearances
- making interlocutory hearings more productive, allowing the early exchange of information, and narrowing issues in dispute
- helping to make case resolution more efficient and effective, including appropriate referral of cases to mediation.

The Commission identified some areas which require 'fine tuning', and others which may need increased flexibility, further consideration or monitoring. There are variations in practice and procedure between different Court registries which were criticised by those firms of lawyers who practise in several different registries of the Court. There also was concern that the judge assigned to hear and

manage a particular case was sometimes engaged with a long running case and lengthy hearings and unable to determine short cases or interlocutory applications when these were ready to be heard. Some of these problems can be remedied by reordering judges' schedules. The Commission makes recommendations to deal with these concerns.

The Commission also makes a number of recommendations in relation to particular areas of litigation in the Federal Court. For example, the Commission proposes in respect of native title cases

- the development of protocols to clarify the complementary roles of the Court and the National Native Title Tribunal
- the establishment of a panel of appropriately qualified assessors and experts which the Court can draw upon for use in native title cases
- a review of the efficacy of the arrangements for taking oral evidence in native title cases on matters relating to the claimants' association and traditional connection with the land.

The Commission also looked at procedures related to representative proceedings (or class actions). Some areas which require further consideration include problems of competing representation where different law firms file applications which involve the same case but a different representative party for the class; settlement of class action claims, particularly where the group is large, and includes unidentified members and members with different claims and entitlements to damages; liability of the representative party for a successful respondent's costs (currently the Court can only order costs against the representative party and not particular group members); and ethical concerns where lawyers represent such large and disparate groups. The Commission recommends that some of these issues be dealt with in legislation or Court guidelines and for national model professional practice rules to set down the role and particular responsibilities of lawyers in representative proceedings.

On other matters of practice and procedure in the Federal Court the Commission recommends: continued efforts at developing harmonised rules on originating process in civil matters in the Federal Court and State and Territory Supreme Courts; requiring respondents to help narrow the issues in dispute; imposing enhanced ethical obligations on parties and lawyers in *ex parte* applications; and refinement of the procedures in relation to electronic discovery.

The Commission also considers a number of other matters designed to assist the Court to manage its operations efficiently and reduce costs and case duration for parties including: permitting increased use of summary judgments; providing for self-executing costs orders; increasing Court supervision of the use of subpoenas (particularly where this may be a means of avoiding controls on discovery); requiring the leave of the Court for supplementary witness statements

and additional evidence; making more active use of interlocutory costs orders in appropriate cases; and monitoring the use and effectiveness of mediation and other ADR options (both Court based and private schemes).

## **Practice, procedure and case management in the Family Court**

Chapter 8 concerns procedures and case management in the Family Court of Australia. In this chapter the Commission acknowledges the difficulties of family jurisdiction, which involves cases with a range of social and emotional as well as legal issues, and in which some parties are angry and disaffected. Much criticism of the Court arises from these factors, and this was taken into account in the Commission's deliberations.

The Commission heard strong and persistent criticism from lawyers and litigants in relation to the Court's practice, procedure and case management. Chapter 8 recites and analyses such criticisms and the Court's responses. Many of these criticisms were previously set down in chapter 11 of DP 62, in which the Commission made various proposals for the Court to deal with the problems identified. The Commission's proposals for case management and procedures were directed to facilitating flexible management and continuous oversight of cases and early identification of issues in dispute and relevant facts. Submissions and consultations on DP 62, with the exception of the Family Court submission, generally supported the Commission's findings and proposals – some with reservations.

In its consultations after DP 62, the Commission continued to hear consistent criticism from lawyers and litigants of the Court's present case management structure and simplified procedures. Lawyers were emphatic that the Court's simplification procedures added to costs and complexity in some instances and delayed settlement in property cases. There was also concern at the repeat case events and inflexible processes.

As noted in DP 62, the Commission's empirical findings indicated that the majority of disputed cases in the Court were quickly resolved by consent between the parties, within six months and after up to three case events. The problems identified by the Commission concerned a substantial minority of cases. In the Commission's sample, almost one quarter of applications for final orders had more than 5 case events: 7% had 10 or more case events. These repeated Court events are a significant cost and the cause of much aggravation to the parties. On the Commission's analysis, each interlocutory case event added between \$700 and almost \$3500 to the cost of a case.

In consultations and submissions subsequent to the DP 62 it became clear that the Court's own research and current reform proposals are also directed to meet the need for flexible, focussed case management which the Commission discussed in DP 62. There appears to be substantial agreement between the Court and the Commission as to the problems with procedures and case management and the general approach to solving them. The Commission is more optimistic, in this report, about the prospects for improved case management and procedures in the Court than it was in DP 62, but has continuing concerns regarding the reform processes in the Family Court, which are set out below.

The Court initiated changes to its practice and procedure to limit costs for parties and to ensure that the documentation provided to the Court was confined to relevant issues. These are laudable and appropriate objectives. However, the overwhelming criticism of the Simplified Procedures is that they have not achieved these objectives and may even have added to client costs. The Court's simplification procedures delay the provision of relevant information in the case. They require all documentation to be on, or in accordance with forms which the Court has designed. The effect of these processes is that parties often do not have a clear idea of the issues in dispute until late in the process and they frequently do not obtain full discovery of relevant documents in the case until after the Court settlement hearing (the conciliation conference). Practitioners were unanimous that many of the forms were too complex, time consuming, did not allow all relevant issues to be identified and explained, and were a considerable cost to clients.

The Commission recommends that the Family Court, and its Future Directions Committee, give priority to a reconsideration of Simplified Procedures, especially in relation to disputes on financial matters. Specific aspects of the procedures that the Commission recommends should be considered are

- a review of the initiating process as it applies to children's matters and financial matters so that it indicates relevant matters in dispute
- giving parties should be given the option of using pro forma documents, or as an alternative addressing matters specified as relevant to the particular case.

In relation to expert evidence, the Commission recommends

- experts should be ordered to confer as early as possible in proceedings; and parties and the Court should as a matter of course consider whether an expert or experts agreed between the parties should be appointed to deal with a particular issue
- family reports should be given priority in cases in which both parties are unrepresented or there are allegations of family violence and child abuse.

The Commission notes unanimous concern from within and outside the Court over what is described as 'the culture of non compliance' in the Court. The Court has repeatedly attempted to address this problem, most recently through the work of its Compliance Committee, whose recommendations are to be considered by the Court. In submissions and consultations the Court, practitioners and parties all acknowledged the problem and blamed each other for its extent.

The Commission notes the variety of factors which contribute to non compliance, including case management and case processing arrangements. The Commission recommends that the Court, and its Future Directions Committee, should identify clearly the particular circumstances and registries in which there is a culture of non compliance, distinguish between inadvertent non compliance (which may be associated with procedural complexity) and deliberate non compliance, and consider appropriate approaches to each problem. Sanctions for non compliance should not be automatic. The Court should retain primary responsibility to initiate sanctions for failure to comply with rules or directions.

The Commission heard many complaints about certain aspects of the Court's case management system. Case management guidelines require parties to attend a series of scripted case events intended to resolve the case, with only limited provisions for exemption from such processes.

Under the current system, in larger registries of the Court there is no consistent oversight of cases on the occasions they are listed for hearing before the Court. Litigants complain of having to repeat their stories at each hearing to a different Court officer. Case management arrangements are inflexible, do not adjust case events to the needs of the parties and were said to contribute to some cases 'getting out of hand' with a large number of unproductive case events, or repeated non compliance with directions by one or both parties. Many practitioners, and some judges, considered that judges should be more involved in the interlocutory process to deal with difficult or intractable cases.

These issues are currently under consideration within the Court, whose Future Directions Committee is preparing proposals for reform of case management and procedures, to be considered by the judges in April 2000. The Commission understands that the reforms proposed by the Committee will result in fewer case events, consistent oversight of cases by registrars and allow judges to be involved strategically as required for difficult cases. The Commission supports these proposals.

A significant element in improving case management processes is the development of an appropriate computerised case management and data collection system. The present technology arrangements have contributed to many of the problems in the Court's case management and procedural reform and have remained unremedied for a considerable time. The Court, since 1985, has been

persistently reminded in public and in Court inquiries of the need to improve its data collection and monitoring of case management processes. The Court is set to implement a new technology system this year.

Practitioners in some registries were enthusiastic about the judges and Court staff they worked with. However, the Commission noted a high level of distrust between practitioners and the Court as a whole. The Court made repeated criticisms of practitioners as the cause of case management problems. Poor communication between the Court and practitioners was the basis of many practitioners' complaints about procedural reform. In the words of one lawyer, '[t]hey think we're always complaining and we think they don't ever listen'.

Since its commencement, the Family Court has introduced significant changes to its practice and procedure and case management. The direction of procedural changes currently under consideration is supported by the Commission, as noted. The major source of concern for the Commission is the continuing need to ensure all procedures are appropriate for routine cases and adaptable and able to be customised for difficult cases where necessary. The Commission is also concerned about the apparently poor relationship between the Court and practitioners. The Commission considers these two factors are related to previous unsuccessful reforms and must be addressed to ensure future reforms are successful.

The Commission identified a number of concerns relating to the Court's reform initiatives and processes. Other matters supporting the need for further external review are the Court's longstanding concern that it is inadequately resourced and that changes to legal aid funding have increased dramatically the number of unrepresented litigants appearing in the Court. The Court has also expressed concern about the possible effects of the introduction of the federal magistracy on the quantity and difficulty of the Court's caseload.

Given this chequered history and these manifest problems, the Commission recommends that within two years of the release of this report, the Attorney-General consider the establishment of an independent review to examine practice, procedure and case management in the Family Court. Such a review would include assessment of funding needs, allocation of resources, efficacy of procedures, and the effectiveness of the Court's information technology system and data collection. The jurisdiction is too important and too fraught for matters to be left only to internal Court deliberations.

## **Practice, procedure and case management in federal merits review tribunals**



Chapter 9 examines proceedings in federal merits review tribunals – the practices and procedures by which tribunals investigate government decisions which are being challenged by citizens, adjudicate and make the correct or preferable decision on the matter.

The tribunals examined are the AAT which reviews the decisions of many different government agencies and the specialist review tribunals, the MRT and RRT which deal with immigration and refugee decisions and the SSAT and Veterans' Review Board (VRB), which deal respectively with decisions relating to social security and veterans' benefits and other entitlements. The Commission's recommendations will be of particular importance to the way in which the ART, the new tribunal to be formed by amalgamating these tribunals (with the exception of the VRB), will operate.

Review tribunal proceedings are diverse and involve individuals claiming refugee status, war veterans and widows, disability claimants seeking pensions or benefits, Commonwealth employees or seafarers claiming workers' compensation, small businesses, such as pharmacies or tax agents affected by licensing decisions, or businesses affected by customs, tariff or diesel fuel rebate decisions. The individuals and businesses who challenge federal government decisions, and the skills and resources available to them, differ greatly.

Review tribunals are intended to provide decision making and dispute resolution which are 'alternative' to traditional court proceedings. Tribunals are part of the executive arm of government and the legislation setting down their structure, powers and practices allows tribunals to investigate facts for themselves. They are less dependant on information or argument put before them by the parties.

In federal review tribunal proceedings there is no necessary conflict between the interests of the applicant and the government. The tribunal 'stands in the shoes' of the government agency which made the original decision. Tribunals are not intended to identify the winner from two competing parties, but to ensure that the government decision making process is effective and that the decision is the correct and preferable one. The Commission's recommendations are intended to assist tribunals in this objective.

The Commission examined 1665 AAT cases to collect data about the conduct of proceedings – how long they took, what events were involved and what outcomes were experienced. Questionnaires were sent to parties and representatives involved in these cases. The Commission also consulted widely with tribunal members and management, government agencies and others with an interest in the system of administrative review.

The Commission's general evaluation of the AAT was that its processes were generally effective. In particular, the AAT conference system was credited and shown to be highly successful in helping the parties settle disputes concerning government decisions. The general view was that AAT proceedings do not require any radical change but need to be 'fine-tuned', in particular to address concerns about the time taken to resolve cases.

The Commission found that cases in the AAT took longer than cases in the Federal Court or Family Court. This is contrary to one of the founding objectives of the tribunal, which was set up to provide speedier resolution of cases than court processes. In this context the Commission makes recommendations to ensure parties cooperate and comply with tribunal directions and timetables and suggests that the AAT should examine case management systems in which each case is allocated to particular decision makers, who take responsibility for managing and progressing allocated cases from commencement to finalisation.

In relation to the other, specialist, review tribunals, the Commission considers that, in some cases, processes do not assist proper investigation of case facts and recommends improved information sharing between the tribunals and the agencies whose decisions they review.

The Commission confirms that the new ART should not operate under a single case management model but should use a range of practices and procedures adapted to suit the different types of cases that will come before it. Overall, the Commission considers that legislation and practice should emphasise the administrative and investigative character of tribunal processes. That is, tribunal procedures can and should be arranged to permit enhanced and independent inquiry into case facts and a process that does not rely primarily on a single hearing, but on a mixture of oral hearings and decisions on the papers. The Commission makes recommendations

- encouraging tribunals and the agencies whose decisions are subject to review to develop better arrangements for contact and communication to enable the agency to assist the tribunal to investigate particular cases
- for the issuing of guidelines for tribunal members on their investigative duties and responsibilities, to encourage them proactively to investigate case facts and to assist applicants who do not have a representative
- encouraging the new ART to use 'multi-member' panels for cases which are particularly complex or require specialist member expertise, or where there are significant benefits for the continuing professional development of tribunal members.

In federal jurisdiction, the AAT is the forum in which expert evidence (usually medical) is routinely required. Repeat use of the same experts may result in inappropriate partisanship and experts becoming identified as 'applicant' or

'government' experts, reducing the credibility and sometimes, the quality, of their evidence. In this context the Commission makes recommendations

- providing review tribunals with clear power to order parties to disclose all relevant documents and specifically providing that legal professional privilege does not apply to expert medical reports obtained for the purposes of compensation, veterans' affairs or social welfare review proceedings
- encouraging parties to agree to the instruction of a single agreed expert in cases.

Tribunals can manage and control party participation and secure party cooperation and assistance in arriving at the correct or preferable decision. The Commission closely considered how parties, both applicants and government, participate and are represented in review tribunal proceedings. Parties in tribunal proceedings frequently are unrepresented – in some tribunals, legislation limits the participation of representatives in tribunal hearings.

The Commission's AAT case file research showed that restricting the participation of lawyers and other representatives may increase the numbers of cases going to a hearing rather than resolving by agreement. This would increase the cost of tribunal proceedings and the time cases take to resolve. Parties who were unrepresented tended to withdraw or have their case dismissed or heard by the tribunal. They were less effective than represented parties in obtaining a settlement. Importantly there also are indications from the case sample that people who are not represented may be less successful in challenging government decisions.

For these reasons the Commission concludes that legislation, policy and practice concerning tribunal proceedings should focus, not on excluding, but on better managing the contribution of representatives. Legislation should not limit the tribunal's discretion to seek assistance from representatives, where this is appropriate or necessary in the case. Submissions emphasised that representation in itself does not necessarily lead to formality or inappropriately court-like procedure. Where there is scope for resolution of the case without a hearing, full participation by representatives should be encouraged, as should assistance by representatives in written case preparation.

The Commission recommends that legislation and practice directions for the new ART should provide the tribunal with discretion to permit applicant representatives to participate in hearings, as the members consider appropriate and useful including in immigration and refugee and social security cases where there are currently restrictions. The Commission also recommends that the federal Attorney-General should specify in model litigant obligations that agencies and agency representatives have express duties to assist the tribunal to reach its decision.

A complete list of all of the Commission's recommendations in this report follows.

# Summary of recommendations

## 1. Managing change: continuity and change in the federal civil justice system

1. In view of the need for civil justice policy making and reform to be informed by empirical research, stakeholders such as courts, tribunals, law firms, legal professional associations, law reform agencies, universities, research centres, and legal and consumer interest groups should seek opportunities for undertaking collaborative research, including through the Strategic Partnerships with Industry – Research and Training (SPIRT) grants scheme.

## 2. Education, training and accountability

2. In addition to the study of core areas of substantive law, university legal education in Australia should involve the development of high level professional skills and a deep appreciation of ethical standards and professional responsibility.

3. All university law schools should engage in an on-going quality assurance auditing process, which includes an independent review of academic programs at least once every five years.

4. The Commonwealth Department of Education, Training and Youth Affairs (DETYA) should give serious consideration to commissioning another national discipline review of legal education in Australia, commencing as soon as practicable.

5. While ensuring that specified standards of minimum competency are achieved, admitting authorities should render practical legal training requirements sufficiently flexible to permit a diversity of approaches and delivery modes.

6. The federal Attorney-General should facilitate a process bringing together the major stakeholders (including the Council of Chief Justices, the Law Council of Australia, the Council of Australian Law Deans, the Australasian Professional Legal Education Council, and the Australian Law Students Association) to establish an Australian Academy of Law. The Academy would serve as a means of involving all members of the legal profession – students, practitioners, academics and judges – in promoting high standards of learning and conduct and appropriate collegiality across the profession.

7. As a condition of maintaining a current practising certificate, all legal practitioners should be obliged to complete a program of professional

development over a given three year period. Legal professional associations should ensure that practitioners are afforded full opportunities to undertake, as part of this regime, instruction in legal ethics, professional responsibility, practice management, and conflict and dispute resolution techniques.

8. The federal Attorney-General should facilitate a process, through the Standing Committee of Attorneys-General, to establish an Australian Judicial College, with a governance structure under the control of the judiciary. The College would have formal responsibility for meeting the education and training needs of judicial officers, particularly in relation to induction and orientation courses for new appointees, and programs of continuing judicial studies and professional development.

Funding for the College should be determined on the basis of block grants from governments (50% from the Commonwealth and 50% from the States and Territories, apportioned on the basis of population), as well as revenues generated through registration fees and the sale and licensing of materials.

9. Every federal review tribunal should have an effective professional development program with stated goals and objectives. This should include access to induction and orientation programs, mentoring programs, and continuing education and training programs. In particular, training in administrative law principles relevant to decision making should be made available to members of tribunals who do not have legal qualifications.

10. A Council on Tribunals should be established as a national forum for tribunal leadership to develop policies, secure research and promote education on matters of common interest. The membership of the Council on Tribunals should include the heads of federal and State tribunals engaged in administrative review and the President of the Administrative Review Council. The functions of the Council on Tribunals should include: developing performance indicators, charters, benchmarking, and best practice standards in tribunal management, practice and procedure, and professional development; improving and coordinating data collection arrangements; developing research and information services for decision making; and developing policies on tribunal member selection, induction and training.

11. Each federal court and review tribunal should develop and publish a protocol for defining, receiving and handling bona fide complaints against judges, judicial officers and members, as well as complaints about court systems and processes.

In its annual report to Parliament, each court and review tribunal should provide statistical details of its complaints handling experience under its protocol. This should include the number of complaints received, to the extent possible a

breakdown by categories (for example, allegations of delay in delivering judgment, or discourtesy), and outcomes.

An Australian Judicial College and a Council on Tribunals (see recommendations 8 and 10) should have regard to these reports in developing and refining orientation, education and training programs.

12. The federal Parliament should develop and adopt a protocol governing the receipt and investigation of serious complaints against federal judicial officers. For these purposes, a 'serious complaint' is one which, if made out, warrants consideration by the Parliament of whether to present an address to the Governor-General praying for the removal of the judicial officer in question, pursuant to s 72 of the Constitution.

Parliament should give consideration to whether, and in what circumstances, the protocol might provide for the establishment of an independent committee, drawn from a panel of distinguished retired judges (or other suitably qualified persons), to investigate the complaint and prepare a report to assist Parliament with its deliberations. Such a provision should not derogate from the flexible powers presently possessed by the two Houses to fashion and control their own procedures.

### **3. Legal practice and model litigant standards**

13. Legal professional associations and regulatory bodies should give priority to the development and implementation of national model professional practice rules.

14. The Law Council of Australia should convene a working group to coordinate the drafting of commentary to legal practice standards. Legal academics and officers of legal complaints handling authorities should be included in the working group. Legal professional associations should develop commentary which can be issued as part of, or a supplement to, national model professional practice rules.

15. The Law Council of Australia should ensure that the proposed rules of the New South Wales Bar Association concerning practitioners' obligations to further the proper administration of justice should be adopted as part of national model professional practice rules. These models also should contain explicit rules stating the more exacting obligation of candour to the court required of lawyers advancing applications for *ex parte* injunctions.

16. The Law Council of Australia should ensure that national model professional practice rules

- incorporate a rule consistent with Rule 11 of the United States Federal Rules of Civil Procedure, which requires practitioners and unrepresented parties to consider the purpose and content of pleadings and other papers before presentation to the court or tribunal. The standard applied should be 'to the best of the practitioner's knowledge and information'.
- are consistent with proposed New South Wales Bar Association rules, requiring practitioners to limit presentation of their case to genuine issues and to complete work in time constraints set by the court and occupy as short a time in court as is reasonably necessary to advance and protect the client's interests.

17. Federal courts and tribunals should develop rules to require practitioners and parties to certify to the best of their knowledge and information, that any allegations, claims and contentions contained in pleadings or forms presented to the court or tribunal are supported by evidence.

18. The Law Council of Australia should ensure that national model professional practice rules include a clear indication of accepted standards of conduct and practice in relation to advising and assisting clients in matters, including standards that practitioners shall, as early as possible, advise clients of relevant non-litigious avenues available for resolution of the dispute which are reasonably available to the client. Such rules should apply equally to barristers and solicitors.

19. The Law Council of Australia should ensure that national model professional practice rules provide guidance, by way of explanatory commentary, on expected standards of conduct and practice of practitioners negotiating any civil matter on behalf of a client. Where practitioners negotiate on behalf of a client, the rules should require that practitioners act in 'good faith'. The commentary to the rules should include a practical explanation of what is meant by acting in good faith in these circumstances. The commentary also should emphasise the practitioner's obligation to inform the client of every offer of settlement from the opposing party and to obtain explicit approval from the client before communicating an offer or acceptance to an opposing party.

20. The Law Council of Australia should ensure that national model professional practice rules include provisions relevant to the practice of lawyer-neutrals in ADR processes and lawyers acting for clients participating in ADR processes and should include a rule requiring practitioners to participate in 'good faith' when representing clients participating in such processes.

21. Legal professional associations should develop national model professional practice rules focussing on issues of particular concern for family practitioners and practitioners representing children.



22. The Law Council of Australia should coordinate the development of a family law practitioner mentoring program by legal professional associations.

23. The text of the model litigant rules should include commentary and examples explaining the required standards of conduct of lawyers (and others) representing government, and giving examples concerning 'unnecessary delay', 'technical defences', and avoiding 'taking advantage of a claimant who lacks resources'.

24. The federal Attorney-General should provide the Office of Legal Services Coordination with authority to investigate complaints relating to non compliance with the model litigant rules. The model litigant rules should state that non compliance could justify termination of a legal services contract, disciplinary measures in relation to an employed lawyer or agency representative, or a direction that the lawyer or agency representative undertake specified legal education and training.

25. The Office of Legal Services Coordination should facilitate appropriate education and training programs to support dispute avoidance and management plans for government agencies and to promote awareness of the content and importance of the model litigant rules.

#### **4. Legal costs**

26. The federal Attorney-General, through the Standing Committee of State and Commonwealth Attorneys-General, should encourage all States and Territories to enact similar legislation to harmonise the requirements for solicitors and barristers to disclose actual, expected or charged fees, with the additional requirement that solicitors and barristers advise their lay and professional clients from time to time, and not less than once every six months, of costs incurred to date and provide an estimate of the future cost of resolving the dispute. Nondisclosure of estimated costs should constitute grounds to cancel or rescind the agreement and a finding of professional misconduct. Where barristers are directly briefed by a lay client, the disclosure rules should be equivalent to those for solicitors.

27. The Law Council of Australia should ensure that national model professional practice rules include a rule setting out the factors relevant to a determination of whether legal fees charged are reasonable. The American Bar Association model rule on reasonable fees should serve as a guide in drafting such a rule. The rule should explicitly state that charging unreasonable fees could constitute unsatisfactory professional conduct and gross overcharging could constitute professional misconduct.

28. The Senate Scrutiny of Bills Committee and the Senate Standing Committee on Regulations and Ordinances should have their standing orders modified, directing them, when considering new legislation, to have regard to the likely impact of the proposed legislation, ordinance or regulation on the cost, complexity and volume of litigation or administrative review.

29. The federal Minister for Financial Services and Regulation should ask the Commonwealth Consumer Affairs Advisory Council to assume responsibility for providing independent advice and information to consumers on consumer issues relating to the provision of legal services.

30. Legal professional associations, and legal services commissioners or ombudsmen should collect information on, and publish in a public, accessible form, the range of charge rates for lawyers in different specialities, firm sizes (including for firms situated in the central business districts, and suburban and regional areas) and fees charged by barristers of varying experience.

31. Federal merits review tribunals should publish information concerning the costs and charges for representatives dealing with relevant case types and distribute this information to applicants when lodging their claims. This information is particularly important in the migration jurisdiction where applicants are vulnerable to overcharging. The information should be obtained from the Migration Institute of Australia, the peak representative body for migration agents.

32. Federal government departments and agencies should be required to disaggregate the 'Compensation and legal services' component of their budgets to create separate 'Compensation' and 'Legal expenses' components. The legal expenses component should note the amounts spent on inhouse legal work and salaries and outsourced legal work. These amounts should be reported in the annual report of each department or agency and provided to the Office of Legal Services Coordination to prepare an annual report on the costs of legal services provided to the government.

33. Event based fee scales should be introduced in all federal jurisdictions with the following features.

- The fee scale amounts set out in the Williams proposal should be recalculated to reflect market based fees paid to practitioners for work associated with case events and reasonably required.
- The judicial assessment of case complexity should be open to reassessment, by leave, at the conclusion of discovery.
- The fee scale matrix should be amended to allow for costs to be allocated to additional case events.

34. The federal Attorney-General should consider enhancing the role and resources of the Federal Costs Advisory Committee. Its resources and membership should be increased to include expertise on costs and econometrics. The FCAC role should include continuing revision of the amounts set in event based fee scales for federal jurisdiction. In addition to annual review in accordance with the consumer price index, there should be a triennial review of the scale amounts and categories to ensure the currency and effectiveness of the scales.

35. The corporation/non-corporation distinction for the purpose of determining the rate of court fees should be abolished.

36. Court fees in federal jurisdiction should be set on a single scale applied to coincide with particular case events, with the fees increased along a sliding scale as a case progresses to hearing. Additional fees should be charged for each notice of motion or, in family jurisdiction, interim application – such fees increasing after the third notice of motion or interim application in a matter. The existing waiver and fee exemptions should continue to apply in order to safeguard access and equity interests.

## 5. Legal assistance

37. Legal professional associations should urge members to undertake pro bono work each year in terms similar to that stated in American Bar Association *Model rules of professional conduct* rule6.1.

38. In order to enhance appreciation of ethical standards and professional responsibility, law students should be encouraged and provided opportunity to undertake pro bono work as part of their academic or practical legal training requirements.

39. Legal aid commissions should standardise data collection nationally and publish this data in their annual reports, with respect to both inhouse and assigned cases, on

- applications and refusals for legal aid, specifying case and applicant type (including data such as gender, non English speaking background, and rural and regional postcode)
- duration (from date of grant to date of finalisation) and outcomes in legal aid cases, by reference to case types (that is criminal, family law, care and protection, administrative law, general civil law cases)
- statistical trends in approvals and refusals of aid
- outcomes in conferencing and/or alternative dispute resolution services within legal aid commissions
- use of legal aid commission services other than under a grant of legal aid.

40. Federal courts and tribunals should publish data in their annual reports on the number of unrepresented parties. In gathering such data, courts and tribunals should consult to develop a standard definition of 'unrepresented party' and information on case outcomes and case duration in matters where there is an unrepresented party.
41. The federal government's expensive cases fund should be open to applications on behalf of parties in all complex, expensive cases in the federal jurisdiction, including family law cases.
42. The federal government should commission research to evaluate the intake procedures used by legal aid commissions to screen and assess applications for legal aid and to determine legal aid services for successful applicants.
43. Legal aid commissions should develop effective mechanisms for identifying priority cases and clients in family law matters. Such priority clients should be assigned to inhouse legal aid lawyers wherever possible. Where an inhouse lawyer is unable to act for a priority client, referral should only be made to private practitioners who are experienced in family law work.
44. Legal aid commissions, in conjunction with law societies and bar associations, should approve panels of lawyers to act in priority family law cases. Payments should be structured so as to retain the services of specialist family law practitioners. In that regard, legal aid commissions also should consider establishing a pro bono scheme in which participant panel lawyers who provide set, agreed, pro bono services are paid at a commensurably higher rate for performing other legal aid work.
45. The Family Law and Legal Assistance division of the federal Attorney-General's Department, in consultation with legal aid commissions, should develop new procedures for assessing and imposing funding limits upon legally aided, family law cases. Such new procedures should ensure that
- 'stage of matter' grants focus on early opportunities for case resolution, including negotiations aimed at the resolution of a dispute, the preparation of preliminary stages of litigation or particular PDR processes, and obtaining evidence such as medical reports
  - uniform caps are replaced by capping procedures directed at particular stages or events in the individual case
  - exceptional additional payments are available in cases approved at director level as requiring funds beyond the cap for a certain stage and provision should be made for such payments to be drawn from the separate fund for expensive, complex cases, as stated in recommendation 41
  - stage limits and caps, set for particular legally aided clients remain strictly confidential.

46. Legal aid commissions should review their practices to allow for grants of aid to be made for family law property matters, subject to a charge levied on the property in dispute.
47. Legal aid commissions should investigate establishing self-funding arbitration schemes for family law property disputes, with a fee calculated by reference to the value of the property in dispute.
48. The Department of Immigration and Multicultural Affairs should reconsider IAAAS funding and priorities. Assistance should be available for the preparation of protection visa applications and/or applications to the Refugee Review Tribunal in cases where there is a strong likelihood of the applicant ultimately qualifying for the visa – for example, where the applicant is from a country with a high success rate for protection visas. Assistance should also be provided for cases before the AAT concerning visa cancellation and deportation. Selection criteria for firms and agencies receiving IAAAS funding should have regard to practitioners' experience in migration, refugee and administrative law matters.
49. Commonwealth legal aid guidelines should be modified to allow limited grants of aid in veterans' matters to clients who satisfy a merit test, to be available for the purposes of
- paying for necessary early disbursements, such as medical reports
  - conducting initial negotiations and drafting correspondence to the Department of Veterans' Affairs in respect of refused applications which have a strong likelihood of success on review.
50. The Department of Veterans' Affairs, the Repatriation Commission and legal aid commissions should cooperate to establish panels of agreed medical experts and processes for the early resolution of disputes.
51. Commonwealth legal aid guidelines should be modified to allow limited grants of aid in social security matters, to clients who satisfy the means and merits test, to be available for the purposes of
- paying for early necessary disbursements, such as medical reports
  - conducting initial negotiations and drafting correspondence to Centrelink in respect of refused applications.
52. The Attorney-General's Department should establish a 'first port of call' online information service to act as a central point of reference and referral for anyone seeking general information on a civil legal matter.
53. Legal aid commissions, legal services commissioners and legal ombudsmen, and law societies should consult to clarify and develop procedures for identifying, dealing with and preventing the occurrence of conflicts of interest in legally aided matters.

54. Federal and State governments should legislate to clarify that conflict of interest in legal aid commission cases only occurs where casework is undertaken for both clients. Limited advice or assistance provided to a person by a solicitor employed in a legal aid commission should not create a conflict of interest in circumstances where another solicitor employed by the legal aid commission acts for another party in dispute with the person, providing no confidential information has been or is at real risk of being disclosed.

55. Legal aid commissions, community legal centres and law societies should develop a process for coordinating and exchanging information among legal (and appropriate non-legal) service providers. This should include the following.

- Provision of one-stop advice where the advice provider is accountable for providing an adequate response to a given inquiry. Such advice provider should be able to contact other organisations, panels of specialist legal aid and private practitioners and refer back to the client with the correct advice.
- Apportionment of work to legal aid commissions, community legal centres and other service providers according to resources and expertise.
- Continued development of registers of experts, including experts relevant to family and civil matters.
- Coordination of community legal education, information, administrative innovation and continuing legal education for staff.
- The exchange of information and education about processes, programs, kits and classes which various service providers use as self-help schemes for unrepresented litigants.

56. Legal aid commissions should develop a comprehensive referral directory for legal and non-legal advice and services in each State and Territory. Such directories should be made available to advisers and the public, on the internet and in printed forms. Each directory should include

- information as to avenues of legal advice, dispute resolution, and related referrals such as relationship and drug and alcohol counselling, community and emergency housing and refuge, ethnic support and interpretation services, domestic violence, trauma and torture services
- relevant government departments and officers
- specialist and approved lawyers who accept legal aid work, initial free consultations and contingency fee arrangements
- and be designed to complement the law handbooks produced by community legal centres.

57. Legal aid commissions should use employed paralegals and/or law students in internship programs, to assist applicants to complete legal aid applications.

58. The federal government should evaluate the Family Law Assistance Program to determine whether it should expand the program nationally.

59. The Family Court should establish and fund Court Network schemes in all registries. The schemes should be integrated with the information desk and the legal aid commission duty lawyer schemes, and coordinated by legal aid commissions, with community legal centres utilised for the sourcing and training of volunteers.

## **6. General issues – practice, procedure and case management**

60. The Federal Court, Family Court and federal review tribunals should develop rules or guidelines to facilitate and regulate the use of technology in litigation and review proceedings consistent with those of the Victorian and New South Wales Supreme Court rules.

61. The Federal Court, Family Court, review tribunals and the federal magistracy should consult to develop

- arrangements for information sharing on technology
- compatible electronic case management systems which promote better communication and movement of files between jurisdictions.

62. The Commission supports the further development of federal court and tribunal procedures to encourage prehearing conferences and other communication and contact between relevant experts. Consideration should be given to developing guidelines on the conduct of court or tribunal ordered conferences of experts.

63. Experts should be required, where requested by a party and with the leave of the court or tribunal, to prepare for and answer questions from parties upon payment prior to trial of the reasonable costs of answering questions.

64. At the conclusion of the Federal Court's review of its expert witness guidelines, the Family Court and the AAT (and the new Administrative Review Tribunal), having regard to the outcome of that review, should develop guidelines for expert witnesses in terms similar to the Federal Court.

65. The Australian Council of Professions should develop a generic template code of practice for expert witnesses, drawing upon the Federal Court's guidelines for expert witnesses. The Australian Council of Professions should encourage its constituent professional bodies to supplement this code with discipline specific provisions, where appropriate.

66. Federal courts and tribunals should, as a matter of course, encourage parties to agree jointly to instruct expert witnesses.

67. Procedures to adduce expert evidence in a panel format should be encouraged whenever appropriate. The Commission recommends that the Family Court and the Administrative Appeals Tribunal establish rules or practice directions setting down such procedures, using the Federal Court Rules as a model.

68. The Attorney-General's Department should develop a 'best practice' blueprint applicable to dispute avoidance, management and resolution for federal government departments and agencies.

69. Each federal department and agency should be required to establish a dispute avoidance, management and resolution plan. Such plans should be consistent with the model litigant rules.

70. An interagency dispute management working group, comprising relevant agency representatives, should be established and coordinated by the Office of the Legal Services Commissioner, to provide a forum for sharing experience and knowledge on dispute management and resolution, to assist in developing dispute avoidance, management and resolution plans, and to evaluate such arrangements.

## **7. Case and hearing management in the Federal Court of Australia**

71. The Federal Court should develop a national procedures guide to the individual docket system. This guide should be regularly revised to correspond with the current practices of the Court.

72. To ensure the continued effective functioning of the individual docket system and avoid any listing problems which may result from busy dockets, the Federal Court should ensure that

- a protocol or practice note is circulated for listing and dealing with cases which are ready for hearing but are not listed for hearing by the docket judge within a reasonable time and
- listing management practices are adequately publicised.

73. Section 25 of the *Federal Court Act 1976* (Cth) should be amended to allow a single judge in an appeal, to exercise powers to stay or dismiss an appeal where no available ground of appeal is disclosed.

74. The Federal Court should continue to facilitate meetings between representatives from the Aboriginal representative bodies, Federal government, State and Territory governments, Federal Court and National Native Title Tribunal



to discuss the expected time frame for resolution of native title claims and ways to manage the cases so as to meet the agreed timetable.

75. To promote the development of consistent and efficient practices and procedures for the management of native title cases, protocols and practice notes should be developed by the Federal Court, in consultation with the National Native Title Tribunal, in relation to

- the role of the National Native Title Tribunal representative in Federal Court review and directions hearings
- the sharing of information, expertise and efficient use of resources and
- the form, content and availability of mediation reports from the National Native Title Tribunal.

76. The Federal Court, in consultation with its user groups, should review the arrangements for taking evidence in native title cases relevant to the claimants' association and traditional physical connection with an area including how best, if at all, to use assessors for taking such evidence.

77. The Attorney-General's Department, in consultation with the relevant parties, including the Australian Anthropological Society and the various State and Territory law societies and bar associations, should establish a panel of appropriately qualified assessors and experts which the Federal Court can draw upon for use in native title cases. Expressions of interest should be sought and appointments made to the panel.

78. The Federal Court should consider drafting guidelines or a practice note, relating to the practices of lawyers and parties in representative proceedings, addressing in particular

- the choice of the representative party, who should not be chosen primarily as a 'person of straw'
- the procedures to be followed to ensure fair cost agreements between group members, the representative party and lawyers
- the obligations of lawyers to the representative party and each group member with respect to competing interests of group members and the group, class closure and settlement arrangements
- the arrangements for communication between respondent lawyers and group members.

79. The Federal Court should promulgate additional rules for representative proceedings in relation to issues such as

- criteria for selecting the appropriate representative action and representative party amongst competing applications
- notification procedures
- proposed settlements, including global settlements.

80. The provisions of Part IVA of the *Federal Court Act 1976* (Cth) should be amended to
- require class closure at a specified time before judgment and
  - enable the Court to approve fee agreements between the representative party and/or group members with the representative party's lawyer.
81. The Attorney-General should commission a review of the operation of Part-IVA of the *Federal Court Act 1976* (Cth).
82. The profession should include rules governing lawyers' responsibilities to multiple claimants and in representative proceedings in professional practice rules.
83. The practice in the New South Wales and Victorian registries of the Federal Court, whereby the solicitor acting on behalf of the Minister for Immigration and Multicultural Affairs, prepares, files and serves a bundle of relevant documents in the matter before the first directions hearing in migration matters, should be extended to all the other Federal Court registries.
84. In its review of the operation of the guidelines for expert witnesses, the Federal Court, in consultation with relevant professional bodies should give particular attention to
- whether parties increasingly are choosing to retain 'silent' expert advisors and the implications of any such trend
  - the incidence and effectiveness of conferences and other prehearing contact between experts and whether guidelines on the conduct of court ordered conferences of experts should be developed (see recommendation 62)
  - whether the guidelines should explicitly remind experts that they can take the initiative before or at the hearing to correct any misstatement or apparent misunderstanding of the evidence they have provided to the Court
  - whether there should be provision for the Court to give leave for parties to submit questions to the expert prior to the hearing, upon payment of the experts' reasonable costs of answering such questions (see recommendation-63)
  - the incidence and effectiveness of the use of panel presentation of expert evidence.
85. The Federal Court should continue to develop appropriate procedures and arrangements, in consultation with legal professional and user groups, to allow judges to benefit from expert assistance in understanding the effect or meaning of expert evidence.
86. The Council of Chief Justices should continue its efforts in further developing harmonised rules and originating process, where appropriate, for Federal Court and State and Territory Supreme Courts civil matters.
87. Federal Court Rules should

- require the respondent to indicate precisely how its case on any issue differs from the case of the applicant and
- permit conclusions of law to be pleaded.

88. The Federal Court should review its practices in, and arrangements for, ex parte applications. If considered appropriate, a practice note should be drafted in relation to conduct required and the duty of candour expected of parties and their representatives bringing ex parte applications.

89. The Federal Court should draft a practice note and/or guidelines for electronic discovery and discovery of electronic documents dealing with general procedures and problems encountered by parties, including

- requirements for parties to disclose search terms and mechanisms
- arrangements for authenticating documents and
- 'fixing' documents in time
- the restoration and retrieval of electronic data by parties.

Any such practice note should be consistent with the NSW and Victorian Supreme Court Practice Notes on discovery of electronic documents.

90. In order to support orders, in appropriate cases that costs of an interlocutory proceeding should be payable and taxable forthwith, the Federal Court Rules should be amended to remove any presumption against this course.

91. Federal Court Rules should be amended so that subpoenas are issued only with leave, unless a judge otherwise directs.

92. The Federal Court should continue to monitor the use and outcomes of court annexed mediation. The Federal Court should develop a practice note requiring parties to inform the Court, at the conclusion of a matter, about their use of private mediation services and the outcome – that is, whether the mediation assisted to resolve all or a significant part of the dispute.

93. Supplementary witness statements and additional oral evidence given at the hearing should be permitted only by leave.

94. The *Federal Court Act 1976* (Cth) or the Rules should be amended to allow the test for entering summary judgment against a party to be applied more flexibly and in respect of either party. In particular, a rule should be promulgated, in terms similar to Rule 24.2 of the Civil Procedure Rules (UK), whereby the Court may give summary judgment against an applicant or respondent on the whole of a claim or on a particular issue if

- it considers that
  - that applicant has no real prospect of succeeding on the claim or issue; or
  - that respondent has no real prospect of successfully defending the claim or issue; and

- there is no other reason why the case or issue should be disposed of at trial.

95. The Federal Court should consider amending its Rules expressly to allow default judgment for a liquidated claim to be obtained by the applicant solely on the pleadings; that is, without adducing any evidence, where the respondent has not filed a defence.

96. The Federal Court should monitor compliance with directions and the manner in which non compliance is dealt with by judges to ensure sanctions are being used effectively and consistently.

97. The Federal Court Rules should be amended to include self-executing costs sanctions in terms similar to the Civil Procedure Rules (UK).

## **8. Practice, procedure and case management in the Family Court of Australia**

98. Family Court committees dealing with practice, procedure and case management should ensure continuing and effective consultation with legal practitioners, including those from community and legal aid organisations.

99. The Family Court's Forms sub-committee, in consultation with practitioners, should investigate options for revising the initiating process in children's matters and in financial matters. In relation to children's matters, the review should take into account the information needed by child representatives and routinely sought directly from the parties by legal aid commissions and others acting as child representatives.

100. The federal Attorney-General, in consultation with the Family Court, should consider whether the Family Law Act should be amended to allow consent orders to be made by the Court without independent consideration where parties provide a certificate confirming they have received independent legal advice.

101. In revising its forms and procedures, the Family Court should consider whether, consistent with the decision in *Harris v Caladine*, Form 12A can be modified to limit the information required where parties are legally represented and advised.

102. Where the Family Court produces pro forma documents, use of such documents should be optional. As an alternative, it should be permissible to file a document that addresses, as relevant, a stated list of matters, as with the present Outline of Case document.

103. The Family Court, and its Future Directions Committee, should give priority to a reconsideration of simplified procedures, particularly for financial matters. At all stages the Court should ensure its consultations include legal practitioners with collective experience in representing a wide range of family litigants (in terms of social background and socio-economic status), and community and legal aid organisations that assist unrepresented parties. Issues that should be taken into account include

- the cost to parties of the current forms and procedures – including costs to parties and their representatives produced by changes to the forms and procedures
- the information needed to define issues, identify relevant facts, and conciliate effectively
- the need for forms and procedures which can accommodate a range of cases
- the needs of unrepresented parties
- the information needs of child representatives
- the clear identification of issues in dispute so that parties are required to compile certain forms, such as the Outline of Case document, jointly, and respondents' forms are required to answer those of the applicant.

104. In consultation with relevant organisations, the Family Court should revise Order 20 rule 2 of the Family Law Rules to provide that

- registrars or the Court have discretion to grant discovery and subpoenas at any time where this will assist the parties to conciliate on an informed basis, or is needed to prepare for hearing
- where appropriate, the Court may grant discovery in relation to documents directly relevant to particular identified issues properly in dispute or by reference to particular documents or defined categories of documents directly relevant to such issues
- where there are many documents, consideration will be given to granting discovery in stages without the need to verify lists of documents
- non compliance with discovery may be dealt with by costs orders in appropriate cases (costs to be taxed and paid forthwith, at the interlocutory stages) or preclusionary sanctions.

105. The Family Court should order experts to confer as early as is feasible in proceedings, including in children's cases.

106. Parties and the Family Court should, as a matter of course, consider whether an expert (or experts) agreed between the parties should be appointed in a case or to deal with a particular issue. Examples of categories of case where the use of

agreed experts will often be appropriate include property disputes where valuation of assets is in issue. The Family Court also should direct parties to agree a joint expert valuer in simple property issues.

107. The Family Court should ensure that family reports are given priority in cases in which both parties are unrepresented or where there are allegations of family violence or child abuse. Particular care should be taken to ensure that such reports are made available in a timely fashion and are clearly focussed on the key issues in dispute.

108. The processes by which the Family Court establishes social facts should be reviewed with the aim of making such processes more transparent and open to challenge by the parties. Where the Court relies upon social science research provided by experts, including court experts, such reliance should be disclosed fully.

109. The Attorney-General should request the Family Law Council to report on whether the Family Law Act should be amended to provide specifically that whenever the best interests of children are being determined, the Court may have regard to any relevant, accredited and published research findings. Any such material relied upon should be expressly acknowledged by the Court.

110. The Family Court and its Future Directions Committee, in considering the recommendations of the Compliance Committee, should identify clearly the various causes, circumstances, processes and registries in which there is significant non compliance. The Future Directions Committee should distinguish between inadvertent and deliberate non compliance, and the range of solutions and responses required. Such measures in response to non compliance should avoid automatic sanctions. The Court should retain primary responsibility to initiate sanctions for failure to comply, and disallow frivolous or repetitious party complaints concerning failure to comply. Processes, procedures or forms that are unduly complex, or generate non compliance, should be identified and modified, or should be monitored on a continuing basis.

111. The Family Court should adopt the Future Directions Committee's proposal that the Court replace the current first directions hearing with a case conference as the first return date in all registries. In considering this proposal the Court should have regard to

- consolidation of case events where possible, to minimise the number of times parties and lawyers must attend Court
- early identification of the matters in issue
- ensuring the officer presiding at the case conference has discretion to make directions for any procedures or processes, including discovery or obtaining family reports, as well as referral to PDR processes.

112. The Family Court should implement the Future Directions Committee's proposal to develop the process of streaming cases according to their needs. In considering this proposal, the Family Court should ensure that the guidelines provide sufficient flexibility, and attention to the needs of a particular case, so that parties are not directed repeatedly to PDR or other processes unless the circumstances of the case require it. (See recommendation 114).

113. In establishing the specifications for the Casetrack computer system, the Family Court should ensure that cases in which there are multiple or repeated applications are automatically identified and are capable of being consolidated and/or referred to a duty judge.

114. The Family Court should develop further the Future Directions Committee's draft case management proposals, to the extent that they enable consistent oversight of cases. In considering the proposals, the Court should give particular attention to

- the need to ensure that problematic cases can be assigned to particular judicial officers or registrars for management, or directed to the same judicial officer or registrar for all relevant case events
- the need for assessment of cases early in the interlocutory process by a person who has the knowledge, skills and authority to identify and direct the case to appropriate procedures
- consolidation of interlocutory events
- minimising the number of case events parties are required to attend
- represented parties should not be required to attend purely procedural events
- where possible, adapting the timing and arrangement of case events to minimise disruption to the parties (see recommendation 111). The Court should consider whether it is practicable to use electronic communication such as email, telephone or fax to a greater extent for the purposes of directions and procedural matters, and whether the new Casetrack system will facilitate such practise.

115. The Family Court should set benchmarks for the number of full sitting days for judges each year.

116. The Family Law Act should be amended to permit a single judge in an appeal to exercise the powers of the Family Court to stay or dismiss any proceeding where

- no reasonable cause of action is disclosed
- the proceeding is frivolous or vexatious or
- the proceeding is an abuse of the process of the court.

117. Within two years of the release of this report, the Attorney-General should consider establishing an independent review to examine practice, procedure and

case management in the Family Court. The review should assess funding needs and measure the performance of the Court, including

- the efficacy of its originating processes, forms and case management procedures
- the duration and outcomes of cases, and
- the effectiveness of the Court's information technology system and data collection.

The inquiry should extend beyond an efficiency audit to include an examination of whether the Court's resources are allocated and used effectively, having regard to the identified priorities of the Court's role and operation.

## **9. Practice, procedure and case management in federal merits review tribunals**

118. Federal review tribunals should set performance standards for their members. Such standards should be developed in cooperation with members. The impact of performance standards should be monitored, including their effect on case processing and on the quality and durability of the decisions made.

119. The new Administrative Review Tribunal should be permitted to use multi-member panels in all review jurisdictions, to be constituted as appropriate. Multi-member panels should be used at the discretion of the president or divisional executive member, as required, for cases which are particularly complex or require specialist member expertise, or where there are significant benefits for the continuing professional development of tribunal members.

120. The new Administrative Review Tribunal should issue guidelines for members stating that members should inquire into any relevant fact in issue where

- the fact is relied on by an applicant
- a finding in relation to that fact is necessary in order for the Tribunal to reach its decision and
- it is practicable for the Tribunal to inquire into that fact.

121. The federal Attorney-General should specify in the model litigant obligations, set down in legal services directions under the *Judiciary Act 1903* (Cth), that agencies and agency representatives in the conduct of federal review tribunal proceedings have duties to assist the tribunal to reach its decision.

122. Federal review tribunals and the agencies whose decisions are subject to review should focus on developing appropriate arrangements and procedures for contact and communication to enable investigative assistance to be given by the agency to the tribunal in particular cases. Such arrangements should accord with the requirements of procedural fairness to applicants and should be arranged in such a manner as not to undermine the independence of tribunal decision makers.



123. Legislation and practice directions for the new Administrative Review Tribunal should provide the tribunal with discretion to permit applicant representatives to participate in hearings as the members consider appropriate and useful. Such discretion should be applicable to all divisions, including the immigration and refugee division and the income support division.

124. The Administrative Appeals Tribunal should focus development of its case management processes on reducing case duration in all review jurisdictions and on engendering a culture of compliance with directions. The AAT should examine the efficacy of arrangements, within the constraints of its membership structure and statutory requirements for the constitution of the tribunal, in which each case is allocated to particular decision makers who take responsibility for the allocated cases from commencement to finalisation.

125. Federal tribunal conference registrars should have statutory powers, similar to those of judicial registrars in the Federal Court and the Family Court, to issue directions relating to procedural matters.

126. The *Administrative Appeals Tribunal Act 1975* (Cth) should be amended to

- remove the requirement that documents returned under summons be produced at a directions hearing or hearing and
- provide that all members (not just presidential or senior members) should be able to grant a party leave to inspect documents.

127. The new Administrative Review Tribunal should not operate under a single case management model but should utilise a range of practices and procedures adapted to suit its different review jurisdictions, including those which have been effective and successful in the existing specialist federal review tribunals. Such management processes should allow effective streaming of cases to appropriate management or fast-tracked hearing, allow timely resolution and engender a culture of compliance with directions.

128. Arrangements for costs in the Administrative Appeals Tribunal's compensation jurisdiction, under which respondent agencies pay legal costs of successful applicants, should be reviewed to allow payment on a successful application for reconsideration of a compensation decision. Such costs should be a capped amount to be paid where the lawyer advises and prepares the application for reconsideration. The costs should be paid only if the matter is resolved at this stage. Such sums for legal costs should not be added to the costs claimed at the conclusion of any subsequent review tribunal proceeding, except for the costs of medical reports subsequently relied on.

129. Where applicants have failed without good reason to comply with tribunal directions, any additional or wasted sums should be able to be deducted from costs recovered by the successful applicant.

130. The Administrative Appeals Tribunal and the new Administrative Review Tribunal should be able to take 'Calderbank offers' into account for the purposes of costs in jurisdictions where costs are able to be ordered by the tribunal in favour of successful applicants.

131. The new Administrative Review Tribunal legislation should provide a continuing obligation on both applicants and respondents in review proceedings to lodge relevant documents with the tribunal. To encourage frank disclosure between applicants and their lawyers, client legal privilege should be retained, subject to the exception in recommendation 137.

132. Prior to the establishment of the Administrative Review Tribunal, the Attorney-General's Department and the Administrative Appeals Tribunal should convene meetings of relevant agencies and legal aid commissions, to discuss arrangements for the appointment of expert witnesses and adducing of expert evidence in particular review jurisdictions.

133. Administrative Appeals Tribunal practice directions should encourage parties to agree to the instruction of a single expert for the case.

134. Legislation should expressly provide federal review tribunals with the power to require parties to agree to the instruction of a single expert for the case, where the tribunal considers this appropriate. In such circumstances, additional expert evidence on the same matter should be permitted only in exceptional circumstances.

135. In those review jurisdictions where successful applicants are able to obtain costs, where the tribunal directs parties to agree on a single expert, the costs of additional experts consulted by the applicant should not be recoverable.

136. Legislation governing the Administrative Appeals Tribunal and the new Administrative Review Tribunal specifically should require prompt disclosure to applicants of reports of all the respondents' medical experts.

137. Legislation governing the Administrative Appeals Tribunal and the new Administrative Review Tribunal should provide that neither applicants nor respondent agencies can claim client legal privilege for expert medical reports created for the dominant purpose of anticipated or pending review tribunal proceedings in the compensation, veterans' affairs or social welfare review jurisdictions.

138. The Administrative Appeals Tribunal, and in due course, the Administrative Review Tribunal should monitor the impact of, and practices in, review proceedings consequent upon changes to the rules and practices for expert evidence.



# Participants

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## Abbreviations

AALS	Association of American Law Schools
AAT	Administrative Appeals Tribunal
AAT Act	<i>Administrative Appeals Tribunal Act 1975 (Cth)</i>
ABA	American Bar Association
ABIO	Australian Banking Industry Ombudsman
ABS	Australian Bureau of Statistics
ACCC	Australian Competition and Consumer Commission
ACOLE	Australian Council on Legal Education
AD(JR) Act	<i>Administrative Decisions (Judicial Review) Act 1977 (Cth)</i>
ADR	alternative dispute resolution
ADT	Administrative Decisions Tribunal (NSW)
ADT Act	<i>Administrative Decisions Tribunal Act 1997 (NSW)</i>
A-G's Dept (Cth)	Commonwealth Attorney-General's Department
AGS	Australian Government Solicitor
AIJA	Australian Institute of Judicial Administration
AIRC	Australian Industrial Relations Commission
AJAC report	Access to Justice Advisory Committee <i>Access to justice – An action plan</i> AGPS Canberra 1994
ALRC	Australian Law Reform Commission
ALRC 38	<i>ALRC Evidence</i> AGPS Canberra 1987
ALRC 46	<i>ALRC Grouped proceedings in the Federal Court</i> AGPS Canberra 1988
ALRC 67	<i>ALRC Interim: Equality before the law: Women's access to the legal system</i> ALRC Sydney 1994
ALRC 69	<i>ALRC Equality before the law: Justice for women</i> Part One ALRC Sydney 1994 <i>ALRC Equality before the law: Women's equality</i> Part Two ALRC Sydney 1994
ALRC 73	<i>ALRC For the sake of the kids: Complex contact cases and the Family Court</i> ALRC Sydney 1995
ALRC 75	<i>ALRC Costs shifting – who pays for litigation</i> ALRC Sydney 1995
ALRC 78	<i>ALRC Beyond the door-keeper: Standing to sue for public remedies</i> ALRC Sydney 1996
ALRC 84	<i>ALRC &amp; HREOC Seen and heard: Priority for children in the legal process</i> ALRC Sydney 1997
ALRC, AAT Empirical Report Part One	<i>ALRC Part one: Empirical information about the Administrative Appeals Tribunal</i> ALRC Sydney June 1999

ALRC, AAT Empirical Report Part Two	ALRC <i>Part two: Empirical information about the Administrative Appeals Tribunal</i> ALRC Sydney June 1999
ALRC BP 1	ALRC Background Paper 1 <i>Federal jurisdiction</i> ALRC Sydney 1996
ALRC BP 2	ALRC Background Paper 2 <i>Alternative or assisted dispute resolution</i> ALRC Sydney 1996
ALRC BP 3	ALRC Background Paper 3 <i>Judicial and case management</i> ALRC Sydney 1996
ALRC BP 4	ALRC Background Paper 4 <i>The unrepresented party</i> ALRC Sydney 1996
ALRC BP 5	ALRC Background Paper 5 <i>Civil litigation practice and procedure</i> ALRC Sydney 1996
ALRC BP 6	ALRC Background Paper 6 <i>Experts</i> ALRC Sydney 1999
ALRC DP 62	ALRC Discussion Paper 62 <i>Review of the federal civil justice system</i> ALRC Sydney 1999
ALRC IP 20	ALRC Issues Paper 20 <i>Review of the adversarial system of litigation: Rethinking the federal civil litigation system</i> ALRC Sydney 1997
ALRC IP 21	ALRC Issues Paper 21 <i>Review of the adversarial system of litigation: Rethinking legal education and training</i> ALRC Sydney 1997
ALRC IP 22	ALRC Issues Paper 22 <i>Review of the adversarial system of litigation: Rethinking family law proceedings</i> Sydney 1997
ALRC IP 23	ALRC Issues Paper 23 <i>Technology – what it means for federal dispute resolution</i> Sydney 1998
ALRC IP 24	ALRC Issues Paper 24 <i>Review of the adversarial system of litigation: Federal tribunal proceedings</i> ALRC Sydney 1998
ALRC IP 25	ALRC Issues Paper 25 <i>Review of the adversarial system of litigation: ADR – its role in federal dispute resolution</i> ALRC Sydney 1998
ALSA	Australian Law Students' Association
ALTA	Australasian Law Teachers Association
APLEC	Australasian Professional Legal Education Council
ARC	Administrative Review Council
ARC 39	ARC <i>Better decisions: Review of Commonwealth merits review tribunals</i> AGPS Canberra 1995
ART	Administrative Review Tribunal
ASIC	Australian Securities and Investment Commission
ATO	Australian Taxation Office

ATSILS	Aboriginal and Torres Strait Islander Legal Services
Bowman report	G Bowman <i>Review of the Court of Appeal (Civil Division) – Report to the Lord Chancellor</i> Lord Chancellor's Dept London 1997
CALD	Council of Australian Law Deans
CBA	Canadian Bar Association
CBA Task Force papers	Canadian Bar Association <i>Systems of civil justice task force – Civil justice: Reform for the 21st century</i> Canadian Bar Association <i>Systems of Civil Justice Task Force Conference</i> Toronto February 1996
CBA Task Force report	Canadian Bar Association <i>Systems of civil justice task force report</i> CBA Toronto August 1996
CCAAC	Commonwealth Consumer Affairs Advisory Council
CJEI	Commonwealth Judicial Education Institute (Canada)
CLAFs	contingent legal aid (or assistance) funds
CLCs	community legal centres
CLE	continuing legal education
COAG	Council of Australian Governments
CPR (UK)	Civil Procedure Rules 1999 (UK)
DCM	differential case management
DETYA	Department of Education, Training and Youth Affairs
DIMA	Department of Immigration and Multicultural Affairs
DVA	Department of Veterans' Affairs
Evaluation Committee report	Family Court of Australia <i>Report to the Chief Justice of the Evaluation of Simplified Procedures Committee</i> August 1997 Family Court Sydney 1997
Evidence Act	<i>Evidence Act 1995</i> (Cth)
FACS	Department of Family and Community Services
Federal Court Act	<i>Federal Court of Australia Act 1976</i> (Cth)
FCAC	Federal Costs Advisory Committee
Family Law Act	<i>Family Law Act 1975</i> (Cth)
FLC	Family Law Council
Fry T, Family and Federal Courts Costs Report	T Fry <i>Costs of litigation in the Family Court of Australia and in the Federal Court of Australia</i> ALRC Sydney November 1999
Griffith legal aid report	J Dewar et al <i>the impact of changes in legal aid on criminal and family law practice in Queensland</i> Faculty of Law Griffith University 1998
HECS	Higher Education Contribution Scheme
Hilmer report	National Competition Policy Review <i>National competition policy</i> AGPS Canberra 1993

IAAAS	Immigration Advice and Application Assistance Scheme
IARC	Immigration Advice and Rights Centre
ICJ	RAND Institute for Civil Justice (US)
ICS	integrated client services
IDS	individual docket system
IRT	Immigration Review Tribunal
JCA	Judicial Conference of Australia
JCNSW	Judicial Commission of New South Wales
Joint Select Committee report	Joint Select Committee Inquiring into Certain Aspects of the Operations and Interpretation of the Family Law Act <i>The Family Law Act 1975: Aspects of its operation and interpretation</i> AGPS Canberra 1992
JRC	Justice Research Centre
JRC, Family Court Research Part One	<i>JRC Family Court research part one: Empirical information about the Family Court of Australia</i> ALRC Sydney June 1999
JRC, Family Court Research Part Two	<i>JRC Family Court research part two: The costs of litigation in the Family Court of Australia</i> ALRC Sydney June 1999
JRC, Family Court Research Part Three	<i>JRC Family Court research part three: Comparison with the report on "The review of scales of legal professional fees in federal jurisdictions" by Professor Philip Williams et al</i> ALRC Sydney June 1999
Justice statement	Attorney-General's Dept <i>Justice statement</i> A-G's Dept (Cth) Canberra 1995
LACs	legal aid commissions
Law Council	Law Council of Australia
Logan report	B Logan et al <i>Report of the review of the Attorney-General's legal practice</i> AGPS Canberra 1997
LRCWA	Law Reform Commission of Western Australia
LRCWA Final report	Law Reform Commission of Western Australia <i>Project 92 Review of the criminal and civil justice system in Western Australia – Final report</i> Perth 1999
MacCrate report	American Bar Association <i>Legal education and professional development – An educational continuum (Report of the task force on law schools and the profession: Narrowing the gap)</i> ABA Chicago 1992
Matruglio T & McAllister G Family Court Empirical Report Part One Sydney February 1999	T Matruglio & G McAllister <i>Part one: Empirical information about the Family Court of Australia</i> ALRC Sydney February 1999
Matruglio T, Family Court Empirical Report Part Two	T Matruglio <i>Part two: The costs of litigation in the Family Court of Australia</i> ALRC Sydney June 1999

Matruglio T & McAllister G Federal Court Empirical Report Part One	T Matruglio & G McAllister <i>Part one: Empirical information about the Federal Court of Australia</i> ALRC Sydney March 1999
Matruglio T, Federal Court Empirical Report Part Two	T Matruglio <i>Part two: The costs of litigation in the Federal Court of Australia</i> ALRC Sydney 1999
MCLE	mandatory continuing legal education
Middleton report	P Middleton <i>Report to the Lord Chancellor by Sir Peter Middleton GCB</i> Lord Chancellor's Dept London 1997
Migration Act	<i>Migration Act 1958</i> (Cth)
MIRO	Migration Internal Review Office
MRT	Migration Review Tribunal
NACLEPA	National Advisory Committee on Legal Education and Professional Admission
NADRAC	National Alternative Dispute Resolution Advisory Council
NCSC	National Center for State Courts (US)
NJI	National Judicial Institute (Canada)
NNTT	National Native Title Tribunal
OLSC (NSW)	Office of the Legal Services Commissioner (NSW)
Ontario Civil Justice Review	Ontario Civil Justice Review <i>Civil justice review: First report</i> Ontario Court of Justice & Ministry of the Attorney-General Toronto 1995
Ontario Legal Aid Review	Ontario Legal Aid Review <i>Report of the Ontario Legal Aid Review: A blueprint for publicly funded legal services</i> Queen's Printer for Ontario 1999
PD	Practice Direction
PDR	primary dispute resolution
Pearce report	D Pearce et al <i>Australian law schools: A discipline assessment for the Commonwealth Tertiary Education Commission</i> AGPS Canberra 1987
PHIO	Private Health Insurance Ombudsman
PLT	practical legal training
Priestley 11	Consultative Committee of State and Territorial Admitting Authorities, (list of compulsory subject areas)
Productivity Commission report 1999	Steering Committee for the Review of Commonwealth/State Service Provision (SCRCSPP) <i>Report on government services 1999 Volume 1: Education, health, justice</i> AusInfo Canberra 1999
RACS	Refugee Advice and Case Service
RRT	Refugee Review Tribunal
SCAG	Standing Committee of Attorneys-General
Senate Legal Aid Inquiry	Senate Legal & Constitutional References Committee <i>Inquiry into the Australian legal aid system – Third</i>

	<i>report</i> Senate Printing Unit Canberra June 1998
Simplification	Family Court of Australia <i>Report of the</i>
Committee report	<i>Simplification of Procedures Committee to the Chief Justice May 1994</i> Family Court Sydney 1994
SOAR	Society of Ontario Adjudicators and Regulators
Social Security Act	<i>Social Security Act 1991 (Cth)</i>
SRC Act	<i>Safety Rehabilitation and Compensation Act 1988 (Cth)</i>
SSAT	Social Security Appeals Tribunal
TIO	Telecommunications Industry Ombudsman
Trade Practices Act	<i>Trade Practices Act 1974 (Cth)</i>
TPC	Trade Practices Commission
TPC final report	Trade Practices Commission Final report <i>Study of the professions – Legal</i> TPC Canberra 1994
VCAT	Victorian Civil and Administrative Tribunal
Veterans' Entitlements Act	<i>Veterans' Entitlements Act 1986 (Cth)</i>
VRB	Veterans' Review Board
Williams report	P Williams et al <i>Report of the review of scales of legal professional fees in federal jurisdiction</i> A-G's Dept (Cth) Canberra 1998
Woolf interim report	Lord Woolf <i>Access to justice: Interim report to the Lord Chancellor on the civil justice system in England and Wales</i> Lord Chancellor's Dept London 1995
Woolf report	Lord Woolf <i>Access to justice: Final report to the Lord Chancellor on the civil justice system in England and Wales</i> HMSO London 1996
Woolf Rules	Lord Woolf <i>Access to justice draft civil proceedings rules</i> HMSO London 1996



# 1. Managing justice: continuity and change in the federal civil justice system

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## **The terms of reference**

1.1. On 29 November 1995, the then Attorney-General, the Hon Michael Lavarch MP, asked the Commission to review the adversarial system of conducting civil, administrative review and family law proceedings before courts and tribunals exercising federal jurisdiction. The terms of reference<sup>1</sup> asked the Commission to have regard to

- the need for a simpler, cheaper and more accessible legal system
- the government's Justice statement,<sup>2</sup> and
- recent and proposed reforms to courts and tribunals,

and referred to the Commission for inquiry and report, the following

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1. The complete terms of reference are set out at p 3.  
2. Attorney-General's Department *Justice statement A-G's Dept* (Cth) Canberra 1995 (Justice statement). The Justice statement was the then government's response to the report of its advisory committee on access to justice: Access to Justice Advisory Committee *Access to justice: An action plan* AGPS Canberra 1994 (AJAC report).

- (a) the advantages and disadvantages of the present adversarial system of conducting civil, administrative review and family law proceedings before courts and tribunals exercising federal jurisdiction
- (b) whether any changes should be made to the practices and procedures used in those proceedings and
- (c) any related matter.

1.2. The terms required the Commission to consider, among other things, the following specific matters

- civil litigation and administrative law procedures in civil code jurisdictions
- the procedures and case management schemes used by courts and tribunals to control the conduct of proceedings that come before them
- the relationship between courts and tribunals
- mechanisms for identifying the issues in dispute
- means of gathering, testing and examining evidence
- the use of court-based and community alternative dispute resolution schemes
- the significance of legal education and professional training to the legal process
- the training, functions, duties and role of judicial officers as managers of the litigation process
- appellate court processes.

1.3. On 2 September 1997, the Attorney-General, the Hon Daryl Williams AM QC MP, amended these terms of the reference<sup>3</sup> to give more specific focus to the inquiry. The amended terms<sup>4</sup> required the Commission to *exclude* from its inquiry issues relating to

- the structure and management of federal merits review tribunals
- the breadth, type, coverage and nature of decisions in merits review of federal administrative decisions
- the possible establishment, structure and jurisdiction of a federal magistracy
- the organisation and provision of family counselling services, and
- the structure of the Family Court and its relationship to the Federal Court of Australia.

1.4. The amended terms of reference also excluded consideration of changes that would or might require amendment of the Constitution, and specifically asked the Commission to focus its attention on issues relating to the causes of excessive costs and delay (including economic factors), case management, alternative dispute

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3. Under the *Australian Law Reform Commission Act 1996* (Cth) s 20.

4. The amended terms of reference are set out at p 5.

resolution, pleadings and other court processes, expert evidence and expert witnesses, and unrepresented litigants.

## Defining the scope of the inquiry

1.5. The establishment of the Commonwealth in 1901 created a federal jurisdiction.<sup>5</sup> Federal jurisdiction is a national jurisdiction within the Australian legal system which operates directly or indirectly, or otherwise has influence, in almost all areas of Australian law.<sup>6</sup> Under the Constitution, federal judicial power was vested in the High Court of Australia and in such other federal courts as the Parliament might create under chapter III, as well as in State courts specifically vested with federal jurisdiction.

1.6. It was not until the 1970s, with the establishment of the Federal Court of Australia (Federal Court), the Family Court of Australia (Family Court) and the Administrative Review Tribunal (AAT), that a significant federal judicial system developed below the High Court. Until that time, for pragmatic reasons as well as political sensibilities about the relative roles of the Commonwealth and the States, heavy reliance was placed upon State courts. It is still the case that federal jurisdiction is shared and exercised by the various federal and State courts – although as the High Court recently ruled, State courts may be vested with federal jurisdiction, but the Constitution does not permit federal courts to be vested with State jurisdiction.<sup>7</sup>

1.7. In effect, then, the terms of reference potentially directed the Commission to a vast inquiry into access, practice and procedure across all of the federal and State courts. This was a major project, having regard to the breadth and complexity of the task and the need to conduct empirical research to support evaluation and reform of the federal justice system. For these reasons, the Commission focussed its

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5. The nature, constitutional source, scope and development of federal jurisdiction is discussed in Australian Law Reform Commission Background Paper 1 *Federal jurisdiction* ALRC Sydney 1996 (ALRC BP 1). The *Judiciary Act 1903* (Cth) effected a conferral of general federal jurisdiction on all State courts. The concept of 'federal jurisdiction' refers to the exercise of the judicial power of the Commonwealth. Viewed in this context, federal and State tribunals do not exercise federal jurisdiction, because they are not courts for the purposes of chapter III of the Constitution. In relation to tribunals, the Commission understands its terms of reference to refer to the exercise of executive power granted to federal tribunals under Commonwealth legislation. On the nature of and major issues in Australian federal jurisdiction, see B Opeskin and FWheeler (eds) *The Australian federal judicial system* Melbourne University Press (forthcoming).
  6. Perhaps the only areas in which State jurisdiction has a largely unfettered remit are criminal law and (State) administrative law, though even in these areas the supervisory impact of the High Court cannot be overlooked. On the influence of federal administrative law principles on the various systems of administrative law in the States and Territories see the AJAC report, ch 13.
  7. Sharing of jurisdiction is effected in accordance with the terms of the conferral or investiture of jurisdiction (accrued jurisdiction), through operation of the cross-vesting scheme and uniform, customised, legislative schemes, such as the Corporations Law and its mirror State legislation. The High Court recently held the cross-vesting scheme and the Corporations Law scheme were constitutionally invalid in so far as they purported to give the Federal Court jurisdiction to exercise State judicial power: *Re Wakim; Ex parte McNally; Re Wakim; Ex parte Darvall; Re Brown; Ex parte Amann; Spinks v Prentice* (1999) 163 ALR 270.

inquiry on the workings of the Federal Court,<sup>8</sup> the Family Court,<sup>9</sup> and those review tribunals set for amalgamation in the proposed new federal Administrative Review Tribunal (ART): namely the AAT,<sup>10</sup> the Migration Review Tribunal (MRT, which incorporates the former Immigration Review Tribunal), the Refugee Review Tribunal (RRT) and the Social Security Appeals Tribunal (SSAT).

1.8. The report also refers, where appropriate, to State courts exercising federal jurisdiction in relation to family law proceedings. It is important to note, however, that data and comments in this paper concerning 'the Family Court' refer to the Family Court of Australia, not to the separately constituted Family Court of Western Australia, or to local courts exercising federal family jurisdiction, unless explicitly stated. The Commission has not reviewed the workings of the Australian Industrial Relations Commission (AIRC) or the National Native Title Tribunal (NNTT) and deals with those agencies only in relation to the way in which they may interact with the Federal Court's handling of industrial relations matters and native title claims.

1.9. Notwithstanding some of these choices and limitations, the Commission's inquiry still encompasses a very wide range of cases and litigant types. Parties in federal civil proceedings are diverse, including individuals of varied means and backgrounds, and with different expectations of the justice system: Australian citizens and intending residents; big and small businesses; interest groups; whole classes of persons involved as parties to representative actions; government; regulators; and the variety of family members concerned in family disputes.<sup>11</sup>

1.10. In terms of case types, the Commission's inquiry covered everything from high volume, routinised processing of cases with relatively simple issues of fact and law in dispute, to lengthy and highly sophisticated disputes over intellectual property, trade practices or native title, to representative actions involving potentially thousands of applicants within a class, and requiring procedures which must be crafted and customised for each particular case.

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8. The Federal Court is a superior court of record and a court of law and equity, created by the *Federal Court of Australia Act 1976* (Cth) and derives its original jurisdiction from more than 100 Commonwealth statutes. See also ch 7 for a discussion on procedure and case management in the Federal Court.

9. The Family Court is a superior federal court exercising family law jurisdiction dealing with matrimonial and divorce cases which has a statutory jurisdiction arising principally from the *Family Law Act 1975* (Cth). See also ch 8 on the Court's jurisdiction; ALRC and HREOC *Seen and heard: priority for children in the legal process* ALRC Sydney 1997, ch 15 (ALRC 84).

10. The AAT was established under the *Administrative Appeals Tribunal Act 1975* (Cth) and has jurisdiction to review decisions conferred by a broad range of enactments. In exercising its jurisdiction, the Tribunal reviews a range of administrative decisions made by Ministers and government officers as well as decisions reviewed by the SSAT and the Veterans' Review Board (VRB). See ch 9 for discussion on the federal merits review tribunals.

11. See ch 6 and 8.

Likewise, the inquiry ranged across matters in which litigants often have to (or sometimes choose to) represent themselves, and those in which litigants (typically government or corporate) are represented by the leading law firms and retain teams of experienced counsel.

1.11. This diversity has particular force where, as in this inquiry, the reform agenda is explicitly directed to issues of cost, accessibility and efficiency.

1.12. In this report, the Commission uses the term ‘federal civil justice system’ to refer to the full array of judicial, administrative review and community and court based alternative dispute resolution (ADR) schemes found in federal civil jurisdiction. This extends, for example, to the use of ADR by industry ombudsmen to deal with complaints in areas under federal regulation, such as banking and telecommunications.<sup>12</sup>

1.13. This chapter discusses the philosophical and methodological approaches the Commission has taken to this inquiry into reform of the federal civil justice system. The chapter develops some themes considered in the Discussion Paper 62 which preceded this report.

## ‘Managing justice’

1.14. The title of this final report, *Managing justice*, is consciously intended to have a double meaning. One of the major thrusts of this report is that our civil justice system works best when judicial officers take an active role in *managing* proceedings from an early stage. Although the description and analysis of case management practices in the various federal courts and tribunals forms a significant portion of this report, the Commission does not place its faith entirely in such management. As is evident from the substantial treatment of legal education, judicial education, practice standards and legal assistance, the Commission recognises the need to engage the legal profession, the academy, government, and others in the task of reshaping legal practice and professional culture in aid of meaningful reform of the civil justice system. Managing justice is an ongoing process. There is no simple, once and for all solution to the problems of civil justice systems, no single best practice for managing or resolving disputes.

1.15. As the discussion below will indicate, the Commission does not underestimate the difficulties involved, nor the international history of indifferent results in this area. In this light, the word *managing* is also used in the aspirational sense, intending to convey the Commission’s hope that this report will assist in *managing to achieve* an Australian federal civil justice system of the highest order.

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12. The term federal civil justice system is not without its difficulties. For example, on its face, such a term could also refer to federal administrative regulation, but the Commission uses the term with a more limited meaning.

## The Commission's consultations

1.16. Over the several years of this inquiry, the Commission has consulted very widely with judges and tribunal members, court and tribunal administrators, the legal profession, ADR practitioners, litigants and others involved in or affected by the legal system or ADR processes. To ensure that we obtained a wide range of views, information, experience and expertise, the Commission used a number of separate consultative and advisory processes.

### Advisory and working groups

1.17. The Commission arranged for an Advisory Group comprising eminent judges, lawyers, and others to assist on this reference. A list of the Advisory Group members appears at page 47. The Commission was also assisted by a Consultative Group, comprising the Chief Justices of the Federal Court, Family Court and the President of the Administrative Appeals Tribunal. A list of the Consultative Group members appears at page 47. Both these groups assisted the Commission to focus its review and advised on policy issues and proposals for change. Mr Julian Disney, a member of the Advisory Group, also acted as a special consultant and adviser in the preparation of DP 62.

1.18. The Commission also established a number of expert working groups to provide detailed advice and assistance on Federal Court, Family Court and federal tribunal proceedings and processes, on costs issues, technology, ADR processes, and on training and education. A list of the working groups and their members appears at page 47.<sup>13</sup>

1.19. Members of the advisory and working groups were asked to read and comment upon draft chapters, including reports on the Commission's empirical work, and gave generously of their time. Some members had to travel extensively to attend meetings. The Advisory Group considered and commented upon a penultimate version of the set of final recommendations contained in this report, and was influential in the shape of these final recommendations. The Commission derived enormous assistance from the advisory and working groups and extends our deep appreciation to the members for their time, patience, and generosity.

### Conferences

1.20. The Commission co-sponsored two conferences associated with this inquiry. One conference, entitled *Beyond the adversarial system: Changing roles and*

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13. The ADR working group was also assisted by expert advisors. Additional expert advisors were GeriEttinger, Senior Member, AAT; Paul Lewis, Australian Dispute Resolution Association (ADRA); Professor Laurence Boulle, Bond University and Michael Redfern, solicitor.

*skills for courts, tribunals and practitioners*, considered common law and civil code processes in relation to education and training.<sup>14</sup> The other, entitled *The management of disputes involving the Commonwealth. Is litigation always the answer?* concerned dispute avoidance, management and litigation involving Commonwealth departments and agencies.<sup>15</sup> The Commission also co-sponsored an education and training workshop.<sup>16</sup> Commissioners and staff participated in a number of conferences organised by other institutions, presenting research and analysis developed as part of this inquiry.

1.21. The Commission will be hosting a major conference entitled *Managing Justice ... the way ahead for civil disputes*, on 18–20 May 2000, in Sydney, representing the culmination of its work on this inquiry. The conference will bring together leading international and Australian figures in areas of civil justice practice, research and reform, and court and tribunal management. It is expected that the conference proceedings will be published commercially, adding further to the literature in this field.

## Consultations and submissions

1.22. The Commission consulted with many organisations and individuals with particular interest or expertise in different areas of federal civil litigation and review and received some 400 formal submissions. A large number of meetings were held with groups of individual judges, tribunal members, court and tribunal administrators, practitioners and others. Following the publication of DP 62, the Commission held a series of consultations in all capital cities except Hobart, meeting with judges, tribunal members, court and tribunal staff, law societies and bar associations (and their specialist committees), legal academics, government lawyers, legal practitioners, legal aid commissions, community legal centres, ADR practitioners, court support networks, government departments and agencies involved in litigation and review, expert witnesses and others. Such consultations were particularly helpful in obtaining the views and experiences of those people involved in court and tribunal proceedings.

1.23. Footnote references are made throughout this report to particular consultations. Given the very extensive nature of this process, the invidious nature of selecting out the ‘most important’ events, and the practical limitations of printing and binding a report of this size, the Commission has not appended a full

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14. ALRC and National Institute for Law Ethics and Public Affairs (NILEPA) *Beyond the adversarial system: Changing roles and skills for courts, tribunals and practitioners* Griffith University Brisbane 10–11 July 1997.

15. ALRC, Australian Competition and Consumer Commission (ACCC) and the Commonwealth Ombudsman *The management of disputes involving the Commonwealth. Is litigation always the answer?* Canberra 22 April 1999.

16. ALRC and NILEPA *Education workshop* Sydney 19 November 1998.



or select list of consultations. A complete list may be found at the Commission's homepage: <<http://www.alrc.gov.au>>.

## **Issues, background and discussion papers**

1.24. During the inquiry the Commission released a number of consultative and background papers. These papers formed the focus of the Commission's consultation with interested persons and organisations. The issues papers released were

- *Rethinking the federal civil litigation system*<sup>17</sup>
- *Rethinking legal education and training*<sup>18</sup>
- *Rethinking family law proceedings*<sup>19</sup>

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17. ALRC Issues Paper 20 *Review of the adversarial system of litigation – Rethinking the federal civil litigation system* ALRC Sydney April 1997 (ALRC IP 20).

18. ALRC Issues Paper 21 *Review of the adversarial system of litigation: Rethinking legal education and training* ALRC Sydney August 1997 (ALRC IP 21).

19. ALRC Issues Paper 22 *Review of the adversarial system of litigation: Rethinking family law proceedings* ALRC Sydney November 1997 (ALRC IP 22).

- *Technology – what it means for federal dispute resolution*<sup>20</sup>
- *Federal tribunal proceedings*<sup>21</sup>
- *ADR – its role in federal dispute resolution*<sup>22</sup>

1.25. A series of background information papers was also prepared as part of the Commission's initial research and consultation. The papers covered

- *Federal jurisdiction*<sup>23</sup>
- *Alternative or assisted dispute resolution*<sup>24</sup>
- *Judicial and case management*<sup>25</sup>
- *The unrepresented party*<sup>26</sup>
- *Civil litigation practice and procedure*<sup>27</sup>
- *Experts*<sup>28</sup>

1.26. The major publication in this reference preceding this report was the Commission's Discussion Paper 62, *Review of the federal civil justice system*, published in August 1999.<sup>29</sup>

## The importance of empirical research

1.27. At the beginning of the reference, the Commission recognised the need for, and initiated, empirical research on the working of the federal civil justice system. This resulted in the most extensive and comprehensive empirical research project ever conducted in relation to the Australian federal civil justice system. Information was collected from courts, federal review tribunals, litigants, lawyers and legal professional bodies concerning litigants, case characteristics, case types, case resolution, registry practices, the costs of litigation, charging practices and educational initiatives. The Commission engaged consultants, Tania Matruglio and Gillian McAllister, to collect this data and conduct evaluative research from Federal Court and Family Court case files and from surveys of samples of solicitors and unrepresented litigants associated with sampled cases finalised in these

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20. ALRC Issues Paper 23 *Technology – What it means for federal dispute resolution* ALRC Sydney March 1998 (ALRC IP 23).
  21. ALRC Issues Paper 24 *Review of the adversarial system of litigation: Federal tribunal proceedings* ALRC Sydney 1998 (ALRC IP 24).
  22. ALRC Issues Paper 25 *Review of the adversarial system of litigation: ADR – Its role in federal dispute resolution* Sydney June 1998 (ALRC IP 25).
  23. ALRC Background Paper 1 *Federal jurisdiction* ALRC Sydney 1996 (ALRC BP 1).
  24. ALRC Background Paper 2 *Alternative or assisted dispute resolution* ALRC Sydney 1996 (ALRC BP 2).
  25. ALRC Background Paper 3 *Judicial and case management* ALRC Sydney 1996 (ALRC BP 3).
  26. ALRC Background Paper 4 *The unrepresented party* ALRC Sydney 1996 (ALRC BP 4).
  27. ALRC Background Paper 5 *Civil litigation practice and procedure* ALRC Sydney 1996 (ALRC BP 5).
  28. ALRC Background Paper 6 *Experts* ALRC Sydney 1999 (ALRC BP 6).
  29. ALRC Discussion Paper 62 *Review of the federal civil justice system* ALRC Sydney 1999 (ALRC DP 62).

jurisdictions. The Commission undertook such case file research and surveys in respect of the AAT<sup>30</sup> and also the courts, federal review tribunals and legal professional bodies concerning their educational initiatives.

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30. See, in particular, ch 9.

1.28. The results of this work were reported in a series of publications prepared by the Commission and our research consultants, and inform the discussion throughout this final report. The results of a separate survey on educational initiatives were reported on by the Commission in 1997.<sup>31</sup> Tania Matruglio and Gillian McAllister prepared background information on the data and technology needs of courts and tribunals which was incorporated in two research papers in 1998.<sup>32</sup> Their main work for the Commission involved the preparation of empirical reports on the Federal Court and the Family Court, published in 1999.<sup>33</sup> Similar empirical reports on the AAT were prepared by the Commission.<sup>34</sup> Further analysis of the Commission's Family Court data was conducted by the Justice Research Centre.<sup>35</sup>

1.29. Dr Tim Fry of Monash University prepared a further report in 1999, involving a modelling exercise using the Commission's costs data to create regression equations applying to the Federal Court and Family Court.<sup>36</sup>

1.30. Details on the methodology of the surveys, the sampling techniques and data collection instruments used are contained in the empirical reports which are published in electronic form on the Commission's homepage:  
<<http://www.alrc.gov.au>>.

1.31. Briefly, the samples for the case file surveys were as follows.

- In the Federal Court: information was collected from 682 cases identified by the Court as finalised during February, March and April 1998.
- In the Family Court: information was collected from 1288 cases removed from the Court's Active Pending Cases List during May and June 1998.

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31. ALRC IP 21.

32. T Matruglio & G McAllister *Part one: The status of data collection and evaluation research in the Federal Court, the Family Court and the Administrative Appeals Tribunal* ALRC Sydney January 1998; T-Matruglio & G McAllister *Part two: Data and technology needs of courts and tribunals: Background information* ALRC Sydney February 1998.

33. T Matruglio & G McAllister *Part one: Empirical information about the Family Court of Australia* ALRC Sydney February 1999; T Matruglio *Part two: The costs of litigation in the Family Court of Australia* ALRC Sydney June 1999; T Matruglio & G McAllister *Part one: Empirical information about the Federal Court of Australia* ALRC Sydney June 1999; T Matruglio *Part two: The costs of litigation in the Federal Court of Australia* ALRC Sydney 1999.

34. ALRC *Part one: Empirical information about the Administrative Appeals Tribunal* ALRC Sydney June 1999; ALRC *Part two: Empirical information about the Administrative Appeals Tribunal* ALRC Sydney June 1999.

35. Justice Research Centre *Family Court research part one: Empirical information about the Family Court of Australia* ALRC Sydney June 1999; Justice Research Centre *Family Court research part two: The costs of litigation in the Family Court of Australia* ALRC Sydney June 1999; Justice Research Centre *Family Court research part three: Comparison with the report on 'The review of scales of legal professional fees in federal jurisdictions'* by Professor Philip Williams et al ALRC Sydney June 1999.

36. T Fry *Costs of litigation in the Family Court of Australia and in the Federal Court of Australia* ALRC Sydney November 1999.

- In the AAT: information was collected from 1665 cases defined by the AAT as finalised during August, September and October 1997.

1.32. Information was collected from case files or from court or tribunal computerised case management systems (the case file information) and from responses to self-administered questionnaires sent to party representatives or to unrepresented parties (the questionnaire information).

1.33. The case file information provided the Commission with comprehensive data relating to the types of parties and cases, how and at what stage cases were resolved, the duration to resolution, the outcomes achieved, the number of represented parties, the effect representation had on case processing and case outcomes, and differences between registries.

1.34. The questionnaire information included details about the cost of proceedings, how these costs were funded and the charging arrangements associated with them. Information was also solicited about other issues including the use of representation or other assistance, the dispute resolution processes used, the factors working for and against settlement, and prehearing case management by the relevant court or tribunal.

1.35. This research and analysis has been essential to the Commission's understanding of the effect of case management practices in federal courts and tribunals and, along with the extensive consultations and submissions received by the Commission, forms the basis for the recommendations in this paper. The Commission expresses special thanks to all of the research consultants for their contributions, which set this inquiry into the civil justice system apart from so many others.

1.36. The Commission strongly believes that all successful systemic reform must be grounded in empirical research. Deprecation of the legal system and failed efforts at reform often proceed on the basis of anecdote and assumption. This can include both untested and unfounded criticism of some current practices, procedures and institutions, as well as uncritical acceptance of alternatives.

1.37. One example may be the 1970s push for tribunals as a quicker, cheaper alternative to courts. In fact, the Commission's research shows that government expenditure on tribunals is now little different from spending on courts. The case survey research reveals that private costs for certain tribunal matters were little different from the costs of judicial review matters in the Federal Court and that the median duration for finalising cases in the AAT was longer than for cases in the Federal Court and Family Court.<sup>37</sup> Elsewhere in this report the Commission suggests that moves towards greater use of ADR processes also need to be subjected to empirical study,<sup>38</sup> to ensure that in the drive to avoid litigation we are

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37. See ALRC DP 62 ch 4, ch 12; and ch 9 of this report.

38. See para 6.66.

not continuing to assume that all alternatives to litigation are necessarily cheaper and faster processes.

1.38. In proposing a 'single-minded' effort at reducing cost and delay, Garry Watson has suggested that the lesson to be learned from previous unsuccessful attempts at civil justice reform is the critical need for allied empirical research.

The process has two components: rigorous analysis designed to select only reforms that will be likely to improve the cost and delay picture; and the introduction of systems to measure the actual impact of reform. To date, we have typically undertaken neither. As a result, we implement some reforms that have a little or no likelihood of reducing costs and delay. When it is all over, we have a poor, or at best an anecdotal and impressionistic, understanding of what we achieved ... My plea ... is to measure the impact of reforms as best we can and to introduce no reforms without an impact measurement plan.<sup>39</sup>

1.39. Professor Marc Galanter has observed that in the United States — which is generally thought to be well in advance of most countries in terms of data collection and funding empirical research — the collective database on the justice system is improving but is often 'thin and spotty';<sup>40</sup> lawyers 'are dogged in challenging and dissecting evidence' but less effective in analysing large social aggregates or employing 'the most severe critical standards';<sup>41</sup> legal scholarship has 'remained diffident toward the investigative, empirical side of the legal realist legacy';<sup>42</sup> and legal institutions and governments have invested little in litigation research and development.<sup>43</sup>

1.40. The same criticisms certainly may be made of the present position in Australia, although some steps already have been made to remedy this.<sup>44</sup> In 1994, the Access to Justice Advisory Committee (AJAC) proposed that a national court statistics collection program be undertaken 'for the identification of best practice court procedures'.<sup>45</sup> The Steering Committee for the Review of Commonwealth/State Service Provision, operating under the auspices of the Council of Australian Governments (COAG), now collects and presents performance data on court services and is seeking to develop its civil justice data

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39. G Watson 'From an adversarial to a managed system of litigation: A comparative critique of Lord Woolf's interim report' in R Smith (ed) *Achieving civil justice* Legal Action Group London 1995, 79, 82. See also I Scott 'Procedural law and judicial administration' (1987) 12 *The Justice System Journal* 67, 77-84; M Rosenberg 'Civil justice research and civil justice reform' (1981) 15 *Law & Society Review* 473, 481.

40. M Galanter 'News from nowhere: The debased debate on civil justice' (1993) 71(1) *Denver University Law Review* 77, 99.

41. id 100.

42. id 100; see also M Chesterman and D Weisbrot 'Legal scholarship in Australia' (1987) 50 *Modern Law Review* 709, 723.

43. M Galanter 'News from nowhere: The debased debate on civil justice' (1993) 71(1) *Denver University Law Review* 77, 101.

44. AJAC report, para 17.49-17.68.

45. id 412, action 17.2.

collection and analysis.<sup>46</sup> The Commission endorses such initiatives, as providing an essential tool for understanding and improving the justice system.

1.41. Federal courts and tribunals are likewise improving their own data collection, evaluation and performance monitoring. The Commission supports the view that such a performance monitoring system should be

- integral to the operations of the court, so that it is developed by judicial officers, managers and court users who understand its purpose and can use it for further organisational development
- relevant to the core values of courts, so that it makes available information about the most important court activities
- capable of collecting data whose relevance to court goals and values is explicit and unambiguous
- feasibly developed and applied without detracting from the court's availability to achieve its central goals through siphoning off resources.<sup>47</sup>

1.42. Some courts and tribunals have sought to adapt the United States Trial Court Performance Standards which cover five broad areas: access to justice; expedition and timeliness; equality, fairness and integrity; independence and accountability; public trust and confidence.

1.43. There traditionally has been limited academic interest and activity in empirical research into the justice system in Australia.<sup>48</sup> However, the dominant focus on black letter, doctrinal research has begun to shift towards more theoretical and applied work in recent years, and some excellent scholars are emerging whose work is strongly empirical and reform-oriented in character. In the following chapter, the Commission looks at legal education, and proposes (among other things) that matters of process and professionalism feature more prominently in law school teaching – which, if taken up, inevitably would have an effect on research priorities.

1.44. Empirical research into litigation, administrative review and ADR processes should begin to result in the accumulation of comparative data sets, which itself can provide an impetus for the further development of applied

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46. Steering Committee for the Review of Commonwealth/State Service Provision *Report on government services 1999 – Vol 1: Education, health, justice* AusInfo Canberra 1999 (Productivity Commission report 1999).

47. R Mohr et al 'Performance measures for Australian courts' (1997) 6(3) *Journal of Judicial Administration* 156, 158–9.

48. See D Pearce et al *Australian law schools: A discipline assessment* Vol 2, Commonwealth Tertiary Education Commission 1987, para 9.180–9.185; and M Chesterman and D Weisbrot 'Legal scholarship in Australia' (1987) 50 *Modern Law Review* 709. The same is apparently true in England: see I Scott 'Procedural law and judicial administration' (1987) 12 *The Justice System Journal* 67, 79.



academic, postgraduate, postdoctoral and other research in this area. Additional funding and concerted research planning and effort are needed, however.

1.45. One possible avenue for obtaining funding for such research is through the Strategic Partnerships with Industry – Research and Training (SPIRT) grant scheme.<sup>49</sup> The SPIRT scheme supports collaborative research projects between

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49. Further information about the SPIRT grant scheme may be found on the homepage of the Commonwealth Department of Education, Training and Youth Affairs (DETYA), at <<http://www.detya.gov.au/highered/research/grants/grantap1.htm#spirt>>.

higher education researchers and industry partners on topics of direct relevance to industry. Industry partners represent a broad spectrum of enterprises from business and industry, and include public sector bodies<sup>50</sup> such as courts.<sup>51</sup>

1.46. The Commission sees considerable benefit in universities, courts, tribunals, law firms, legal professional associations, law reform agencies, research centres, legal interest groups and others collaborating in various applied research projects relevant to the operation and working of the federal civil justice system. The development of an Australian Academy of Law, proposed in the following chapter,<sup>52</sup> would assist in coordinating and encouraging applications for SPIRT grants for civil justice research, as well as in facilitating rigorous standards of peer review for such applications.

**Recommendation 1.** In view of the need for civil justice policy making and reform to be informed by empirical research, stakeholders such as courts, tribunals, law firms, legal professional associations, law reform agencies, universities, research centres, and legal and consumer interest groups should seek opportunities for undertaking collaborative research, including through the Strategic Partnerships with Industry – Research and Training (SPIRT) grants scheme.

## A system in crisis?

1.47. Calls for radical change to our legal system frequently derive from a sense that the system is in crisis. At the inception of this inquiry such calls were common. Former Chief Justice, Sir Gerard Brennan, said in 1996 that

[t]he courts are overburdened, litigation is financially beyond the reach of practically everybody but the affluent, the corporate or the legally aided litigant; governments are

50. D Kemp '53 million for university-industry research' *Media release* 27 October 1999

<<http://www.detya.gov.au/ministers/kemp/oct99/k11510-271099.htm>> (6 January 2000).

51. A good example of an existing initiative in this area is the SPIRT grant in relation to family law research: H Rhoades, M Harrison and R Graycar *Interim report. The Family Law Reform Act 1995: Can changing legislation change legal culture, legal practice and community expectations?* University of Sydney and Family Court of Australia Sydney April 1999; also see Family Court of Australia Management Information and Research Office of the Chief Executive *1998 Study of the effects of legal aid cuts on the Family Court of Australia* and its *Litigants final report* Family Court Sydney December 1998; JDewar et al *The impact of changes in legal aid on criminal and family law practice in Queensland. A research report commissioned by the Queensland Law Society and the Family Law Practitioners' Association* Griffith University 1998.

52. See para 2.77, 2.115-2.128 and rec 6.

anxious to restrict expenditure on legal aid and the administration of justice. It is not an overstatement to say that the system of administering justice is in crisis.<sup>53</sup>

1.48. Insofar as the Commission's terms of reference were directed to help 'fix' a crisis, the Commission's investigation does not support the crisis theory – at least not in relation to the federal courts and tribunals. For example, the Commission found a rise in case loads in some areas of federal jurisdiction, but no 'litigation explosion';<sup>54</sup> small numbers of cases taking two to three years to finality, evident room for improvement in case duration, but no systemic, intractable delay in case processing or resolution;<sup>55</sup> and a range of very high and medium legal costs and much litigation assistance from lawyers and government. The adage that the justice system is open only to the very rich and very poor was not confirmed by our empirical survey.<sup>56</sup>

1.49. The Commission found a range of litigants utilising federal courts and tribunals, although not surprisingly lower income litigants tend to be found mainly in circumstances in which they may have little or no choice but to become involved in court or tribunal processes. For example, a study of family law litigants by the Justice Research Centre found a median annual income of only \$25000–\$28000.<sup>57</sup> Apart from the limited availability of legal aid, speculative and delayed fee charging arrangements also have assisted to make some federal civil processes accessible to people of varied means, particularly where there is the potential of a monetary award or settlement from which expenses can be recouped.<sup>58</sup> Private and publicly funded informal dispute resolution options, such as industry ombudsman's offices, also assist in broadening access to the federal civil justice system.

1.50. It must be stressed that this inquiry is concerned only with the federal civil justice system. Absent from the Commission's consideration are a number of vexed areas that are primarily the domain of State and Territory courts and which cause significant controversy and disquiet, including the bulk of personal injury matters and criminal law. For example, the Law Reform Commission of Western

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53. G Brennan 'Key issues in judicial administration' *Paper* Fifteenth Annual Conference Australian Institute of Judicial Administration Wellington 20–22 September 1996.

54. From 1993–94 to 1997–98, the number of lodgments in civil proceedings in State and Territory Supreme Courts and in the Federal Court, has been relatively stable, except for the Supreme Court of the Northern Territory, where there has been a significant increase over that time: Productivity Commission report 1999, table 7A.1.

55. See ch 6–9.

56. See H Gibbs *Sydney Morning Herald* 10 April 1984, 6, quoted in D Weisbrot *Australian lawyers* Longman Cheshire Melbourne 1990, 245; Senate Standing Committee on Legal and Constitutional Affairs Discussion Paper No 6 *The cost of legal services and litigation: the courts and the conduct of litigation* AGPS Canberra 1992, para 1.1; *The cost of justice: Foundations for reform* AGPS Canberra 1993, 4 in the AJAC report, para 1.3; A Gleeson 'Access to justice' (1992) 66 *Australian Law Journal* 270, 274. See also para 4.8–4.19, 5.21–5.25.

57. R Hunter *Family law case profiles* Justice Research Centre Sydney 1999, para 299–303.

58. See para 4.51–4.18 and 5.21 .

Australia noted that public dissatisfaction with the justice system often focusses on issues of sentencing and the treatment of victims of crime.<sup>59</sup>

1.51. In DP 62, the Commission enumerated many problems with the existing system, including

- insufficient attention given to education and training for lawyers in professional skills, legal ethics and professional responsibility<sup>60</sup>

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59. Law Reform Commission of Western Australia *Review of the criminal and civil justice system in Western Australia final report* LRCWA Perth 1999, para 23.1.

60. See ALRC DP 62 ch 3.

- no real market operating for legal services, and thus the absence of competitive pressures to reduce costs, especially for one-off consumers<sup>61</sup>
- incomplete or inadequate statements of the ethics and standards of practice expected of lawyers<sup>62</sup>
- the lack of adequate legal representation for many litigants in the justice system, and the significant disadvantages which flow from this (including to other parties and the court or tribunal)<sup>63</sup>
- lack of coordination in the government's handling of dispute prevention, management and resolution<sup>64</sup>
- examples of poor practice, tactical game playing, and non compliance with court and tribunal directions by lawyers, which lengthens proceedings and increases costs<sup>65</sup>
- matching the resources of the court, especially the availability of the trial judge, with the readiness of the parties, even in a successful case management system such as the individual docket system (IDS) employed by the Federal Court<sup>66</sup>
- inflexible and poorly designed case management and data collection processes in the Family Court, and a pervasive sense of dissatisfaction with the practice and procedure in the Court, as expressed almost uniformly by lawyers and litigants<sup>67</sup>
- undue delays and costs in the tribunals (which were established expressly to be quick and economical)<sup>68</sup> and
- 'expert shopping', and other problems with the use of expert evidence in courts and tribunals.<sup>69</sup>

1.52. These are not matters for complacency, and the bulk of this report is devoted to discussion, analysis and recommendations aimed at resolving or ameliorating these problems.

1.53. The Commission sees these problems as difficult ones, but susceptible to repair, and found that much of the system works reasonably well – indeed, the Commission's empirical research indicated that much of the system performs better than many of the institutional participants believe and the anecdotal 'common wisdom' suggests.

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61. See ALRC DP 62 ch 4.

62. See ALRC DP 62 ch 5.

63. See ALRC DP 62 ch 6–7.

64. See ALRC DP 62 ch 8.

65. See ALRC DP 62 ch 9.

66. See ALRC DP 62 ch 10. See also G Watson 'From an adversarial to a managed system of litigation: A comparative critique of Lord Woolf's interim report' in R Smith (ed) *Achieving civil justice* Legal Action Group London 1995.

67. See ALRC DP 62 ch 11.

68. See ALRC DP 62 ch 12.

69. See ALRC DP 62 ch 13.

1.54. Justice Ron Sackville, who chaired the federal government's Access to Justice Advisory Committee, has noted, in an analysis with which the Commission strongly agrees, that the perception that problems are so deep seated and intractable that urgent and far reaching remedies are required carries with it certain 'dangers', including that

- the strengths of the current system will be overlooked or at least given insufficient attention. This carries with it with the further danger that unrealistic expectations will be created, specifically, that the courts (as distinct from other elements in the civil justice system) can continue to perform their traditional functions, yet comply with heightened community expectations that justice should be speedy, cheap and effective.
- in the pursuit of drastic remedies for problems perceived to be deep-seated but curable, solutions will be imported from other jurisdictions without a full analysis of the legal and social culture of which they form part and without a full appreciation of the difficulties of transplanting the solutions to a different environment.
- the advantages of a process of continuous adaptation and reform will be underestimated, in favour of far reaching reforms, the effectiveness of which may rest on untested and untestable assumptions; and
- because the problem is perceived as so urgent, solutions will be proposed that are responsive to a particular difficulty, but fail to address other components of the perceived problem.<sup>70</sup>

1.55. The Law Council agreed with the Commission that there is no fundamental crisis in Australia's federal justice system, and submitted that radical changes are unwarranted and that the current system has demonstrated a capacity for change and reform.<sup>71</sup>

1.56. Indeed, with the notable exception of the Family Court, no court, tribunal, agency or institution sought to argue that the federal civil justice system was in crisis. The Family Court's submissions<sup>72</sup> and public statements<sup>73</sup> consistently focussed on what it described as its lack of resources, the overburdening of the courts and reductions in legal aid funding.

1.57. The Family Court's submission criticised the Commission's 'unquestioning acceptance of the decline in legal aid and the rise in unrepresented

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70. R Sackville 'The civil justice system – the process of change' *Paper Beyond the Adversarial System Conference Brisbane 10–11 July 1997*, 8.

71. Law Council *Submission 126 and Submission 375*.

72. Family Court *Submissions 264, 287, 348, 351, 383*.

73. Interview with the Chief Justice of the Family Court Alistair Nicholson and Professor David Weisbrot, President of the Australian Law Reform Commission *Morning with Jon Faine* 3LO 26 October 1999 *Transcript*, 2.

litigants'. It characterised the Commission's assertion in DP 62 that there was 'no crisis' as representing a

failure in its duty to present an independent report on problems in the federal judicial system ... and the fact that they have been brought about at least to some extent by deliberate Government policy.<sup>74</sup>

1.58. The Commission's research, detailed in DP 62, did confirm the real problems associated with the lack of legal representation. The Commission reported that unrepresented parties appear to experience difficulties in securing effective, consensual outcomes within litigation and review proceedings and may be less successful in the case outcome than represented parties.<sup>75</sup>

1.59. There is an evident relationship between levels of representation in the courts and government funding of legal aid schemes. Chief Justice Murray Gleeson has noted that

the expense which governments incur in funding legal aid is obvious and measurable, but what is real and substantial, is the cost of the delay, disruption and inefficiency which results from the absence or denial of legal representation. Much of that cost is also borne, directly or indirectly, by governments. Providing legal aid is costly. So is not providing legal aid.<sup>76</sup>

1.60. In DP 62, the Commission observed that governments across the developed common law and continental legal systems have sought to cap and contain legal assistance costs, and this is not a peculiarly Australian phenomenon. As former federal Attorney-General Michael Lavarch has said, the essential difficulty for all governments with legal aid funding is that it is open-ended, demand-driven and rising in cost.<sup>77</sup> As a general matter, Mr Lavarch noted that in his experience of the budgetary process

The reality is that the legal system is a very low priority when it comes to the overall responsibilities of the Federal Government. It does not rate compared to other

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74. Family Court *Submission 348*. The complex issues associated with the provision of legal assistance, the causes, outcomes and impact of the perceived rise in unrepresented parties are dealt with in ch 5, see particularly para 5.11, 5.51-5.54, 5.63-5.67, 5.71-5.93, 5.147-5.157. There is no empirical research to establish the rise in numbers — it is a qualitative assessment, documented by courts and tribunals. Figures on the numbers of unrepresented parties have not been kept by courts until recently. Figures show significant numbers currently in certain jurisdictions — around 18% of Federal Court cases, 41% of Family Court cases and 33% of AAT cases in the Commission's research samples involved one or more unrepresented or partially represented parties: see para 5.7 and 6.139. The Commission recommends that better data on unrepresented litigants be collected — see rec 39 and 40. Chief Justice Murray Gleeson has noted that it would be 'instructive' for courts to compile figures on cases where one or both parties are unrepresented: M Gleeson 'The state of the judiciary' *Speech* Australian Legal Convention Canberra 10 October 1999.

75. ALRC DP 62 para 9.49-9.53, 11.39-11.42, 11.165-11.173, 12.9-12.23, 12.212-12.23.

76. M Gleeson 'The state of the judiciary' *Speech* Australian Legal Convention Canberra 10 October 1999.

77. M Lavarch 'Fighting the fiends from finance' in H Stacy and M Lavarch (eds) *Beyond the adversarial system* Federation Press 1999, 10, 14 and 17.



government responsibilities such as health, education or defence. In fact, it would not be going too far to say that many in the executive see the legal system and lawyers as a hindrance to the operation of a fair and just society, rather than an essential component of such a society.<sup>78</sup>

... in a budget of severe expenditure reduction, legal aid was not considered as high a priority as other government expenditure such as defence, so as to be spared significant funding cuts. Indeed, the same could be said of the legal system as a whole.<sup>79</sup>

1.61. The constraints on legal aid have intensified pressures to research and implement effective and proportionate legal servicing and case management processes.<sup>80</sup> Concern about legal aid has generated considerable impetus to find ways to limit, predict and control legal costs.<sup>81</sup> Future research should provide better measures of legal need and appropriate case expenditures.

1.62. To some extent, rising costs reflect the increasing reach and complexity of, and constant changes to, substantive law, especially the explosion in legislation and regulations in modern times.<sup>82</sup> Later in this report, the Commission recommends that parliamentary committees should scrutinise bills to determine the potential impact on legal costs, since government has some responsibility to balance demands it creates with appropriate resources to meet these demands.<sup>83</sup>

1.63. However, the Commission believes that courts and tribunals must take similar responsibility for the way in which they manage their own processes and procedures.

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78. id 13.

79. id 14.

80. Government, legal aid commissions, courts and tribunals have recently funded research to measure legal need, to measure and evaluate the costs, outcomes and processes of private and legal aid family cases: see para 5.81; R Hunter *Family law case profiles* JRC Sydney June 1999; JRC *Research conducted for the Australian Law Reform Commission – Part two: The costs of litigation in the Family Court of Australia* JRC June 1999; and the experience of unrepresented parties: H Gamble and RMohr 'Litigants in person in the Federal Court of Australia and the Administrative Appeals Tribunal: A research note' *Paper* 16th AIJA Conference Melbourne 4–6 September 1998; J Dewar et al *The impact of changes in legal aid on criminal and family law practice in Queensland* Faculty of Law Griffith University 1998. At the same time experimental or pilot initiatives have been set up to consider ways to assist parties with legal disputes and manage difficult cases in cost effective ways – for example, see discussion of clinical education programs and their funding at para 5.203, the Monash-Oakleigh Legal Service's Family Law Assistance Program in Victoria at para 5.205 and the Magellan Project of the Family Court at para 8.55. Such research will provide more accurate measures of legal need, legal costs and effective and appropriate assistance and case management practices.

81. See ch 5.

82. M McHugh 'The growth of legislation and litigation' (1995) 69 *Australian Law Journal* 37; see also GGibson *The cancer in litigation* Blake Dawson Waldron Melbourne 1997.

83. See para 4.56–4.61; rec 28.

1.64. The Commission heard frequent, strong complaints from lawyers and litigants<sup>84</sup> (and, indeed, from some Family Court judges and staff) about the undifferentiated and unduly prescriptive approaches to case management in the Family Court. Lawyers and litigants expressed considerable frustration over the wastage of costs and resources (including of capped legal aid funds) through unnecessary, repetitive or ineffective procedures, and through inappropriate streaming of cases to particular dispute resolution processes.<sup>85</sup>

1.65. As far back as 1983, Professor Ian Scott, a leading expert on case management, wrote that

Politicians do not believe that the way to reduce delays is to provide more resources. The road back to adequate funding starts with judges, lawyers and administrators putting their own house back in order so that they can demonstrate to those who control the strings of the public purse that they have done all within their power to see that the court system is being run as efficiently and effectively as possible on the resources available and so that they can show that any further resources that are made available will be used productively.<sup>86</sup>

1.66. After surveying the position in a dozen industrialised nations,<sup>87</sup> including both common law and civil law legal systems, Adrian Zuckerman came to a similar conclusion.

A recurring complaint is that courts are understaffed and short of other resources. These may well be important factors. However, there is a growing recognition that, before asking the taxpayer to assume an even greater burden in paying for the administration of civil justice, we should try and find out whether there are other factors contributing to the duration of proceedings ...

We should try and find ways of curbing the appetite for unproductive procedural activity, before we expand the number of judges and of support staff.<sup>88</sup>

1.67. The Commission accepts the practical wisdom of this approach.<sup>89</sup> Rather than simply imploring the government to 'send more money', the Commission has sought to make recommendations aimed at achieving best practice in all aspects of the justice system, from the initial training of potential lawyers at university through to the management of the most complex types of litigation. It may well be that, even operating at optimal efficiency, our civil justice system will require additional public funding to support litigants of modest means, or greater

84. In the case file survey, and in consultations and submissions.

85. These matters are dealt with more fully in ch 6, 8.

86. I Scott 'Is court control the key to reduction in delays?' (1983) 57 *Australian Law Journal* 16, 18.

87. Australia, England, the United States, France, Italy, Spain, Portugal, Brazil, Greece, Japan, Germany and the Netherlands.

88. A Zuckerman 'Justice in crisis: Comparative dimensions of civil procedure' in A Zuckerman (ed) *Civil justice in crisis: Comparative perspectives of civil procedure* Oxford University Press 1999, 50.

89. See para 8.15 regarding the heavy expenditure on administrative staff in the Family Court. See ch 5 on cost of effective ways to provide legal assistance.

resources for courts, tribunals or ADR processes – and in this case such arguments will be easier to make, and to win.

1.68. Persistent talk of ‘crisis’ based on anecdotal evidence, which portrays the exceptional (and invariably the exceptionally *bad*) case as the norm, and always sees the problems as emanating from another source, has the tendency to produce cynicism and induce paralysis – a sense that the problems are far too overwhelming to be fixed. In fact, while acknowledging the existing flaws, the Commission believes that many parts of the federal civil justice system have demonstrated a healthy capacity for self-analysis, engagement with constructive criticism, and adaptability in the face of difficult circumstances.

## Thinking about access to justice

1.69. As indicated above, this inquiry initially was prompted by the work and report of the Access to Justice Advisory Committee, and the then government’s Justice statement in response. Accordingly, the Commission’s terms of reference were directed to a consideration of the cost, timeliness, efficiency and accessibility of the federal civil justice system.<sup>90</sup> These are complex and interrelated issues which concern the nature, quality and role of our justice system.

1.70. Evaluations of cost, accessibility and efficiency can vary depending upon the particular vantage point one adopts to view the litigation and review systems. To take the example of costs, do we measure the cost of the litigation and administrative review system to the government or to the parties? A reduction in public costs frequently displaces such costs to private parties. The ‘user pays’ principle, now so well entrenched in many other aspects of public policy, would seem to mandate such cost shifting.

1.71. Determining a single vantage point for private ‘users’ is also problematic, of course, since parties have significantly different skills and resources to deploy on litigation and review. The Commission has sought to provide some detail on the profile, skills and expectations which litigants and review parties bring to courts and tribunal processes.<sup>91</sup> Court processes and management timetables may appear to be lax and accommodating to one party and strenuous and incomprehensible to another. Costs may appear insurmountable to one party, and simply part of everyday business and commerce to another. Thus the Commission focusses on particular types of proceedings and litigation wherever possible to highlight and explicate these differences.

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90. For an account of the thinking behind the original reference, see M Lavarch ‘Fighting the fiends from finance’ in H Stacy and M Lavarch (eds) *Beyond the adversarial system* Federation Press Sydney 1999, 10–20.

91. See ch 5–9.

1.72. The issues of cost, timeliness, efficiency and accessibility have been analysed and considered by a growing number of law reform bodies here and overseas. Judging from this literature these are problems which bedevil civil justice systems around the world. As Adrian Zuckerman has observed,

[a]lthough excessive delay and high cost have serious effects on the system of justice, they have been persistent in most civil justice systems for a very long time. Every country boasts a long history of attempts to reduce delay and cost, yet few have been even moderately successful in reaching a sensible balance.<sup>92</sup>

1.73. Garry Watson notes, similarly, that

[d]espite some sixty reports in England on aspects of civil procedure since 1851, there has been no lasting solution to the twin problems of cost and delay. The same is true of North America. Our predecessors were neither foolish dullards nor acting in bad faith; reform is simply very difficult. The challenge is not simply to propose change: it is to propose reforms which significantly improve the current position.<sup>93</sup>

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92. A Zuckerman 'Justice in crisis: Comparative dimensions of civil procedure' in A Zuckerman (ed) *Civil justice in crisis: Comparative perspectives of civil procedure* Oxford University Press 1999, 51.

93. G Watson 'From an adversarial to a managed system of litigation: A comparative critique of Lord Woolf's interim report' in R Smith (ed) *Achieving civil justice* Legal Action Group London 1995, 63.

1.74. And Professor Judith Resnik agrees that

[t]he history of procedure is a series of attempts to solve the problems created by the preceding generation's procedural reforms.<sup>94</sup>

1.75. It is difficult not to agree with Professor Thomas Cromwell (now Justice Cromwell) of the Canadian Task Force on Civil Justice, who has summarised a finding common to all such efforts: '[t]here are probably no quick fixes or sudden insights that will ensure great improvement' to the justice system.<sup>95</sup>

1.76. The Commission considered many leading overseas reports, including reports of the Ontario Civil Justice Review,<sup>96</sup> the Canadian Bar Association Systems of Civil Justice Taskforce,<sup>97</sup> and the Ontario Legal Aid Review,<sup>98</sup> Lord Woolf's inquiry into the civil justice system in England and Wales and subsequent reform papers,<sup>99</sup> and from the United States, the many research and policy reports of the RAND Institute for Civil Justice,<sup>100</sup> the State Justice Institute, the Federal

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94. J Resnik 'Precluding appeals' (1985) 70(4) *Cornell Law Review* 603, 624. The example cited to support this is 'discovery', a process imported to deal with adversarial tactics which has itself become a litigation tactic. See also E Sward 'Values, ideology and the evolution of the adversary system' (1989) 64 *Indiana Law Journal* 301, 328; R Millar 'The mechanism of fact-discovery: A study in comparative civil procedure' (1937) 32 *Illinois Law Review* 261, 261-76.

95. T Cromwell *Dispute resolution in the twenty-first century* Canadian Bar Association – Systems of Civil Justice Task Force Ottawa January 1996, 2.

96. Ontario Civil Justice Review *Civil justice review: First report* Court of Justice and Ministry of the Attorney-General Toronto 1995; Ontario Law Reform Commission *Study paper on prospects for civil justice* Ontario Law Reform Commission Toronto 1995; Ontario Law Reform Commission *Rethinking civil justice: Research studies for the civil justice review* Vols 1 and 2 Ontario Law Reform Commission Toronto 1996.

97. Canadian Bar Association *Systems of civil justice task force report* CBA Toronto August 1996 and Canadian Bar Association *Systems of civil justice task force – Civil justice: Reform for the 21st century* Canadian Bar Association Systems of Civil Justice Task Force Conference Toronto February 1996.

98. Ontario Legal Aid Review *Report of the Ontario Legal Aid Review: A blueprint for publicly funded legal services* Queen's Printer Ontario 1998 <<http://www.attorneygeneral.jus.gov.on.ca/olar/>> (27 July 1999).

99. Lord Woolf *Access to justice: Interim report to the Lord Chancellor on the civil justice system in England and Wales* Lord Chancellor's Dept London 1995; Lord Woolf *Access to justice: Final report to the Lord Chancellor on the civil justice system in England and Wales* HMSO London 1996; Lord Woolf *Access to justice draft civil proceedings rules* HMSO London 1996; P Middleton *Report to the Lord Chancellor by Sir Peter Middleton GCB* Lord Chancellor's Dept London 1997; G Bowman *Review of the Court of Appeal (Civil Division) – Report to the Lord Chancellor* Lord Chancellor's Dept London 1997 (Bowman report). Lord Chancellor's Department consultation and research papers are available at <<http://www.open.gov.uk/lcd/lcdhome.htm>> examples include T Goriely and T Williams *Resolving civil disputes: Choosing between out-of-court schemes and litigation. A review of the literature* Lord Chancellor's Dept London 1997 Research Series No 3/97; R Dingwall et al *Rationing and cost-containment in legal services* Lord Chancellor's Dept London 1998 Research Series No1/98; R Baldwin *Regulating legal services* Lord Chancellor's Dept London 1997 Research Series No 5/97; M Hope *Expenditure on legal services* Lord Chancellor's Dept London 1997 Research Series No 9/97; T Goriely et al *Costing fast track procedures through hypothetical studies* Lord Chancellor's Dept London 1998 Research Series No 4/98.

100. eg J Kakalik et al *Just, speedy and inexpensive? An evaluation of judicial case management under the Civil Justice Reform Act* RAND Institute for Civil Justice Santa Monica 1996.

Judicial Center and the National Center for State Courts.<sup>101</sup> The Commission also considered reports of the American Bar Association<sup>102</sup> and the Judicial Conference of the United States.<sup>103</sup>

1.77. In Australia, research on civil justice has been undertaken over several years by the Access to Justice Advisory Committee,<sup>104</sup> the federal courts and tribunals themselves, parliamentary committees,<sup>105</sup> the Australian Institute of Judicial Administration (AIJA),<sup>106</sup> the Administrative Review Council (ARC),<sup>107</sup>

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101. National Center for State Courts *Examining the work of state courts* NCSC Williamsburg Virginia 1994; National Center for State Courts *Trial court performance standards and measurement system* NCSC Williamsburg Virginia 1997.
102. American Bar Association *ABA Blueprint for improving the civil justice system: Report of the American Bar Association Working Group on Civil Justice System Proposals* ABA Chicago February 1992; American Bar Association *Saving our system: A national overview of the crisis in America's system of justice* ABA Chicago 1993; American Bar Association *Just solutions: Seeking innovation and change in the American justice system* ABA Chicago 1994.
103. Judicial Conference of the United States *Long range plan for the federal courts* Long Range Planning Office, Administrative Office of the United States Courts Washington DC December 1995.
104. The AJAC report considered wide ranging proposals for reform covering equality before the law, the legal services market and the regulation of legal costs, legal aid reforms, dispute resolution outside of courts, court reforms and the accessibility and harmonisation of legislation. Many elements of the report are directly relevant to the Commission's inquiry and are canvassed where appropriate.
105. Senate Standing Committee on Legal and Constitutional Affairs Background Paper *Cost of legal services and litigation: Access to legal services: The role of market forces* AGPS Canberra 1992; Background Paper *Cost of legal services and litigation: A survey of reforms to the English legal profession* AGPS Canberra 1991; Discussion Paper No 1 *Cost of legal services and litigation: Introduction to the issues* AGPS Canberra 1991; Discussion Paper No 3 *Cost of legal services and litigation: Contingency fees* AGPS Canberra 1991; Discussion Paper No 4 *Cost of legal services and litigation: Methods of dispute resolution* AGPS Canberra 1991; Discussion Paper No 6 *Cost of legal services and litigation: The courts and the conduct of litigation* AGPS Canberra 1992; Discussion Paper No 7 *Cost of legal services and litigation: Legal aid: 'for richer for poorer'* AGPS Canberra 1992; Discussion Paper No 8 *Cost of legal services and litigation: The legal profession: a case for microeconomic reform* AGPS Canberra 1992; *The cost of justice: First report – foundations for reform* AGPS Canberra 1993; *The cost of justice: Second report – checks and imbalances* AGPS Canberra 1993; Senate Legal and Constitutional References Committee *Inquiry into the Australian legal aid system – First report* Senate Printing Unit Canberra March 1997; *Inquiry into the Australian legal aid system – Second report* Senate Printing Unit Canberra June 1997; *Inquiry into the Australian legal aid system – Third report* Senate Printing Unit Canberra June 1998. In relation to family law see eg: Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act *The Family Law Act 1975: Aspects of its Operation and Interpretation* AGPS Canberra 1992; House of Representatives Standing Committee on Legal and Constitutional Affairs report *To have and to hold: Strategies to strengthen marriage and relationships* Canberra June 1998.
106. eg R Cranston et al *Delays and efficiency in civil litigation* AIJA Melbourne 1985; B Cairns 'The use of discovery and interrogatories in civil litigation' AIJA Melbourne 1990; H Powles et al *The litigant in person – A discussion paper* AIJA Melbourne 1993; P Williams et al *The cost of civil litigation before the intermediate courts of Australia* AIJA Melbourne 1992; T Church and P Sallmann *Governing Australia's courts* AIJA Melbourne 1991; P Lane *Court management information – A discussion paper* AIJA Melbourne 1993; AIJA 'Case management in the higher courts' *Papers* AIJA Melbourne 1995; SParker *Courts and the public* AIJA Melbourne 1998; AIJA *Technology for justice report* AIJA Melbourne 1999; I Freckelton et al *Australian judicial perspectives on expert evidence: An empirical study* AIJA Melbourne 1999, 21–22. AIJA holds annual conferences that focus on case management, court technology and broader issues relating to courts and tribunal administration.

the Family Law Council (FLC),<sup>108</sup> the National Alternative Dispute Resolution Advisory Council (NADRAC),<sup>109</sup> consultants commissioned by the federal Attorney-General's Department,<sup>110</sup> State law reform commissions and committees,<sup>111</sup> the Queensland Litigation Reform Commission and the Queensland Department of Justice,<sup>112</sup> the Victorian Civil Justice Review,<sup>113</sup> the

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107. eg ARC *Better decisions: Review of Commonwealth merits review tribunals* AGPS Canberra 1995 (ARC 39); ARC *Access to administrative review: Provision of legal and financial assistance in administrative law matters* AGPS Canberra 1988 (ARC 30); ARC *Access to administrative review by members of Australia's ethnic communities* AGPS Canberra 1991 (ARC 34).
  108. The FLC undertakes policy advice and research in relation to family law. FLC publications relevant to the inquiry include: Family Law Council *Family mediation* AGPS Canberra 1992; *Involving and representing children in family law* AGPS Canberra 1996; *Family law appeals and reviews* AGPS Canberra 1996; *Child contact orders: Enforcement and penalties* AGPS Canberra 1998.
  109. NADRAC was established in 1995 and acts as an advisory body to the federal Attorney-General on issues relating to the regulation and evaluation of ADR processes and procedures. Relevant reports include: NADRAC *Primary dispute resolution in family law: A report to the Attorney-General on Part 5 of the Family Law Regulations* NADRAC Canberra March 1997; NADRAC *Alternative dispute resolution definitions* NADRAC Canberra March 1997; NADRAC Discussion Paper *Issues of fairness and justice in alternative dispute resolution* NADRAC Canberra November 1997.
  110. Marsden Jacob Associates et al *Survey of small business attitudes and experience in disputes and their resolution – Results, implications and directions* A-G's Dept (Cth) Canberra 1999 and Marsden Jacob Associates et al *Survey of small business attitudes and experience in disputes and their resolution – Report A-G's Dept (Cth) Canberra 1999*; P Williams et al *Report of the review of scales of legal professional fees in federal jurisdictions* A-G's Dept (Cth) Canberra 1998 (Williams Report).
  111. Law Reform Commission of Western Australia *Review of the civil and criminal justice system – Final report* LRCWA Perth 1999. There have also been a number of consultation papers on civil proceedings on the advantages and disadvantages of adversarial proceedings; costs; pleadings; the role of the legal profession; ADR; and expert evidence. Copies of the individual consultation drafts are available from the LRCWA website at <<http://www.wa.gov.au/lrc>> (1 August 1999). See also NSWLRC *Scrutiny of the legal profession: Complaints against lawyers* NSWLRC Sydney 1993 (NSWLRC 70); Victorian Law Reform Committee Report *Technology and the law* Government Printer Melbourne 1999; Law Society of New South Wales *ADR Task Force Report* Law Society of NSW Sydney August 1999.
  112. See Dept of Justice (Qld) *Uniform civil procedure rules for the Supreme Court, District Court & Magistrates Court – Consultation draft* Dept of Justice Brisbane 1997 and the work of the Queensland Litigation Reform Commission. See also G Davies and S Sheldon 'Some proposed changes in civil procedure: Their practical benefits and ethical rationale' (1993) 3 *Journal of Judicial Administration* 111; G Davies 'Civil justice reform in Australia' in A Zuckerman (ed) *Civil justice in crisis: Comparative perspectives of civil justice* Oxford University Press 1999, 166–203; *Uniform Civil Procedure Rules 1999* (Qld).
  113. Recommendations have been forwarded to the Victorian Attorney-General: Civil Justice Review Project *Consultation* Sydney 26 August 1997. The Commission consulted with the project director and researchers.

Justice Research Centre,<sup>114</sup> the Council of Chief Justices of Australia and New Zealand,<sup>115</sup> the Judicial Conference of Australia,<sup>116</sup> legal professional associations such as the Law Council of Australia<sup>117</sup> and the Law Society of New South Wales,<sup>118</sup> — and this Commission.<sup>119</sup>

1.78. In sum, the Commission has thoroughly examined the many reports of task forces and special commissions of inquiry, the growing international secondary literature, and the many experiments and innovations instigated by institutions within the justice system or mandated by their executives or legislatures, domestic and overseas.

1.79. The Commission heard often from experts and institutions overseas that developments here are followed closely and have influenced overseas reform

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114. Justice Research Centre 'Rolling lists in the Family Court — Sydney registry' *Briefing Note* JRC Sydney 1996; M Delaney and T Wright *Plaintiffs' satisfaction with dispute resolution processes: Trial arbitration, pre-trial conference and mediation* JRC Sydney 1997; C Guest and T Murphy *Economic evaluation of differential case management* JRC Sydney 1995; T Matruglio and J Baker *An implementation evaluation of differential case management: A report on the DCM program in the Common Law Division of the Supreme Court of New South Wales* JRC Sydney 1995; T Matruglio *Plaintiffs and the process of litigation: An analysis of the perceptions of plaintiffs following their experience of litigation* JRC Sydney 1994; J Baker *Who settles and why? A study of the factors associated with the stage of case disposition* JRC Sydney 1994; T Matruglio *So who does use the courts?* JRC Sydney 1993; D Worthington and J Baker *The cost of civil litigation: Current charging practices in New South Wales and Victoria* JRC Sydney 1993; T Matruglio *Researching alternative dispute resolution* JRC Sydney 1992; R Hunter *Family law case profiles* JRC Sydney 1999; Justice Research Centre *Family Court research part one: Empirical information about the Family Court of Australia* ALRC Sydney June 1999; Justice Research Centre *Family Court research part two: The costs of litigation in the Family Court of Australia* ALRC Sydney June 1999; Justice Research Centre *Family Court research part three: Comparison with the report on 'The review of scales of legal professional fees in federal jurisdictions' by Professor Philip Williams et al* ALRC Sydney June 1999. The Commission also consulted with the project director and researchers on the JRC's evaluation of the Federal Court's individual docket system of case management (IDS): JRC *Consultation* 12 October 1999. See also para 7.4–7.5, 7.16–7.17.
115. Council of Chief Justices of Australia and New Zealand *Electronic appeals project — Final report* May 1998 <<http://www.ccj.org/reports/Final%20Report.htm>> (27 July 1999).
116. The Judicial Conference holds or arranges meetings, conferences and seminars and publishes papers in respect of topics concerning the judiciary: see <<http://www.law.monash.edu.au/JCA/>> (17 January 2000). The Judicial Conference and the ALJA arranged for the preparation of C Roper *Proposed Australian Judicial College: Discussion paper* Centre for Legal Education Sydney September 1999.
117. eg Law Council *Blueprint for the structure of the legal profession — A national market for legal services* Law Council Canberra 1994.
118. The Law Society of NSW established an Access to Justice Task Force which produced a report in 1998: Law Society of NSW *Access to Justice: Final report* Law Society of NSW Sydney 1998.
119. A number of the Commission's earlier reports are relevant to this inquiry: ALRC *Costs shifting — who pays for litigation* ALRC Sydney 1995 (ALRC 75); ALRC *For the sake of the kids: Complex contact cases and the Family Court* ALRC Sydney 1995 (ALRC 73); ALRC and HREOC *Seen and heard: Priority for children in the legal process* ALRC Sydney 1997 (ALRC 84); ALRC *Legal risk in international transactions* ALRC Sydney 1996 (ALRC 80), ALRC *Beyond the door-keeper: Standing to sue for public remedies* ALRC Sydney 1996 (ALRC 78); ALRC *Equality before the law: Justice for women* ALRC Sydney 1994 (ALRC 69); ALRC *Equality before the law: Women's equality* ALRC Sydney 1994 (ALRC 69); ALRC *Grouped proceedings in the Federal Court* AGPS Canberra 1988 (ALRC 46); ALRC *Evidence* AGPS Canberra 1987 (ALRC 38).



initiatives. Australian federal courts and tribunals enjoy a fine reputation internationally. While this Commission would never suggest that international best

practice should not be keenly monitored, it is important also to recognise homegrown achievements and expertise. Throughout this report, the Commission has endeavoured to highlight both domestic and international reform efforts.

### Notions of procedural justice

1.80. An accessible justice system implies dispute resolution processes that are widely available, explicable and affordable. Even if this is provided for disputants, however, not all would choose to avail themselves of such processes. When litigants and the public speak of 'access to justice', they usually proceed from a conception of the legal system as a service provider, as a means for addressing their particular grievance, vindicating their rights and achieving their desired outcomes. Litigants may lack confidence in, or harbour anxiety about, the way the justice system might treat their claim or afford them a remedy. For many, subjective factors associated with the way they perceive or experience the justice system are key barriers to access to justice.<sup>120</sup>

1.81. Access to *justice* can only ever mean, in broad institutional and systemic terms, relatively equitable access to the legal *process*. Access to the system is no guarantee of a successful outcome from the process, and thus is no guarantee of litigant satisfaction in all cases.<sup>121</sup>

1.82. It is now well accepted that access to justice does not involve only enhanced access to the formal processes of civil courts. There is a range of well utilised informal, dispute resolution options available for federal civil disputes. Federal tribunals, government and industry ombudsmen schemes, court and community based ADR processes, conciliation schemes in the Human Rights and Equal Opportunity Commission (HREOC) and the Australian Competition and Consumer Commission (ACCC), community justice and dispute resolution centres, and family and relationship counselling, all play a significant part in dealing with legal disputes. In the federal jurisdiction, such agencies also generally undertake to educate the community about dispute resolution and dispute prevention.

1.83. Taking the Australian Banking Industry Ombudsman, the Telecommunications Industry Ombudsman and the Private Health Insurance Ombudsman, the major industry watchdogs in areas of federal jurisdiction, the total number of contacts made to these organisations rose from about 27 000 in 1995–96 to over 100 000 in 1997–98. The number of complaints lodged grew from about 2000 in 1995–96 to 6000 in 1997–98.<sup>122</sup>

120. E Lind et al 'In the eyes of the beholder: Tort litigants' evaluation of their experience in the civil justice system' (1990) 24 *Law and Society Review* 953; R Macdonald 'Study paper – Prospects for civil justice' in Ontario Law Reform Commission *Study paper on prospects for civil justice* Ontario Law Reform Commission Ontario 1995, 93.

121. On litigant dissatisfaction and complaints against judges see para 2.273–2.297.

122. See para 4.6 and ALRC DP 62 para 4.28–4.31.

1.84. The facilitation of these schemes certainly is to be commended. As noted above, however, there is also a real need for careful empirical study of the quality and effectiveness of such schemes (and their ultimate impact on the workloads of courts and tribunals), lest the imperative to create alternatives to formal litigation results in more processes seen to deliver 'second class' justice.

1.85. 'Justice' resists easy definition, but is usually equated with fair, open, dignified, and careful processes. As Professor Rod Macdonald has observed, a justice system that over emphasises matters of cost, speed and 'efficiency' may not succeed in delivering 'true justice'.

It may be that the public is more concerned with the substance of justice than with the specific procedures put in place to achieve it ... Yet, there are many studies suggesting the opposite. The outcome of a trial, even in cases where one or both parties feel that 'true justice' has not prevailed, is seen as less important than the fairness of the process. Indeed, to feel that one has been listened to impartially and conscientiously, even if this imposes significant additional costs and delays, is a central litigant value. In other words, it is important not to ... assum[e] that all things being equal, the best solution to problems with the civil justice system would be to ensure an efficient, timely, and inexpensive judicial process.<sup>123</sup>

1.86. Some flavour of this in federal jurisdiction is provided by an analysis of the repeat litigation in family law and refugee cases. For example, the Commission was told that refugee claimants seek judicial review to 'cure' their sense of unfair processes in tribunal proceedings.<sup>124</sup> Similarly, one Family Court judge said of repeat litigants in that jurisdiction that

a number of people use the system exploitatively and keep coming back with repeat applications. You must remember, however, that these parties have often been harshly dealt with, either by a spouse or by the Court at an earlier stage, causing a deep sense of injustice to well up through a series of holes in the structure. The fact that the parties have been badly handled by the Court at early stages makes such parties — who are basically reasonable at heart — become outrageous and obstructive in their behaviour in Court. This is a far wider problem than can be dealt with by case management.<sup>125</sup>

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123. R Macdonald 'Prospects for civil justice' in Ontario Law Reform Commission *Study paper on prospects for civil justice* Ontario Law Reform Commission 1995, 15–16. See also on litigant values: RMacdonald 'Access to justice and law reform' (1995) 10 *Windsor Yearbook of Access to Justice* 287; Alberta Law Reform Institute Research Paper 19 *Dispute resolution: A directory of methods, projects and resources* ALRI Edmonton 1990, 40; T Matruglio *Plaintiffs and the process of litigation* Civil Justice Research Centre Sydney 1994; Ontario Law Reform Commission *Rethinking civil justice: Research studies for the civil justice review* vol 1 OLCRC Toronto 1996, 5; National Consumer Council *Seeking civil justice: A survey of people's needs and experiences* National Consumer Council London 1995; M Winfield *Far from wanting their day in court: Civil disputants in England and Wales* National Consumer Council London 1996.

124. See ch 9, fn 39.

125. Family Court judges *Consultation* 28 September 1999.

1.87. Legal system reform is frequently characterised as a policy choice between individualised, expensive ‘Rolls Royce’ justice, on the one hand, and affordable, robust, high volume ‘Holden’ justice on the other.<sup>126</sup>

1.88. This dichotomy is a false one. First, it is odd that the language of public transport is rarely invoked, when the justice system is a part of the public infrastructure and, as former Attorney-General Lavarch has described above, it competes with other parts of the public sector for government funding. Second, if as research suggests, parties accord a primary value to fair and attentive processes, an element of individualised justice must be the indispensable characteristic of any good dispute resolution system – whether this is delivered in particular cases by lower courts, superior courts, or tribunals, or by ADR processes.

1.89. The demand for individualised justice is said to have ‘placed an immense strain’ upon the justice system.<sup>127</sup> In this context, there is some comfort in the truism that cases vary in the individual attention and assistance they require from courts and tribunals. Some cases need the early and continuing intervention of a judge; detailed, extended disclosure of information and documents; and then a formal hearing leading to a written judgment.<sup>128</sup> In others, the parties may require only the ‘shadow of the court’ or tribunal to help them to define the issues in dispute, or opportunities for negotiation or mediation, and ultimately the certainty of a binding outcome.

1.90. Perhaps the most important part of an effective case management system<sup>129</sup> is the ability to provide a legal version of what hospital emergency rooms refer to as ‘triage’ – the initial and prompt separation of cases according to the degree of urgency and specialist attention required.

1.91. Society and the profession have wrongly been caught up in a rhetoric that often equates expense and formality with importance and quality. So, for example, as Victoria Legal Aid has pointed out the repeated comment that,

because our kids are important, decisions involving kids should be made at the top level. Concepts such as ‘best decisions’, ‘best lawyers’, ‘Rolls-Royce justice’ in the higher courts are a fiction and are not borne out by the quality of the decisions made ... As legal

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126. Note for example the following comment.

Most lawyers will recognise a conflict exists between, on the one hand, cheap and speedy resolution of a dispute and, on the other, achieving justice, according to law, as nearly as it is possible to do ... we do argue that most litigants would prefer a ‘Holden’ system to a ‘Rolls-Royce’ one; and that the system we now have is a ‘Rolls-Royce’ one. Accordingly we would wish to simplify and shorten the litigation process, even at the cost of less perfect justice: G Davies and JLeiboff ‘Reforming the civil litigation system: Streamlining the adversarial framework’ (1995) 25 *Queensland Law Society Journal* 111, 114.

127. M Gleeson ‘Individualised justice – The holy grail’ (1995) 69 *Australian Law Journal* 421, 430.

128. *ibid*; G Gibson *The cancer in litigation* Blake Dawson Waldron Melbourne 1997.

129. See ch 6.

complexity is not the issue in many family law matters, high level courts are often inappropriate.<sup>130</sup>

1.92. The counterweight to the institutional desire to provide an idealised form of individualised justice is the obligation to apply the limited resources available within the civil justice system in such a way as to meet the instances and areas of greatest need. The central theme of the Woolf report was that a sense of *proportionality* should guide the management of litigation. As Zuckerman has described

the move towards judicial domination of the civil process represents more than a change in the mechanics of litigation. It involves the development of a new philosophy of procedure. The new philosophy is most clearly elaborated in the new Civil Procedure Rules in England, where the idea of proportionality is spelt out. According to this idea, the procedure adopted for

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130. Victoria Legal Aid *Consultation* Melbourne 26 August 1999.

resolving a given dispute should be proportionate to the value, importance, and complexity of the dispute ... These ideas are fairly widespread throughout the systems [studied].<sup>131</sup>

1.93. The proportionality principle is associated with the philosophical theories of 'distributive justice', most famously developed by John Rawls,<sup>132</sup> Ronald Dworkin,<sup>133</sup> Amartya Sen,<sup>134</sup> Robert Nozick<sup>135</sup>, John Roemer,<sup>136</sup> and others. Notions of distributive justice have their modern origins in the analyses of the redistributive policies and programs of the welfare state. Apart from the obvious application to situations in which provision is made for disadvantaged persons to receive assistance to participate more fully in public life (for example with respect to education, health care, and legal aid), more recent debates in this area also extend to broader questions of intergroup, international and intergenerational equity.

1.94. In terms of its application to policies and procedures within the civil justice system, Zuckerman has noted that

[n]otwithstanding the cultural divides between different systems (not just between common law and civil law systems but even within each of these groups), there seems to be emerging some general trend towards judicial control of the litigation process. The assertion of judicial control seems to go hand in hand with a new philosophy of distributive justice in procedure.

According to this idea, the function of the courts is not only to decide cases according to the law and the facts, but also to ensure that the limited resources of the system of civil justice are justly distributed between all those seeking justice. Accordingly, judges must ensure that the resources given to individual disputes are proportionate to the complexity and importance of each dispute. In so doing judges must take into account not only the interests of the litigants before the court, but also the interests of all others waiting in the queue. The aim of judicial control is, therefore, to avoid unnecessary cost and delay and ensure that the court resources are economically managed. This philosophy of distributive justice brings to the administration of civil justice the practical considerations of cost-effectiveness and of efficient management of public resources, which play an important part in the provision of most other public services.<sup>137</sup>

1.95. In the Australian system of civil justice, the courts appropriately are accorded independence from executive interference, and the federal courts and the

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131. A Zuckerman 'Justice in crisis: Comparative dimensions of civil procedure' in A Zuckerman (ed) *Civil justice in crisis: Comparative perspectives of civil procedure* Oxford University Press 1999, 48. Zuckerman notes also that the Portuguese code of civil procedure contains a 'principle of procedural economy'.

132. J Rawls *A theory of justice* Belknap Press Cambridge Massachusetts 1971.

133. R Dworkin *A matter of principle* Harvard University Press Cambridge Massachusetts 1985.

134. A Sen *On ethics and economics* Blackwell Oxford 1987.

135. R Nozick *Anarchy, state and Utopia* Basic Books New York 1977; see also J Wolff *Robert Nozick: Property, justice and the minimal state* Stanford University Press Stanford California 1991.

136. J Roemer *Theories of distributive justice* Harvard University Press Cambridge Massachusetts 1996.

137. *id.* 51.

AAT are also administratively autonomous.<sup>138</sup> Thus, as discussed later in this chapter, it becomes primarily a matter for the courts and tribunals themselves,<sup>139</sup> in consultation with key user groups, to develop their own practices and procedures. In practice, this would rarely if ever involve a stark choice between competing procedural models of individualised and distributive justice. Rather, the task is to strike an effective balance between the concerns for individualised justice and for efficient use of limited public resources across the system.

1.96. A welcome sense of individual justice can derive, for example, from the array of appropriate dispute resolution options within and outside the civil justice system,<sup>140</sup> from the availability of sensible advice and assistance about options and processes (whether or not delivered by lawyers), from responsive and engaged registrars and court and tribunal staff, and from attention paid to the design features,<sup>141</sup> atmosphere and facilities provided by institutions. A system providing information and options, employing courteous and attentive officers, offering thoughtful consideration to the issues and evidence, and yielding fair and sensible results, need not be prohibitively expensive.

### **Recognising the multiple functions of a justice system**

1.97. The popular image of courts has a judge presiding over a trial (often with a jury) and then delivering judgment. In fact, only a small proportion of cases lodged in courts and tribunals proceed all the way to a hearing. Much of the time and expense of litigation or review is associated with interlocutory and facilitative processes. Looking at the outcomes of litigation empirically, the major product of courts is not judgments, but settlements. Professor Marc Galanter has noted that

[s]ettlement is not an 'alternative' process, separate from adjudication, but is intimately and inseparably entwined with it. Both may be thought of as aspects of a single process of strategic manoeuvre and bargaining in the (actual or threatened) presence of courts.<sup>142</sup>

1.98. Settled case outcomes lessen demands on courts and tribunals. The legal system — in both civil and criminal jurisdictions — could not possibly function if a significantly larger proportion of matters proceeded through the system to a full,

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138. Unlike the AAT some 'portfolio tribunals' have funding arrangements with federal agencies.

139. Within their respective legislative frameworks, of course.

140. On the values and perceptions of family law litigants concerning court facilities and services see Family Court of Australia *Draft survey of family client perceptions of service quality* Family Court of Australia Canberra March 1999; also see S Parker *Courts and the public* AIJA Melbourne 1998 which discusses determining and meeting the needs of the public (ch 4-5).

141. On the importance of court design and court facilities, see M Black *Speech* Representing justice conference Wollongong 22 June 1998.

142. M Galanter 'The federal rules and the quality of settlements: A comment on Rosenberg's, "The Federal Rules of Civil Procedure in action"' (1989) 137 *University of Pennsylvania Law Review* 2231, 2232-3.

formal hearing and judgment. The system seeks to facilitate settlements through a variety of ADR processes,<sup>143</sup> and summary and single issue determinations. These processes signal or identify for the parties the points of convergence in their dispute, and the transaction costs – the time, attention, opportunity costs, and uncertainties – which constitute their settlement range.<sup>144</sup>

1.99. In evaluating the workings of courts and tribunals, settlement rates are typically counted as measures of ‘success’. Settlements are ascribed to particular facilitative strategies and processes. There are different factors leading parties to settle. Not all cases are amenable to settlement. Some highly interventionist settlement processes may be experienced by the parties as coercive or ‘bullying’.<sup>145</sup> In evaluating case management systems, the Commission has been careful not to rely uncritically on settlement rates as the sole barometer of success, in isolation from other ‘quality’ indicators.<sup>146</sup>

1.100. In its empirical study and consultative processes, the Commission sought to document and analyse the different types of cases, parties, processes and outcomes for cases in the Federal Court, Family Court and the AAT. The findings concerning this evaluation are set out in the chapters that follow. However, there are few agreed indicators of the quality or the efficacy of settlements in delivering ‘justice’, and a great deal more empirical research is needed in this area in Australia.<sup>147</sup>

1.101. In addition to determining and facilitating the resolution of disputes, courts and tribunals provide ‘norms and procedures’,<sup>148</sup> which regulate adjudication of disputes. Court rulings provide statements of ‘social purpose ... the proper meaning to our public values’.<sup>149</sup> The legal system affords mechanisms by which society monitors and regulates its incessant change. Basic elements of fair decision making, as determined by courts, have resonated far outside the courtroom.<sup>150</sup> Sir-Gerard Brennan has commented

It is for the service of the people that the courts are created and perform their functions. The courts sit in public, think and write in private, then publish to all the world their decisions and reasons. No other branch of government responds so unfailingly to every

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143. These are alternative to adjudication, but statistically represent the norm.

144. M Galanter ‘The federal rules and the quality of settlements: A comment on Rosenberg’s, “The Federal Rules of Civil Procedure in action”’ (1989) 137 *University of Pennsylvania Law Review* 2231, 2232.

145. See ch 6, 8.

146. NSW Bar Assoc *Submission 88*. Also see ch 6. Research indicates that there is an optimal settlement rate for ADR (83%): see para 5.89.

147. See rec 1.

148. M Galanter ‘The radiating effects of courts’ in K Boyum and L Matheu (eds) *Empirical theories about courts* Longman New York 1983, 121.

149. O Fiss ‘Foreword: The forms of justice’ (1979) 93 *Harvard Law Review* 1, 30.

150. T Cromwell *Dispute resolution in the twenty-first century* Canadian Bar Association – Systems of Civil Justice Task Force Ottawa January 1996, 80.



application within its jurisdiction nor gives so adequate an explanation of the reasons for its decisions.<sup>151</sup>

1.102. In family jurisdiction, the impact of the court likewise extends far beyond the courtroom.

Family law is the legal system's metaphor, the crucible where so much else in law intersects ... It is also, because it is the area of law by means of which most people will come into contact with it, the area by which the legal system will be judged by most people.<sup>152</sup>

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151. G Brennan 'Farewell to the Honourable Sir Gerard Brennan AC, KBE' (1998) 5 *Australian Bar Gazette* 1, 7.

152. R Abella 'The challenge of change – Family law in the crucible' edited version of speech to 8th National Law Conference Hobart 24–28 October 1998 published in (1999) 13(3) *Australian Family Lawyer* 1, 2.

1.103. This broader impact is reflected in the Family Law Act, which aims, with respect to children

to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.<sup>153</sup>

1.104. In fulfilling this role, the Family Court was described in one study as a 'frontline institution to resolve family violence'.<sup>154</sup>

1.105. Reform to the litigation or review system cannot discount the role of courts and tribunals beyond adjudication or review. The Federal Court, for example, plays a pivotal role in relation to various sectors of economic activity. It creates and maintains formal and informal rules which keep business transaction costs low, defines and protects rights (including intellectual property rights), gives force to contractual agreements, influences private commercial dispute resolution, ensures the security of property, helps to regulate markets (including capital and labour markets) and ensure competition, and scrutinises the behaviour of public officials and the quality of legislation.<sup>155</sup>

1.106. Some economic theory now posits that key institutions, including the courts, may be as important to the working economy as the three factors in classical economic theory: money, people and resources.<sup>156</sup> Researchers have documented the link between effective judicial management of intellectual property cases and the amount and kinds of technology transfer and direct investment in a country.<sup>157</sup>

1.107. Corporate lawyers and inhouse counsel consulted by the Commission were emphatic in their view that law and legal services are a key export, and that an efficient court and legal system is part of what makes Australia competitive in the Asia-Pacific region and beyond.<sup>158</sup> In summarising our consultations leading to the publication of DP 62, the Commission reported that there has been consistent

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153. *Family Law Act 1975* (Cth) s 60B(1).

154. T Brown et al Monash University *IP Submission 47* to ALRC 84.

155. R Sherwood 'The economic importance of judges' *Paper* International Judges Conference 1999; E-Mansfield *Intellectual property protection, foreign direct investment, and technology transfer* Discussion Paper 19 International Finance Corporation of the World Bank Group 1994; E Mansfield *Intellectual property protection, direct investment and technology: Germany, Japan, and the United States* Discussion Paper 27 International Finance Corporation of the World Bank Group 1995. Also see Arthur Robinson *Submission 189*; Australian Corporate Lawyers Association *Submission 70*.

156. R Sherwood 'The economic importance of judges' *Paper* International Judges Conference 1999; E-Mansfield *Intellectual property protection, foreign direct investment, and technology transfer* Discussion Paper 19 International Finance Corporation of the World Bank Group 1994, 2.

157. E Mansfield *Intellectual property protection, foreign direct investment, and technology transfer* Discussion Paper 19 International Finance Corporation of the World Bank Group 1994; E Mansfield *Intellectual property protection, direct investment and technology: Germany, Japan, and the United States* Discussion Paper 27 International Finance Corporation of the World Bank Group 1995.

158. Corporate counsel *Consultation* Melbourne 14 January 1998.

praise for the Federal Court as a 'world class civil court'.<sup>159</sup> The Commission believes that the independence, integrity, and quality of the federal civil justice system are matters of comparative advantage in the region, which government and industry should promote strongly in seeking foreign investment and in positioning Australia as a regional finance centre and corporate headquarters.

1.108. The natural concern for producing an efficient and effective system for resolving civil disputes should not obscure another critical social interest, however – that the courts, especially the superior courts, play an essential role in progressively developing the common law, and in regulating the balance and separation of powers. As the Chief Justice of New South Wales, the Hon Justice James Spigelman has stated

We must never lose sight of the fact that the legal system is the exercise of a governmental function, not the provision of a service to litigants as consumers.<sup>160</sup>

1.109. The submission from the ACCC, for example, noted that it sought to strike a strategic balance utilising negotiated settlements and ADR processes to secure compliance by the business community in individual cases, and litigation to attract public attention and to establish important legal precedents.<sup>161</sup>

1.110. Professor John Leubsdorf has written of the tension involved in pursuing civil justice reform in a system with multiple aims and functions.

We might fix on three fairly trite criteria for appraising a procedural system: the cost of litigation; the time needed to resolve disputes; and the accuracy with which the system finds the facts and applies the law ... some will question these criteria: those, for example, who see litigation less as law enforcement and more as dispute resolution might replace accuracy by liti-gant satisfaction. And the three criteria sometimes conflict. Making procedure speedier and cheaper might well make it less accurate even though keeping it slower and more expensive will not necessarily make it more accurate.<sup>162</sup>

Ultimately, our judgement of a procedural system should go beyond its average speed, cheapness, and accuracy. We should think about what suits we want it to foster or discourage. We should think about how its procedures will affect litigants and others. We should recognize it as part of the governmental system, wielding powers that must be properly allocated and controlled. Very likely concerns such as these greatly influenced the creators of past and present procedural systems, however loudly they may have proclaimed their desire to make lawsuits cheaper, speedier, and more accurate. The most firmly implanted myth of procedural reform may be that we can talk

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159. ALRC 'Judges the key to improving the federal civil justice system' *Media release* 20 August 1999.

160. The Hon J Spigelman 'Opening of the law term dinner' *Speech* 1 February 1999  
<[http://www.agd.nsw.gov.au/sc/sc.nsf/pages/sp\\_002](http://www.agd.nsw.gov.au/sc/sc.nsf/pages/sp_002)> (28 July 1999).

161. ACCC *Submission* 396.

162. J Leubsdorf 'The myth of civil procedure reform' in A Zuckerman (ed) *Civil justice in crisis: Comparative perspectives of civil procedure* Oxford University Press 1999, 55.

usefully about it as simply an effort to increase judicial efficiency, without talking about our visions of procedural and social justice.<sup>163</sup>

## The adversarial/non adversarial (non) debate

1.111. Implied in the directive to the Commission to consider ‘civil litigation and administrative law principles in civil code countries’<sup>164</sup> was the need to report on the comparative advantages and disadvantages of the common law adversarial system.

1.112. In DP 62 the Commission concluded that an adversarial–non adversarial construct was too elusive a basis on which to analyse problems or to formulate change to the system. Such debate assumes that transplants from different political and cultural systems will function in similar ways when rooted in our legal system, that such change can be engineered, and that it will improve the system rather than introducing a new host of problems.<sup>165</sup>

1.113. The Law Council,<sup>166</sup> and the Law Reform Commission of Western Australia, in its review of the civil and criminal justice systems in that State, agreed with the Commission’s caution about such an approach.<sup>167</sup>

1.114. In DP 62 the Commission also noted that calls for overthrow of the adversarial system generally oversimplify the problems and solutions in our civil justice system.<sup>168</sup> Such calls assume that the problems associated with, say, costs, delay or unfairness in the system, are attributable to the ‘adversarial character’ of the system and that these problems can be ‘cured’ by extensive borrowing from the civil code systems. Relevant in this regard is Lord Woolf’s diagnosis that litigation problems in England and Wales derive to a large extent from the unrestrained adversarial culture of their legal system.<sup>169</sup>

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163. id 67. See also R Bush ‘Dispute resolution alternatives and the goals of civil justice: Jurisdictional principles for process choice’ [1984] *Wisconsin Law Review* 893, 908–924.

164. The Family Court stated that  
The Commission by avoiding its primary task has missed what would have been a significant opportunity to examine the adversarial nature of the system in a family law context.

The primary task was said to be to focus on the adversarial system: Family Court *Submission* 348.

165. eg W Pizzi and L Marafioti ‘The new Italian Code of Civil Procedure: The difficulties of building an adversarial trial system on a civil law foundation’ (1992) 17 *Yale Journal of International Law* 1, 22–3; M Hooker *Legal pluralism* Clarendon Press Oxford 1975.

166. Law Council *Submission* 375.

167. Law Reform Commission of Western Australia *Review of the criminal and civil justice system in Western Australia – Final report* LRCWA Perth 1999, para 6.2.

168. The Commission has no reference to consider criminal proceedings.

169. Lord Woolf *Access to justice: Interim report to the Lord Chancellor on the civil justice system in England and Wales* Lord Chancellor’s Dept London 1995, 7.

Without effective judicial control ... the adversarial process is likely to encourage an adversarial culture and to degenerate into an environment in which the litigation process is too often seen as a battlefield where no rules apply.

1.115. However, Lord Woolf's primary solution, active judicial case management, has been an established practice for some time throughout the United States and Canada,<sup>170</sup> and in Australia.<sup>171</sup>

1.116. The debate on changing adversarial culture or processes is also clouded by definitional questions as protagonists debate core values and practices in stereotypical legal models, sometimes comparing the perceived shortcomings of one system with an idealised version of the other, and often failing to acknowledge the number of variables in play or the complexity of these inter-relationships.<sup>172</sup> The terms 'adversarial' and 'inquisitorial' have no precise or simple meaning,<sup>173</sup> and to a significant extent reflect particular historical developments rather than the practices of modern legal systems.<sup>174</sup> No country now operates strictly within the prototype models of an adversarial or inquisitorial system. The originators of those

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170. See G Watson 'From an adversarial to a managed system of litigation: A comparative critique of Lord Woolf's interim report' in R Smith *Achieving justice* Legal Action Group London 1995, 65.

171. See para 6.3.

172. The Family Court submitted that

One problem which causes complaints and confusion for many who understand it is that family law is thought to be highly adversarial in nature. While this may be correct in relation to a minority of cases it is far from true of the majority and children's cases in particular have non adversarial features: Family Court *Submission* 348.

173. For a critical analysis of the use of these terms see M Damaska 'Structures of authority and comparative criminal procedure' (1975) 84 *Yale Law Journal* 480. See also ALRC IP 20, ch 2, which summarises the features taken to be general characteristics of adversarial and non adversarial models. A number of submissions to the Commission referred to the tendency to oversimplification, vagueness and misunderstanding in debates about the relative merits of adversarial and inquisitorial systems.

Epithets such as 'adversarial' and 'inquisitorial', though convenient, can be misleading when applied generally to common law and civil law systems: B McKillop *Submission* 59. The reason that the label 'adversarial' is unhelpful is that it is simplistic and inaccurate in that there are already a considerable number of inquisitorial features in our system: Law Council *Submission* 30.

Particularly in matters relating to children, proceedings in the Family Court are now conducted so differently from the adversarial model, that it is unhelpful and potentially misleading to conduct an enquiry ... By moving from a position which categorises those proceedings, inaccurately, as adversarial, or even, 'modified adversarial': B Warnick *Submission* 147.

The adversary system or adversarial system is a vague description of certain types of behaviours and attitudes exhibited during conflict leading up to a court hearing. It is important to acknowledge that no conflict management system embodies all the features of a pure 'adversary system' all of the time: J Wade *Submission* 86.

174. In England the common law, 'adversarial' system developed in the Middle Ages and was exported to countries such as Australia, Canada, New Zealand and the United States through colonisation. In Europe, civil law inquisitorial systems had their basis in Roman law, the Napoleonic Codes (1804-1811) in the French civil law system and the German Civil Code (1896) in Germany. Civil law systems in Europe and Asia have generally styled themselves on either the French or German model.

systems, England, France and Germany, have modified and exported different versions of their respective systems.

1.117. In very broad terms, an adversarial system refers to the common law system of conducting proceedings in which the parties, and not the judge, have the primary responsibility for defining the issues in dispute and for investigating and advancing the case.<sup>175</sup>

1.118. The Law Council defined an 'adversarial system' as

a specific type of proceeding taking place in a court which deals with a dispute between at least two parties ... The dispute is 'party controlled', that is, the parties define the dispute, define the issues that are to be determined and each has the opportunity to present his or her side of the argument.<sup>176</sup>

1.119. The term 'adversarial' also connotes a competitive battle between foes or contestants<sup>177</sup> and is often associated in popular culture with partisan and unfair litigation tactics. Battle and sporting imagery are commonly used in reference to

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175. 'In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries': *Jones v National Coal Board* [1957] 2 QB 55, 63 (Denning LJ).

176. Law Council *Submission* 196.

177. Macquarie Concise Dictionary 2nd ed defines 'adversary' as an 'unfriendly opponent; an opponent in a contest; a contestant'; R Eggleston 'What is wrong with the adversary system?' (1975) 49 *Australian Law Journal* 428, 429.

our legal system.<sup>178</sup> Lawyers' anecdotes about the courtroom are 'war stories'. The term 'adversarial' has become pejorative. The comparison is the perceived harshness of our own system with an idealised, cooperative dispute resolution model (not a conflict model) associated with ADR, or the 'games' and tactics of adversarial systems set against 'truth finding' inquisitorial processes of civil code systems.

1.120. The Law Council defined civil code proceedings as representing, in procedural theory, 'judicial prosecution' of the parties' dispute, as opposed to the 'party prosecution' of the dispute that has typified the common law system.<sup>179</sup> The term 'inquisitorial' refers to a proceeding in which a neutral judicial officer carries out an investigation

to discover facts, the discovery of which will serve some identifiable public purpose. There is no dispute per se.<sup>180</sup>

1.121. The Commission noted in DP 62 that there is limited utility in simply listing and comparing the advantages and disadvantages of the present 'adversarial' system of conducting civil administrative review and civil law proceedings in federal jurisdiction.<sup>181</sup> The relative merits and demerits of adversarial systems have been extensively debated and were repeated in submissions to the Commission. There are many texts which recite and analyse the 'adversarial' benefits of judicial impartiality,<sup>182</sup> independence, consistency, flexibility and the democratic character of adversarial processes,<sup>183</sup> or perceived disadvantages

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178. R Eggleston 'What is wrong with the adversary system?' (1975) 49 *Australian Law Journal* 428, 429; Denning LJ in *Jones v National Coal Board* [1957] 2 QB 55, 63; J Hunter and K Cronin *Evidence, advocacy and ethical practice* Butterworths Sydney 1995, 50; A Crouch 'The way, the truth and the right to interpreters in court' (1985) 59 *Law Institute Journal* 687, 690.

179. Law Council Submission 126.

180. Law Council Submission 196.

181. A view confirmed by the Law Reform Commission of Western Australia *Review of the civil and criminal justice system – Consultation draft: The advantages and disadvantages of the adversarial system in civil proceedings* LRCWA Perth November 1998, 1. The Commission deals with revisions to practice standards to limit excessive partisanship and adversarial tactics in ch 3. See para 3.30-3.41.

182. The common law imperative is 'that justice should not only be done, but should manifestly and undoubtedly be seen to be done': *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 259; [1923] All ER 233, 234 (Lord Hewart CJ). See also A Amerasinghe 'Judicial independence – Some core issues' (1997) 7 *Journal of Judicial Administration* 75. Judge Glomb of the German District Court has commented on German civil procedures: 'It will be apparent that the judge virtually knows the result of the case before the hearing': K Glomb 'Roles and skills of a German judge' *Paper* Beyond the adversarial system Conference Brisbane 10-11 July 1997, 3. On impartiality issues in civil code systems, see: C Lécuyer-Thieffry 'France', ch 6 in C Campbell (ed) *International civil procedures* Center for International Legal Studies and Lloyd's of London Press Ltd London 1996, 261.

183. The adversarial nature of litigation is said to be democratic by allowing the parties to define and control the dispute – litigation is essentially a participatory process where competing versions of the dispute are publicly aired and debated. Adversaries 'sometimes do bring into court evidence which, in a dispassionate inquiry, might be overlooked': J Frank *Courts on trial: Myth and reality in American justice* Princeton University Press Princeton 1949, 80.

including tactical manoeuvring,<sup>184</sup> partisan and unreliable witnesses,<sup>185</sup> the obscured focus of many adversarial hearings,<sup>186</sup> and the unfairness that can result in such hearings when parties are unrepresented or there is inequality of legal representation.<sup>187</sup>

1.122. Submissions to the Commission developed some of the perceived advantages of adversarial proceedings, including

[t]he ability to provide procedural safeguards, the ability to enforce orders relating to disclosure of information, the ability to test statements and information in cross examination, the ability of a third party to review outcomes to ensure they are just and equitable.<sup>188</sup>

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184. R Eggleston 'What is wrong with the adversary system' (1975) 49 *Australian Law Journal* 428, 430; SParker 'Islands of civic virtue? Lawyer and civil justice reform' (1997) 6 *Griffith Law Review* 1; E-Whitton *Trial by voodoo* Random House Sydney 1994; E Whitton *The cartel: Lawyers and their nine magic tricks* Herwick Sydney 1998.
185. Jerome Frank has observed that 'the partisan nature of trials tends to make partisans of the witnesses', including experts: J Frank *Courts on trial: Myth and reality in American justice* Princeton University Press Princeton 1949, 86. See para 6.91-6.95.
186. For example, the debate over whether it is an objective of a common law hearing to discover the truth. In civil law countries the responsibilities of the judge to discover the truth go beyond the determination of the dispute between the parties: J Jolowicz 'The Woolf report and the adversary system' (1996) 15 *Civil Justice Quarterly* 198, 208.
- Within the adversarial system, despite some statements to the contrary, the function of the courts is not to pursue the truth but to decide on the cases presented by the parties: A Mason 'The future of adversarial justice' *Paper 17th Annual AIJA Conference Adelaide* 7 August 1999,7.
- However, others believe that 'truth is best discovered by powerful statements on both sides of the question': Lord Eldon LC quoted with favour by Denning LJ in *Jones v National Coal Board* [1957] 2 QB 55, 63; or that '[s]uccessful cross examination is the most effective means of discovering the truth': G Downes 'Changing roles and skills for advocates' *Paper Beyond the adversarial system Conference Brisbane* 10-11 July 1997, 5. See also R Gerber 'Victory vs trust: The adversary system and its ethics' (1987) 19(3) *Arizona State Law Journal* 3. It remains a moot point which system offers the best method for ascertaining the truth. Critics familiar with both systems do not agree.
- The argument as to whether the truth is best obtained by the adversary system or by something more closely approximating to the civil procedure adopted on the Continent is of course incapable of being resolved: R Eggleston 'What is wrong with the adversary system?' (1975) 49 *Australian Law Journal* 428, 433.
187. The adversarial system has proceeded on the assumption that the fairest and most effective method of determining the truth of a matter is to allow the parties to put their respective cases in their own way. This assumption depends upon the parties being able to identify their own interests and fight their own battles. The extent to which a party can do that will depend upon their own qualities and resources and those of their legal representatives and experts: *Dietrich v R* (1992) 177CLR 292, 335 (Deane J); *Giannarelli v Wraith* (1988) 165 CLR 543, 556 (Mason CJ). A number of submissions referred to the difficulties for unrepresented litigants in an adversarial system: WLS Brisbane *Submission* 218. The Federation of Community Legal Centres (Vic) asserted that the fairness and effectiveness of the adversarial system is
- based on the premise that both parties are equally able through personal and financial means to put their own case forward in the best possible way': Federation of Community Legal Centres *Submission* 155.
188. WLRC *Submission* 153.



The use of an adversarially based system provides important safeguards to litigants and to the community, in that the issues in dispute are defined by the parties and the litigation is then fundamentally conducted by them, under the supervision of the Court, in conformity with identifiable rules of court and rules of law. A public accountability which is not present in other systems is intrinsic to an adversarial system of litigation.<sup>189</sup>

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189. WLS Brisbane *Submission 218*.

1.123. The Law Council stated that the best aspects of the Australian federal civil litigation system were that it was fair, provided opportunity to air grievances, had highly trained and respected adjudicators,<sup>190</sup> brought finality of decisions, was in accord with an individualistic, rights based society, developed a core of legal rules which helped to resolve other disputes, was independent of government and produced good decision makers.<sup>191</sup>

1.124. The NSW Bar Association stated that adversarial features such as the detachment and impartiality of the judge, and the relatively high degree of party control of the process, and the public nature of the final trial exposing the strengths and weaknesses of each case, promoted understanding of the reasons for the result and helped losing parties to accept the result.<sup>192</sup>

1.125. Several submissions from individual litigants, corporations and consumer groups expressed the view that the adversarial system was unsuitable for many types of disputes, particularly family law disputes,<sup>193</sup> because the system was concerned with 'winning at all costs',<sup>194</sup> exacerbated conflict,<sup>195</sup> victimised the poor and less powerful<sup>196</sup> and left children out of the process.<sup>197</sup>

In the event of an adjudication following the adversarial process there will be a disappointed party – the loser.<sup>198</sup>

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190. Law Council *Submission 126*. The NSW Bar Association stated that two of the best features of the current system were that it was 'based on a common law system of orality which is by far the best method yet discovered of ascertaining the truth and delivering justice' and 'there has never been a serious suggestion of corruption in the federal judicial system and the integrity of judges is beyond question': NSW Bar Association *Submission 88*.

191. Law Council *Submission 126*.

192. NSW Bar Association *Submission 88*. A number of submissions and commentators expressed concerns with transplanting inquisitorial processes in Australia; the need for retraining of the judiciary and legal profession; the capacity of inquisitorial systems to be sufficiently independent of government: eg Law Council *Submission 126*; A Rowland *Submission 36*; PHeerey *Submission 49*; B McKillop *Submission 59*. See also A Mason 'The future of adversarial justice' *Paper 17 Annual AIJA Conference Adelaide 7 August 1999*, 9.

193. A Buchanan *Submission 124*; Family Law Association *Submission 134*; Family Law Reform and Assistance Association Inc *Submission 157*; R Kelso *Submission 159*; Burnside *Submission 160*; Children's Interest Bureau *Submission 170*; R Cook *Submission 322*. There was some suggestion that the AAT was overly adversarial eg Public Policy Assessment Society *Submission 325*.

194. Australian Chamber of Commerce and Industry *Submission 61*.

195. N Pasqua *Submission 132*; J Weingarh *Submission 52*.

196. Taxi Employees League *Submission 128*.

197. Burnside *Submission 160*.

198. Legalcare *Submission 50*.

1.126. Notwithstanding the supposed variation between the adversarial and non adversarial models, there is a significant degree of convergence in the way both common law and civil code countries now approach civil disputes.<sup>199</sup> For example, German civil procedure has many of the same characteristics as civil processes in adversarial systems and is described in the literature as an adversarial or party system.<sup>200</sup> In private civil disputes in both models, the involvement of the parties in the presentation of the case extends to initiating proceedings, determining the issues to be decided, investigating the facts, and selecting and presenting witnesses and other evidence. In common law systems, the parties also select and present experts (in civil code systems experts are appointed by the court), and present oral evidence, argument and submissions by counsel at the hearing.<sup>201</sup>

1.127. The European Union is contributing to the convergence of English and Continental civil procedure.<sup>202</sup> The American Law Institute aims to establish a single system of civil procedure across national boundaries.<sup>203</sup> Basil Markesinis said of such arrangements that

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199. An indication of convergence is the adoption of case management and managerial judging. This convergence will not necessarily conclude with the same, integrated systems; it is more an indication of the adoption by one system of the principles and procedure used in another. Some important differences remain. These may be so entrenched that there is never complete convergence. See the work of the American Law Institute *Transnational rules of civil procedure* Discussion draft American Law Institute Philadelphia 1 April 1999. Also see B Markesinis 'Learning from Europe and learning in Europe' in B Markesinis *The gradual convergence: Foreign ideas, foreign influences, and English law on the eve of the 21st century* Oxford University Press Oxford 1994, 30; R David and J Brierley *Major legal systems in the world today* 3rd ed Stevens & Sons London 1985, parts 1 and 3.

200. The court only considers the facts brought before it; it may not investigate on its own G Wittuhn and R Stucken 'Germany' ch 7 in C Campbell (ed) *International civil procedures* Center for International Legal Studies and Lloyd's of London Press Ltd London 1996, 297. Parties present the facts to the court and their lawyers have roles comparable to lawyers' roles in common law countries: J Langbein 'The German advantage in civil procedure' (1985) 52(4) *University of Chicago Law Review* 823, 824.

The Law Council has stated that its research demonstrates that both common law and civil code countries characterise their system of settling civil disputes as 'adversarial' in the sense that the court's role is to resolve the parties' dispute as put to them: Law Council *Submission 126*. The Council referred in particular to France and Germany as having adversarial civil justice systems: Law Council *Submission 126*. See also D Staats 'The education and further training of German judges for their duties in civil proceedings' and M Lemonde 'Training of judicial officers and attorneys in France' *Papers Beyond the Adversarial System Conference Brisbane* 10–11 July 1997. This should be contrasted with their criminal proceedings where there are the hallmarks of inquisitorial systems: Law Council *Submission 126*.

201. C Lécuyer-Thieffry 'France' in C Campbell (ed) *International civil procedures* Center for International Legal Studies and Lloyd's of London Press Ltd London 1996, ch 6, 258; R David and JBrierley *Major legal systems in the world today* 3rd ed Stevens & Sons London 1985, parts 1 and 3.

202. B Markesinis *The gradual convergence: Foreign ideas, foreign influences, and English law on the eve of the 21st century* Oxford University Press Oxford 1994, 30.

203. See the work of the American Law Institute *Transnational rules of civil procedure* Discussion draft American Law Institute Philadelphia 1 April 1999. Also see International Association of Procedural Law 'Procedural law on the threshold of a new millennium' *Papers World Congress on Procedural Law University of Vienna* 23–28 August 1999.

convergence is taking place ... There is thus a convergence of solutions in the area of private law as the problems faced by courts and legislators acquire a common and international flavour; there is a convergence in the sources of our law since nowadays case law *de facto* if not *de jure* forms a major source of law in both common and civil law countries; there is a slow convergence in procedural matters as the oral and written types of trials borrow from each other and are slowly moving to occupy a middle position; there may be a greater convergence in drafting techniques than has commonly been appreciated ... there is a growing rapprochement in judicial views.<sup>204</sup>

1.128. Similarly, Zuckerman's introduction to a recent comparative review of the civil justice systems in both common law and civil code countries, revealed that

The clearest trend emerging from the different national accounts is a general tendency towards judicial control of the civil process. Both common law countries and civil law countries display a shift towards the imposition of a stronger control by judges over the progress of civil litigation. In virtually all the systems reviewed here there is a perception that, when the process of litigation is left to the parties and their lawyers, its progress is impeded by narrow self-interest. Such self-interest may be that of recalcitrant defendants bent on exhausting and tormenting their plaintiffs or that of self-interest of lawyers determined to enhance their own incomes.

The contemporary dominant view is that the disruptive self-interest of parties and their lawyers can only be kept at bay by an active judiciary that directs the litigation process and is able to prevent disruptive tactics. The USA has been leading the trend amongst common law countries. A culture of managerial judges is now well established there. In England and Australia the move towards judicial control is more recent, but it is equally dramatic.

A similar trend is reported from the great majority of civil law countries. In France, Spain, Portugal, Italy, and even in Japan and in Germany, moves are afoot to strengthen the judicial supervision of the litigation process.<sup>205</sup>

1.129. As this suggests, in the Australian civil justice system processes such as case management, court or tribunal connected ADR processes, and discretionary rules of evidence and procedure, have modified the adversarial nature of the system.

1.130. For example, the federal review tribunal system has borrowed extensively from procedures in civil code systems.<sup>206</sup> In family proceedings, the Family Law

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204. B Markesinis 'Learning from Europe and learning in Europe' in B Markesinis *The gradual convergence: Foreign ideas, foreign influences, and English law on the eve of the 21st century* Oxford University Press Oxford 1994, 30.

205. A Zuckerman 'Justice in crisis: Comparative dimensions of civil procedure' in A Zuckerman (ed) *Civil justice in crisis: Comparative perspectives of civil procedure* Oxford University Press 1999, 47-48. See also J Jolowicz 'The Woolf report and the adversary system' (1996) 15 *Civil Justice Quarterly* 198, 200.

206. T Thawley 'Adversarial and inquisitorial procedures in the Administrative Appeals Tribunal' (1997) 4 *Australian Journal of Administrative Law* 61; J Dwyer 'Fair play the inquisitorial way: A

Act and case law in relation to children's matters enable the Family Court to intervene in ways not open to traditional courts to elicit additional information

beyond that provided by the parties,<sup>207</sup> to assist an unrepresented litigant,<sup>208</sup> to order family reports to be prepared,<sup>209</sup> to appoint a child representative whose role is 'akin to counsel assisting',<sup>210</sup> and of its own motion to call any person before it as a witness.<sup>211</sup> The Law Council noted of such arrangements that it was not

aware of any country that has an inquisitorial approach for family law matters relating to children ... Children's issues are unique and family law litigation has been modified for its particular needs ... The modifications are merely a change to the practice and procedure of the Court.<sup>212</sup>

1.131. A conference examining comparative legal systems, co-sponsored by the Commission as part of this inquiry, described the high costs and delays likewise afflicting the French and German systems (the systems discussed at the conference).<sup>213</sup> Lowenfeld, reviewing common law and civil code systems in the 1997 *American Journal of Comparative Law* symposium on civil procedure, commented that

one result of listening to and reading about each other's problem was the realization that none of the observers and commentators was satisfied with the system he or she knew best.<sup>214</sup>

1.132. There are also strong cultural and pragmatic reasons for not recommending a full embrace of the continental European model. Former Chief Justice Sir Anthony Mason commented that

A move to the European model would also present a major culture shock for the legal profession and litigants ... the move away from the present system would certainly

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207. *In the Marriage of Gibson* (1981) FLC 91-049; *In the Marriage of Lonard* (1976) 26 FLR 1. Also see Watson J's decision in *In the Marriage of Lythow* (1976) FLC 90-007; R Chisholm 'The adversary system and Family Court developments' in *Family Court National Seminar Papers: Coffs Harbour July 1992* Commonwealth of Australia 1994.

The Family Court's wide-ranging discretion to decide what is in the child's best interests cannot be qualified by requiring the Court to try the case as if it were no more than a contest between the parents to be decided solely by reference to the acceptance or rejection of the allegation of sexual abuse on the balance of probabilities: *M and M* (1988) FLC 91-979 quoted in *Family Court Submission 348*.

208. *In the Marriage of Johnson* (1997) 22 Fam LR 141. See para 5.147-157.

209. Family Law Act s 62G.

210. See ALRC 84, para 13.33-41. Also see Family Law Act s 68L, 68M and *Re K* (1994) FLC 92-461, 80, 770.

211. Family Law Rules O 30 r 5.

212. Law Council *Submission 197*.

213. K Glomb 'Roles and skills of a German judge'; W van Caenegem 'Changing roles and skills of practitioners in civil litigation: A comparative perspective'; M Lemonde 'Educating French legal professionals'; J Staats 'Educating German legal professionals' *Papers Beyond the Adversarial System Conference Brisbane 10-11 July 1997*.

214. A Lowenfeld 'Introduction: The elements of procedure: Are they separately portable?' (1997) 45-*American Journal of Comparative Law* 649, 651.

disappoint expectations on the part of litigants who believe that their day in court entails the presentation of a case as shaped by their advocate, along with cross examination of witnesses.<sup>215</sup>

A shift to the European model ... requires an extraordinary act of faith. It would be contrary to our traditions and culture; it would generate massive opposition; and it would call for expertise that we do not presently possess. And at the end of the day we would have a new system without a demonstrated certainty that it is superior to our own.<sup>216</sup>

1.133. Reviewing the pros and cons of the American adversary system, Professor David Luban justified retention of the current system on pragmatic grounds.

[F]irst the adversary system, despite its imperfections, irrationalities, loopholes and perversities, seems to do as good a job as any at finding truth and protecting legal rights ... Second, some adjudicatory system is necessary. Third, it's the way we have always done things. These things constitute a pragmatic argument: if a social institution does a reasonable enough job of its sort that the costs of replacing it outweigh the benefits, and if we need that sort of job done, we should stay with what we have.<sup>217</sup>

1.134. In a similar vein, Professor Cromwell has commented on the Canadian situation that

First the fact that our process of adjudication is adversarial does not require that all parts of the process ... need be adversarial. Second, ... there is plenty of room to change many aspects of our present adjudicative process without striking fundamentally at any of these core attributes. Third, the best argument in favour of an adversary process is pragmatic. The process is not divinely inspired nor are all others essentially corrupt; it is simply our tradition and it probably is not worth trying to eradicate it.<sup>218</sup>

## Continuity ...

1.135. In addition to these pragmatic and cultural reasons for refining our own civil justice model rather than importing another, there are also some important matters of principle and constitutional constraints which limit the scope for radical change in the federal jurisdiction.<sup>219</sup>

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215. A Mason 'The future of adversarial justice' *Paper* 17th Annual AIJA Conference Adelaide 7 August 1999, 9.

216. *ibid.*

217. D Luban *Lawyers and justice: An ethical study* Princeton University Press Princeton 1988, 92.

218. T Cromwell *Dispute resolution in the twenty-first century* Canadian Bar Association Systems of Civil Justice Task Force Toronto 1996, 90-91.

219. The Commission's amended terms of reference specifically exclude consideration of changes of a kind that would or might require amendment of the Constitution. The amended terms of reference are set out at p 5. The Commission's recommendations on revised practice standards to reduce excessive partisanship are set down in ch 3.

1.136. As the Commission noted in DP 62,<sup>220</sup> the key principles of the Australian civil justice system are constants, notably: the rule of law and the constitutional doctrines concerning the separation of powers, judicial independence, the exercise

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220. ALRC DP 62 para 2.34.



of judicial power and judicial process,<sup>221</sup> and principles concerning the role of lawyers as partisan advocates and advisers of their clients, subject to their overriding duties as officers of the court and to relevant practice rules.<sup>222</sup>

1.137. Justice Michael Kirby has observed that in its form, formality and etiquette, legal practice replicates its traditions.

A lawyer from Dickens' time, walking out of Bleak House into a modern Australian court on an ordinary day, would see relatively few changes. Same wigs and robes. Same elevated Bench and sitting times. Very similar basic procedures of calling evidence and presenting argument. Longer judgments: but still the same structure of facts, law and conclusion.<sup>223</sup>

1.138. There are legal, practical, cultural and cost constraints on how reform may be achieved in our justice system to meet these changing circumstances. A significant limitation derives from the federal Constitution.

1.139. As stated above, Chapter III of the Constitution vests the 'judicial power of the Commonwealth'<sup>224</sup> in the High Court of Australia and other federal courts created by Parliament, which now includes the Federal Court and the Family Court, and will include the new federal magistrates service. An essential feature of judicial power is that it be exercised in accordance with the judicial process.<sup>225</sup>

Judicial power involves the application of the relevant law to facts as found in proceedings conducted in accordance with the judicial process. And that requires that the parties be given an opportunity to present their evidence and to challenge the evidence led against them.<sup>226</sup>

1.140. Judicial process requires an open and public inquiry, the application of the rules of natural justice and a determination of the law and the facts and the

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221. For a discussion of the role of courts see eg J Doyle 'Administrative law and the rule of law: Still part of the same package?' *Paper* 1998 Administrative Law Forum Melbourne 18-19 June 1998, 1; J Raz 'The rule of law and its virtue' (1977) 93 *Law Quarterly Review* 195, 198-201; J Doyle 'The well-tuned cymbal' in *Fragile bastion: Judicial independence in the nineties and beyond* Judicial Commission of NSW Sydney 1997, 40-41.

222. See further ch 3.

223. M Kirby 'The future of courts – Do they have one?' (1999) 8(4) *Journal of Judicial Administration* 185, 186.

224. The primary character of the judicial power was described by the High Court in *Huddart, Parker & Co v Moorehead* (1909) 8 CLR 330, 357 as the power of a sovereign authority to 'decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property' (Griffith CJ). See also *Fencott v Muller* (1982-1983) 152 CLR 570, 608 (Mason, Murphy, Brennan and Deane J).

225. *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 703 (Gaudron J).

226. *Bass v Permanent Trustee Co Ltd* (1999) 161 ALR 399 at [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan J).

application of the law to those facts.<sup>227</sup> In *Leeth v Commonwealth* Chief Justice Mason and Justices Dawson and McHugh agreed that

any attempt on the part of the legislature to cause a court to act in a manner contrary to natural justice would impose a non-judicial requirement inconsistent with the exercise of judicial power.<sup>228</sup>

1.141. Family proceedings, despite certain non adversarial features, are also constitutionally constrained. In *R v Watson* the High Court held that the provisions of s 97(3)<sup>229</sup> of the Family Law Act which

require him [the trial judge] to proceed without undue formality, do not authorise him to convert proceedings between parties into an inquiry which he conducts as he chooses ... A judge can neither deprive a party of the right to present a proper case nor absolve a party who bears the onus of proof from the necessity of discharging it. These remarks are not intended to fetter a judge of the Family Court in the exercise of a proper discretion or to insist upon the observance of unnecessary formality; they are designed to make it clear that a judge of the Family Court exercises judicial power and must discharge his duty judicially.<sup>230</sup>

The position is different with respect to federal tribunals, which are not constituted as Chapter III courts. In the *Brandy* case,<sup>231</sup> the High Court outlined two essential aspects of judicial power

- the ability to make a binding and authoritative determination which is immediately enforceable,<sup>232</sup> and
- the determination of existing rights and duties according to law; that is, by the application of a pre-existing standard rather than by the formulation of policy or the exercise of an administrative discretion.<sup>233</sup>

1.142. A consequence of this reasoning is that federal tribunals, unlike courts exercising the judicial power of the Commonwealth, possess no power to make determinative findings of law, and therefore decisions of federal tribunals, insofar as they affect existing legal rights, can never be definitive and are always open to

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227. *Harris v Caladine* (1991) 172 CLR 84, 150. This is reiterated in *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 496 and *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 703-4.

228. (1992) 174 CLR 455, 470 (Mason CJ, Dawson and McHugh J).

229. Section 97(3) provides that '[i]n proceedings under the Act, the court shall proceed without undue formality and shall endeavour to ensure that the proceedings are not protracted'.

230. (1976) 136 CLR 248, 257-8. On the issue of constitutional constraints, the Law Council stated Chapter III ... vests the judicial power of the Commonwealth in the High Court and other courts with federal jurisdiction. Consequently, the Parliament cannot require or authorise the Family Court to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power: *Submission 197*.

231. *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

232. id 259, 269.

233. id 268.

judicial supervision.<sup>234</sup> The ability of tribunals to operate informally is also constrained by the general requirement that they comply with natural justice.

1.143. While 'due process', 'natural justice', the 'essential character of the court', and the 'nature of judicial power' are not inherently adversarial concepts, they are characteristics of our adversarial system. A duty to act fairly is also consistent with non adversarial procedures. A judge who conducts the investigation, assists the parties to clarify the issues and pleadings and questions witnesses is not proceeding unfairly. However, the adoption of some inquisitorial features into the Australian legal system may interfere with accepted notions of procedural fairness. For proceedings to be fair in an adversarial system, a judge must be independent of the state, impartial and seen to be impartial, with clear limitations to a judge's participation, investigation and management of a matter.

1.144. Procedural fairness may be said to be 'the line in the sand' circumscribing the judicial role and entrenching facets of the adversarial model. It is protected through party control of investigation and proceedings.<sup>235</sup>

1.145. In terms of constitutional protection for judicial process, the question is not whether an adversary system is required by the Constitution, but rather, whether those elements required by the Constitution, such as procedural fairness, are best protected in an adversarial system.

1.146. The Law Council stated that

replacing the current adversarial system of litigation with a true inquisitorial system of litigation would seriously erode procedural safeguards and breach the rules of natural justice. Such a reform would certainly be subject to constitutional challenge.<sup>236</sup>

1.147. Similarly, the NSW Bar Association submitted that

Any attempt to undermine the adversarial system would, in our view, be likely to offend Chapter III of the Constitution. That is because Chapter III clearly contemplates a federal system of courts based upon assumptions which are 'adversarial' in nature ... Chapter III refers to a court structure which in 1900 was undoubtedly part of the common law tradition. That tradition was fundamentally adversarial in nature.<sup>237</sup>

1.148. In Australia judges generally do not actively investigate matters outside the evidence presented by the parties.<sup>238</sup> They preside over cases, actively manage

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234. See A Hall 'Judicial power, the duality of functions and the AAT' (1994) 22 *Federal Law Review* 13, 18-21.

235. J Thibaut and L Walker *The social psychology of procedural justice* Plenum Press New York 1988 cited in M Shirley *Procedural justice – A shifting focus* Laws 99203 Dissertation, 37.

236. Law Council *Submission* 197.

237. NSW Bar Association *Submission* 88.

238. *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, 569 (Latham CJ), 575 (Starke J), 588-9 (Dixon and Evatt J).

their progress and facilitate settlement. However, they do not conciliate in matters they are to determine. Former Chief Justice Sir Anthony Mason described these constraints as follows.

The judge must remain a judge, despite the temptation in the world of case management to call him a manager. It is vital to build up and maintain public confidence in the court system. Accordingly, there is a risk that, if we put too much emphasis on speedy disposition of cases, we shall prejudice the just disposition of cases. This is just what we cannot afford to do.<sup>239</sup>

1.149. Justice Michael Kirby noted in this regard

[n]o court can adopt procedures, however well intentioned and whatever the wishes of the parties, if those procedures are incompatible with the Constitution. Nor is it for the parties to litigation or a federal court (or a court exercising federal jurisdiction) to agree on a course of action which contradicts the requirements of ChIII of the Constitution governing the exercise of the judicial power of the Commonwealth.<sup>240</sup>

1.150. Sir Anthony Mason counselled against changing from an adversarial system stating that further change to 'traditional judicial methodology' raises a critical tension between the paramount view of parliamentary supremacy and the separation of judicial power'.<sup>241</sup>

[I]f we were minded to adopt the European model, two major questions would confront us. The first is whether the constitutional concept of judicial power ... would extend to the determination of disputes according to the European model. The answer to that turns largely on the extent to which the concept of judicial power mandates common law conceptions of procedural fairness or natural justice. And there are indications in recent High Court judgments that the extent is substantial.

The second major question is whether we are willing to make less of an emphasis on procedural fairness. Are we willing to allow the judge to decide (a) whether witnesses will be called and, if so, which witnesses and (b) to limit cross examination that is not as significant an element in the European model as it is with us.<sup>242</sup>

1.151. However, in relation to tribunal proceedings, inquisitorial procedures do not offend the Constitution. A dual system operates in Australia of courts,

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239. A Mason 'The courts as community institutions' (1998) 9 *Public Law Review* 83, 85.

240. *Bass v Permanent Trustee Co Ltd* [1999] 161 ALR 399, 425 (Gleeson CJ, Gaudron, McHugh, Kirby, Gummow, Hayne and Callinan J), discussing the procedure used by the trial judge to answer formulated questions without making factual findings. See also *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146.

241. A Mason 'A new perspective on separation of powers' (1996) 82 *Canberra Bulletin of Public Administration* 1, 7.

242. A Mason 'The future of adversarial justice' *Paper 17th Annual AIJA Conference Adelaide* 7 August 1999, 10.

emphasising more traditional adversarial proceedings, and tribunals, which provide a blend of adversarial and non adversarial processes.<sup>243</sup>

1.152. The indication from High Court dicta is that any shift to adopt inquisitorial features or other features fundamentally inconsistent with its conception of procedural fairness in relation to federal courts would be unconstitutional. This is the singular limitation to any reform agenda deriving from the Commission's implied term of reference to consider changing from the adversarial system. Thus, the federal government is not in a position to follow the steps taken by the States and Territories in establishing determinative tribunals<sup>244</sup> to deal with small claims and other matters which may lend themselves to less elaborate dispute resolution. Despite the many calls for a low cost tribunal for family matters, this is likewise limited by the Constitution. This is one reason why a federal magistracy was established within the bounds of chapter III, to provide lower cost, summary processes for certain federal matters.

### **... and change**

1.153. Notwithstanding the continuities and constraints described above, the past 20 years or so have seen dynamic changes to the circumstances in which the federal civil justice system operates, including

- an increase in the complexity, volume and range of federal legislation<sup>245</sup>
- the establishment, abolition and restructuring of specialised federal courts and tribunals<sup>246</sup>
- an increase in complex litigation, with more organisations and individuals capable of sustained, strategic use of litigation
- the implementation of, and modifications to, case management practices<sup>247</sup>
- changing policies, practices, funding and provision of legal aid<sup>248</sup>
- growing concern over unrepresented parties in court and tribunal proceedings<sup>249</sup>

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243. The High Court acknowledged the inquisitorial nature of procedures in the AAT in *Bushell v Repatriation Commission* (1992) 175 CLR 408, 424–5, when it said

Proceedings before the AAT may sometimes appear to be adversarial when the Commission chooses to appear to defend its decision or to test a claimant's case but in substance the review is inquisitorial.

The basis for this conclusion was the ability of the tribunal to request or compel the production of further material: see T Thawley 'Adversarial and inquisitorial procedures in the Administrative Appeals Tribunal' (1997) 4 *Australian Journal of Administrative Law* 61; J Dwyer 'Fair play the inquisitorial way: A review of the Administrative Appeals Tribunal's use of inquisitorial procedures' (1997) 5 *Australian Journal of Administrative Law* 5, 19.

244. As opposed to federal merits review tribunals.

245. See para 4.56–4.61.

246. See ch 9.

247. See ch 6–9.

248. See ch 5.

- the greater use of ADR within and outside court and tribunal systems<sup>250</sup>
- changes in the modes of court and tribunal governance, with federal courts and the AAT given individual control of and responsibility for their own administration<sup>251</sup>
- the development of enhanced public accountability models for the justice system, including benchmarking, performance standards,<sup>252</sup> corporate planning and accrual accounting
- the continuing work by the Productivity Commission to measure the efficiency of courts and tribunals<sup>253</sup>
- the technological revolution which has increased the information which parties can retrieve, manipulate and deploy in litigation, and dramatically altered legal research and publishing, communication within the legal system, and the provision of legal advice and dispute resolution<sup>254</sup>

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249. See ch 5–6.

250. See ch 6.

251. S Skehill 'Comment on court governance' (1994) 4 *Journal of Judicial Administration* 28; P Sallmann 'Where are we heading with court governance?' (1994) 4 *Journal of Judicial Administration* 5; G-Green 'Comment on court governance papers' (1994) 4 *Journal of Judicial Administration* 18; J-Fitzgerald 'Comment on court and court-system governance' (1994) 4 *Journal of Judicial Administration* 22; R Nicholson 'Judicial governance and the planning of court space and facilities' (1994) 3 *Journal of Judicial Administration* 181.

252. See ch 6.

253. See para 6.40.

254. See ch 6 and ALRC IP 23.

- the privatisation and contracting out of government services affecting administrative review rights and the provision of legal services to federal government agencies<sup>255</sup>
- the application of competition policy on the legal profession and legal practice<sup>256</sup>
- changes in the size, composition, work practices, competitiveness and ethos of the legal profession<sup>257</sup>
- the globalisation of legal practice and litigation.<sup>258</sup>

## **A collaborative approach to managing justice in a federal system**

1.154. The Commission's primary focus has been to ensure that the system delivers fair, quality outcomes which are efficient and cost effective. In formulating recommendations for reform the Commission has been guided by particular goals, namely to

- take education and training seriously, as an essential aspect of promoting a healthy legal culture and maintaining high standards of performance among lawyers, judges and tribunal members
- emphasise the need for a range of options to be made available for the resolution of disputes, including processes outside the formal civil justice system
- place the onus on the legal profession to develop professional practice standards which promote ethical behaviour and professional responsibility
- encourage appropriate, effective and timely settlements of litigious matters
- ensure cost effective case preparation
- emphasise the strategic importance of good case management in the courts and tribunals
- refine procedures to reduce case events to those necessary to drive the matter towards resolution
- ensure time effective and cost effective hearings
- place litigants in a better position to obtain legal services at reasonable cost
- ensure fair and effective use of public subsidies for legal assistance and litigation.

1.155. These goals are measurable and achievable. The goals do not promise 'cheaper' justice, but more cost effective processes that will contribute to delivering meaningful access to justice across the community.

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255. See ch 3, 9.

256. See ch 3.

257. *ibid.*

258. *ibid.*

1.156. In the Commission's consultations, judges, court administrators and practitioners consistently nominated three features necessary for appropriate change



- effective court or tribunal governance
- efficient administration, including appropriate allocation of resources and good data collection and management
- meaningful communication and consultation within and outside the institution.

1.157. On this last point, the Ontario Civil Justice Review noted that problems with the civil justice system in that province were exacerbated by poor communication and limited cooperation among the various stakeholders – government, the judiciary and Bar – leading the Review to dub them ‘the solitudes’.

[I]n each of these constituent groups ... there are individuals who are working hard to build bridges and to devise co-operative methods of addressing and finding solutions to the problems which have beset the system. In general, however, the Judiciary, the Administration and the Bar have maintained an individuality in their approach to the system which has precluded a sense of collaboration, co-ownership or co-responsibility for these problems. There is a tendency to view the system from the perspective of one’s own constituency and to view the failings of the system in terms of the needs of that constituency. Along with this tendency goes a reluctance to admit to being part of the problems.<sup>259</sup>

1.158. Effective communication is essential to facilitate and manage individual and systemic change. This theme has featured in several of the recent reports and reviews into the practices and processes of common law, civil justice and administrative review systems.<sup>260</sup>

1.159. The report by Professor Stephen Parker for the Australian Institute of Judicial Administration, *Courts and the public*, noted the critical importance of communication within the courts and between the courts and their publics.<sup>261</sup>

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259. Ontario Court of Justice and Ministry of the Attorney-General *Civil justice review: First report* Ontario Court of Justice and Ministry of the Attorney-General Toronto 1995, 103.

260. See eg Lord Woolf *Access to justice: Final report to the Lord Chancellor on the civil justice system in England and Wales* HMSO London 1996; Ontario Court of Justice and Ministry of the Attorney General *Civil justice review* Ontario Court of Justice and Ministry of the Attorney-General Toronto 1995; Ontario Law Reform Commission *Study paper on prospects for civil justice* OLRG Toronto 1995; Canadian Bar Association *Systems of civil justice task force report* CBA Toronto 1996; Law Reform Commission of Nova Scotia *Reform of the administrative justice system in Nova Scotia* LRCNS Halifax 1997; Agenda for Civil Justice Reform in America *A report from the President’s Council on Competitiveness* 1991; American Bar Association Working Group on Civil Justice System Proposals *Blueprint for improving the civil justice system* ABA Washington DC 1992; Report on the American Bar Association’s ‘Just Solutions’ Conference and Initiative *Just solutions: Seeking innovation and change in the American justice system* ABA Washington DC 1994.

261. S Parker *Courts and the public* AIJA Carlton South 1998. The report found that all court systems in Australia are moving in the direction of consumer orientation and a culture of service’ but some are moving considerably more quickly than others’. Continuing problems included the lack of the following: reliable mechanisms for identifying and sharing best practice; common performance indicators or standards; statistical information about court users; strategic planning; routine use of feedback; and clear and responsive complaints systems. The report recommended that courts should have communication plans and information strategies to improve that communication.

1.160. In the court systems this requires exchanges among judges, registry staff, lawyers, litigant groups and others. In the administrative review system, it involves improved communication between policy makers, departmental or agency decision makers, administrative agencies and tribunals, and the parties affected individually or collectively by administrative decisions or recommendations, as well as the representatives who act for such parties.<sup>262</sup>

1.161. Successful change in the federal civil justice system in Australia has been introduced where there has been honest discussion about problems, clear statements about what is meant to be achieved by proposed changes, and close consultation among the various participants within and outside courts and tribunals.<sup>263</sup> Case management reforms in the Federal Court, for example, have changed the rules and procedures of litigation and the legal culture, as represented in the working patterns of judges and lawyers. Case management which provides consistent, informed oversight of interlocutory processes (such as discovery) is generally credited with improving litigation practices.<sup>264</sup>

1.162. In this report, after a comprehensive and lengthy inquiry, the Commission makes a large number of recommendations for reform of the federal civil justice system – none of which are self-executing. These recommendations are made to the Attorney-General, for tabling in federal Parliament, but in the nature of things they are directed to government, to courts and tribunals, to legal aid commissions, to the legal profession, and to the education sector. The success or otherwise of this reform agenda is now dependent upon these bodies, which will have the major responsibility (individually and, where appropriate, in concert) for considering and implementing these proposed changes.

### **The role of government**

1.163. The federal government is a key participant in and a primary architect of the content, structure, and form of the federal civil justice system. The government controls the legislative program of Parliament which has an impact on the volume, complexity and costs of legal advice, disputes and litigation. Government funds the court and review tribunal systems, sets court fees, and finances ADR programs and legal aid, thereby directly affecting the degree of access to the federal civil justice system. Government also makes major decisions on the substance, form and operation of federal dispute resolution – for example, by funding decisions and priorities and by establishing courts and tribunals, determining their jurisdictions, and defining some of their powers and functions. Government sets research

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262. Law Reform Commission of Nova Scotia *Final report: Reform of the administrative justice system in Nova Scotia* LRCNS Halifax 1997, 13. See ch 9.

263. See ch 6–9.

264. *ibid.*

priorities within the public sector, and provides much of the funding for this activity.

1.164. The government's own approach to disputes, dispute prevention, resolution and litigation is highly influential. For example, the fact that the Commonwealth government holds itself out to operate as a 'model litigant' has an important

symbolic effect on perceptions and expectations about ethical propriety, and an important practical effect in the many matters in which the government is directly involved as a litigant.<sup>265</sup>

1.165. In our federal system, the federal government also plays a key role in highlighting the need for, and then facilitating, coordinated action among the various States and Territories. Although there is increasing recognition of the need for a national market for legal services, for example, it is still the case that the admission, regulation and discipline of legal practitioners is primarily a matter for each State and Territory. Similarly, federal legal aid funds are dispensed through State and Territory legal aid commissions.

1.166. As discussed later in this report, there have been significant moves in recent years towards the creation of a national legal profession, and towards greater national coordination of legal aid guidelines, priorities, programs and practices through National Legal Aid.<sup>266</sup> In other areas where there is still much more to be done, the Commission has made recommendations to the federal Attorney-General to facilitate various actions and processes through the Standing Committee of Attorneys-General (SCAG), which is the body best placed to support efforts at coordination, harmonisation and the development of national approaches and institutions.

1.167. One recommendation in this report is directed to the Houses of Parliament, rather than executive government, urging development of a protocol for handling of those very rare complaints against federal judges which are of such seriousness and substance as to merit parliamentary consideration of removal.<sup>267</sup>

## The role of courts and tribunals

1.168. As stated, Australian federal courts and the AAT are independent from executive interference, and for some years also have been self-administering, although they depend on executive and parliamentary approval for their 'one line' budget allocations.<sup>268</sup> The High Court of Australia has collective financial and administrative responsibility.<sup>269</sup> In the Federal Court and Family Court, the Chief Justice has full legal responsibility for decision making on the expenditure of funds

265. Particular consideration was given to the government's role as a litigant and party to disputes in ALRC DP 62 ch 8, and ch 3, para 3.129–3.173 of this report.

266. See ch 5.

267. See ch 2, rec 12.

268. B Beaumont 'The self-administering court: from principles to pragmatism' (1999) 9(2) *Journal of Judicial Administration* 61, 63. The *Courts and Tribunals Administration Amendment Act 1989* (Cth) transferred from the Attorney-General's Department to the Family Court and the AAT supervision of their own financial management and administration. Part IIA of the *Federal Court of Australia Act 1976* (Cth) made similar arrangements for the Federal Court.

269. *High Court of Australia Act 1979* (Cth) s 17, 46 ('the powers of the High Court under this Act may be exercised by the Justices or a majority of them').

and the use of resources.<sup>270</sup> The federal courts and the AAT report annually to Parliament through the Attorney-General on expenditure and activities, and are subject to audit.<sup>271</sup>

1.169. Courts and tribunals are difficult institutions to manage. While budgets are relatively fixed, workload is generated outside the institution, can fluctuate and is only moderately predictable. The appointment of key staff — judges and executive members of tribunals — is outside of the control of court management. In relation to ‘chapter III judges’, the sort of performance standards and formal accountability measures which are commonplace in other settings are limited by the Constitution.<sup>272</sup> Great care must be taken not to intrude upon judicial independence, which underpins the integrity of our justice system. However judges can invoke the principle of judicial independence to resist change.

1.170. The challenge for court governance is often getting the members of the court to work together towards a common purpose.<sup>273</sup> Professor Scott has noted generally of courts that they

have a systemic tendency towards disorganisation and poor coordination and these problems are never solved once and for all but have to be worked at constantly.<sup>274</sup>

1.171. Case management can provide some discipline against poor work practices and assist to produce rough equities in judge or member workloads. There are different pressures in tribunals where performance measures and indicators can be more readily enforced and operate as a factor in a member’s reappointment.<sup>275</sup> It is critical that the judges or members constituting the court or tribunal are competent, energetic and responsive to change. The Commission frequently heard high praise concerning the quality of the judiciary in federal jurisdiction.

1.172. In recent years, the Federal Court, the Family Court and the AAT all have initiated significant changes to their rules, practices and procedures, case management systems, data collection and information technology systems, education and training programs, and approach to ‘customer service’ — with, it must be said, varying degrees of success.

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270. M Gleeson ‘Judicial accountability’ *Paper Courts in a Representative Democracy Conference* Canberra 13 November 1994, 4.

271. *ibid.* Justice Beaumont notes that ‘the United States National Center for State Courts has published a model annual report which should be compared with guidelines established by the Australian Senate in its *Scrutiny of annual reports*’: B Beaumont ‘The self-administering court: from principles to pragmatism’ (1999) 9(2) *Journal of Judicial Administration* 61, 67.

272. See the discussion in ch 2 regarding s 72(ii) of the Constitution and its impact on judicial accountability.

273. C Baar ‘The model judiciary — The emergence of the judiciary as an institution’ *Paper Third Asia-Pacific Court Conference Shanghai, PRC* 6–8 October 1998, 16.

274. I Scott *Correspondence* 24 November 1999.

275. See ch 9.

1.173. The analysis of this experience in DP 62 prompted differing reactions from the three main institutions. The Commission generally praised the operations of the Federal Court and no doubt this contributed in some measure to the cooperative relationship the Commission has with the Court.

1.174. The Commission also noted from its consultations that family law practitioners and litigants were strongly and consistently critical of the case management practices of the Family Court. These concerns were not directed at the quality of decision making, or at the integrity or professionalism of the judges and court staff. Rather, the criticism was directed mainly at the way the Family Court views its functions, how it organises its dispute resolution processes, and how it has managed its own efforts at reform. The Court's submission and the Chief Justice's public comments on DP 62 were highly and personally critical, implying that the Commission was acting in bad faith.<sup>276</sup>

1.175. The Commission also made a number of criticisms of the AAT's case management processes in DP 62, including that matters were taking too long to resolve and at too great a cost, and that members needed to become more effective at progressing cases and enforcing compliance with tribunal directions and orders.<sup>277</sup> Nevertheless, the President of the AAT, Justice Deirdre O'Connor wrote that

the Tribunal and the Commission have worked together closely during the past 18 months ... The Tribunal is grateful for the Commission's analysis, which has stimulated and enhanced the Tribunal's own internal dialogue in relation to case management programmes.<sup>278</sup>

1.176. One of the key signs of a well managed court with a strong collegiate sense and a healthy culture will be its ability to engage with constructive criticism and to manage change. It is also imperative that such changes are seen to improve matters. Repeated failed reform efforts produce a palpable sense of 'reform fatigue' and cynicism among participants, contribute to the sense of 'crisis' discussed above, and make it that much more difficult to marshal the effort to effect positive change at a later date. The experience of each of these institutions in these respects has been detailed and evaluated in separate chapters later in this report.

### The role of the legal profession

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276. Family Court *Media release* 19 October 1999; see also para 8.11.

277. See ALRC DP 62 para 12.46-39. Also see ALRC 'Review of the federal civil justice system: ALRC discussion paper 62' *Media briefing* 20 August 1999.

278. Report of the President of the Commonwealth Administrative Appeals Tribunal *Administrative Review Council Meeting No 190* 5 November 1999.

1.177. Much of the international literature is highly critical of the legal profession's role in, it is suggested, obstructing meaningful reform of the civil justice system. For example, a major survey of common law and civil law countries found that

[i]n all the countries represented in this volume the legal profession has tended to resist measures designed to simplify the litigation process, or to speed it up or to reduce its cost.<sup>279</sup>

1.178. Even where lawyers support change, their motivation may be called into question.

Lawyers usually find ways to profit from the status quo, but they also usually profit from changes – if only because lawyers are needed to propose, resist, explain, and litigate about new law. Lawyers are good at profiting from the law, whatever it may be. And a change that reduces profits in one way may increase them in another, so that lawyers often disagree with other lawyers about whether a proposal would be good or bad for the bar. The interests of one segment of the profession may conflict with those of another. In addition, as recent studies claim professionals seek prestige as well as profit, and promoting reform might increase the bar's prestige.<sup>280</sup>

1.179. However, it must be said that the Commission's experience in the course of this inquiry is that the Law Council of Australia, State and Territory law societies and bar associations, and individual lawyers participated genuinely, constructively and – often in keeping with professional norms – forcefully. Inevitably, the profession has disagreed with some of the Commission's findings and proposals, and supported many others. In consultations and submissions, it was not unusual for lawyers and legal professional associations to argue against their own self-interest (financial or otherwise) in areas related to reform of practice, procedure, costs and case management.

1.180. The Commission also welcomes the adoption by the NSW Bar Association of a new set of rules of professional ethics, which come into effect in March 2000, identifying the over-riding concerns of candour and fairness, ensuring that allegations are reasonably supported by evidence, discouraging the misuse of litigation and tactical manoeuvring, advising clients about alternatives to litigation, and not wasting court time and costs.<sup>281</sup>

1.181. This is encouraging, since many of the recommendations in this report are directed to the legal profession, including those related to developing uniform

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279. A Zuckerman 'Justice in crisis: Comparative dimensions of civil procedure' in A Zuckerman (ed) *Civil justice in crisis: Comparative perspectives of civil procedure* Oxford University Press 1999, 52.

280. J Leubsdorf 'The myth of civil procedure reform' in A Zuckerman (ed) *Civil justice in crisis: Comparative perspectives of civil procedure* Oxford University Press 1999, 61.

281. See ch 3; see also B Lane 'Barrister's ethics raise Bar' *Australian* 13 January 2000; and Editorial 'Ethical rules put reliance on evidence' *Australian* 13 January 2000.

national professional practice standards, restraining costs, providing legal assistance, and supporting improvements to professional education.

#### The role of the educational sector

1.182. Chapter 2 of this report is devoted to matters of legal, professional and judicial education. As noted there, the Commission's view is that education plays a critical role in shaping the 'legal culture', and thus in determining how well the system operates in practice.<sup>282</sup>

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282. See D Ipp 'Opportunities and limitations for change in the Australian adversary system' in H Stacy and M Lavarch (eds) *Beyond the adversarial system* Federation Press 1999, 68, 84; and L Olsson 'Combating the warrior mentality' in C Sampford, S Blencowe and S Condlin (eds) *Educating lawyers for a less adversarial system* Federation Press 1999, 2, 6-8.



1.183. Lord Woolf has recognised that the success of his procedural reforms in England will rely in substantial part on changing the legal culture to make it is less bound up with notions of adversarialism and tactical game play.<sup>283</sup> Watson agrees, but has noted that ‘on what is to be the mechanism for changing lawyers’ culture, he [Lord Woolf] is quite unclear’.<sup>284</sup>

1.184. Accordingly, the Commission has developed a set of recommendations expressly intended to lift legal education, including

- increasing the emphasis at university law schools on teaching legal ethics and professional responsibility, as well as professional skills such as dispute resolution
- permitting diversity in the delivery of practical legal training (PLT) and articulated clerkship programs
- adopting a rule-commentary approach to the development of uniform national professional practice standards to promote greater clarity, ease of application and usefulness for instructors
- ensuring the regular participation of legal practitioners in continuing professional development programs
- establishing an Australian Academy of Law to promote collegial relations among judges, lawyers, legal academics and law students, in aid of higher standards of conduct and learning
- establishing an Australian Judicial College, to enhance judicial studies federally and nationally, and
- ensuring appropriate education and training for tribunal members.

1.185. These recommendations cut across the interests and responsibilities of many different bodies: the federal government (especially in terms of funding arrangements); universities, law schools, legal academics and law students; PLT institutions; legal professional associations and legal practitioners; courts and tribunals, judges, members and staff; admitting authorities; and continuing legal education providers.

1.186. These recommendations also move away, in some respects, from the approach taken in DP 62. For example, the Commission decided not to proceed at this time with a proposal for a national authority to accredit law school programs.<sup>285</sup> The Commission is aware that not all of those interested will have had an opportunity to comment on what is now the Commission’s preferred approach *prior* to the publication of this report.

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283. Lord Woolf *Access to justice: Interim report to the Lord Chancellor on the civil justice system in England and Wales* Lord Chancellor’s Dept London 1995, 7.

284. G Watson ‘From an adversarial to a managed system of litigation: A comparative critique of Lord Woolf’s interim report’ in R Smith (ed) *Achieving civil justice* Legal Action Group London 1995, 67.

285. See ALRC DP 62 proposal 3.1 regarding an Australian Council on Legal Education.

1.187. However, the recommendations in this report represent no more, and no less, than the Commission's considered advice to the federal Attorney-General – and an invitation to all of the other key stakeholders to weigh and debate what we have proposed, and to proceed to implement effective reforms within their own areas of responsibility in the federal civil justice system.

The Commission received assistance from a wide variety of individuals and organisations who provided advice, comments and submissions and valuable administrative and technical assistance with our research.

The Commission extends thanks to the legal professional bodies, particularly the Law Council of Australia, law societies and bar associations, and practitioners who arranged and attended focus groups and meetings and provided commentary on draft chapters and proposals. In this regard special thanks are owed to those practitioners and litigants who responded to the Commission's survey questionnaires about cases and costs.

The Commission could not have undertaken its research or the inquiry without ongoing and extensive assistance from federal courts and tribunals. In particular, the Federal Court, the Family Court and the AAT permitted the Commission to conduct empirical research, collected and transported more than 3000 case files, and responded to repeated requests for information and comment. The Commission thanks the judges, tribunal members and court and tribunal administrators and staff who provided this assistance.

There are a number of people who provided their expertise and assistance on many occasions and in a variety of circumstances. The Commission expresses special thanks to Mr Warwick Soden and Mr John Mathieson of the Federal Court; Ms Margaret Harrison, Ms Angela Filippello and Mr Ron Eather of the Family Court; Ms Christine Harvey of the Law Council of Australia; Ms Kay Ransome, Ms Janet Cooper, Ms Rhonda Evans and Mr Chris Matthies of the AAT; Mr Robert Cornall of Victoria Legal Aid (now Secretary of the Commonwealth Attorney-General's Department); Ms Judith Ryan and Mr Ben Slade of Legal Aid New South Wales; Professor Rosemary Hunter of the Justice Research Centre; Professor Stephen Parker of Monash University; Professor Ian Scott; Ms Alison Stanfield; Mr Steve Mark NSW Legal Services Commissioner; Mr Christian Klettner of the Productivity Commission; Mr Chris Staniforth of Legal Aid ACT and National Legal Aid; Mr Richard Coates of NT Legal Aid; Mr Anthony Brown of Legal Aid Qld; costs consultants Ms Susan Pattison and Ms Deborah Vine-Hall; Ms Gabriel Fleming; Mr Ian Freckelton; Mr Hugh Selby; Mr Andras Markus; Ms Libby Haigh; Mr Julian Disney; Ms Tania Matruglio and Ms Gillian McAllister.

## 2. Education, training and accountability

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### Introduction

2.1. The terms of reference for this inquiry ask the Commission to consider ‘the significance of legal education and professional training to the legal process’ as well as the ‘training, functions, duties and role of judicial officers as managers of the litigation process’. The Commission has produced a separate Issues Paper (IP-21)<sup>286</sup> dedicated to these matters, and education, training and judicial accountability was the subject of a chapter in Discussion Paper 62, which preceded this report.<sup>287</sup>

2.2. In its submission to the Commission in response to IP 21, the Law Council of Australia indicated that it believed that

a general review of legal education is ... peripheral to the Commission’s terms of reference, [and that] such a review is unnecessary. Each Australian jurisdiction has an authority which is specifically charged with the task of ensuring that legal practitioners in that jurisdiction have received appropriate education and training before commencing practice. The introduction of the Mutual Recognition legislation has meant that the various jurisdictions have taken substantial steps towards establishing uniform requirements at both the undergraduate and pre-admission levels.<sup>288</sup>

This view is repeated in the Law Council’s submission in response to DP 62.<sup>289</sup>

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286. Australian Law Reform Commission Issues Paper 21 *Review of the adversarial system of litigation: Rethinking legal education and training* Sydney 1997 (ALRC IP 21). This paper canvassed education and training for decision makers in courts and tribunals, for lawyers, and for non lawyer participants in the litigation system (such as expert witnesses and unrepresented litigants).

287. Australian Law Reform Commission Discussion Paper 62 *Review of the federal civil justice system* Sydney 1999 ch 3 (ALRC DP 62).

288. Law Council *Submission 196*.

289. Law Council *Submission 375*.

2.3. With respect, the Commission's extensive research and consultations and the weight of submissions<sup>290</sup> over the course of this inquiry make clear that education, training, and accountability play a critical role in shaping the 'legal culture' – and thus in determining how well the system operates in practice.<sup>291</sup> In the rest of this report, the Commission makes a large number of recommendations aimed mainly at fine-tuning the federal civil justice system through improved rules, practices and procedures. However, it is evident that, while it is of the utmost importance to get the structures right, achieving systemic reform and maintaining high standards of performance rely on the development of a healthy professional culture – one that values lifelong learning and takes ethical concerns seriously.

2.4. In this chapter, as in DP 62, the Commission looks separately at the education and training needs of lawyers, federal judges, judicial officers and tribunal members. Finally, consideration is given to establishing an effective (and constitutionally valid) mechanism to improve judicial accountability, both as an aspect of improving the performance of the federal justice system and increasing public confidence in its operations.

## Education for the legal profession

2.5. In DP 62, the Commission noted that the 'requirement of higher educational qualifications is classically one of the defining features of a

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290. For example NRMA *Submission 81*.

291. See D Ipp 'Opportunities and limitations for change in the Australian adversary system' in H Stacy and M Lavarch (eds) *Beyond the adversarial system* Federation Press Sydney 1999, 68, 84; D Schon *The Reflective Practitioner* Basic Books New York 1983; and L Olsson 'Combating the warrior mentality' in C Sampford et al (eds) *Educating lawyers for a less adversarial system* Federation Press Sydney 1999, 2, 6-8. There is a considerable literature on the socialising effects of legal education and training. See eg G Rathjen 'The impact of legal education on the beliefs, attitudes and values of law students' [1976] 44 *Tennessee Law Review* 85, 94, which suggests that 'law school does serve to alter legal orientations, legal ideologies and legal values'. R Bush 'Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice' [1984] *Wisconsin Law Review* 893, 1002, suggests a causal link between 'the habits of thinking and assumptions which legal training inculcates in lawyers', including the importance of 'thinking like a lawyer', which 'produces strong support for adjudication and great suspicion about mediation'. In Australia, D Anderson et al 'Law and the making of legal practitioners' in R Tomasic (ed) *Understanding Lawyers* Law Foundation of NSW Sydney 1978, 190, report survey findings indicating that there is a shift in the course of legal education from 'a community centred orientation to one which was profession centred', manifest in attitudes about who should assess the effectiveness of legal services, regulate legal practitioners, and so on. In the Pearce Report's survey of law graduates, the predominant answer to the question about how law school had influenced their values, was that it made them 'more cynical' (54%). This was followed by 'more practical' (52%), and 'more politically aware' (39%). Only 10% of graduates reported that legal education made them 'more idealistic': DPearce et al *Australian law schools: A discipline assessment for the Commonwealth Tertiary Education Commission* AGPS Canberra 1987, appendix 5, 195, table 5.19 (Pearce report).

profession'.<sup>292</sup> However, theory and practice in relation to the nature, shape, siting, funding and regulation of professional education is contingent and dynamic, and thus open to contest and controversy.

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292. ALRC DP 62 para 3.4, citing A Carr-Saunders & P Wilson *The professions* 1933, 28 cited in D-Weisbrot *Australian lawyers* Longman Cheshire Melbourne 1990, 4-6.

## Changing patterns of legal education

### *The traditional divide*

2.6. Unlike the university based pattern of legal education which emerged early on in continental Europe,<sup>293</sup> common law countries retained their traditional apprenticeship approaches well into this century.<sup>294</sup> Legal education in English speaking countries also has been affected by the traditional common law paradigm of private legal practice, regulation of the profession by the courts, and the appointment of senior practitioners (usually counsel) to the judiciary. This contrasts with European civil law traditions of an enhanced role for public sector lawyering, state regulation of legal practice, and career judiciaries.<sup>295</sup>

2.7. Since the 1960s, legal education in English speaking countries generally has been described as being

divided into three relatively discrete stages, involving (1) academic training at a university; (2) subsequent practical training with both institutional and in-service components; and (3) continuing education.<sup>296</sup>

2.8. By and large, first phase legal education in Australia is provided by universities in courses leading to the award of a Bachelor of Laws (LLB), the degree which is generally recognised for the purposes of admission to practice.<sup>297</sup> A number of university law schools in Australia still operate 'straight law' degrees,

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293. See eg J Brunne 'The reform of legal education in Germany: the never-ending story and European integration' (1992) 42 *Journal of Legal Education* 399, 402-4; and see R Abel and P Lewis (eds) *Lawyers in society – The civil law world* Berkeley University of California Press 1988.

294. See R Abel and P Lewis (eds) *Lawyers in society – the civil law world* Berkeley University of California Press 1988; and R Abel *The legal profession in England and Wales* Oxford Basil Blackwell 1988. For an account of an early attempt at university legal education in Canada, see WPue "'The disquisitions of learned judges': Making Manitoba lawyers 1885-1931' in G Baker and JPhillips (eds) *Essays in the history of Canadian law* Vol III University of Toronto Press Toronto 1999, 512-60.

295. See eg J Merryman 'How others do it: The French and German judiciaries' (1988) 61 *Southern California Law Review* 1865, 1874. See also R Abel and P Lewis (eds) *Lawyers in society – The civil law world* Berkeley University of California Press 1988.

296. See D Weisbrot *Australian lawyers* Longman Cheshire Melbourne 1990, 124 and following. These arrangements were recommended in Australia by the *Report of the Committee on the Future of Tertiary Education in Australia* Government Printer Canberra 1964 para 52-56 (the Martin report); and subsequently in the United Kingdom in the *Report of the Committee on Legal Education* (Cmd 4595) HMSO London 1971, para 100 (the Ormrod report).

297. It is, of course, the content of the program rather than the title of the degree which is critical. Some universities offer other degree programs at the Bachelor's level (eg the Bachelor of Legal Studies), or less commonly at the postgraduate level (eg Master of Legal Practice), which also are accepted for admission purposes.

but in practice the great majority of students are enrolled in combined degree programs or already hold one or more degrees in other disciplines.<sup>298</sup> This places

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298. Arts-Law, Commerce-Law and Science-Law are still the most common programs, but the range of possible combinations has grown to include engineering, social work, education, communications, and international studies.

the Australian pattern somewhere between the United Kingdom model, which is still predominantly undergraduate, and the model in the United States and common law Canada, which is entirely postgraduate.<sup>299</sup>

### *Practical legal training*

2.9. Practical legal training (PLT) has largely been the preserve of the profession, whether delivered directly through articulated clerkships (for solicitors) or pupillage programs (for barristers), or through specially designed institutional courses of instruction, such as those mounted by the College of Law in New South Wales and the Leo Cussen Institute in Victoria. Beginning in the 1970s, some of these PLT institutions affiliated with universities<sup>300</sup> – at least in part to take advantage of Commonwealth funding for universities and students. More recently, a number of university law schools have moved into the direct provision of PLT (in competition with the traditional providers), mainly in the form of ‘add-on’ programs available after the completion of LLB studies,<sup>301</sup> but sometimes integrated within the basic law degree program.<sup>302</sup> Motivation for this move is mixed – in part, it is driven by the desire to provide a service to existing students as well to attract new students; in part, by the imperatives of federal arrangements;<sup>303</sup> and in part by an interest in experimenting with new pedagogical approaches.

2.10. Monash University recently received approval from the Council of Legal Education in Victoria to offer a postgraduate (that is, post-LLB) PLT course, over the opposition of the Leo Cussen Institute. Students will be given extensive experience advising clients through a community legal centre, such as Springvale Legal Service. A novel feature of the course is the ‘pervasive approach’ to ethical issues. These are built into the activities and tasks throughout the course so that students become familiar with identifying ethical issues as well as resolving them.

### *Continuing legal education*

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299. In recognition of this, American law schools phased out the LLB degree in the 1960s and replaced it with the ‘Juris Doctor’ (JD) degree. The approach in civil law Canada (ie Quebec) is more akin to the UK model.

300. For example, the College of Law affiliated with the University of Technology, Sydney (UTS), but has since disaffiliated. The equivalent program in South Australia was affiliated with the South Australian Institute of Technology (SIT), now part of the University of South Australia, but the University withdrew from the PLT program in 1998 and it is now conducted by the Law Society of South Australia.

301. For example the programs at Wollongong University, UTS (after disaffiliation with the College of Law), Queensland University of Technology, Bond University and Monash University.

302. For example the programs at Newcastle University and Flinders University.

303. A Stewart *Submission* 327. See para 2.15 below for a more complete discussion of this point.



2.11. Continuing legal education (CLE) has become a very crowded and competitive field, which now includes legal professional associations, university law schools, PLT institutions, private companies and law firms.

*A period of dynamic change*

2.12. As noted in DP 62, there have always been some variations to this general pattern of legal education in Australia, and if anything the offerings have been more diverse in recent years.<sup>304</sup> In terms of substitution regimes, for example, it is still possible in New South Wales to gain admission via successful completion of a non-degree program of study and examinations administered by the Legal Practitioners' Admission Board (LPAB),<sup>305</sup> while articulated clerkships are still available in some jurisdictions instead of PLT.<sup>306</sup>

2.13. Over the past decade or so, legal education in Australia has undergone a period of unprecedented growth and change. To some extent, this parallels the dynamic change in the legal profession – characterised by rapid growth; moves towards national admission and practice; globalisation; the end of traditional statutory monopolies; the application of competition policy and competitive pressures; the rise of corporate 'mega-firms'; the emergence of multi-disciplinary partnerships; increasing calls for public accountability; more demanding clients; and the influence of new information and communication technologies – but many of the changes in legal education have been driven by other factors.<sup>307</sup>

*The role of university law schools*

2.14. In 1960, there were six university law schools, one in each State capital. At the time of the Pearce Committee's review of Australian legal education,<sup>308</sup> completed in 1987, there were twelve university law schools. One of the major recommendations of the Pearce Committee was that, especially given the limited resources available in a country the size of Australia, no new law schools should be established. Nevertheless, in little more than a decade, the number of university law schools more than doubled to 28, with at least two other programs scheduled to commence soon.<sup>309</sup>

2.15. There are 37 members of the Australian Vice-Chancellor's Committee (AVCC), the peak association, so that the *absence* of a law faculty in a university is now more remarkable than the presence of one. This extraordinary growth was facilitated by the major policy shifts undertaken during the tenure of John Dawkins as Minister for Higher Education. A uniform, national system was established; the binary divide (between universities and colleges of advanced education/institutes of technology) eliminated and institutions merged; formula funding introduced

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304. ALRC DP 62 para 3.10.

305. In association with the University of Sydney's Law Extension Committee.

306. For example in Queensland, the Northern Territory, Tasmania and Western Australia.

307. See para 2.14 and following and para 5.201-5.214 regarding university clinical programs.

308. D Pearce et al *Australian law schools: A discipline assessment for the Commonwealth Tertiary Education Commission* AGPS Canberra 1987 (Pearce report).

309. At Victoria University of Technology and Central Queensland University.

which is largely dependent upon student load; and control over the approval of new degree programs largely relinquished by the federal bureaucracy, leaving this for individual universities to determine.

Law faculties are attractive propositions for universities, bringing prestige, professional links and excellent students, at a modest cost compared with comparable professional programs such as medicine, dentistry, veterinary science, architecture or engineering.<sup>310</sup>

2.16. As noted in DP 62,

This phenomenon has not been replicated elsewhere. Over the same period, only two new (ABA-accredited) law schools were established in the United States, one in New Zealand, and none in Canada. The United States now has 176 ABA-accredited law schools, which is nearly six times the number in Australia — but with about 14 times the population base. Canada has 21 university law schools [within its 91 universities] with a population of more than 30 million.<sup>311</sup>

2.17. For some years, Australian law schools have accepted that their dual mission was to provide (or contribute to, in the case of combined degrees) a broad liberal education,<sup>312</sup> as well as to provide a basic grounding for those entering the profession. As stated in DP 62

To some extent, law is coming to be seen as a prestigious generalist degree that can prepare students for a variety of occupations. At the same time, law schools recognise their responsibility to provide the training necessary to prepare future legal practitioners, and there is a trend towards increasing the proportion of time and resources devoted to ‘professional skills training’, whether through clinical or classroom based methods.<sup>313</sup>

2.18. In the United States, ‘live client’ clinical programs, usually focussing on community legal centre/poverty law type practice, have been widely used by law schools to supplement classroom instruction on substantive law, and to provide students with an appreciation of the nature of ‘law as it is actually practised’ — including the social dimension and the ethical dilemmas which may arise.<sup>314</sup> Virtually every accredited American law school operates a substantial clinical practice program, and some have a range of programs which cater for specialist interests (such as environmental law, criminal appeals, civil liberties, children, and so on).

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310. ALRC DP 62 para 3.13.

311. id para 3.14.

312. See the Statement of Australian Law Deans, attached as appendix 3 to the Pearce report.

313. ALRC DP 62 para 3.16.

314. On the desirability of teaching ethics in a clinical context, see W Simon ‘The trouble with legal ethics’ (1991) 41 *Journal of Legal Education* 65; W Simon *The practice of justice: A theory of lawyers’ ethics* Cambridge Harvard University Press 1998; and A Hutchinson ‘Legal ethics for a fragmented society: between professional and personal’ (1998) 5 *International Journal of the Legal Profession* 175.

2.19. In Australia, the much lower level of resources available to law schools has meant that only a handful of law schools run clinical programs – and only the University of Newcastle allows students to undertake a fully integrated clinical

degree program rather than simply an elective unit.<sup>315</sup> Both for reasons of resources as well as recognition of the importance of non-adversarial forms of dispute resolution, the emerging trend in Australia has been toward the teaching of generic 'professional skills'<sup>316</sup> — that is, skills which will be needed in any subsequent legal practice, but would be equally valuable in a range of other occupations and professions.

According to this view, legal education should focus on the development of skills other than advocacy and the analysis of appellate judgments, to include training in fact finding, negotiation and facilitation skills, as well as the discrete skills, functions and ethics associated with decision making.<sup>317</sup>

2.20. As noted in DP 62, the major 1992 review of legal education in the United States — the MacCrate report<sup>318</sup> — sought to narrow the gap between what was taught in law schools and the day to day skills (and ethical understandings) required of modern legal practitioners. Perhaps the best known and most quoted part of the MacCrate report was the 'Statement of Skills and Values' (SSV), which seeks to enumerate core skills for lawyers which law schools are meant to address. According to MacCrate, the 10 fundamental lawyering skills are

- problem solving
- legal analysis and reasoning
- legal research
- factual investigation
- communication (oral and written)
- counselling clients
- negotiation
- understanding litigation and alternative dispute resolution processes and consequences

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315. ALRC DP 62 para 3.10–3.12. The other law schools with elective clinical programs which involve operation of a community legal centre (and receive substantial Commonwealth funding) are the Universities of New South Wales, Monash, Murdoch and Griffith. The University of Western Australia is currently operating an experimental program, with the encouragement of the WA Supreme Court, which involves law students assisting (under supervision) with criminal appeals in cases in which legal aid is not available or insufficient. Other law schools, for resource and pedagogical reasons, have chosen to develop placement programs rather than clinical programs; for example, Wollongong and Sydney. Many law students also are volunteers with community legal centres.

316. Specific issues and initiatives with respect to the current state of skills teaching in Australia are set out in ALRC DP 62 para 3.26–3.43.

317. See also Lord Chancellor's Advisory Committee on Legal Education and Conduct *First report on legal education and training* HMSO London 1996, 15.

318. American Bar Association *Legal education and professional development — An educational continuum (Report of the task force on law schools and the profession: Narrowing the gap)* ABA Chicago 1992 (MacCrate report). See also E Clark 'Legal education and professional development — An educational continuum' (1996) 14 *Journal of Professional Legal Education* 227; R Stropus 'Mend it, bend it, and extend it: The fate of traditional law school methodology in the 21st century' (1996) 27 *Loyola University Chicago Law Journal* 449.

- organisation and management of legal work, and
- recognising and resolving ethical dilemmas.<sup>319</sup>

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319. MacCrate report 139-40.

The 'fundamental values of the profession' according to the MacCrate report, are

- the provision of competent representation
- striving to promote justice, fairness and morality
- striving to improve the profession, and
- professional self development.<sup>320</sup>

2.21. As the Commission commented in DP 62

It is notable that where the MacCrate Report focusses on providing law graduates with the high level professional skills and values they will need to operate in a dynamic work environment, and assumes that lawyers will keep abreast of the substantive law as an aspect of professional self development, the equivalent Australian list – the 'Priestley 11' – focusses entirely on specifying areas of substantive law.<sup>321</sup> In other words, MacCrate would orient legal education around *what lawyers need to be able to do*, while the Australian position is still anchored around outmoded notions of *what lawyers need to know*.<sup>322</sup>

2.22. Similarly, the central theme of the Canadian Bar Association's Task Force Report on Systems of Civil Justice<sup>323</sup> is the need to ensure that there are more opportunities for early settlement or resolution of disputes within the legal system. In terms of education and training needs to support this approach, Recommendation 49 of that report recommended that

- (a) The CBA and the Canadian Council of Law Deans, the Canadian Association of Law Teachers and the Federation of Law Societies form a joint multi-disciplinary committee to consider and propose a comprehensive legal education plan to assist in civil justice reform for the 21st century, and
- (b) The plan address the whole spectrum of service providers and the full range of educational opportunities.

2.23. Following this recommendation, a 'joint multi-sectoral committee' was established in 1998, comprised of four academics, one judge, one practitioner and one CLE provider, and a discussion paper released in late 1999.<sup>324</sup> The

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320. *ibid.*

321. The Consultative Committee of State and Territorial Admitting Authorities, headed by Justice Priestley of NSW, compiled a list of compulsory subject areas for academic legal study, colloquially known as 'the Priestley 11', which individuals must complete in order to fulfil admission requirements – and this includes 'Professional Conduct'. Although this does not directly affect law school curricula, universities are under pressure to provide those subjects to graduates in order to satisfy academic requirements to practice law. The availability and content of professional responsibility courses do vary from law school to law school, however.

322. ALRC DP 62 para 3.23.

323. Canadian Bar Association Systems of Civil Justice Task Force *Final report* Canadian Bar Association Toronto 1996 (CBA Task Force report).

324. Committee Responding to Recommendation 49 of the Systems of Civil Justice Task Force Report *Attitudes-skills-knowledge: proposals for legal education to assist in implementing a multi-option civil justice system in the 21st century* Discussion Paper Canadian Bar Association Ottawa August 1999.



'Recommendation 49 Committee' settled upon a number of premises for its conclusions and proposals, including

- The study of law necessarily involves a study of human interaction and conflict and of various approaches to responding to these phenomena. The practice of law moves the study of law directly into engagement with human interaction, and through this engagement is itself part of the process of norm or law creation. To ensure that the law and legal system operate to support social development and improvement in human interaction, rather than exacerbating conflict, lawyers must develop high levels of self-awareness and of reflection on their practice at the individual and general levels.
- A comprehensive modern legal education curriculum must focus on the development of this awareness and encourage effective social interaction, knowledge and information as an essential aspect of the discipline of law, as well as developing technical expertise about application of legal rules and the various ameliorative responses available in the legal system.
- This requires a cross-disciplinary approach to legal education and may include materials and faculty from a range of social sciences such as psychology, sociology, conflict resolution specialists and social work schools. This information is a substantive aspect of legal education that is obtained through a combination of theory, experiential learning and conflict analysis skill, including legal analysis.<sup>325</sup>

2.24. The Recommendation 49 Committee's proposals for discussion mirror the points above, as well as specifying that

- Law students should have the opportunity in substantive courses to practice negotiating the settlement of legal problems and to develop knowledge about theories of analysis of interpersonal conflict. Students should be expected to develop an awareness of contract clauses that provide for dispute resolution as well as to design and critically evaluate processes for resolving conflicts in light of broader public interest concerns and legal rights.
- In order to develop their negotiation, communication and conflict resolution skills, law students should be encouraged, through varying forms of evaluation, to carry out some team projects that develop the ability to reach solutions and resolve interpersonal conflict effectively. There should be an opportunity for reflection on these exercises.
- Civil procedure courses should include information about the various dispute resolution processes and practices available and their utility in resolving various kinds of problems.
- Law schools are urged to consider making mandatory ethics courses which should include negotiation and mediation ethics as well as issues relating to

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325. id ix, 45–46.

obligations of lawyers regarding human rights and inter-personal relationships.<sup>326</sup>

### **A need for national standards and/or accreditation?**

2.25. In DP 62, the Commission suggested that the rapid growth and change in Australian legal education<sup>327</sup> might militate in favour of 'a body to provide a degree of oversight and coordination to ensure that standards are developed and maintained, and a measure of quality assurance provided',<sup>328</sup> to be known as the Australian Council on Legal Education (ACOLE).

The federal Attorney-General, in consultation with the Standing Committee of Attorneys-General (SCAG), should establish a broadly constituted advisory body known as the Australian Council on Legal Education. This council would be charged with developing model standards for legal education and training for lawyers and other key participants in the justice system.<sup>329</sup>

2.26. However, the Commission cautioned that ACOLE should not be, or be allowed to become

a monolithic body engaged in central planning and enforcing a single vision of what is required for the education and training of the Australian legal profession. Rather, the institution is to ensure the regular exchange of information, dialogue, coordination and collaboration in this area. This process should also include the development of coherent national standards and objectives in relation to all aspects of legal education and training.<sup>330</sup>

2.27. The Commission further explained the proposed nature and role of ACOLE in the following terms

Membership in such a body should be broadly constituted and drawn from the major interest groups, such as legal educators, practising lawyers, consumer groups, judicial officers, officials of legal professional associations, students and so on. The Commission believes very strongly that this council should not be a representative body, comprised of nominees from peak organisations or appointees from a specified set of categories (for example, one law dean, one judge, one law society president). Locking members into fixed positions based on the positions of their home organisations would severely inhibit the ability of the council to operate as a genuinely deliberative body and would impair the quality of the advice provided to the Attorney-General.

The council should have responsibility for considering as aspects of undergraduate legal education (LLB degree programs and the equivalent), PLT, CLE, the educational

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326. id 47–48.

327. cf R Simmonds 'Growth, diversity and accountability: An insider's outside look' in J Goldring et al *New foundations in legal education* Cavendish London 1998.

328. ALRC DP 62 para 3.66.

329. ALRC DP 62 proposal 3.1.

330. id para 3.67.

requirements for admission to practise and for specialist accreditation, and education and training issues for non lawyer participants in the justice system (such as ADR practitioners).

Given that the setting of educational requirements for admission purposes (and the associated accreditation of educational programs) is currently a State and Territory matter, and there is no suggestion that State and Territory admitting authorities will readily relinquish this power (even with the development of portable practising certificates), the work of the proposed council will of necessity be advisory. Thus, the national standards it would promulgate would serve as benchmarks rather than rules. Similarly, any regime the council might establish to accredit education providers (whether this involved law schools, or PLT providers, or CLE programs) — if indeed it moved in this direction — would carry considerable weight, but not the force of law, unless adopted by an admitting authority.

Given the dynamic state of legal education in this country, and increased blending and merging of the stages of legal education, the Commission questions whether the proposed council should be organised formally into committees or divisions based on the traditional three phases approach. While the council will, of course, determine its own processes and working groups, it should be careful not to structure itself in such a way as to constrain debate about the most effective means of delivering high quality legal education, nor to discourage innovation and experimentation in practice.<sup>331</sup>

2.28. The Commission's proposal 3.1 stemmed, in substantial part, from prior initiatives aimed at establishing a form of national appraisal or accreditation in respect of legal education in Australia.

#### *Initiatives under the Law Council's Blueprint*

2.29. In 1994, the Law Council released its *Blueprint for the structure of the legal profession*<sup>332</sup> (the Blueprint) which, among other things, proposed the establishment of a National Appraisal and Standards Committee to accredit law schools, as an incident to the move to uniform, national admission. It specified that this Committee should be comprised of

- a member of the judiciary (who would also serve as chairman)
- the federal Attorney-General (or a nominee)
- four Law Council representatives (not more than one from each state/territory)
- four law school representatives (not more than one from each state/territory) and
- one lay person (nominated by the Attorney-General and the President of the Law Council).

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331. *id* para 3.70–3.73.

332. Law Council *Blueprint for the structure of the legal profession: A national market for legal services* Law Council Canberra 1994.

2.30. This Committee specifically would be asked to consider such matters as

- course objectives and curriculum structures
- teaching practices
- assessment procedures
- staff appointment and promotion procedures
- management structures
- resource allocation procedures.

2.31. Not surprisingly, the Committee (now Council) of Australian Law Deans (CALD) expressed serious reservations about this aspect of the Blueprint, particularly in respect of the fact that the proposal was developed and ratified by the Law Council without any process of consultation with CALD or with law schools; the suggested composition of the Appraisal Committee (with only four of the 11 members being legal educators); the intrusive nature of the terms of reference, which included internal matters of personnel and resource management; and the unexplained method for funding such a labour-intensive system.

2.32. A letter from the then President of the Law Council, Mr Stuart Fowler, to CALD, sought to assure law deans that the Law Council had no intention of encroaching impermissibly into areas of academic expertise, explaining that

Ultimately, the whole purpose of accrediting law schools and faculties is to determine the level of PLT, if any, required upon graduation as a prerequisite to admission to practise.<sup>333</sup>

2.33. The Law Council also undertook to consult further before proceeding. In 1996, the Law Council set up a National Advisory Committee for Legal Education and Professional Admission (NACLEPA), which included two representatives from CALD.

***The Consultative Committee's proposal to the Standing Committee of Attorneys-General (SCAG)***

2.34. In October 1997, the Consultative Committee of State and Territorial Law Admitting Authorities (the Consultative Committee) made a proposal to SCAG for the establishment of a National Appraisal Council for the Legal Profession (National Appraisal Council)<sup>334</sup> through an Inter-governmental Agreement (and incorporated in one of the participating jurisdictions), with 'a mechanism for

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333. Letter to Professor Ralph Simmonds, convenor of the Committee of Australian Law Deans, 25-November 1994.

334. Law Council *Submission 375* Attachment A: 'Proposal for a National Appraisal Council for the legal profession' 21 October 1997, by Justice LJ Priestley, on behalf of the Law Council and the Consultative Committee of State and Territorial Law Admitting Authorities to Mr Laurie Glanfield, Director-General of the NSW Attorney General's Department, for consideration by the Standing Committee of Attorneys-General (SCAG) (Consultative Committee Proposal). Law Admissions Consultative Committee *Submission 384*.

converting Council decisions into obligations which bind admitting authorities in each jurisdiction, perhaps by statute or subordinate legislation'.<sup>335</sup>

2.35. The suggested purpose of the National Appraisal Council would be

to ensure that national standards are developed and applied for –

- appraising the academic and practical training required of both Australian and overseas applicants for admission to practise law;
- determining any additional studies or practical training required by overseas applicants for admission to practise law in Australia;
- appraising the suitability of subjects offered by tertiary courses in law, in order to satisfy the national academic and practical training requirements developed by the Council.<sup>336</sup>

2.36. The Consultative Committee stated that the National Appraisal Council's 'primary function would be "to advise and make recommendations to" the admitting authority in each jurisdiction, in relation to each of those matters'. However, 'if necessary', the Council's decisions should be given binding force.

Because of the peculiar difficulties which have prevented national standards being uniformly applied in the past, there must be fail-safe mechanisms which, if necessary, can be triggered to ensure that each jurisdiction complies with, and applies, standards determined by the Council.<sup>337</sup>

2.37. The suggested composition of the National Appraisal Council was

- a President, appointed by the Council of Chief Justices
- 8 representatives, drawn from each admitting authority, nominated by the relevant Chief Justice
- 3 persons nominated by the Law Council of Australia
- 2 representatives nominated by the Council of Australian Law Deans
- 1 representative nominated by the Australasian Practical Legal Education Council
- 1 representative nominated by SCAG
- 1 other 'eminent person' nominated by SCAG.

2.38. The Consultative Committee's proposal noted that, realistically, a Council of this size and composition could only afford to meet two or three times per year, so that day-to-day management would have to be vested in an Executive Committee with substantial discretion.<sup>338</sup>

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335. *ibid.*

336. *id.* 1.

337. *id.* 2.

338. *id.* 4. It is proposed that the Executive Committee be comprised of 'not less than three and not more than five persons, appointed by the President of the Council of Chief Justices, after

2.39. It is notable that where CALD was concerned about the level of academic participation (4 of 11 members) in the Blueprint's proposal for national appraisal of legal education, the Consultative Committee's proposal would reduce this further to 2 of 17 members. The Law Council's submission in response to DP 62 suggests that<sup>339</sup>

(i) In preparing the proposal for the National Appraisal Council and considering its composition, the Law Council and the Priestley Committee followed the model for a 'good practice' course review and accreditation process set by the Higher Education Council. In its publication *Professional education and credentialism*,<sup>340</sup> the Higher Education Council stated that, in its view, the model should include all stakeholders.<sup>341</sup>

2.40. However, while the proposal lists most of the key 'stakeholders', it omits others (for example, law students,<sup>342</sup> and the Department of Education, Training and Youth Affairs (DETYA)), and heavily skews the balance.

2.41. By way of comparison, in 1993, the American Bar Association's (ABA) 18-member Accreditation Committee, drawn from 11 states and the District of Columbia,<sup>343</sup> was comprised of 10 legal academics (including four law deans and the chair); 3 judges; 2 officials involved in the setting and administration of State bar examinations; 2 public (lay) representatives and 1 practitioner. The ABA balance is clearly drawn in favour of those with special or hands-on expertise in legal education, while recognising the value of professional, judicial and community perspectives.

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consultation with the President of the National Appraisal Council', from a list of members of Council who make themselves available for this purpose.

339. Law Council *Submission 375*.

340. National Board of Employment, Education & Training, Higher Education Council *Professional education and credentialism* AGPS Canberra 1996.

341. *id.* xii.

342. Australian Law Students' Association *Submission 346*.

343. Some States have additional representatives, for example, California 4, New York 2, and North Carolina 2.

2.42. In England and Wales, the Lord Chancellor's Advisory Committee on Legal Education and Conduct was established<sup>344</sup> in 1990 with a general duty<sup>345</sup> to assist in the maintenance and development of standards in the education, training and conduct of providers of legal services, and to keep under review, and advise upon, legal education. The Advisory Committee – which was notable for its lay majority – consisted of a Chairman, who was a Lord of Appeal or a Supreme Court judge, and 16 others appointed by the Lord Chancellor, including a Circuit judge; two practising barristers appointed after consultation with the General Council of the Bar; two solicitors appointed after consultation with the Law Society; two law teachers, appointed after consultation with the relevant institutions; and nine persons *other than* judges, barristers, solicitors and law teachers, appointed for their experience in, or knowledge of, the provision of legal services, the working of the courts, social conditions, consumer affairs, commercial affairs, or the maintenance of professional standards in professions other than law.

2.43. In late 1999, the Advisory Committee was abolished<sup>346</sup> and replaced by the Legal Services Consultative Panel,<sup>347</sup> with a similar array of responsibilities in relation to legal education and training. All members of the Panel are now appointed by the Lord Chancellor, who is directed only to the 'desirability' of ensuring that the Panel

- includes persons who (between them) have experience in or knowledge of –
- (a) the provision of legal services;
  - (b) the lay advice sector;
  - (c) civil or criminal proceedings and the working of the courts;
  - (d) legal education and training;
  - (e) the maintenance of the professional standards of persons who provide legal services;
  - (f) the maintenance of standards in professions other than the legal profession;
  - (g) consumer affairs;
  - (h) commercial affairs; and
  - (i) social conditions.<sup>348</sup>

Again, the contrast with the Consultative Committee-Law Council proposal is stark.

2.44. The Consultative Committee also proposed that the Commonwealth and the States and Territories share the costs of meetings of the Council and the Executive Committee, with the remainder of the Council's operations funded from

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344. Under the *Courts and Legal Services Act 1990* (UK) s 19. The Advisory Committee replaced the non-statutory Lord Chancellor's Advisory Committee on Legal Education, established in 1971 following the Ormrod report.

345. *Courts and Legal Services Act 1990* (UK) s 20.

346. By the *Access to Justice Act 1999* (UK) s 35.

347. *Courts and Legal Services Act 1990* (UK) s 18A, inserted by the *Access to Justice Act 1999* (UK) s 35.

348. *Courts and Legal Services Act 1990* (UK) s 18A(2).

- admission registration fees, collected by each admitting authority;
- fees for assessing the qualification of overseas applicants, collected by each admitting authority; and
- fees for appraising the subjects in law courses, collected from law schools.<sup>349</sup>

2.45. Despite the prior adverse reaction to the lack of any consultative process in the formulation of the Law Council's Blueprint, the Consultative Committee made no effort to include CALD or the law school community in the development of its proposal for a National Appraisal Council, nor was CALD notified formally about such a proposal being put to SCAG.

2.46. In the event, SCAG rejected the proposal.<sup>350</sup> The Commission understands that the Attorneys-General expressed serious reservations, on the grounds that

- the proposed appraisal body was decidedly unrepresentative
- statutory powers were sought, when SCAG would prefer an advisory role
- while States and Territories are happy to participate in a cooperative regime to achieve greater consistency and uniformity, the proposal would interfere with the right of States and Territories to control their own professions, and there is no imminent prospect that States and Territories would concede the right to operate their own admitting authorities
- as a matter of access and equity, no higher barriers than already exist should be placed on entry into the legal profession.

2.47. Nevertheless, the Consultative Committee's submission to this inquiry reports that '[w]hile the idea has receded it has not been abandoned', and that 'the Council of Chief Justices ... remains firmly supportive of the proposal for a National Advisory Council of the type advocated in the joint proposal of 1997'.<sup>351</sup>

2.48. It is notable that the Consultative Committee's recitation of the problems in the existing system (based upon NACLEPA's perceptions) – and thus the mischief to be remedied by the establishment of a National Appraisal Council – was expressed entirely in terms of the shortcomings and difficulties of admitting authorities (inconsistent interpretation and application of standards, 'perfunctory and superficial' appraisal of law courses, inability to assess effectively overseas qualifications).<sup>352</sup> Thus, SCAG's conclusion was that, if there are significant problems with the way admitting authorities are operating, this would be best

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349. Consultative Committee Proposal 4.

350. Letter from Mr Laurie Glanfield, Secretary to the Standing Committee of Attorneys-General, 21-April 1998, to the Consultative Committee and Law Council, advising them of the outcome of their proposal.

351. Law Admissions Consultative Committee *Submission 384*.

352. Consultative Committee Proposal 2.



addressed by forging greater cooperation and consistency among the admitting authorities, such as by way of improved information sharing.

***The American Bar Association accreditation process in the United States***

2.49. A national accreditation scheme has operated in the United States since 1921. Separate, comprehensive accreditation standards are promulgated by the ABA and the Association of American Law Schools (AALS), although there is not a great deal of difference between the two in practice. The AALS standards place more emphasis on scholarship and teaching issues; the ABA standards are somewhat more detailed on issues of resources and administration/management. Taken together, there are many hundreds of pages of standards, guidelines,

interpretations and examples.<sup>353</sup> It is important to note that, notwithstanding the comprehensive nature of these standards in many areas, they do not intrude in any way into the content of the law degree (overall, or with respect to individual subjects), a matter which is left entirely to the judgment of law schools. However, the system of State bar examinations has some influence on curriculum decisions, and certainly influences student choice of subjects.

2.50. Every accredited law school (including those provisionally accredited) must annually complete and file a lengthy questionnaire covering all aspects of the accreditation standards. The initial accreditation process involves a rather close and continuing scrutiny of the law school by a visiting panel drawn from the larger ABA Accreditation Committee. (As a matter of practice, the Visiting Panel is usually a joint ABA/AALS panel, which assesses for accreditation and membership, in order to avoid unnecessary duplication). Established law schools only receive the general panel visit every seven years (although there may be more particularised visits, such as those which focus on clinical education). Panel visits take 1 to 2 days, and involve inspections of facilities and programs as well as extensive interviews with students, graduates, academic and general staff, and senior law school and university administrators.

2.51. It should be noted that ABA accreditation is not a prerequisite for admission purposes in the United States, although it may be influential. Each admitting authority makes its own decisions about the accrediting of degree programs. In California, for example, there is a three-tier system: ABA-accredited law schools effectively receive automatic State recognition; other law schools may apply for State accreditation and recognition; and even unaccredited law schools are permitted to operate, although their students must pass a special preliminary examination (the so-called 'Baby Bar') before they are permitted to undertake the State bar examination, which determines admission to practice. Graduates of non-accredited law schools are disadvantaged in terms of interstate and reciprocal admissions, however, since the rules relating to admission of out-of-state lawyers generally favour graduates of ABA-accredited institutions.

2.52. Apart from routine acceptance for admission purposes, ABA accreditation has other benefits, of course — prestige, ready transferability of academic credits, and so on. Virtually every 'serious' new law school seeks provisional, and then craves full, accreditation, and every accredited law school would be mortified about any threat to this status. The AALS scheme is voluntary, and relies entirely on the 'prestige of membership' to attract members and enforce its standards.

2.53. There is evidence of some dissatisfaction with, and some controversy attached to, the ABA system. Many of the leading law schools see the process as

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353. There are currently 176 ABA-accredited law schools, of which 159 are also members of AALS.

unduly time consuming, overly prescriptive and unnecessarily intrusive into matters of academic policy, while delivering them few real benefits. Many of the newer or less elite law schools feel themselves to be in a state of continuous jeopardy, and to be unable to set their own priorities or to carve out their own niche in the educational marketplace. However, there is a substantial middle core of American law schools generally in favour of reforming and retaining the system.

2.54. In 1994 the ABA formed a special commission (the Wahl Commission) to study the accreditation process and standards.<sup>354</sup> It is understood that the Commission is revising the standards to make them less intrusive,<sup>355</sup> and to intensify the focus on institutional self-review, rather than on the external panel assessment.

### *The Canadian position*

2.55. There is no national accreditation system for law schools in Canada, nor is there any regulation of the content of a law degree. This is instructive, since Canada is far closer to Australia than is the United States in terms of the number of law schools and law students; the number of jurisdictions in the federal system; the public-private balance; the fee structure and resource base of universities; legal culture and the traditions of legal practice, and so on. Professor Jeremy Webber suggests that

This system, though ostensibly unregulated externally, still produces people who have a broad background in law, who take professional values seriously, and who are fully prepared for, for example, a high-powered commercial practice.<sup>356</sup>

2.56. Webber notes that there are sufficient 'incentives within the system for taking breadth of preparation seriously', including market pressures, the professionalism and professional identification of law teachers, and student demands, such that 'the decisions one gets from a lightly regulated system are no

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354. The deans of 14 'elite law schools', such as Harvard, Yale and Stanford, wrote a letter to all of the other American law deans, calling into question the nature and value of the ABA accreditation system. The arguments, essentially, were that the system is 'too inflexible'; too time consuming; 'overly intrusive' into matters of internal administration; 'concerned with details at odds with quality'; and demands too great a degree of conformity, resulting in a depressing homogeneity and a lack (indeed a suppression) of creativity and diversity.

355. In 1993, a new law school (Massachusetts Law School, established 1988) which had been denied accreditation filed suit against the ABA for anti-trust violations (restrictive trade practices), and challenged the US Department of Education's official certification of the ABA standards and processes. The US Department of Justice also launched an investigation into the ABA's accreditation process. The suit and investigation were settled out of court, with the ABA agreeing to eliminate some of its resource based standards, such as those which prescribed minimum salaries for law professors and deans.

356. J Webber *Submission 334*.

worse than those generally imposed externally, and indeed they may be less prone to the pitfalls of rule-making by anecdote and hazy nostalgia'.<sup>357</sup>

*Comparisons with the Australian position*

2.57. Any consideration of the adoption of an accreditation system along the lines operated in the United States must recognise the very important differences between our systems of legal education. These include

- the much larger number of law schools in the United States (176-ABA-accredited, with many hundreds more which are partially-accredited or non-accredited)
- the larger number of separate jurisdictions (50 States, plus Territories) and, thus, admitting authorities
- the greater mobility of American law students and lawyers, which means admitting authorities are regularly faced with making decisions about interstate qualifications
- the existence and influence of State bar examinations (and the absence of any PLT requirements)
- the much larger number and proportion of private law schools, and the relative ease with which 'universities' and 'law schools' can be established, without the need for legislation and
- the vastly greater resource base of American law schools (both public and private), which charge substantial tuition fees, have large endowments, and receive tremendous support from alumni and benefactors.

2.58. These circumstances may militate in favour of a formal, national accreditation system in the United States. There is little quality control over higher education or legal education at the State or Territory level in the United States, and even less at the national level. It would be very difficult for each jurisdiction to maintain familiarity with the plethora of law schools in the various States and Territories.

2.59. At the same time, the sheer size of the 'system' of American legal education delivers the economies of scale and the resources necessary to run an effective accreditation process.<sup>358</sup> Finally, American law schools are in a position, within reason, to address resource-sensitive accreditation concerns by seeking additional resources from the State legislature (for many public law schools), by increasing their tuition fees (for public and private law schools) and by calling for additional alumni support and corporate sponsorship (again, for all law schools).

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357. *ibid.* R Simmonds *Submission 301*, urged the need for research to 'replace standard setting by anecdote'.

358. Indeed, as described above, there are effectively two, operated by the ABA and AALS.

2.60. The position in Australia is different in almost every respect.<sup>359</sup> Here, we have

- law primarily as part of an undergraduate (usually combined) degree program – and thus Australian law schools have a somewhat broader ‘liberal education’ mission than American graduate law schools, which are more narrowly oriented towards ‘professional’ preparation
- a relatively smaller number of law schools (even if growing), which are much less able to remain ‘anonymous’ in the student/consumer or professional marketplace
- only two private law schools
- a unified national system for the public universities, which is fully accountable to the federal bureaucracy (DETYA), and subject to periodic reviews and quality assurance processes
- only eight state and territory admitting authorities

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359. Given the ABA’s requirements for substantial recurrent financial resources (for example, ABA Standard 201(b) – Adequate resources), large libraries, and other expensive programs and facilities, very few, if any, Australian law schools – even the longest established and best funded by local standards – would be likely to gain ABA accreditation.

- PLT requirements, but no bar examinations, prior to admission
- limited financial support from law school alumni and from the legal profession generally
- low levels of mobility, still, among admitted lawyers, and especially among students
- a federally funded system, with virtually no contribution from the States to legal education (whereas State Departments of Health are more involved in medical schools, through clinical programs and teaching hospitals)
- less autonomy over tuition fees (none in the case of Higher Education Contribution Scheme (HECS) students, who are the vast majority of LLB students)
- a sizeable proportion of law students enrolled in university law courses do not intend to practice law
- a sizeable proportion of intending legal practitioners who are enrolled in non-university law courses (for example, through the NSW Legal Practitioners Admission Board).<sup>360</sup>

*Advantages and disadvantages of formal, national accreditation*

2.61. Assuming that a National Appraisal Council could be constituted with suitable membership, reasonable terms of reference, and an adequate budget, the benefits which might flow from national accreditation include<sup>361</sup>

- the promotion of a truly national legal profession
- a measure of quality assurance for legal education
- greater inducement for law schools to engage in regular self review, in anticipation of external review
- possible leverage for law school deans with university administrations over resources,<sup>362</sup> although in competition with heads of many other programs subject to external accreditation

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360. Entry entirely by apprenticeship (articles) may now be rare, but it is still possible in some jurisdictions. In New South Wales, entry via the Admission Board course is not only still possible, but the numbers are large. According to the Centre for Legal Education, there are over 4000 'students-at-law' registered with the Admission Board, of whom over 3000 appear to be 'active'. This nearly matches the total of all university LLB students in NSW.

361. See E Clark and M Tsamenyi 'An Australian perspective on the promises and pitfalls of law school accreditation' in P Birks (ed) *Reviewing legal education* Oxford University Press 1994, ch 5, 47-59.

362. For example, DETYA statistics for university funding, released on 7 September 1998, indicate that the Base Operating Grant per Planned EFTSU (equivalent to a full-time student unit) in 1998 was \$11 197. However, after internal distribution within universities, only the best funded law schools get about \$5000/EFTSU, with many given the 'marginal cost' sum of \$2300. Accredited American law schools would operate on at least five times this amount (not taking into account exchange rate differences), and elite law schools on at least ten times this amount. For a general discussion of funding differentials, see G Moodie 'Let's keep status in proportion' *Australian* 14 October 1998. Law is nevertheless placed in the highest band for HECS liability and repayments, together with

- the creation of opportunities for professional and community involvement in legal education.

2.62. However, national accreditation systems of the sort proposed by the Consultative Committee or the Law Council would have a number of significant disadvantages. Such systems could

- discourage diversity and innovation, and tend to be self replicating (that is, entrenching a status quo)
- lead to greater external (judicial and professional) dominance over university law schools, endangering academic freedom
- encourage the establishment of a more narrowly vocational paradigm of legal education and
- result in significant extra work and costs for law schools, simply in order to comply with reporting requirements.

### **Reactions to the Commission's discussion paper**

2.63. Reactions to proposal 3.1 of DP 62 were mainly favourable. However, as detailed below, the views expressed about the nature, composition, and functions of an Australian Council on Legal Education were contradictory – and to a large extent mutually exclusive – such that the Commission feels unable to make a positive recommendation at this time. Instead, the Commission believes that the major stakeholders need to do a great deal more planning, and full consultation should take place, before a system can be established which will produce the desired results in the public interest, and have the confidence of all of the key participants.

2.64. There was cautious support from legal academics for a national authority which would set minimum standards – but concern over the composition of such a body, and its working assumptions about the way legal education in Australia should develop. At its meeting in Canberra on 8 October 1999, CALD passed a resolution in the following terms

The Deans support the establishment of an appropriately funded national body that would promote innovation, diverse scholarly and high-quality legal education, and on which the Deans are significantly represented.

In commenting on this resolution, the then convenor of CALD, Professor Paul Redmond of the University of New South Wales, was quoted as saying that if a new body such as the one the Commission floated in DP 62 was established, it

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the expensive clinically based programs in medicine, dentistry and veterinary science. In 2000, full time law students will attract a HECS liability of \$5772 per year.

could 'reconsider the approach taken in the 11 Priestley areas of knowledge for legal education'.<sup>363</sup>

2.65. Professor Andrew Stewart of Flinders University, a former convenor of CALD and a founding member of NACLEPA, also envisaged this sort of role for a national body in his submission.

There is an urgent need to review the scope and purpose of legal education in this country, to determine what kind of training a practising lawyer needs and whether that training should be broken down into distinct 'phases', and to set appropriate minimum standards for education and training programmes. In so small a country (in terms of population and size of economy), and with provision now for mutual recognition of qualifications and the 'portable' practising certificate, it is imperative that this task be undertaken at a national level.

It is also imperative that any review of legal education and ongoing development of standards be a matter for a body that is much more broadly constituted than the existing Consultative Committee of State and Territorial Admitting Authorities (the 'Priestley Committee'). That committee, which (as far as I am aware) is still composed entirely of judges and hence is not even representative of the variously constituted admitting authorities, has shown no inclination to conduct the kind of wide-ranging reconsideration of legal education requirements that is plainly called for by developments over the past two decades. As the Discussion Paper correctly points out, its prescriptions for undergraduate education (the 'Priestley Eleven') are outmoded, and in my opinion have severely and unnecessarily constrained the capacity of Australian law schools to engage in innovative curriculum development. As for the standards it has set in relation to practical legal training (the 'Priestley Twelve'), they have certainly not been uniformly applied and, like their 'academic' counterparts, put too much emphasis on (quickly outdated) knowledge of rules and procedures as opposed to generic skills. There is a pressing need to rethink these standards, and the body to do it will need members with both substantial and varied experience and expertise in legal education and training.

[In relation to] the aforementioned Priestley 11 ... any new standards must (a) move away from the traditional preoccupation with stipulating areas of knowledge as opposed to areas of competence; and (b) reflect the realities of the kinds of work which lawyers actually perform, including of course methods of dispute resolution other than litigation.<sup>364</sup>

2.66. Professor Stewart does, however, agree with the Consultative Committee's approach to the limited extent that the establishment of a national council by way of an inter-governmental agreement would be desirable.

It is possible (indeed I would say sensible) to envisage a division of responsibility whereby the proposed Council formulated the necessary standards and the local admitting authorities applied them, retaining responsibility for accrediting programmes and determining the suitability of individual applicants for admission. Advice given to

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363. P Lawnham 'Law deans aim nationally' *Australian* 13 October 1999.

364. A Stewart *Submission* 32.



the National Advisory Committee on Legal Education and Professional Admission, which essentially adopted this model, suggested that the States and Territories could conclude a formal agreement with the Commonwealth both to establish the proposed national body and to implement its recommendations. The value of proceeding by inter-governmental agreement would be that the new system could be implemented without any need to wait for legislation in each jurisdiction, while ensuring that the new national standards were actually adopted.<sup>365</sup>

2.67. Similarly, Professor Neil Rees, Foundation Dean of Law at the University of Newcastle, wrote

The extraordinary growth in the number of law schools since the Pearce Report and the Dawkins reforms — 16 new law schools in a decade — has produced competition and the desire for a distinct identity. As a result we have seen greater diversity in the nature of the law degree with conspicuous features being a stronger vocational emphasis, a broader range of combined degree programs, institutional emphasis upon particular areas of law, growth in clinical legal education programs, more skills training and genuine attempts to integrate both academic and practical training, as well as education in law and related disciplines.

Our conservatism and complacency, which are fuelled in large part by high student demand for our courses and high employer demand for our graduates, coupled with the low funding of law compared to other disciplines, have meant that we have probably paid less attention to the nature of our courses than our colleagues in many other fields.

Until we wrestle control of the content of the law degree away from the judiciary and establish a working partnership with all relevant stakeholders innovation will be stifled. We would do well to remember the exhortation of ... a decade ago, that what is needed [in Australia] is<sup>366</sup>

a legal education that is both far more theoretical and more practical than is presently envisioned anywhere in the Anglo-American legal world. Such education will find real legal theory and clinical legal education central to legal study.<sup>367</sup>

2.68. Professor Ralph Simmonds, Dean of Law at Murdoch University and another former convenor of CALD, submitted that a national coordinating body (such as ACOLE) would be desirable to undertake research towards the development of 'a world class legal education system' for Australia, but it should not itself be a national accreditation authority for legal education providers.

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365. *ibid.*

366. N Rees 'The nature and purpose of the law degree' *Paper* Global legal education: An Anglo-Australian virtual conference 13 October 1999, 24–25. The conference was sponsored by the British Council, Australia, the Centre for Legal Education, Australia, the Law Foundation of NSW, and the College of Law of London. For a discussion of the conference see Law Foundation of NSW (Spring 1999) 4(3) *Newsletter* 4 and <<http://lawfoundation.net.au/cle/nswlec.html>> (17 January 2000).

367. J Schlegel 'Legal education — More theory, more practice' (1988) 13 *Legal Service Bulletin* 71, 73, quoted in D Weisbrot *Australian lawyers* Longman Cheshire Melbourne 1990, 136.

Rather, this body should supplement the work done by the existing State and Territory admitting authorities.<sup>368</sup>

2.69. By way of contrast, the submission from the Law Council reaffirmed its commitment to the 1997 joint proposal with the Consultative Committee which was rejected by SCAG.

The Law Council also supports the establishment of an Australian Council on Legal Education or similar body so long as it has the functions and role as proposed by the Law Council with its National Appraisal Council.

The Law Council does not support the establishment of an *advisory body*, to be known as the Australian Council on Legal Education, under the control of the federal Attorney-General.

The Law Council does support the establishment of a *determinative body* on legal education and training. In a joint submission in 1997 to the Standing Committee of Attorneys-General, the Law Council and the Priestley Committee proposed the establishment of a National Appraisal Council.

Although the joint proposal was rejected by SCAG, the Law Council remains committed to the establishment of the National Appraisal Council or similar body which has more than an advisory role.

The Commission's proposal does not acknowledge the necessity for developing and applying standards for the admission of overseas applicants. With the development of the national legal services market in Australia, it is essential that consistent standards be applied throughout Australia to ensure that foreign qualified lawyers are not able to be admitted in the jurisdiction with the least demanding admission standards and then be able to be admitted into every other jurisdiction, through the mutual recognition scheme.

It is essential that a national body undertakes some form of accreditation of tertiary law school courses in a consistent and objective manner to ensure that graduates completing different university courses are not able to be admitted throughout Australia by first being admitted in the jurisdiction which has the least demanding admission standards. A body such as the National Appraisal Council would set and enforce rules regarding accreditation to ensure high standards throughout Australia. ...

In summary, the Law Council and Priestley Committee proposal for a National Appraisal Council goes much further than the Commission's proposal for an Australian Council on Legal Education. The Law Council recognises that an overriding body is needed to set rules, and not be merely an advisory body. If there is no such central body with the authority to set and enforce rules, the current situation, which is sought to be remedied, namely a fragmented and inefficient system, will be perpetuated.<sup>369</sup>

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368. R Simmonds *Submission 301*.

369. Law Council *Submission 375*.

2.70. The submission of the Federal Court, while supporting the Consultative Committee's approach, noted the need for greater cooperation between legal academics and the profession in ensuring high and appropriate standards of education for intending practitioners.

The problems dealt with [in the relevant sections of DP 62] are not new, although, for a number of reasons some may now be more serious or more complex. Among the reasons are (i) the dramatic, and questionably desirable increase in the number of Law Schools over the last decade with the corresponding concern as to possible deficiencies in the quality of academic training that may be being provided in some Schools; (ii) the increasing number of university law students who do not intend to enter professional practice; and (iii) the abandonment in some, but not all, jurisdictions of the system of articles as a means of acquiring recognised professional legal training for admission.<sup>370</sup>

2.71. After referring to the Council of Chief Justices-endorsed 'Academic Requirements for Admission' (the Priestley 11) and the 'Practical Legal Training Requirements' (the Priestley 12), the Federal Court raised a number of questions about the future of legal education in Australia.

(i) To what extent should 'practice skills' related subjects be either integrated into mainstream law school curricula without the assurance of appropriate and effective participation in that teaching by legal practitioners or be kept in the province of the profession without the assurance of appropriate and effective academic participation? This is an area where cooperation between the profession and universities seems desirable. These comments are made for the purpose of highlighting that significant aspects of practice skills are themselves the subject of academic study and expertise; practitioners are not, as of course, effective teachers; and there are aspects of skills training more likely to be more effectively provided in some cases by practitioners, and in others by academics and this is irrespective of whether the course in question is being provided by a university.

(ii) To what extent will devolution of such teaching to undergraduate education crowd law courses which are already under stress? ... Law school curricula and teaching presently are under a great deal of pressure, largely (though not exclusively) because of the demands made by the federal government. To prescribe additional skills courses in the LLB degree as de facto prerequisites for admission could well be at the expense of the analytical and conceptual bases of [a] law course. This would be a real cause of concern.

(iii) Who is to finance additional skills training? If such training is devolved to universities without financial supplementation, significant objections could be made to it. This funding question cannot be taken lightly, given the current plight of law schools.

... Why, instead of setting up such a body [ACOLE], should not the 'Priestley Committee' be further evolved and enhanced for the purpose.<sup>371</sup>

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370. Federal Court *Submission* 393.

371. *ibid.*

2.72. The submission from the law firm Freehill Hollingdale & Page supported a national body.

[DP 62] makes a cogent case for the establishment of an Australian Council on Legal Education which would be charged with developing model standards for legal education and training for lawyers and other key participants in the justice system. The rapid expansion of legal education imposes stress on institutions and academics who, in the context of dwindling resources, are barely able to discharge their immediate task of dealing with the increasing numbers of students. They are certainly not able to reflect in any sustained way on the future development of legal education. Nor are they able to see clearly the effect of the compromises which inevitably they have to make in these circumstances.

Therefore we support proposal 3.1. In addition to the arguments put forward by the Commission we stress the following advantages:

1. In tight economic times when, as the Report indicates, legal education is being run on the cheap, the standards promulgated by an independent and respected body would give law faculties and other teaching institutions some ammunition to use against their own institutions and would give the institutions some ammunition to use against governments and funding authorities.
2. There is a tendency for legal education to be merely reactive or haphazard. The competing demands for strictly legalistic education which concentrates on 'black letter' law training and for a theoretical and policy oriented approach which ignores the need for students to acquire practical skills and a substratum of essential knowledge leads almost inexorably to mediocrity. An independent and respected body may be able to ameliorate this tendency.<sup>372</sup>

2.73. Philip Greenwood of the Sydney Bar, who has a long involvement with legal education, suggested that such a Council would have difficulty in facilitating change — 'which is really its central role' — unless its structure and operation were different from the usual models. Greenwood suggested that the selection of members at its inception would be critical to the success of the Council, both in terms of the quality of its work and its acceptance. Greenwood shared the Commission's concerns about a body comprised largely of organisational representatives.

With some exceptions, the approach of inviting delegates seems to ensure that very little occurs. It is just not possible for every organisation to be 'represented' on such a Council. It is very difficult to find a way to appoint the members of this Council so as to ensure that the members will be well qualified and well respected as well as willing and able to get across the broad issues and participate in wide ranging discussions, leading to a consensus and recommendations. I suspect you will need a tactful, hard working visionary who can enlist support in a variety of different disciplines within and beyond the legal education family. ... The operation of the Council would need to be extremely

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372. Freehill Hollingdale & Page *Submission* 339.

flexible to avoid it becoming hide bound with formalities and paper work. It will need to be looking at the big picture.<sup>373</sup>

### The Commission's preferred approach

2.74. As the foregoing material suggests, there is a disjunction between the prevailing academic view and that of the profession and the judiciary (as represented by the Law Council and the Consultative Committee). Legal educators would welcome a national authority, but want to see that it has a significant representation of academics and a reformist agenda (which includes replacement of 'the Priestley 11' with a better conceived and more appropriate set of standards).

2.75. It is disappointing that the relationship between the legal profession and the legal academy – which, in 1987, the Pearce report described as 'uneasy',<sup>374</sup> and the law deans said 'contains an element of tension'<sup>375</sup> – has not been advanced by this time, and that a more consultative and respectful approach has not yet developed.<sup>376</sup> For the same array of reasons that SCAG rejected it, the Commission does not favour, in its present form, the proposal made by the Consultative Committee and the Law Council for a National Appraisal Council.

2.76. The Commission believes that, in the medium to long term, the public interest may be better served by the establishment of a body which sets (appropriately high) national minimum standards for legal education. Once developed, such standards should be accorded great weight in determining whether a degree from a particular institution will be accepted for admission purposes. The formal auditing and accrediting process should remain at the State and Territory level. This would in no way imperil the emerging system of mutual recognition and uniform national admission. Admitting authorities surely should be able to trust each other to monitor effectively the standards of law schools within each jurisdiction, with automatic and reciprocal effect given to State and Territory accreditation. This would make for a far less cumbersome, protracted, expensive and intrusive system, would allow for greater participation and representation within each jurisdiction, and would accord with virtually all of the

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373. P Greenwood *Submission 303*.

374. Pearce report 991.

375. Statement of Australian Law Deans, appendix 3 of the Pearce report para 71.

376. See D Weisbrot, 'Competition, cooperation and legal change' (1993) 4 *Legal Education Review* 1, especially 16–27. Unfortunately, the position in England may not be greatly different: see P Birks 'The academic and the practitioner' (1998) 18 *Legal Studies* 397. Although there is tension between legal academics and the judiciary over the particular issue of accreditation, this is not necessarily symptomatic of the general relationship, which has warmed in recent times. Academic writing is now much more widely cited by the courts, for example, and there is much greater acceptance of the appointment of academics to the judiciary – still somewhat more common in the federal courts and tribunals than at State and Territory level. A number of judges also have connections with law schools as members of faculty boards or advisory boards, or as occasional lecturers.

other regulatory processes in operation in respect of the legal profession in Australia.

2.77. However, the major stakeholders must work together constructively and develop a sense of commonality of interests. Until such time as this eventuates, and in order to promote conditions which might facilitate this cooperative approach, the Commission has replaced its proposal 3.1 (for an ACOLE) with a suite of recommendations, which involve

- the encouragement of an emphasis upon legal ethics and high order professional skills, without derogating from the responsibility law schools have to provide students with a grounding in substantive law
- the introduction of a regime for quality assurance in Australian law schools
- another national discipline review, to update and build upon the Pearce report
- the establishment of an Australian Academy of Law
- an approach which permits diversity in the delivery of PLT programs and
- ensuring the participation of practitioners in approved, high quality professional development programs.

#### *Increased emphasis on broad professional skills development*

2.78. As discussed in DP 62,<sup>377</sup> the traditional law school focus on developing analytical skills through a close reading of cases and statutes in subjects organised around bodies of substantive law is increasingly being supplemented by teaching<sup>378</sup> in areas of dispute resolution,<sup>379</sup> advocacy, fact finding, client interviewing (that is, communications), negotiation<sup>380</sup> and drafting — all areas which also are replete with difficult ethical dilemmas for practising lawyers. This teaching need not be limited to separate subjects — some of the best skills teaching occurs in context, within substantive units.<sup>381</sup> For example, the law of contracts

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377. ALRC DP 62 para 3.17-3.43.

378. See J Goldring et al (eds) *New foundations in legal education* Cavendish London 1998; M Le Brun and R Johnstone *The quiet revolution: Improving student learning in law* Law Book Co Sydney 1994; E Clark *Submission* 333.

379. See H Astor and C Chinkin *Dispute resolution in Australia* Butterworths Sydney 1992; C Brabazon and S Frisby 'Teaching alternative dispute resolution skills' in C Sampford et al (eds) *Educating lawyers for a less adversarial system* Federation Press Sydney 1999, 156; R Calver 'The teaching of commercial alternative dispute resolution: Problems and opportunities' (1995) 12 *Journal of Professional Legal Education* 113; and C Menkel-Meadow 'To solve problems, not make them: Integrating ADR in the law school curriculum' (1995) 46 *Southern Methodist University Law Review* 199.

380. See M Galanter 'Worlds of deals: Using negotiation to teach about legal process' (1984) 34 *Journal of Legal Education* 268.

381. See C Menkel-Meadow 'Can a law teacher avoid teaching legal ethics?' (1991) 3 *Journal of Legal Education* 3.

provides opportunities for skills development in negotiation and drafting, and for contemplating the ethical considerations involved in negotiations. Teaching

good corporate lawyering, while not sufficient to ensure good corporate citizenship, can help equip our graduates to be effective not only at best-practice advising, planning and advocacy for corporate interests, but also at doing so reflectively and responsibly.<sup>382</sup>

2.79. The Commission is aware of the resource intensive nature of professional skills training, which generally requires ‘small group teaching’ to be effective. Greater financial support from the profession, alumni and government is needed to make this more achievable. Nevertheless, it is apparent from university handbooks that most (if not all) Australian law schools already share some commitment to advancing this approach – but much can and should be done.<sup>383</sup>

2.80. In order to assess progress in this area, law schools should make explicit the nature and extent of their skills development programs (whether as separate units, as modules within substantive units, or in clinical programs), and how they examine these skills.

2.81. In calling for greater attention to be paid to broad, generic professional skills development, the Commission does not seek to minimise the need for students to receive a solid grounding in core areas of substantive law, the historical organisation (and divisions) of the common law system, the language and key concepts of core areas of law, and the nature of the relationships as between the state, the courts and the individual.<sup>384</sup> As stated in DP 62, the Commission

does not wish to perpetuate a false polarity between substantive knowledge and professional skills. It is obviously important to provide law students with a basic grounding in the major areas of substantive law, especially ‘building block’ areas such as contracts and public law, and to acquaint them with how these areas developed over time – that is, to provide an appreciation of the common law method. Nor is it possible to teach legal professional skills effectively in a substantive vacuum, or in manner which does not promote intellectual analysis and reflection on law as an art and a social science as well as a technical or professional service.<sup>385</sup>

2.82. What the Commission does wish to see, however, is a move away from a solitary preoccupation with the detailed content of numerous bodies of substantive

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382. C Parker and P Redmond ‘Teaching good corporate lawyering’ (1999) 3 *Flinders Journal of Law Reform* 97. See also J von Doussa ‘Corporate law teaching and professional standards’ (1999) 3-*Flinders Journal of Law Reform* 119.

383. See for example A Goldsmith ‘Heroes or technicians? The moral capacities of tomorrow’s lawyers’ (1996) 14 *Journal of Professional Legal Education* 1 and R Granfield *Making elite lawyers: Visions of law at Harvard and beyond* Routledge New York 1992.

384. C Roper *Submission 313* noted the joint statement of the Law Society of England and Wales and the General Council of the Bar on the need to maintain the ‘foundations of legal knowledge’.

385. ALRC DP 62 para 3.24.

law, which is essentially the position taken by the 'Priestley 11' requirements.<sup>386</sup> For one thing, this approach makes it difficult to agree upon a set of 'core' areas of substantive law. There is little doubt that the core must include constitutional law, criminal law, contract, torts, and property law. Some generations ago administrative law was barely recognised and conveyancing was a staple of the profession. Some important and high profile areas — such as family law, environmental law, taxation and trade practices — are popular with students, but are rarely compulsory in law schools. Globalisation suggests that public international law and conflicts of law (private international law) could be seen as within the modern 'core', but few law schools make these compulsory.<sup>387</sup> In the United Kingdom, a recent joint statement by the Law Society and Bar Association (awaiting the approval of the Lord Chancellor) emphasised the importance of intellectual lawyering skills, and listed only about a half-dozen 'core areas of knowledge', including European Community Law.<sup>388</sup>

2.83. Second, a requirement that students must 'master' (or least 'know') large bodies of substantive law ignores the stark reality that this substance changes dramatically over time — sometimes in a very short time. Where once it was possible to trace the slow and careful development of the common law, and identify with either the 'bold' or 'timorous' judges of the English superior courts, Justice Paul Finn has described Australians as 'born to statutes'.<sup>389</sup> Justice Michael McHugh has noted that

[l]egislation is the cornerstone of the modern legal system. For a long period in the history of the Anglo-Australian legal system, the rules of the common law, as modified by the great system of equity jurisprudence, were the basic instruments of public and private law. But throughout this century, successive Parliaments have legislated to control more and more social and economic conduct. As a result, the rules of the common law and equity are constantly being modified by statute law. The growth of legislation appears to have reached almost exponential levels. However, the increase has not been so much in the number of Acts passed as in the length of legislation passed.<sup>390</sup>

2.84. Thus, a student who 'masters' taxation law or environmental law or social security law, but does not then work in these areas for a time, would find the substance of the law almost unrecognisable a decade later; and a practitioner who

386. Law Admissions Consultative Committee *Submission 384* which emphasised the difference between compelling law schools to adopt a set curriculum, and compelling applicants for admission to have completed a prescribed set of subjects.

387. Sydney Law School is unusual in teaching these together in one subject, which is compulsory — in part, a legacy of Professor Julius Stone's belief in the importance of international and comparative approaches to developing a 'sociological jurisprudence'.

388. General Council of the Bar and the Law Society of England and Wales *Joint Announcement on Qualifying Law Degrees* 6 October 1999 <<http://www.barcouncil.org.uk/et/academic-b1.html#1>> (12 January 2000).

389. P Finn 'Statutes and the common law' (1992) 22 *University of Western Australia Law Review* 7, 8.

390. M McHugh 'The growth of legislation and litigation' (1995) 69 *Australian Law Journal* 37, 37–38.



relied significantly on what he or she learned in law school would soon, if unwillingly, become acquainted with the law of professional negligence.

2.85. Again, it is important to make clear that, properly conceived and executed, professional skills training should not be a narrow technical or vocational exercise. Rather, it should be fully informed by theory, devoted to the refinement of the high order intellectual skills of students, and calculated to inculcate a sense of ethical propriety,<sup>391</sup> and professional and social responsibility.<sup>392</sup> The Commission agrees with the view of the Lord Chancellor's Advisory Committee on Legal Education and Conduct in the United Kingdom that an undergraduate law degree course 'should stand as an independent liberal

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391. The Law Reform Commission of Western Australia *Review of the criminal and civil justice system in Western Australia – Final report* Project 92 LRCWA Perth 1999, rec 440, specifies that '[l]egal ethics training should be required for students to obtain undergraduate law degrees'.

392. For a good example of this approach, see R Watterson 'Teaching public interest advocacy' *Seminar paper* Newcastle Legal Centre at the University of Newcastle, 27 August 1999. See also K-Economides (ed) *Ethical challenges to legal education and conduct* Hart Oxford 1998; J Goldring 'What do we teach? Legal ethics or something else?' (1992) 10 *Journal of Professional Legal Education* 83 and 'Lawyers, legal practice and values' (1996) 18 *Sydney Law Review* 249; C Menkel-Meadow 'What's missing from the MacCrate report – Of skills, legal science and being a human being' (1994) 69 *Washington Law Review* 593.

education in the discipline of law, not tied to any specific vocation', and its warning that a good legal education should not be 'highly instrumental' or 'anti-intellectual'.<sup>393</sup>

2.86. In mandating requirements for legal education in Australia, surprisingly little regard has been paid to the policies, debates and experiences which are shaping education and training in other learned professions. Professor Stephen Leeder, Dean of Medicine at the University of Sydney, has suggested,<sup>394</sup> for example, that 'common and important themes' have emerged in recent times with respect to medical education, with 'the beginning of a substantial, Australia-wide discourse on the reform of medical education'.<sup>395</sup>

2.87. Leeder notes that surveys of medical practitioners indicate that they generally were happy with the way their own degree program gave them an 'excellent grounding in the basic sciences', but they also believed that there were important matters which were missing from their education.

[They] identified communication skills most frequently, skills of critical appraisal of information and research including statistics, and inadequacies in the education methods used to teach [them]. Other strong themes were a perceived lack of integration of basic science with clinical practice, a lack of explicit teaching in regard to the method of problem-solving, no training for coping with the practicalities of practice management, and not enough on ethics and philosophy<sup>396</sup>.

2.88. In DP 62,<sup>397</sup> and later in this chapter, the Commission notes that the particular ability of judges to engage in self directed learning must be recognised in the design of judicial education programs. The very high quality of Australian law students, however, is a factor which receives too little consideration in the design of many legal education programs (both LLB and PLT). Despite the enormous growth in the number of law schools and the number of places available

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393. Lord Chancellor's Advisory Committee on Legal Education and Conduct *First report on legal education and training* 1996, 57, 59 cited in the Australian Law Students' Association *Submission* 346.

394. S Leeder 'Changing medical education for the 21st century' (June 1994) *Thoracic Society News* 42, 43. See also S Leeder, 'The future of medicine: does the profession have a vision?' (1995) 163 *The Medical Journal of Australia* 271; and B Habbick and S Leeder, 'Orienting medical education to community need: a review' (1996) 30 *Medical Education* 163.

395. Dissatisfaction with the traditional medical degree, however, has led the University of Sydney, the University of Queensland and Flinders University recently to revamp completely their programs, moving to four year graduate-only degree programs — pioneered by Newcastle University in Australia, Harvard Medical School in the United States, and McMaster University in Canada — which are organised around problem based learning, give emphasis to the development of an ethical sensibility and communication skills, and feature such major 'curricular themes' as basic and clinical sciences; the community and the doctor; the patient and the doctor; and personal and professional development: S Leeder 'Changing medical education for the 21st century' (June 1994) *Thoracic Society News* 42, 43.

396. *id* 44.

397. See ALRC DP 62 para 3.90, 3.109.

to law students, the almost insatiable demand for entry into law school has created a highly competitive environment in which virtually all law schools can select from within the top 10 per cent of the annual cohort of applicants, and the leading law schools select from within the top 1–2 per cent.<sup>398</sup>

2.89. Accompanied by a commitment to facilitating ‘lifelong learning’ for professionals, Australian law schools might consider adoption of an underlying philosophy which holds that

[i]n a changing environment, the best preparation that a law school can give its graduates is one which promotes intellectual breadth, agility and curiosity; strong analytical and communication skills; and a (moral/ethical) sense of the role and purpose of lawyers in society.<sup>399</sup>

**Recommendation 2.** In addition to the study of core areas of substantive law, university legal education in Australia should involve the development of high level professional skills and a deep appreciation of ethical standards and professional responsibility.

#### *Regular reviews of academic programs*

2.90. As discussed above, the rapid growth in the number of law schools in Australia over the past decade has raised concerns in some quarters about quality assurance in legal education. Although there is no discussion of the increasing degree of accountability and quality assurance required of Australian universities in the proposal by the Consultative Committee and the Law Council for a National Appraisal Council, this area has developed considerably in recent years.

2.91. As a comprehensive World Bank study for the United Nations Educational Scientific and Cultural Organisation (UNESCO) of quality assurance in higher education by El-Khawas and others found

The issues have evolved over the years, however, from an initial questioning of whether new forms of quality assurance were needed to current debates on what are the more effective approaches to quality assurance. Many academic leaders criticized early approaches and defended academe’s traditional methods for quality assurance even though they were largely internal and not transparent to external audiences. More recently, academics seem to have conceded that the pressures of mass higher education and financial constraints have changed the conditions of higher education sufficiently

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398. Leaving aside, of course, those admissions which are made through special access and equity programs catering for students who have suffered serious disadvantage. At some of the leading law schools, even these special admissions are limited to students in the top 10% or so.

399. D Weisbrot ‘From the Dean’s desk’ (1994) 3(1) *Sydney Law School Reports* 1.

that formal, externally validated methods of quality control must be a central component of higher education systems.<sup>400</sup>

To be successful, such an effort requires collective action by universities and by governmental agencies, along with scholars in educational research.<sup>401</sup>

2.92. El-Khawas concluded that world's best practice in quality assurance in this sector requires the following core elements<sup>402</sup>

- monitoring by semi-autonomous agencies
- development of explicit standards and expectations
- self study by the academic institution or unit
- external review by visiting experts
- written recommendations
- a transparent public reporting process and
- attention to both process (that is, capacity) and actual outcomes/results/achievements.

2.93. In the Commission's view, quality assurance concerns in relation to legal education may be met satisfactorily by measures which are being introduced by the federal government, so long as these comply with the core elements described above. On 18 October 1999, federal Cabinet approved the introduction of new quality assurance processes in relation to all higher education institutions which receive (or seek) financial support from the federal government. Announcing the new scheme, the Minister for Education, Training and Youth Affairs, Dr David Kemp, averted to the rapidly changing environment and noted the weaknesses in the existing system.

While the current system has served us well, it has focused on inputs and has tended to become preoccupied with process at the expense of analysing outcomes. Its weaknesses also include the facts that:

- universities have complete discretion over the rigour of the process;
- there is no external review of the quality assurance processes or standards;
- there is no way to compare degrees between institutions or to compare Australian standards with those of other countries; and
- there is a lack of coherence in policies and procedures for the accreditation of institutions and courses.

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400. E El-Khawas et al 'Quality assurance in higher education: Recent progress; challenges ahead' *Paper UNESCO's World Conference on Higher Education: Vision and Action Paris 5 October 1998*, 7 <<http://www.worldbank.org/html/extdr/educ/postbasc.htm>> (17 January 2000). See also VMassaro 'Quality measurement in Australia: An assessment of the holistic approach' (1996) *Higher Education Management* 1.

401. E El-Khawas et al 'Quality assurance in higher education: Recent progress; challenges ahead' *Paper UNESCO's World Conference on Higher Education: Vision and Action Paris 5 October 1998*, 15 <<http://www.worldbank.org/html/extdr/educ/postbasc.htm>> (17 January 2000).

402. id 7.

The need to strengthen the current system is evident and initiatives have emerged from the Commonwealth, the States and Territories and the sector itself.<sup>403</sup>

2.94. What is proposed is the establishment of an independent 'Australian University Quality Agency'<sup>404</sup> to conduct periodic (at least five yearly) quality audits of academic institutions as well as accreditation authorities.

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403. See D Kemp MP, Minister for Education, Training and Youth Affairs 'Quality assured: A new Australian quality assurance framework for university education' *Speech Seminar on the New Quality Assurance Framework* Canberra 10 December 1999

<<http://www.detya.gov.au/ministers/kemp/dec99/ks101299.htm>> (17 January 2000).

404. With a joint membership structure in which one third of the governing Board is elected by the higher education sector, one third nominated by the Commonwealth and one third nominated by the states and territories: See D Illing 'AVCC calls for national audit board' *Australian* 27 October 1999; G Moodie 'Market mentality sparks quality rush' *Australian* 3 November 1999; Dilling 'Agency to assure quality' *Australian* 8 December 1999; D Illing 'Unis face quality controls' *Australian* 11-12 December 1999; and Editorial *Australian* 11-12 December 1999.

2.95. The Commission believes that this process will provide an important framework for quality assurance in university education generally;<sup>405</sup> however, as it will operate on an institution wide basis, it must encompass, or be supplemented by, a review process which is specific to law schools.

**Recommendation 3.** All university law schools should engage in an on-going quality assurance auditing process, which includes an independent review of academic programs at least once every five years.

*Another national discipline review of legal education*

2.96. Almost every submission to the Commission pointed to the remarkable changes in Australian legal education since the 1987 Pearce report. The study by McInnis and Marginson on the important and beneficial effects of that last national discipline review indicate that the time may be right for DETYA to consider conducting another exercise to assess the new environment and establish new benchmarks. According to McInnis and Marginson,

[t]he Pearce Committee's work suggests that discipline reviews are able to play a significant role in securing improvement in the work of individual schools, and in building a culture of reflection and evaluation within and between higher education institutions ...

An example is the way in which, in the wake of the Pearce Report, law schools suddenly began to define and articulate their aims and objectives. (One of the spin-offs from this change was that it provided a stronger basis for evaluation and accountability mechanisms). Discipline reviews should not become absorbed in the process of gathering detailed data about daily operations. They are a unique opportunity to uncover the bedrock questions, such as those concerning the nature and direction of the discipline ... the process of review can position the discipline in an outward facing stance bringing it under pressure to satisfy its external clients — students, employers, government — as well as the logic of its own development, and the working needs of academics in the discipline ...<sup>406</sup>

2.97. The contention that discipline reviews foster introspection and prompt the articulation of aims and objectives appears apt: the last time the Council of Australian Law Deans formulated a broad statement on the role of law schools and the aim of a legal education (as opposed to responding to particular concerns and

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405. Any process involving university law schools should, for these purposes, also apply to the large Law Extension Committee program operated through the University of Sydney on behalf of the NSW Legal Practitioners Admission Board.

406. C McInnis and S Marginson *Australian law schools after the 1987 Pearce report* Centre for the Study of Higher Education University of Melbourne and AGPS Canberra 1994, 267–9.

developing particular initiatives) was in its 1986 submission to the Pearce Committee.

2.98. McInnis and Marginson correctly point out that Quality Assurance (QA) mechanisms and discipline reviews perform different functions, so that the QA process encouraged in the previous recommendation does not necessarily displace the need for, or value of, periodic discipline reviews. While QA is 'designed to encourage ongoing mechanisms of self-evaluation', discipline reviews 'are a one-off mechanism designed to illuminate the content of the discipline concerned'. QA is 'primarily about management', while a review is 'concerned also (and mostly primarily) about teaching and research'.<sup>407</sup>

2.99. Following on from the work of the Pearce Committee, it is suggested that another discipline review need not be as lengthy, go over the same ground, collect the same data, or be as expensive, and 'would benefit from the lessons of the Pearce experience'.<sup>408</sup>

2.100. The Commission agrees that another national discipline review of legal education may be timely, commencing in 2001, or as soon as is practicable, and focussing on such matters as

- the impact on diversity and quality of the dramatic growth in law school numbers
- the balance in law school curricula between liberal and professional education
- the teaching of professional skills (including legal ethics and professional responsibility), and the mounting of clinical programs
- the trend towards location of PLT programs in law schools
- the resource base for law schools and law libraries.

2.101. The Commission agrees that such a review could be managed in less time and at less expense than the Pearce review, since it could build upon the work already done by the Pearce Committee (and other external committees of review of individual law school programs) rely upon better data collection systems now in place in the tertiary education sector, and make use of the personnel and infrastructure from existing expert, independent bodies, such as the Australian Universities Teaching Committee<sup>409</sup> and the Centre for Legal Education.

[Redacted]

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407. id 270.

408. id 270-1.

409. Formerly known as the Committee for the Advancement of University Teaching (CAUT), and the Committee on University Teaching and Staff Development (CUTSD).

**Recommendation 4.** The Commonwealth Department of Education, Training and Youth Affairs (DETYA) should give serious consideration to commissioning another national discipline review of legal education in Australia, commencing as soon as practicable.

*Accepting a diversity of approaches to practical legal training*

2.102. As noted in DP 62,<sup>410</sup> it was only in the 1970s in Australia that there was a trend away from the long enduring system of ‘articled clerkships’

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410. ALRC DP 62 para 3.44.



as the main method of providing post university practical legal training, in favour of a model recommended by reports here and in the United Kingdom: that is, six to nine months of second stage professional education in an institutional setting followed by a period of in service training, under supervision, with a restricted practising certificate.<sup>411</sup> While the theory behind articles, as with other apprenticeship training, was that intending lawyers would best learn skills, practices and procedures on the job, the reality often involved poor supervision, menial tasks, and limited exposure to a range of different types of work. The shift 'had as much to do with concern over the inadequacy of the articles system as it did with the belief in the efficacy of formal, institutional training'.<sup>412</sup>

2.103. The PLT phase of legal education is still in considerable flux, with a recent entry into this field by university law schools – including some offering clinical approaches (see para 2.9–2.10 above); substantial modifications to the format and content of PLT programs;<sup>413</sup> and the beginning of diversity as to modes of delivery – with a number of IT supported distance learning programs already in place. The PLT requirements also vary considerably in Australia from jurisdiction to jurisdiction, and range from two years of articles to sliding combinations of articles, work experience, and institutional training.<sup>414</sup> Although there is a general view that there needs to be a PLT 'bridge' between graduation from law school and entering practice, consensus is more elusive when it comes to making clearer what exactly it is that reasonably can be expected and achieved from this part of the education process.

2.104. A recent Australia-United Kingdom 'virtual conference' on legal education also highlighted the uncertainty of leading figures in PLT about the best way forward.<sup>415</sup> Professor Avrom Sherr, Woolf Professor of Legal Education at the Institute of Advanced Legal Studies, wondered whether the move to PLT (the legal practice course in the United Kingdom) meant that 'we may have lost what was good about apprenticeship – "the fire", the immediacy of personal experience?'<sup>416</sup> Ms Audrey Blunden, National Director of Legal Education for Malleon Stephen Jaques, forecast that 'increasingly, we will see inhouse PLT offered by the large law firms, customised to their own needs'. Similarly, Mr Tony King, Director of Education and Training at Clifford Chance, commented that 'timing is critical – delivering the education and training when the person is ready for it, needs it, and

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411. See Martin report vol 2 para 52–56; Ormrod report para 100. The Martin report recommended two years of practical legal training.

412. D Weisbrot *Australian lawyers* Longman Cheshire Melbourne 1990, 149.

413. ALRC DP 62 para 3.45.

414. Law Admissions Consultative Committee *Submission 384* notes that in some Australian jurisdictions, articles remain the sole or preferred means of acquiring practical training and experience.

415. British Council, Australia; Centre for Legal Education, Australia; Law Foundation of NSW and the College of Law of London 'Global legal education: An Anglo-Australian virtual conference' 13 October 1999. See <<http://lawfoundation.net.au/cle/nswlec.html>> (17 January 2000).

416. For a personal reflection on articles in Australia, see M Kirby 'Seven ages of a lawyer' *Address Leo Cussen Memorial Lecture Melbourne* 25 October 1999, 6–7.

values it', and that partners had begun again to appreciate that it was important to undertake a mentoring role to make this work. King noted that

The best development comes from handling tasks for clients. The workflow in many law firms means it is not easy to ensure young lawyers progress at a steady and sensible pace up the learning curve. There is a tension between providing young lawyers with appropriately broad-ranging development opportunities and ensuring they are as profitable as possible to enable the firm to get a return on its investment in them.<sup>417</sup>

2.105. Mr Andy Harvey, Director of Course Design at the College of Law (England and Wales), also highlighted the difficulty in getting the balance right at this phase between providing further teaching of substantive law (that is, identifying what level of knowledge of the law can be assumed) and offering training aimed at developing practice skills. Harvey stated that when the modern PLT course was first set up in 1992, the Law Society looked for at least 25% of the course to be devoted to the prescribed skills (practical legal research; writing and drafting; interviewing and advising; and advocacy). However, 'current feedback from practitioners indicates a desire for emphasis on the underlying law ('black letter law') and on the particular skills of Practical Legal Research and Legal Writing and Drafting'.<sup>418</sup>

2.106. Two sets of standards have been developed in Australia: the 'Practical Legal Training Requirements' (the Priestley 12) endorsed by the Council of Chief Justices, and 'the Standards for the Vocational Preparation of Australian Legal Practitioners' (the APLEC Prescription). The Australasian Professional Legal Education Council (APLEC) is comprised of all PLT providers (with institutional and staff membership) in Australia and New Zealand. After a period of consultation and development, APLEC approved a common statement of the content and learning outcomes in PLT programs, which is not enforceable, but has been highly influential. The APLEC Prescription includes the following nine fields of training (the APLEC 9)

- criminal practice
- family practice
- civil litigation
- wills and estate practice
- business law and practice
- property practice
- professional skills
- work management and business skills, and

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417. T King 'Session 4 – On-the-job training' *Comment* Global legal education: An Anglo-Australian virtual conference, British Council, Australia; Centre for Legal Education, Australia; Law Foundation of NSW and the College of Law of London 13 October 1999  
<<http://lawfoundation.net.au/cle/nswlec.html>> (17 January 2000).

418. id 32.

- ethics and professional responsibility.

2.107. The general view appears to be that the APLEC 9 are conceptually superior and easier to work in practice than the Priestley 12. Although the Priestley 11 requirements concerning law schools have been accepted and are applied by all State and Territory admitting authorities, the 'Priestley 12' requirements concerning PLT have not. APLEC recently has engaged a consultant to restate the APLEC Prescription in terms of entry level standards, 'outcomes and competencies', as recommended for professional certification by the National Board for Employment, Education and Training (NBEET). The Consultative Committee's submission states that the Committee and APLEC, 'with the encouragement of the Council of Chief Justices and of SCAG, are now jointly engaged in an effort to produce a single reformulation of the APLEC 9 and Priestley 12 which will include competency standards', with the 'revised uniform standard' expected to be completed in 2000.<sup>419</sup>

2.108. In April 1998, SCAG released a discussion paper reviewing the basis upon which admission to legal practice should be granted in Australia. One issue concerned the post graduation PLT training requirements. The paper also proposed a model for dealing with legal education, training and admission.<sup>420</sup> The SCAG approach was concerned primarily with what is required for admission, while APLEC has emphasised the skills and knowledge needed for practice.

2.109. The submission from the Australian Law Students' Association (ALSA) argued in favour of a diversity of modes and providers, bound by a set of national minimum competency standards.

A prescriptive standardisation approach to pre-admissions training does not recognise the diversity of Australian law graduates' career destinations. Apart from any pedagogical disadvantages, the reduction in methods of admission is fundamentally uncompetitive. Furthermore, it will detrimentally impact upon graduates who wish to gain accreditation to practise, yet move into an alternative career path thereafter. For example, such graduates may choose PLT courses which allow for a shorter period of practical experience as opposed to the articles of clerkship model. In addition, as post-graduate PLT courses are up-front full-fee paying, the availability of integrated undergraduate PLT programs or articles of clerkship as options to gaining accreditation to practise may go some way towards ensuring equity of access to a career in the legal profession.

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419. Law Admissions Consultative Committee *Submission 384*.

420. Completion of a law degree (which meets the Priestley 11 areas of knowledge); completion of other pre admission training in preliminary professional responsibility and ethics; entitlement to admission to legal practice with practice rights restricted for three years after commencing practice during which time the practitioner is able only to practise as an employee under supervision; within five years of commencing practice the lawyer must also complete structured training courses in eight primary skill based subjects, and complete at least three months practical legal work experience in each of four separate areas of legal practice.

The debate pertaining to methods of gaining accreditation to practise is concerned principally with ensuring that prospective legal practitioners are trained to a sufficient standard. To achieve this goal, rather than to standardise pre-admissions training and methods, a national body such as ACOLE should concentrate upon *standards formulation*. This can accommodate the current diverse means of gaining the necessary training for entry into legal practice, which include integrated PLT programs, articles of clerkship and post-graduate PLT programs. To this end, ALSA proposes the creation of *national minimum competency standards*. The aim of these standards should be to maintain the current diversity of accreditation methods, whilst also ensuring that a consistent standard of pre-admission training for graduates across Australia is attained. Furthermore, it will increase competition amongst PLT providers including universities, PLT institutions and employers. This will in turn increase educational standards.<sup>421</sup>

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421. Australian Law Students' Association *Submission 346*. Cf Law Admissions Consultative Committee *Submission 384*.

2.110. The Law Council's submission<sup>422</sup> was critical of the Commission's reference to the entry of university law schools into the PLT field,<sup>423</sup> and the possibility that down the track 'an expansion of the role of university PLT courses might obviate the need for a separate PLT stage'.<sup>424</sup> The Law Council cited the 1987 Pearce report and the 1983 Clarkson report in Western Australia,<sup>425</sup> which were 'critical of the nexus between PLT and universities', fearing that this would lead to undesirable competition for limited resources and a conflict of educational objectives.

2.111. These are valid concerns and, for the foreseeable future, most university law schools will opt to steer clear of PLT. However, as discussed elsewhere in this chapter, the system has changed dramatically since the time of the Pearce and Clarkson Reports. Among other things, the number of law schools has greatly increased, the basis for Commonwealth funding of undergraduate and postgraduate education has changed radically, professional associations have become alarmed at the cost of providing PLT programs for the increasing numbers,<sup>426</sup> clinical education has expanded somewhat (although not nearly enough see para 2.19), and quite a few university law schools already have established PLT programs – some of them integrated, some of them 'add-on' – which are approved for admission purposes by the relevant State admitting authorities.

2.112. As noted above, the motivation for this trend is mixed, encompassing in relative degrees an interest in experimenting with new pedagogical approaches; budgetary and marketing considerations (that is, the attraction of government funded or fee paying student load); and equity concerns about the increasing demands placed upon students to pay HECS and upfront fees.<sup>427</sup>

2.113. Funding policies and practices may yet change in this area. As the Director of the NSW College of Law's Professional Program, Ms Kay Smith, has commented, the Stanley report<sup>428</sup> on postgraduate education

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422. Law Council *Submission* 375.

423. ALRC DP 62 para 3.45.

424. *id* para 3.48.

425. Pearce report 862 and *Report of the Committee of Inquiry into the Future Organisation of the Legal Profession in Western Australia* GPS Perth 1983, 177–178 (the Clarkson report). See also J Eckert *Development of a practical legal training court in Western Australia* GPS Perth 1994.

426. J Goldring *Submission* 76; C Roper *Submission* 313.

427. A Stewart *Submission* 327

Flinders University should be added to the list of universities which have integrated PLT courses into their undergraduate programmes. It might also be useful to note that the primary rationale for us taking this step was to ensure that our students would be able to complete all their required pre-admission training without needing to pay upfront fees. It was only by incorporating PLT into the undergraduate programme, as opposed to a separate postgraduate degree, that it was possible to guarantee that all necessary subjects could be taken on a HECS–liable basis.

428. Committee of Review of Fee-paying Arrangements for Postgraduate Courses *Report* AGPS Canberra 1995 (the Stanley report).



seems to make it quite clear that the public purse ought not to be burdened with costs which are properly to be interpreted as compliance costs for the profession or industries and so even in the vocationally oriented LLB programs we might expect over time escalating pressure on the practical training dollar.<sup>429</sup>

2.114. As the foregoing discussion suggests, questions about the best venue for PLT have been overtaken by the need to clarify the goals, improve the content and develop a set of national minimum standards and competencies.

**Recommendation 5.** While ensuring that specified standards of minimum competency are achieved, admitting authorities should render practical legal training requirements sufficiently flexible to permit a diversity of approaches and delivery modes.

### Towards an Australian Academy of Law

2.115. Until about the early 1970s, persons identifying themselves as practising lawyers almost invariably would have been members of a law society or a bar association, and would have felt that their professional interests were being catered for, and represented externally, by these associations. With judicial appointment coming almost exclusively from the ranks of the bar, a special relationship also existed between the bench and the bar. Most 'students-at-law' already worked in the profession as articulated clerks, interacted regularly with practitioners (across the solicitor-barrister divide), and received mentoring from senior ('master') practitioners. Students organised their studies around their work responsibilities, with classes held mainly in the evening and taught mainly by practitioners, and with only a small core of full-time academics in the one law school located in each capital city. Law graduates mostly went into the profession, and practised as solicitors or barristers. The organisation of the profession lent itself to a natural hierarchy of judges, barristers and solicitors.

2.116. Without overly romanticising the previous situation, the size and structure of the profession as it then existed promoted a greater degree of cohesion and solidarity. That position has changed very dramatically over the past three decades.<sup>430</sup> The number of lawyers has grown rapidly (much faster than the population at large); specialisation is now a feature of practice, there are very large national and international firms (which did not exist until the late 1970s); the number of law schools has nearly quintupled, and the academy mainly comprised

429. K Smith 'The vocational stage – a case study' *Paper* Global legal education: An Anglo-Australian virtual conference British Council, Australia; Centre for Legal Education, Australia; Law Foundation of NSW and the College of Law of London 13 October 1999 <[http://lawfoundation.net.au/cle/nswlec\\_s3.html](http://lawfoundation.net.au/cle/nswlec_s3.html)> (17 January 2000).

430. See generally D Weisbrot *Australian lawyers* Longman Cheshire Melbourne 1990, ch 7.

of full time academics has a much more attenuated relationship with the practising profession. Law graduates are as likely to consider a career in finance, journalism,



banking or management consulting as in law;<sup>431</sup> there is now a wider choice of ways in which to 'practise law'.<sup>432</sup> Membership in professional associations now tends to be voluntary, and in some jurisdictions there is a choice of associations. Appointment to the judiciary is no longer the exclusive preserve of the bar. Importantly, the market for legal services is now far more competitive, with non-lawyers doing work previously reserved for lawyers, law firms developing a more 'business-like' orientation and structure, and firms operating nationally and (often) internationally.

2.117. This growth and fragmentation presents serious challenges to the maintenance of a coherent professional identity, and render difficult the maintenance of traditional collegiate approaches. Without positive action the single 'legal profession' could become a multiplicity of 'legal occupations', none of which see itself as part of a larger whole.<sup>433</sup>

2.118. In the Commission's view, there is a need for an institution which can draw together the various strands of the legal community to facilitate effective intellectual interchange of discussion and research of issues of concern,<sup>434</sup> and nurture coalitions of interest. Such an institution should have a special focus on issues of professionalism (including ethics) and professional identity, and on education and training.

2.119. No institution currently exists to fill this need – or which readily could be adapted to do so. A significant proportion of legal academics in Australia (as well as in New Zealand and Papua New Guinea) belong to the Australasian Law Teachers Association (ALTA), and law schools have institutional membership in CALD – but neither includes judges, students or practitioners. The Judicial Conference of Australia (JCA) is essentially a judge-only body. The Australian Law

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431. The Centre for Legal Education has conducted several 'career intention' and 'career destination' surveys' since 1991 which indicate that about half of law students envisage a career in private practice. See eg S Vignaendra, *Australian law graduates career destinations* Centre for Legal Education and the Department of Employment, Education, Training and Youth Affairs, 1998. There is no effective collection or collation of statistics about employment patterns and trends for lawyers nationally; the Law Society of NSW has done some very good work in this area, and the Law Institute of Victoria has started this more recently. Professor Ralph Simmonds, Dean of Murdoch University, has commented that there is a need for a comprehensive study of law graduates who have left the profession due to dissatisfaction with legal practice: Law school deans *Consultation* Perth 22 September 1999.

432. Including work as inhouse corporate counsel; in government; in regulatory authorities; in academia; as members of tribunals; and in what are now sometimes referred to as 'multidisciplinary partnerships', but which previously were known as 'firms of accountants'.

433. cf R Abel 'Lawyers in the civil law world' in R Abel and P Lewis (eds) *Lawyers in society – The civil law world* Berkeley University of California Press 1988, 4–5; see also D Weisbrot *Australian lawyers* Longman Cheshire Melbourne 1990, 6–7, 59–62.

434. See R Simmonds *Submission 301* on the critical need for research to support improvements in legal education and the legal process. Prof Simmonds urges a 'partnership model', involving university law schools, the profession, the judiciary and government, including the possibility of an Academy of Law.

Students' Association (ALSA) has only student members. Law societies and bar associations are State and Territory based, and have practitioner-only membership. The Law Council is the peak organisation for those professional associations – although even here the Law Society of New South Wales has threatened to withdraw and establish a separate organisation representing only solicitors.<sup>435</sup> The Australian Institute of Judicial Administration (AIJA) probably comes closest, as a broadly based body, whose membership includes a significant number of judges, magistrates and practitioners – but only a limited number of academics, and no students. The AIJA's focus on court administration and judicial education, while important, is narrower than the brief suggested for an Australian Academy of Law.

2.120. There are a variety of possible models and precedents for such a body. Four learned societies already exist in Australia, namely the Academy of the Social Sciences in Australia (ASSA), the Australian Academy of Humanities (AAH), the Australian Academy of Science (AAS), and the Academy of Technological Sciences and Engineering (ATSE). The four academies operate as autonomous, non-governmental organisations, and cooperate through the National Academies Forum, formed in 1995. Funding comes from subscriptions and a modest annual subvention from the federal government. Only ASSA has any significant interest in law, with about 20 Fellows with legal backgrounds, out of a total membership of around 350.<sup>436</sup>

2.121. CALD has been considering a proposal developed by Professor David Barker, Dean of Law at the University of Technology, Sydney, for the establishment of an Australian Academy of Law which 'could increase co-operation between the judiciary, professional legal associations, CALD and ALTA'.<sup>437</sup>

2.122. According to the proposal,<sup>438</sup> the suggested membership of 300 should be 'selected on the basis of professional achievement and demonstrated interest in the improvement of the law'. Ex officio membership would be granted for Chief Justices, Attorneys-General, Solicitors-General, heads of law reform commissions, the President of the Law Council, and law deans. The suggested objects would include the following.

- To promote excellence in and encourage the advancement of legal practice in Australia.
- To promote collegiality among members of the judiciary, legal practitioners and law teachers.

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435. A Burrell 'NSW Law Society looks at quitting the LCA' *Australian Financial Review* 10 December 1999.

436. See Academy of the Social Sciences in Australia (ASSA) <<http://coombs.anu.edu.au/~assa/about.html>> (17 January 2000).

437. D Barker 'Proposed Australian Academy of Law' *Paper* Council of Australian Law Deans, 8 October 1999. At its meeting of 4 July 1999 the CALD agreed that the concept should proceed, but be broadened to take in New Zealand, Papua New Guinea and the University of the South Pacific.

438. id 2.

- To promote excellence in legal research and the publication of contributions to legal knowledge.
- To promote the professional development of members of the legal profession.
- To promote views relating to legal reform to Government, the community and other professions.
- To promote high standards of ethical conduct within the legal profession.

2.123. The working model for the CALD proposal is the American Law Institute, which is best known for its exhaustive research and consultation work and the production of the Restatement of American Law series. While there are some features of this model which are attractive, and adaptable to Australian circumstances, the proposed membership structure (as well as the focus on codification type law reform) would not suit the imperative for a more comprehensive and collegially minded body.

2.124. Concern by leading figures in the Republic of Singapore with respect to collegiality, legal education, and the ethical standards of the profession led to the establishment of the Singapore Academy of Law<sup>439</sup> in 1988.

It was then observed that in the United Kingdom, there were Inns of Court which also served as places for judges, lawyers, academics and law students to gather together and share their experiences with one another. Such institutions had similarly enabled junior lawyers to socialise with senior lawyers and to learn from the latter's rich experiences. As such facilities were not available in Singapore, the [Singapore Academy of Law Act] was passed to create the Academy as an institution for continuing legal education and to take up the role of providing a place where judges, lawyers, academics and law students could meet informally with one another. It is patterned after the Inns of Court, but unlike the Inns it brings together under one umbrella the Judiciary, the Bar, the Academy and the Government Legal Service. The Supreme Court Judges and Senior Counsel as well as other distinguished persons are fellows of the Academy.<sup>440</sup>

2.125. Section 4 of the Singapore Academy of Law Act sets out the Academy's functions.

- To promote and maintain high standards of conduct and learning of the members of the legal profession in Singapore and the standing of the profession in the region and elsewhere.
- To promote the advancement and dissemination of knowledge of the laws and the legal system.
- To promote legal research and scholarship and the reform and development of the law.
- To provide continuing legal education for its members.

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439. Established as a statutory body under the *Singapore Academy of Law Act* (Chapter 294A, Revised Edition 1989). See also <<http://www.sal.org.sg>> (17 January 2000).

440. C Lim, Senior State Counsel, Attorney-General's Chambers, Singapore *Personal communication* 27-October 1999 referring to material from the SAL website at <<http://www.sal.org.sg>>.

- To provide for the training, education and examination by the Academy or by any other body, of persons intending to practise the profession of law.
- To provide the facilities for the social interaction of its members.
- To promote good relations and social interaction amongst members and between members and law students and persons concerned in the administration of law and justice in Singapore.

2.126. On the basis that its broadly inclusive membership 'put the Academy ... in a strategic position to strike a balance between the competing interests of its members and the public',<sup>441</sup> the Act was amended in 1995 to give the Academy additional responsibilities for the appointment of notaries public and commissioners for oaths; and to undertake activities, projects and consultancies relating to 'the study, development and operation of laws and legal systems and the facilities, information technology and infrastructure in support thereof'. Thus, the Academy now serves as the umbrella organisation which houses the Singapore Law Reform Committee, chaired by a Supreme Court judge.

2.127. The Singapore Academy of Law levies annual membership subscriptions, which are staged according to seniority (and may be waived in appropriate cases), and provide the organisation with a funding base for its activities. Income also is generated by fees for CLE courses, conferences, and publications.

2.128. In the Commission's view, the Singapore model provides a point of departure for customising an institution which would best suit the interests of Australia. The precise nature, composition and role of an Australian Academy of Law is one for the major stakeholders to determine, following consultation. It should aim to develop communication and collegiality across the profession. Although it is not the Commission's intention that an Academy of Law be established in the first instance as a body with appraisal or accreditation powers in respect of legal education providers, it would be an appropriate body to conduct the research and undertake the consultation necessary to develop acceptable national minimum standards.

**Recommendation 6.** The federal Attorney-General should facilitate a process bringing together the major stakeholders (including the Council of Chief Justices, the Law Council of Australia, the Council of Australian Law Deans, the Australasian Professional Legal Education Council, and the Australian Law Students Association) to establish an Australian Academy of Law. The Academy would serve as a means of involving all members of the legal profession – students, practitioners, academics and judges – in promoting high standards of learning and conduct and appropriate collegiality across the profession.

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441. *ibid.*

**Professional development as an essential aspect of professionalism**

2.129. Mandatory continuing legal education (MCLE) programs were first introduced in the United States in 1975, and most states in the United States typically specify that a practitioner must spend a certain number of hours (generally 8–12) per year (sometimes averaged over three years) undertaking approved courses in order to retain practice rights. Following a recent challenge to the constitutionality of California’s MCLE requirements – particularly the exemption for retired judges, elected state officials, and law professors – the California Supreme Court upheld the rules by a 5–2 majority. Ten days later, California Governor Gray Davis signed into legislation a bill which: reduced the education requirement from 36 to 25 hours over three years, but mandated that four of these hours involve instruction in professional ethics; and removed the exemption for retired judges. It was expressly part of the Supreme Court’s finding that the exemption for retired judges did not violate the equal protection clause of the State Constitution.<sup>442</sup>

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442. N McCarthy ‘Bar dues, MCLE restored: Supreme Court upholds bar’s MCLE program in its entirety’ (October 1999) *California Bar Journal* 1, 10 and 26.

2.130. In Australia, the Law Society of New South Wales adopted the concept of MCLE in principle in 1985, and formalised this in 1986. Solicitors in New South Wales must now complete 10 hours of accredited CLE training per year in order to maintain a current practising certificate. While participation in CLE activities is encouraged by all legal professional associations in Australia, and may be required for certified specialists,<sup>443</sup> no other State or territory has followed the New South Wales lead in establishing general MCLE requirements for practitioners.<sup>444</sup>

2.131. Even in New South Wales, the Legal Profession Advisory Council<sup>445</sup> conducted a review of MCLE in 1996, and its report to the Attorney-General accepted the Bar Association's arguments that the MCLE requirements not be extended to barristers.<sup>446</sup> Essentially, the arguments put and accepted were that barristers presenting cases in court required far more detailed knowledge of the specific area of law than is typically available through CLE courses, and barristers who specialised in a particular area were obliged to maintain an exhaustive knowledge of that area and would gain little from MCLE. These arguments seem to go more to the generalist-specialist divide than to the solicitor-barrister divide. It is not clear, for example, why the same logic should not apply to a highly specialised partner in a large firm, or in a 'boutique' firm of solicitors.

2.132. While accepting the benefits of specialist accreditation, the profession properly has resisted any move to restrict practice in some areas to certified specialists or to limit specialists to their own fields.<sup>447</sup> In the view of the Commission, the need for generalist lawyers to engage in lifelong learning is no less pressing than for specialists, and specialists will benefit from keeping abreast of important developments in the law outside their own field.

2.133. A more limited, but nevertheless important, form of compulsory education is found in some jurisdictions in relation to practice management and risk management. For example, New South Wales and Queensland require practice management training as a condition of receiving an unrestricted practising certificate for new principals and, as a condition of obtaining compulsory professional indemnity insurance, all solicitors in Western Australia are required to

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443. In Victoria, Queensland and NSW.

444. See ALRC DP 62 para 3.51.

445. Established under the *Legal Profession Act 1987* (NSW) s 58, to 'keep under constant review the structure and functions of the legal profession and ... make reports and recommendations to the Attorney General': s 59(2).

446. NSW Legal Profession Advisory Council *Report and Recommendation in respect of mandatory continuing legal education and the New South Wales Barristers' Rules* Sydney December 1996.

447. In the way, for example, that non-lawyer property conveyancers are restricted to that particular area. See *Legal Profession Act 1987* (NSW) s 48E(4); *Legal Practitioners Act 1981* (SA) s 21(3)(o)-(p); *Legal Practitioners Act 1893* (WA) s 77(2); and *Legal Practitioners Act 1974* (NT) s 132(2). See also Trade Practices Commission *Study of the professions – Legal* TPC Canberra 1994, 270 (TPC Final report).

undertake 2 to 4 hours of risk management education per year.<sup>448</sup> A number of jurisdictions overseas, such as British Columbia, also use the mechanism of discounting premiums for professional indemnity insurance based on CLE attendance.

2.134. As noted in DP 62, whether compulsory or not, CLE programs are nevertheless widespread.

The earliest CLE providers in Australia tended to be university law schools. This is now a very crowded field. Other CLE course providers include law societies and bar associations, PLT institutions, government departments and agencies, specialist legal interest groups, and private companies. Particularly since the advent of MCLE requirements in New South Wales, large law firms have begun to operate their own 'in-house' programs — a practice which has attracted special scrutiny in the US, but has not excited particular concern in Australia.<sup>449</sup>

2.135. The Commission has noted that there are valid criticisms of the design and execution of some CLE programs,<sup>450</sup> and concedes that there is no significant research base to establish conclusively the beneficial effects of CLE.

While surveys of lawyers who have taken CLE programs indicate widespread support for this scheme and the belief that such programs do improve competence, there has yet to be a study which provides clear evidence that this is the case.<sup>451</sup>

Thus, mandating CLE as an aid to professional competence involves something of an 'act of faith'. Nevertheless, the Commission stated in DP 62 that

Continuing legal education programs are said to contribute to professional competence by allowing lawyers to keep up to date in their own and related fields, by refreshing and expanding substantive knowledge and professional skills, and by aiding specialisation.<sup>452</sup>

In the Commission's view, properly conceived and implemented CLE programs should play an important role in maintaining high professional standards and assuring public confidence in the competence of the legal profession and the efficacy of the justice

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448. See R North 'Post admission learning for lawyers' *Paper* Global legal education: An Anglo-Australian virtual conference British Council, Australia; Centre for Legal Education, Australia; Law Foundation of NSW and the College of Law of London 13 October 1999 <[http://lawfoundation.net.au/cle/nswlec\\_s4.html](http://lawfoundation.net.au/cle/nswlec_s4.html)> (17 January 2000).

449. ALRC DP 62 para 3.52 citing ALRC IP 21 para 7.15-7.16; D Weisbrot *Australian lawyers* Longman Cheshire Melbourne 1990, 152.

450. ALRC IP 21 para 7.9; ALRC DP 62 para 3.56. See also C Roper, 'Mandatory continuing education for professionals, particularly lawyers: a literature review' (1985) 2 *Journal of Professional Legal Education* 76.

451. ALRC DP 62 para 3.54 citing D Weisbrot *Australian lawyers* Longman Cheshire Melbourne 1990, 152.

452. ALRC DP 62 para 3.49 citing the Committee of Inquiry into Legal Education in New South Wales *Report* 1979, 209 (the Bowen report) and C Houle *Continuing learning in the profession* Josey-Bass San Francisco 1980, 34.

system. For this reason, we suggest that all States and Territories adopt mandatory CLE (MCLE) requirements for all practising lawyers.<sup>453</sup>

The Commission also believes strongly that CLE programs should be more firmly embedded within the regulatory system and more widely utilised by disciplinary authorities as a sanction, with the aim of remedying poor professional practice.<sup>454</sup>

2.136. Similarly, legal practice consultant Ronwyn North has pointed out that while MCLE is somewhat controversial<sup>455</sup>

[O]ne of the traditional hallmarks of a profession is a commitment to 'lifelong learning'. In the case of lawyers there is an expectation that lawyers will engage in continuing legal education as a means of being able to continue being deserving of their so-called professional privileges, including protection from competition from non-legal professionals.<sup>456</sup>

2.137. In its recent review of the civil and criminal justice systems in its state, the Law Reform Commission of Western Australia (LRCWA) found that

Legal ethics currently have only a minor place in the initial and continuing education of lawyers, although the review of continuing legal education proposed in the Law Society of Western Australia's strategic plan for 1998-2000 illustrates the increased emphasis on continuing legal education within the profession itself. Significantly, in light of recommendations made throughout this Report, continuing legal education can also serve the important function of informing lawyers of their changing professional and ethical obligations.<sup>457</sup>

2.138. The LRCWA recommended that

440. Legal ethics training should be required for students to obtain undergraduate law degrees. Attendance at legal ethics continuing legal education courses also should be required for practitioners in order to renew practise certificates.

441. A program of mandatory Continuing Legal Education should be established in Western Australia. Accredited providers should be obliged to include coursework on legal ethics and legal procedures.

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453. ALRC DP 62 para 3.58. See also N Gold 'Beyond competence: The case for mandatory continuing learning in law' (1986) 4 *Journal of Professional Legal Education* 17, 20.

454. ALRC DP 62 para 3.58. See the *Legal Profession Act 1987* (NSW) s 171C(1)(f); the *Legal Practice Act 1996* (Vic) s 159(1)(e); the *Legal Profession Act 1993* (Tas) s 61(2)(g); the *Queensland Law Society Act 1952* (Qld) s 6R(1)(l)(iii) and the *Legal Practitioners Act 1981* (SA) s 77AB(1)(d)(ii), for examples of provisions which make this possible.

455. See R North 'Post admission learning for lawyers' *Paper* Global legal education: An Anglo-Australian virtual conference British Council, Australia; Centre for Legal Education, Australia, Law Foundation of NSW and the College of Law of London 13 October 1999 <[http://lawfoundation.net.au/cle/nswlec\\_s4.html](http://lawfoundation.net.au/cle/nswlec_s4.html)> (17 January 2000).

456. id 44.

457. Law Reform Commission of Western Australia *Review of the criminal and civil justice system in Western Australia – Final report* Project 92 LRCWA Perth 1999, para 36.15.



2.139. The LRCWA also supported the establishment of an Australian Journal of Professional Legal Ethics, which 'would be a focus for discussion about best practice, current topics in legal ethics and reflective critiques of the subject'.<sup>458</sup> The LRCWA stated that it is essential that the journal is seen as primarily for the benefit of practitioners<sup>459</sup>. Alternatively, the LRCWA suggested that syndicated articles run in all of the periodicals produced by the professional associations, or that a regular column or section devoted to the subject, be established in the Australian Law Journal.

2.140. The Law Council's submission<sup>460</sup> affirms its 'strong support for Continuing Legal Education' and endorses the Commission's statement about CLE playing 'an important role in maintaining high professional standards and assuring public confidence in the competence of the legal profession and the efficacy of the justice system'.<sup>461</sup> However, the Law Council disagreed with the suggestion that all States and Territories should adopt MCLE requirements for all practising lawyers,<sup>462</sup> reiterating the position it took in its submission in response to IP 21 – which opposed MCLE, particularly for barristers.<sup>463</sup>

2.141. In a recent discussion paper, a Law Society of New South Wales Task Force summarised the pedagogical arguments for and against MCLE.<sup>464</sup> The positive case was that MCLE

- fosters a profession-wide habit of continuing learning
- increases the quantity (and quality) of education programs available
- focuses on needs rather than wants and
- requires the 'rotten apples' to participate in education programs.

The arguments against MCLE are that

- there is no evidence linking compliance with competence
- it discourages the competent
- it is not consistent with 'professionalism'
- it is not consistent with adult learning principles and
- the minimalist requirements (attendance, but not assessment) lack credibility.

2.142. The Task Force acknowledged the Commission's view that an MCLE scheme should be seen as one of the profession's responses to increased public scrutiny

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458. *id* para 36.16.

459. *ibid*.

460. Law Council *Submission* 375.

461. ALRC DP 62 para 3.57.

462. Law Council *Submission* 375.

463. Law Council *Submission* 196.

464. Law Society of New South Wales *Discussion paper Mandatory continuing legal education* Law Society of NSW Sydney 1999, 6–9.

and demands for accountability,<sup>465</sup> noting that its own research, and that conducted overseas, has found that the community is aware that, in addition to their initial qualifications, lawyers were required to keep up with changes and new developments in the law.<sup>466</sup>

2.143. The Law Society's Task Force does not support retention of the status quo — it is said that the present MCLE scheme is not a best practice scheme for the enhancement of professional competence through regulation. The Task Force considered options for improvement of the existing MCLE scheme, through the establishment of a compliance register and refinement of the requirements, such as extending the scheme over a three year period, and encouraging practitioners to complete professional development programs in particular topics by rewarding them with 'bonus' MCLE points. However, the Task Force does not favour this option as it would be difficult to enforce more stringent requirements in NSW and the Law Society and the profession lack the financial and other resources to sustain an enhanced scheme. The Task Force warned against outright abolition of MCLE, arguing that the public and professional advantages of continuing professional development are significant, and that abolition of MCLE without replacement would send an adverse message to the profession and the community.

2.144. The Task Force's favoured approach is to replace the MCLE scheme with a voluntary scheme that relies on providing high quality professional development opportunities, along the lines of the programs currently available for general medical practitioners and accountants. Practitioners would receive professional recognition at various stages of their careers, with each stage linked with a requirement for practitioners to accumulate professional development units. Key features of the voluntary scheme are<sup>467</sup>

- differing requirements depending on 'status' within the profession
- reward of status membership levels within the profession
- a link between membership status and access to members' services offered by the Law Society
- the use of random audits to verify compliance
- the use of a triennium model to provide flexibility
- development of a code of conduct for CLE providers, to be developed in consultation with the Continuing Legal Education Association of Australia.

2.145. The Task Force noted that while a significant amount of energy has been devoted to developing models of education and training at the pre admission level

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465. ALRC DP 62 para 3.57.

466. Law Society of NSW *Discussion paper: Mandatory continuing legal education* Law Society of NSW Sydney 1999, 11.

467. id 21.

(both academic and PLT), this has not been matched by the development of comprehensive policies for continuing professional development by the professional associations. The Task Force concluded that the Law Society should only move to a voluntary scheme of CLE if a well considered and comprehensive professional development vision for the legal profession can be developed.<sup>468</sup>

2.146. The Commission accepts the basic thrust of the Task Force Report. Apart from linking CLE and professional development with membership and associated benefits in a professional association, the system of practising certificates also could be re-conceived to place more emphasis on a commitment to lifelong learning as an incident of being a competent professional. At present the restrictions on limited practising certificates generally do not contain positive obligations to upgrade skills and knowledge. Rather, they limit the ability of a solicitor to become a principal in a firm, sign off on trust accounts, and so on. It may be preferable for practising certificates to be made conditional, with a range of further educational, training and experiential requirements specified which, unless met, would cause the certificate to lapse. This would place much more responsibility on the individual practitioner and on the profession generally – and could serve to revitalise the provision of CLE programs.

**Recommendation 7.** As a condition of maintaining a current practising certificate, all legal practitioners should be obliged to complete a program of professional development over a given three year period. Legal professional associations should ensure that practitioners are afforded full opportunities to undertake, as part of this regime, instruction in legal ethics, professional responsibility, practice management, and conflict and dispute resolution techniques.

## Education and professional development for judges, judicial officers and tribunal members

### Education for judges and magistrates

#### *The need for an Australian judicial college*

2.147. In DP 62, the Commission considered at some length the need for a coherent and high quality system of judicial education in Australia. The Commission quoted AJAC.<sup>469</sup>

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468. id 22.

469. ALRC DP 62 para 3.75.

As important as any issue affecting access to justice is the quality of consideration provided by the judiciary during the hearing and determination of a matter. While it is generally accepted that the quality of judicial decision making in Australia is of a very high standard, there is, no doubt, still room for improvement in this area. Given the inherent costs of litigation, not only to individuals but to the community at large, the fewer first instance decisions that need to be corrected on appeal the cheaper and more efficient the court system will be. There is clearly a nexus between the quality of decision making and the total cost of the court system, and hence access to justice.<sup>470</sup>

2.148. In its 1994 report, AJAC recommended that 'The Commonwealth should explore, in conjunction with the States, the possibility of establishing an independent national judicial education centre'.<sup>471</sup> In DP 62, the Commission noted that

Until the 1980s there was virtually no formal judicial education in Australia. Judges were presumed to possess the necessary skills and experience for judicial functions because the vast majority of them had been selected from among the ranks of the (mid career to senior) bar, and thus familiar with evidence, practice and procedure, advocacy and courtroom dynamics ...<sup>472</sup>

In recent years there has been a belated recognition that transforming a skilled lawyer into a skilled jurist can be 'a tricky manoeuvre', that 'going from adversary to adjudicator means changing one's attitude, learning and using new skills, and in some cases severing old ties'.<sup>473</sup>

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470. AJAC report para 15.80.

471. *id* action 15.4, 379. See also para 15.80–15.103.

472. ALRC DP 62 para 3.74.

473. ALRC DP 62 para 3.76 citing D Catlin 'Michigan's magic touch in educating judges' (1986) 25 *The Judges Journal* 32.

Recognition of a need for, and a commitment to provide, more formal and structured education for judges has come relatively late to the Australian justice system.<sup>474</sup> By comparison with other common law jurisdictions, the development of judicial education here is 'patchy' and we are said to be 'still in the judicial education starting blocks or perhaps even on the warm up track'.<sup>475</sup>

2.149. Judicial education, once the subject of controversy, is now well accepted as a natural part of the professional development of judicial officers.<sup>476</sup>

2.150. Much of the impetus to secure formal judicial education has come from judges and magistrates themselves. The spur to implement such courses and programs has come in response to the changing roles and responsibilities of judges and decision makers, and the increased public demands, expectations and scrutiny of the justice system.<sup>477</sup>

2.151. In DP 62, the Commission suggested that 'a national institute for judicial education' be established in Australia.<sup>478</sup> While the submissions varied in their suggestions about the structure and composition of the body, the design and reach of programs, and funding, there was uniform support for the general concept. The Law Council, which described its attitude on this issue at the time of the Commission's 1997 Issues Paper as 'equivocal', reported that its 'thinking has developed and refined', and it 'agrees with the general tenor' of the Commission's proposal.<sup>479</sup>

2.152. The idea of a national judicial college was given a major push forward by the former Chief Justice of Australia, Sir Anthony Mason, in an address to the Australian Institute of Judicial Administration (AIJA) Conference in August

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474. Although the civil code systems set up elaborate induction training for judicial aspirants, they too have implemented formal continuing judicial education programs only relatively recently. See eg JStaats, German Ministry of Justice 'The education and further training of German judges for their duties in civil proceedings' *Paper Beyond the Adversarial System Conference Brisbane 10-11 July 1997* and M Lemonde 'Training of judicial officers and attorneys in France' *Paper Beyond the Adversarial System Conference Brisbane 10-11 July 1997*. French judges are guaranteed the right to continuous training in the Institutional Act of 25 February 1992 (loi organique) set at five days training annually throughout their judicial career. However, demand exceeds the supply of courses from the *Ecole Nationale de Magistrature*.

475. ALRC DP 62 para 3.77 citing P Sallmann 'Comparative judicial education in a nutshell: A cursory exposition' (1993) 2 *Journal of Judicial Administration* 245, 245, 252. Note this comment was directed to the situation as at 1993, but is still apposite today.

476. See for example, Lord Irvine 'Training in a modern world' (1997) 2 *The Judicial Studies Board Journal* 2; M Gleeson, 'The state of the judiciary' *Address Australian Legal Convention Canberra 10 October 1999*, 4 <<http://www.hcourt.gov.au/speeches.htm>> (17 January 2000); S Colbran *Submission 309*, regarding the role that judicial performance evaluation can play in identifying core competencies and targeting educational needs for the judiciary.

477. ALRC DP 62 para 3.89.

478. ALRC DP 62 proposal 3.2.

479. Law Council *Submission 375*.

1999,<sup>480</sup> by Chief Justice Gleeson in his 1999 'State of the Judicature' address,<sup>481</sup> and by the publication of a discussion paper<sup>482</sup> prepared by Chris Roper on this topic, jointly commissioned by the AIJA and the Judicial Conference of Australia (JCA) (the AIJA-JCA Discussion Paper).<sup>483</sup>

2.153. The Commission noted in DP 62 that Australia is now out of step with other (industrialised) common law countries, which have established national judicial colleges. The United States is particularly well served in this regard,<sup>484</sup> with 65 national and state bodies actively engaged in judicial education, including many which are well known in Australia, such as the National Judicial College (in Reno, Nevada),<sup>485</sup> the Federal Judicial Center (in Washington DC), and the National Center for State Courts (in Williamsburg, Virginia).

2.154. In the United Kingdom, the Judicial Studies Board was established in 1979. Its initial focus on criminal law, especially sentencing, was broadened in 1985 to take in civil and family law, and to extend its reach from judicial officers to include the training of magistrates (including lay magistrates) and tribunal members.<sup>486</sup> Canada also opted for a centralised, national model, establishing the National Judicial Institute (formerly the Canadian Judicial Centre) in 1998, well known for its cultural awareness programs.<sup>487</sup> Judicial training institutions also have been established in recent years in New Zealand and Singapore.<sup>488</sup>

2.155. In Australia, the availability of judicial education programs varies considerably according to jurisdiction. AIJA runs highly regarded training programs, but this is not its main brief.<sup>489</sup> New South Wales (which has about one third of all the judicial officers in Australia) is best served, with the Judicial

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480. A Mason 'The future of adversarial justice' *Paper* 17th AIJA Annual Conference Adelaide 6-8-August 1999.

481. M Gleeson 'The state of the judicature' *Address* Australian Legal Convention Canberra 10 October 1999 <<http://www.hcourt.gov.au/speeches.htm>> (17 January 2000).

482. C Roper *Proposed Australian Judicial College: Discussion Paper* Australian Institute of Judicial Administration and the Judicial Conference of Australia September 1999 (the AIJA-JCA Discussion Paper).

483. The AIJA and the JCA have established a working group to consider the issue, comprised of Justice John Dowsett of the Federal Court, Justice John Byrne of the Supreme Court of Queensland, Professor Stephen Parker, Dean of Law at Monash University, and Professor Greg Reinhardt, Executive Director of AIJA.

484. See ALRC DP 62 para 3.79-3.80.

485. Contrary to the position in most other countries, the National Judicial College (NJC) was established on the initiative of the American Bar Association, the peak professional association, rather than the initiative of judges.

486. See ALRC DP 62 para 3.81. See also AIJA-JCA Discussion Paper, 3, 30.

487. See ALRC DP 62 para 3.82. See also AIJA-JCA Discussion Paper 4, 44.

488. The Singapore Centre for Judicial Education and Learning was established in 1996, and the New Zealand Institute of Judicial Studies in 1998. See ALRC DP 62 para 3.83; AIJA-JCA Discussion Paper 4, 39.

489. J Doyle *Submission* 382 refers to the desirability of maintaining AIJA as an inclusive membership body, remaining apart from a college devoted solely to judicial education.

Commission of New South Wales (JCNSW) established in 1986 by legislation 'to organise and supervise an appropriate scheme for continuing education and training of judicial officers'.<sup>490</sup> The JCNSW has an education division with full-time staff running a large array of programs.<sup>491</sup> In 1998, the JCNSW ran 28 conferences, involving 1725 days of judicial officer attendance, including orientation programs.<sup>492</sup> The JCNSW also has an extensive publication program, with the production of 'Bench Books' for each court, a regular journal (the Judicial Officers Bulletin), research monographs, statistical papers, and online facilities (most famously 'JIRS', the Judicial Information Research System, which includes a sentencing database as well as online access to cases and statutes).

2.156. Since 1996, the JCNSW and the AIJA have run an annual, five day, National Judicial Orientation Programme in Sydney.<sup>493</sup> There is a similar program available for magistrates, as well as a two day pre-appointment program for persons about to become magistrates.

2.157. As noted in DP 62

The particular deficit in Australian judicial and court education offerings is the lack of a specialist judicial or justice education centre. This is in no way a criticism of the courses and educational material provided by AIJA, JCNSW, the University of Wollongong [Centre for Court Policy and Administration], or through in-house programs developed by the courts and tribunals themselves. Indeed, those programs generally have received high commendation. However, as the AJAC report noted,<sup>494</sup> the Judicial Commission's functions relate to New South Wales, AIJA's focus is primarily on judicial administration, and no single court or tribunal is of sufficient size to provide an adequate range of courses for the orientation and continuing needs of all of its judicial officers.<sup>495</sup>

2.158. This echoes a very similar appraisal in Canada in 1986 by Justice Stevenson, which eventually led to the establishment of a National Judicial Institute (NJI).

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490. *Judicial Officers Act 1986* (NSW), as amended by the *Judicial Officers Amendment Act 1987* (NSW), which established the Commission as a statutory corporation independent of executive government.

491. This year, the JCNSW is operating on a budget of about \$2.9 million, employing about 25–26 staff. There is also an Education Committee for each participating court, with members volunteering their time. See JCNSW *Annual report 1998–1999*, 33–41 for staffing information, 51–68 for audited financial information. Judicial education topics presented are detailed in appendix 2, committee membership in appendix 3.

492. E Schmatt, Chief Executive of the JCNSW *Consultation Sydney* 19 October 1999.

493. NSW judicial officers are not charged fees, but judges and magistrates from interstate and overseas are (that is, their respective courts are).

494. AJAC report 377.

495. ALRC DP 62 para 3.105.

Existing Canadian programmes show uneven coverage with significant gaps and deficiencies, duplication, and a lack of coordination with a consequent waste of resources. There is also a shortage of substantial professional organization and presentation.

What is lacking in Canada is any national coordination of resources, any effective means of exchanging information, and any adequately funded long-range planning capacity. There is no national body with permanent staff developing effective teaching techniques. There does not exist an agency with the ability and capacity to respond to national needs.<sup>496</sup>

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496. W Stevenson 'Towards the creation of a national judicial education service for Canada' *Report for the Canadian Judicial Centre Project*, 11 quoted in Judicial College DP at 44, and see also at 10, for a similar quote by Sir Ivor Richardson in 1994 about the New Zealand situation.



## The nature and structure of an Australian judicial college

2.159. The mission statements of the various judicial education institutes tend to be couched in similar terms and are appropriate for adaptation to the circumstances of Australia. Typical of the statement of objectives is the one from the Canadian NJI, which states that it exists

[t]o foster a high standard of judicial performance through programs that stimulate continuing professional and personal growth; to engender a high level of social awareness, ethical sensitivity and pride of excellence, within an independent judiciary; thereby improving the administration of justice.<sup>497</sup>

2.160. Although it is not a matter for the Commission to engage in detailed planning for the establishing of an Australian judicial college<sup>498</sup> – and in any event AIJA and the JCA have this well in hand – there are some general principles relating to the nature and structure of judicial education which are worth identifying to assist in this process.

2.161. In the AIJA-JCA Discussion Paper, Chris Roper surveyed the literature and distilled ‘seven fundamental themes’.

- that it is essential that programs are judge-controlled and often judge-delivered
- the college's activities should be developed in close liaison with courts at various levels and places, so that they reflect the diversity of real interests and needs
- participation in the college's activities should be voluntary
- there should be a diversity of programs, including skills and opportunities for reflection on the judicial role
- the activities should take into account that judges are good at self-directed learning
- the college should be clearly professional in its operations, with a comprehensive and coherent curriculum and incorporating educational principles into its activities, and
- the college's activities should be flexible, reflecting the variety of ways in which judges learn and professionally develop themselves, and should be decentralised as much as possible.<sup>499</sup>

### *Voluntary participation*

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497. See AIJA-JCA Discussion Paper 43.

498. Although it is not a matter of great moment, the Commission prefers the name ‘Australian Judicial College’ to distinguish this institution from the (American) National Judicial Center, and the (Canadian) National Judicial Institute. The question of name is considered in the AIJA-JCA Discussion Paper 49-50.

499. AIJA-JCA Discussion Paper 12-14.

2.162. In DP 62, the Commission stated that

As a general matter, the Commission's submissions and consultations overwhelmingly support voluntary judicial education and its continuing development. There is less support for mandatory judicial education, except perhaps for intake/orientation programs. Voluntary participation is consistent with judicial independence and the self directed mode of learning characteristic of judicial officers.<sup>500</sup>

2.163. The Law Council's submission also highlighted this point

The Law Council wishes to reiterate that its support for a national judicial education institute is entirely dependent upon participation in education programs being not compulsory of judges ... [T]he Law Council believes that any such compulsion would tend to compromise judicial independence. The Law Council also does not believe that compulsion is necessary. It believes that if suitable education opportunities are made available, individual judges will be able to determine their own requirements and avail themselves of the opportunity to attend programs relevant to them.<sup>501</sup>

2.164. In the AIJA-JCA Discussion Paper, Roper describes this condition as the 'non-negotiable requirement of the maintenance of judicial independence'.<sup>502</sup> This principle is universally accepted in common law countries. In the United States, which has the longest experience and the most extensive programs, only one state has ever mandated judicial education for judges. In 1990, the North Dakota Supreme Court promulgated an Administrative Rule<sup>503</sup> to impose (effective in 1991) mandatory continuing education requirements on Municipal Court judges. However, this rule was repealed in 1994.

#### *Judicial control over program governance*

2.165. Chief Justice Gleeson provides a clear rationale for the need for judicial control over judicial education programs in the following terms.

The first reason concerns the constitutional principle of judicial independence. The purpose of the independence of the judiciary is to ensure both the reality and the appearance of impartiality in judicial decision-making. That purpose would be undermined if the training and continuing education of judicial officers were in the hands of people who do not share the judiciary's independence ...

The second reason is related to the first, but is essentially pragmatic. For judicial training to be effective, it must be provided by an organisation with such standing amongst

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500. ALRC DP 62 para 3.90.

501. Law Council *Submission* 375.

502. AIJA-JCA Discussion Paper 11.

503. North Dakota Supreme Court, Administrative Rule 30.1, adopted 5 October 1990, effective 1-January 1991 <<http://www.court.state.nd.us/court/rules/administrative/ar30.1.htm>> (13-January 2000).

judges and magistrates that they will give it their full co-operation and support. An organisation controlled by the executive government would simply be ignored by a substantial section of the judiciary.<sup>504</sup>

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504. M Gleeson 'The future of judicial education' (1999) 11(1) *Judicial Officers' Bulletin* 1, 2.

2.166. Chief Justice Gleeson has commented that the experience of establishing and operating the JCNSW<sup>505</sup> makes clear the lesson that an Australian judicial college 'should be established as part of the judicial branch of government, and it should participate more fully in the independence of the judiciary'.<sup>506</sup> The Chief Justice also suggests that the heads of jurisdiction must be intimately involved if success is to be achieved.

This is a matter of considerable practical importance. Judicial education programmes are tailored to the needs of each particular court. Their success depends upon the support of the head of the court. It is difficult to imagine how a programme could work successfully in relation to a court against the opposition of the head of jurisdiction. At a national level, the counterparts of the heads of jurisdiction are the members of the Council of Chief Justices. As a matter of practicality, their support for any particular model of a National Judicial College would be essential.<sup>507</sup>

2.167. The Federal Court of Australia also makes this a key to its support for the concept.

The Court strongly supports the establishment of a national institute for judicial education, *provided* that it is led by the judiciary and it is properly funded. These twin requirements underlie the impressive success of the Judicial Studies Board in England and Wales. Judicial leadership is the key to the success of the proposal.<sup>508</sup>

2.168. The pattern overseas also strongly supports judicial governance of programs. In the United Kingdom, the report which led to the formation of the Judicial Studies Board (JSB) concluded that, for reasons of credibility and independence, 'to be acceptable to the judiciary, [the Board] must be run and managed by the judges themselves'.<sup>509</sup> The JSB subsequently was established as an autonomous department within the Lord Chancellor's Department, with a memorandum of understanding which stated that the JSB 'will enjoy a level of autonomy in its financial affairs consistent with its independence in assessing the need for, and providing, judicial training'.<sup>510</sup>

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505. M Gleeson 'The state of the judiciary' *Address Australian Legal Convention Canberra* 10 October 1999, 4 <<http://www.hcourt.gov.au/speeches.htm>> (17 January 2000). As noted above, the JCNSW is an independent statutory body, and is not part of the Attorney-General's Department. Its annual budget is negotiated directly with Treasury. Heads of jurisdiction form the education division of the Commission, with education committees in each court.

506. M Gleeson 'The future of judicial education' (1999) 11(1) *Judicial Officers' Bulletin* 1, 3. See also AIJA-JCA Discussion Paper 46.

507. *ibid.* The Council of Chief Justices of Australia and New Zealand consists of the Chief Justices of the High Court of Australia, the High Court of New Zealand, the Federal Court of Australia, the Family Court of Australia, and the Supreme Courts of each State and Territory.

508. Federal Court *Submission* 393.

509. Working party on judicial studies and information *Report HMSO London* 1978 (Bridge report) discussed in AIJA-JCA Discussion Paper 36, 45.

510. AIJA-JCA Discussion Paper 45.

2.169. In New Zealand, the Institute of Judicial Studies (IJS) was established within the Department of Courts but its memorandum of understanding is based on the English one, providing that 'in order to maintain judicial independence, the Institute will have autonomy in its affairs'.<sup>511</sup> The Board of the IJS is comprised of

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511. id 41.

five judges, the Chief Executive Officer of the Department of Courts, one senior practitioner, one academic lawyer, and one community member. In Canada, all but one of the members of the board of the NJI are judges.<sup>512</sup>

2.170. In DP 62, the Commission noted that

submissions and consultations have strongly supported significant judicial involvement in the design and delivery of educational services. Armytage has suggested that this reflects the judges' deeply held view that they are the best arbiters of their own learning needs and should operate free from any external prescription.<sup>513</sup> The Commission agrees that this feature of judicial education planning and delivery should continue. However, care also must be taken to ensure that judicial education does not become overly cautious or a closed shop, divorcing judges from exposure to bodies of expertise and community experiences and perspectives from which they could benefit.<sup>514</sup>

The Commission would favour a model in which a national judicial college was established as a statutory corporation independent of executive government, with a board that ensures judicial control (in deference to judicial independence) but is leavened with some appropriate external (academic, professional and community) representation. For example, the JCNSW is comprised<sup>515</sup> of six 'official members', who are the presiding officers of the various jurisdictions, and four other members appointed by the Governor on the nomination of the responsible Minister. Of the appointed members, one must be a legal practitioner, nominated after consultation with Presidents of the Bar and the Law Society, and the others must be persons of 'high standing in the community', nominated after consultation with the Chief Justice of the Supreme Court of NSW.

2.171. If a national judicial body was established, as recommended by the Commission (see recommendation 8 below), the issue for Australia is how to compose a board in such a way that it is representative, without making it unduly large and thus unwieldy and expensive to maintain.<sup>516</sup>

### *National or federal?*

2.172. As described above, the programs mounted by the JCNSW are generally available, on a fee for service basis, to judicial officers from other Australian jurisdictions and overseas. Individual courts also operate effective judicial education programs from time to time. For example, the Family Court has undertaken significant social context education, focusing on gender, race

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512. *ibid.*

513. L Armytage 'Educating judges: Lessons from common and civil law approaches' *Paper Beyond the Adversarial System Conference Brisbane 10–11 July 1997.*

514. ALRC DP 62 para 3.91.

515. Under the *Judicial Officers Act 1986* (NSW) s 5.

516. AIJA-JCA Discussion Paper 42. The DP canvasses a number of possibilities for structuring such a board.

(especially in relation to Aboriginal and Torres Strait Islander peoples) and cultural awareness issues.<sup>517</sup> The Family Court is notable in that it includes all of its staff (that is, support and counter staff) in its educational programs, eschewing a

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517. See Justice N Buckley *Address* Association of Family & Conciliation Courts Montreal 17-20 May 1995.

hierarchical approach. The Federal Court also has an active program for judges, including the organisation of an interesting 'Science Day' for the Supreme Court and Federal Court Judges' Conference.

2.173. All of this activity reflects the basic fact that judges are now enthusiastic about continuing judicial education — so long as it does not smack of 'the executive sending judges back to school' — and courts are actively seeking opportunities to provide it. Nevertheless, it appears to be widely accepted (and manifest in the training programs of AIJA) that reliance upon a court by court approach is undesirable, and that a broader base is necessary. Apart from achieving economies of scale and other matters relating to efficiency, there is also a view among judges that the best judicial education often involves going beyond periodic meetings with colleagues to enjoy the stimulation and benefits of 'cross-fertilisation' and 'broadening of horizons' achieved by interacting with peers from other jurisdictions (from within, and outside, Australia).<sup>518</sup>

2.174. The Council of Chief Justices of Australia and New Zealand have encouraged AIJA to pursue the initiative of establishing a national judicial college<sup>519</sup> — and it is telling that, among the options considered in the resulting discussion paper commissioned by AIJA and the JCA,<sup>520</sup> retention of a court by court approach is not mentioned.

2.175. Until recently, short shrift also would have been given to any thought of establishing a dedicated college for the federal judiciary, given the relatively small numbers. However, there are currently 109 federal judicial officers serving in the High Court, Federal Court and Family Court,<sup>521</sup> and they will soon be joined by 16 magistrates appointed to a new federal magistrates court<sup>522</sup> — so that there is now a critical mass of 'Chapter III judges' which could justify and sustain a stand alone federal judicial college.

2.176. However, Chief Justice Gleeson also has noted that there are almost 800 judicial officers (judges and magistrates) currently serving in State and Territory courts, and that it is still the case that the state governments of NSW, Victoria and Queensland each appoint more judicial officers than the Federal Government.<sup>523</sup> Notwithstanding the growth of the federal court system since the 1970s, it is also the case that the judicial power of the Commonwealth is still widely dispersed,

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518. Justice French *Consultation* Perth 23 September 1999.

519. G Brennan 'The state of the judiciary' (1998) 72 *Australian Law Journal* 33, 37.

520. See generally AIJA-JCA Discussion Paper.

521. M Gleeson 'The state of the judiciary' *Address* Australian Legal Convention Canberra 10 October 1999, 3 <<http://www.hcourt.gov.au/speeches.htm>> (17 January 2000).

522. D Williams 'Federal magistrates legislation passes parliament' *Media release* 8 December 1999.

523. M Gleeson 'The state of the judiciary' *Address* Australian Legal Convention Canberra 10 October 1999, 3 <<http://www.hcourt.gov.au/speeches.htm>> (17 January 2000).



with some reliance placed upon state courts vested with federal jurisdiction under s77(iii) of the Constitution.<sup>524</sup>

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524. See eg, the discussion of state and federal jurisdiction in *Re Wakim; Ex parte McNally* (1999) 163 ALR 270

2.177. The Commission believes that a national approach to judicial education would be preferable, building upon the national (and regional) success already achieved by AIJA.<sup>525</sup> The Commission confirms the views expressed in DP 62 that the establishment of a national judicial college would

- confirm the nexus between judicial education and judicial independence
- be the most effective means of developing and maintaining national standards
- be generally consistent with self directed, judge led, educational approaches
- take advantage of economies of scale
- have advantages over a system of in-house education insofar as it could utilise a variety of external inputs and programs to suit new or more experienced judges
- permit development of integrated curricula for judges, magistrates and tribunal members
- enhance collegiality between judges, magistrates and tribunal members and
- provide an opportunity to develop partnerships with, for example, university law schools and legal professional organisations, to design and present programs which may complement or supplement in-house efforts.<sup>526</sup>

#### *Range of judicial officers covered*

2.178. Opinions and practices differ about whether a national judicial body should attempt to cater for all judicial officers (judges and magistrates), tribunal members and others (including court staff). The AJAC report favoured an inclusive approach.

The primary function of the centre should be to provide courses and other educative material for judges, magistrates, members of dispute resolution tribunals and any other person performing judicial or quasi-judicial functions.<sup>527</sup>

2.179. In DP 62, the Commission wrote that

[t]here are certain core skills desirable for judges, magistrates and tribunal members. Education and training planning and programs should recognise such common features. Collegial interaction is enhanced by judges, magistrates and tribunal members sharing experiences and discussing common problems and successful (or sometimes unsuccessful) outcomes. Integrated programs are also consistent with the trend towards national practices and procedures, the interrelationships between federal courts and tribunals and their shared jurisdiction in areas of public law and family law.<sup>528</sup>

2.180. The programs of the United Kingdom's JSB are open to judges, magistrates (including lay magistrates), recorders, assistant recorders, and tribunal members

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525. Proposal 3.2 of DP 62 suggested that the establishment of a national judicial college might be achieved by 'reconstituting' AIJA for this purpose, in consultation with the JCA. Consultations with these bodies suggested that this was not their desired approach, and it is significant that their discussion paper does not raise this as an option.

526. ALRC DP 62 para 3.109.

527. AJAC report 379, action 15.4. See also para 15.80-15.103.

528. ALRC DP 62 para 3.93.

(over 70 tribunals with more than 30,000 members). The JSB's orientation has largely been around the needs of those other than judges. In practice, higher court judges have not participated extensively, except as 'faculty',<sup>529</sup> although this may change with the broadening of the JSB's brief to cover of civil and family law matters.

2.181. In the United States,<sup>530</sup> the National Judicial College also caters for magistrates and tribunal members, and runs some programs for practitioners — and, of course, must deal with the fact that some judicial officers in the United States (mainly in state lower courts) do not have any legal qualifications. The Federal Judicial Center also has long taken responsibility for running programs for court administrators.

2.182. However, the NJI of Canada operates for judges only, with the view that other bodies should have responsibility for developing and operating customised programs for tribunal members, court staff, and others.<sup>531</sup>

2.183. The JCNSW has responsibility for New South Wales judges (and masters) and magistrates. An amendment to the *Industrial Relations Act 1996* (NSW) also appears to bring judicial members of the NSW Industrial Commission within the meaning of the term 'judicial officer' for the purposes of education and conduct under the *Judicial Officers Act 1986* (NSW). It is understood that the New South Wales government is considering whether to extend coverage to include members of the State's Administrative Decisions Tribunal (ADT) — which would double the number of persons within the ambit of the JCNSW. The 1998 proposal to establish a judicial college in Victoria (which did not proceed for funding reasons) also envisaged coverage of tribunal members.<sup>532</sup>

2.184. The differences between judicial officers and tribunal members are sharper in the federal arena than in the States and Territories, owing to the constitutional reservation of the exercise of judicial power to persons appointed as 'Chapter III judges'. By way of contrast, many members of state tribunals — such as New South Wales's ADT and the Victorian Civil and Administrative Tribunal (VCAT) — act in much the same ways as magistrates (albeit in more specialised jurisdictions), hearing disputes at first instance and making decisions determining the rights of the parties.

2.185. The Commission's preference would be for an Australian judicial college to concentrate on providing programs for 'Chapter III judges' in the federal system, and the equivalent judicial officers in the States and Territories. This division is emphatically *not* supported on the basis of enforcing status distinctions nor

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529. AIJA-JCA Discussion Paper 33–34.

530. See ALRC DP 62 para 3.79–3.80 and AIJA-JCA Discussion Paper 29–30, 33–44.

531. See AIJA-JCA Discussion Paper 34.

532. *ibid.*

discriminating between those with judicial tenure and those with part time or term appointments. Rather, the Commission believes that, for reasons of differing backgrounds<sup>533</sup> and roles, and differing educational and training needs, tribunal members generally would be better served by developing their own programs. This is particularly true for review tribunals which have specialist administrative functions. Programs customised for tribunal members would help establish their own core sense of identity and professional cohesion and define an appropriate concept of independence in the context of reviewing administrative decisions.

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533. For example, many tribunal members are not legally qualified.

2.186. However, an Australian judicial college could deliver inhouse expertise and programs which, from time to time, could include courses of interest to tribunal members – as well as practising lawyers, bureaucrats, mediators, and business people. There also could be some programs with common streams for judges and tribunal members, with such interaction benefiting both groups.<sup>534</sup> Education and training for tribunal members is considered below.

### *The nature and content of programs*

2.187. As discussed above (see para 2.177), the Commission accepts the critical importance of judicial involvement in, and ultimate control over, programs. In DP-62, the Commission considered the literature and practice in Australia and overseas on the design and delivery of judicial education programs,<sup>535</sup> and it is unnecessary to repeat that here at length.

2.188. Submissions and consultations raised a number of other matters worth considering. The desirability of programs aimed at combating ‘burnout’ among judicial officers was mentioned a number of times.<sup>536</sup>

2.189. Another point was that the establishment of a national judicial college should not preclude participation in other programs offered in Australia,<sup>537</sup> or the better overseas programs, such as McGill University’s visiting judges-in-residence program, or the extremely popular program offered by Princeton University.<sup>538</sup> The latter, which has a waiting list of several years, is a week long residential program of judicial education which involves no ‘law’. Instead, the University brings leading figures in their field to acquaint senior judges with the latest research and thinking in such areas as visual art, literature, astrophysics, biotechnology, architecture, engineering – subject areas in which litigation may arise.

2.190. It was said by two law deans, Professors Ralph Simmonds and Ian Campbell, that it was sometimes difficult to convince judges to make time in their busy schedules for judicial education, and that programs such as the ones at Princeton and Cambridge were popular because they were successful in ‘re-motivating and re-charging’ busy judges.<sup>539</sup> They suggested that what should

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534. M Kirby *Consultation* Sydney 14 October 1999.

535. ALRC DP 62 para 3.87–3.100.

536. For example the Law Institute of Victoria, Litigation Section *Consultation* Melbourne 24 August 1999, suggested that overseas studies pointed to years 6 and 11 as danger spots in the career of a judge; Ernie Schmatt of the JCNSW, also raised the possibility of running a ‘5 years after appointment’ program for judicial officers, dealing with mid career issues, including how to avoid ‘burnout’: *Consultation* Sydney 19 October 1999.

537. R Simmonds *Submission* 368.

538. D Ipp *Consultation* Perth 22 September 1999; French J *Consultation* Perth 23 September 1999.

539. On the challenges involved in getting busy professionals to learn, see C Argyris ‘Teaching smart people how to learn’ (1991) 69(3) *Harvard Business Review* 99.

be avoided is using 'the language of CLE', with its connotations of an extra obligation, after an exhausting day's work, noting up 'recent developments' in some area of the law.<sup>540</sup>

2.191. Justice French also pointed out that the experience of judges delivering education as 'faculty' also was valuable, since this required research, careful thought in preparation, and interaction with participating colleagues.

2.192. An important matter which does not often appear in the literature was highlighted by some judges: the danger of being too specific in judicial education programs and compromising subsequent litigation. For example, lectures by anthropologists aimed at acquainting judges with the nature of traditional land ownership, which looked at the history of a particular place or the customs of a particular group, could ground allegations of bias of participating judges in the event that a native title claim was made which involved that land or group.

#### *Issues of location and affiliation*

2.193. Whether an Australian judicial college emerges as a national or federal body, if the college encompassed the existing resources of the JCNSW (see below), then there would be a logical argument in favour of a Sydney base; otherwise, the choice is at large.

2.194. However, it is important to note that the suggested use of the term 'college' for these purposes does not signify a view on the part of the Commission that the best model necessarily involves establishing a college campus – an actual, dedicated, physical site with its own buildings, and so on, in which all educational programs are run.<sup>541</sup> It is more likely in the Australian context that the college would have its staff and secretariat headquartered in one city but would regularly take its courses out to the states and territories. The use of information technology now makes feasible the development of a virtual campus.

2.195. Many of the best judicial programs have an affiliation with a university. As discussed above, the basic principal of judicial independence and control is accepted; however, as the Stevenson report in Canada stated, ensuring ultimate judicial (rather than academic) control of programs is simply a matter of management.<sup>542</sup> The National Judicial College is based on the campus of the University of Nevada-Reno, but is established as a private (not for profit) corporation with its own board of trustees. The Canadian NJI was originally

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540. R Simmonds (Murdoch University) and I Campbell (University of Western Australia) Law school deans *Consultation* Perth 22 September 1999.

541. The report by Lord Justice Bridge which led to the establishment of the Judicial Studies Board in England specifically recommended the use of the word 'Board', rather than 'College', for this reason. See AIJA-JCA Discussion Paper 3.

542. AIJA-JCA Discussion Paper 47.

headquartered at the University of Ottawa; it has since moved off campus, but maintains an association with that University. The Commonwealth Judicial

Education Institute (CJEI),<sup>543</sup> founded in 1994 by the Commonwealth Magistrates' and Judges' Association, is located at the Law School at Dalhousie University in Halifax, Nova Scotia, Canada. The Institute of Justice and Applied Legal Studies (IJALS), established at the University of the South Pacific in 1995, also plays an important regional role in research and delivery of judicial studies, in association with the South Pacific Judicial Conference.<sup>544</sup>

2.196. The AIJA-JCA Discussion Paper surveyed the international experience, and provided a useful summary of the pros and cons of co-locating a judicial college with a university.

In summary, the advantages appear to be –

- reduced chance of isolation and low profile
- possible free or cheap premises
- possibility of attracting high level staff because of academic rank, some role within the university, etc
- educational services from the university
- administrative and other support services from the university, either free or at a reduced rate
- imposition of financial and administrative accountability mechanisms.

The disadvantages appear to be

- reduced perception of autonomy and independence
- increased bureaucratic requirements
- heightened emphasis on academic, as opposed to practical, aspects of the college's work.<sup>545</sup>

2.197. In DP 62, proposal 3.2 suggested that an Australian judicial college 'would regularly utilise partnerships with other entities (such as academic institutions and professional associations) to conduct its education, training and research programs'.<sup>546</sup> The Commission favours the establishment of an independent national judicial commission, but believes that the advantages of affiliation with a university outweigh the disadvantages, and the emerging college should explore, as a priority, an appropriate form of contractual linkage with a university (or

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543. CJEI has funding from the Commonwealth, non-government organisations (eg the Ford and Nuffield Foundations) and aid agencies (eg USAID, the British Council, the Canadian International Development Agency). It works internationally, in cooperation with local and regional judges' and magistrates' associations; provides support and linkages among Commonwealth judicial education bodies and delivers judicial education programs at the invitation of the Chief Justice of a jurisdiction, where no judicial education body exists, or in partnership where one does exist. The CJEI has been particularly active in the less developed nations of the Commonwealth, especially Africa, the Caribbean, South Asia (Bangladesh, Pakistan and Sri Lanka) and the Pacific Islands. Justice Neil Buckley of the Family Court of Australia is a member of the Board of Directors.

544. See <[http://www.vanuatu.usp.ac.fj/IJALS/ijals\\_main.html](http://www.vanuatu.usp.ac.fj/IJALS/ijals_main.html)> (17 January 2000).

545. AIJA-JCA Discussion Paper 48.

546. ALRC DP 62 proposal 3.2.



universities).<sup>547</sup> This linkage should not, of course, preclude the tendering or commissioning of specific projects (research, curriculum design, etc) to other bodies or individuals.

### *Funding*

2.198. The National Judicial College (NJC) in the United States began life with a major endowment from a charitable foundation and, as noted above, has strong links with a (public) university. For recurrent funding, the NJC relies on income from the endowment, plus 'a combination of tuition, annual gifts and grants from individuals, corporations and foundations'.<sup>548</sup> It must be said that this is a quintessentially American model – relying as it does upon the existence and largesse of philanthropic foundations, private donations and corporate sponsorships, rather than on government funding. As a practical matter it is unlikely to translate to Australian circumstances. There is also an important issue of principle – that is, the compatibility of private funding with judicial independence. Justice Stevenson's survey of judges in Canada found that there was virtual unanimity on the proposition that private funding would be inconsistent with judicial independence.<sup>549</sup>

2.199. In DP 62, the Commission suggested that the national judicial college 'should be sufficiently resourced by the Commonwealth to carry out its mission, and also should receive contributions from the States and Territories on the basis of usage'.<sup>550</sup> DP 62 also acknowledged that

Professional education is expensive. The time taken for education is time away from active case management or decision making. There are significant costs associated with developing and producing materials and paying the salaries of education support staff. In federal courts and tribunals, in particular, the travel costs alone associated with bringing judges and members together for education and training programs can be substantial.<sup>551</sup>

2.200. However, the corollary is also true – that instances of poor judicial performance are very expensive, both in terms of actual dollars and the loss of public confidence in the quality and integrity of the legal system. Chief Justice John Phillips AC of Victoria,<sup>552</sup> and the Chief Executive of the JCNSW, Mr Ernie Schmatt,<sup>553</sup> both have pointed out that if judicial education programs can have

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547. The AIJA has had a linkage for some years with the University of Melbourne, although this is set to end in February 2001 (mainly due to the University's new policy on commercial cost recovery for the provision of accommodation). Affiliation with another institution remains a possibility.

548. AIJA-JCA Discussion Paper 29.

549. id 58.

550. ALRC DP 62 proposal 3.2.

551. id para 3.85.

552. Supreme Court of Victoria *Consultation* Melbourne 25 August 1999.

553. E Schmatt *Consultation* Sydney 19 October 1999.

even a small effect on reducing delays in judgment writing, in management of court lists, and in minimising errors which result in appeals, the savings involved should greatly outweigh the outlays. Comparable common law jurisdictions such as Canada, England, New Zealand and Singapore, and within Australia the State of New South Wales, have all made the calculation that judicial education is of such importance that the commitment of public funding for this purpose (beyond the normal allocation for the operation of the courts) is well justified.

2.201. If an Australian judicial college is established, the Commission recommends that this be funded by a separate allocation from the Commonwealth. The Commission agrees with the submission from the Law Council<sup>554</sup> that it would be inappropriate to use court fees for this purpose, which could result in increased fees and diminished access to the courts.

2.202. Given the Commission's strong preference for a national body, assuming responsibility for the education of State and Territory judicial officers as well as federal judicial officers, the Commission recommends a funding mechanism which seeks to reflect this mix and to promote a sense of ownership (and inevitably a role in governance) amongst all of the parties. That is, funding for an Australian judicial college should be determined on the basis of block grants from governments, with 50% from the Commonwealth and 50% from the States and Territories, apportioned on the basis of population, as well as revenues generated through registration fees and the sale and licensing of materials. As Chief Justice Murray Gleeson has commented, supporting a national judicial college in this way 'will require a considerable exercise in cooperative federalism'.<sup>555</sup>

2.203. There are relevant precedents for such an approach. For example, AIJA is funded 50% by the Commonwealth and 50% by the states and territories (proportionate to population); the National Coronial Information System is funded 50% by the Commonwealth, 50% by the states and territories (proportionate to population);<sup>556</sup> and the National Courts Statistics Unit is funded by equal (33.3%) contributions from the Commonwealth, the Australian Bureau of Statistics, and the States and Territories (proportionate to population).

2.204. The level of funding for the college should be benchmarked nationally against that portion of the New South Wales government's funding of the JCNSW which is used for judicial education.<sup>557</sup> Assuming that New South Wales chose to participate fully in an Australian judicial college, the state could likewise contribute or transfer the resources (including, perhaps, the personnel) it currently devotes to the educational activities of the JCNSW.

**Recommendation 8.** The federal Attorney-General should facilitate a process, through the Standing Committee of Attorneys-General, to establish an Australian Judicial College, with a governance structure under the control of the judiciary. The College would have formal responsibility for meeting the education and training needs of judicial officers, particularly in relation to

554. Law Council *Submission 196*.

555. M Gleeson 'The future of judicial education' (1999) 11(1) *Judicial Officers' Bulletin* 1, 3.

556. As approved by SCAG in 1999.

557. In 1998-99, the JCNSW's aggregated budget was \$2.9 million, most of which was devoted to education, research, publications and online database maintenance. Conduct matters occupy a relatively modest portion of the budget, mainly payments for investigation of complaints.

induction and orientation courses for new appointees, and programs of continuing judicial studies and professional development.

*Recommendation 8 cont'd*

Funding for the College should be determined on the basis of block grants from governments (50% from the Commonwealth and 50% from the States and Territories, apportioned on the basis of population), as well as revenues generated through registration fees and the sale and licensing of materials.

**Professional development for tribunal members**

2.205. In DP 62, the Commission expressed the view, confirmed in this report, at paragraph 2.185, that

[g]iven the diverse range of backgrounds of tribunal members, and their differing needs, the Commission believes that basic education and training programs generally should be separate from those of judicial officers.<sup>558</sup>

2.206. The Commission also noted that

As is the case with judicial officers, there is no general set of educational or experiential pre requisites for appointment to a federal tribunal. In the case of some tribunals, such as the Administrative Appeals Tribunal (AAT), some criteria for appointment of members are laid down in legislation. However, for most tribunals, qualifications for appointment are fixed from time to time by individual ministers who are responsible for making appointments and recommending them to the Executive Council. Tribunal members are appointed from a broad range of occupational groups. Legal skills are relevant, although tribunals have sought a diverse, multi skilled membership.<sup>559</sup>

2.207. In Canada, the Society of Ontario Adjudicators and Regulators (SOAR) has listed education and training as an essential component of performance management, stating that

No matter how careful the selection process, most candidates will not have a full complement of all the knowledge, skills, attitudes and values required to be a good adjudicator at the time they are selected. Some of the necessary attributes will have to be learned or improved. Therefore, a tribunal cannot expect all members to consistently meet performance standards or expectations unless it is prepared to provide the necessary training and continuing education required to do so. Such training should occur at the beginning of a member's tenure and continue throughout.<sup>560</sup>

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558. ALRC DP 62 para 3.117.

559. *id* para 3.114.

560. Society of Ontario Adjudicators and Regulators 'Towards maintaining and improving the quality of adjudication: SOAR recommendations for performance management in Ontario's administrative justice tribunals' (1996) 9(2) *Canadian Journal of Administrative Law and Practice* 179



2.208. In its *Better decisions* report,<sup>561</sup> which followed from a comprehensive review of Commonwealth merits review tribunals, the Administrative Review Council (ARC) articulated a list of skills which it suggested are essential or desirable for members of administrative merits review tribunals

- understanding of merits review and its place in public administration
- knowledge of administrative review principles
- analytical skills
- personal skills and attributes and
- communication skills.<sup>562</sup>

2.209. The ARC recommended,<sup>563</sup> and the Commission endorsed in DP 62, that tribunals cooperate to develop

a minimum set of core skills and abilities required of effective tribunal members, for use in organising professional development of members and in the process of developing selection criteria.<sup>564</sup>

and that

- review tribunals should ensure that all new members have acquired a minimum level of knowledge and skills before they commence reviewing decisions
- the skills and experience of review tribunal members should be developed through their participation on multi member panels where appropriate and through training and development programs and
- all review tribunals should cooperate with each other and where appropriate with courts and the AIJA to provide professional development programs for members.<sup>565</sup>

2.210. Generally speaking, individual federal tribunals have endeavoured to provide induction training for new appointees and some ongoing professional development training programs for members. As Julian Disney noted

Most legal and medical members, for example, could benefit from greater exposure to other disciplines, skills, and values. Many non-lawyers would benefit from a systematic but succinct introduction to legal principles, structures, procedures and skills. Promising initiatives have been commenced in several tribunals along these lines; due largely to particular leadership which by reason of professional background or gender is less constrained by legalistic traditions and obsessions with status. These initiatives epitomise the breath of fresh air which tribunals can bring to the stuffy confines of

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561. Administrative Review Council Report 39 *Better decisions: Review of the Commonwealth merits review tribunals* AGPS Canberra 1995 (ARC 39).

562. ARC 39 para 4.17 quoted in ALRC DP 62 para 3.115.

563. ARC 39 rec 31.

564. ALRC DP 62 para 3.116.

565. ARC 39 para 4.84-4.92.

traditional justice systems, although it remains to be seen how far the air will be allowed to circulate.<sup>566</sup>

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566. J Disney 'The way ahead for tribunals' in R Creyke (ed) *Administrative tribunals: Taking stock* ANU Centre for International and Public Law 1992, 126.



However, as is the case with judicial officers, there is a need for greater comprehensiveness, coherence and coordination. In DP 62,<sup>567</sup> the Commission pointed to the 'useful model' of the AAT's continuing professional development program,<sup>568</sup> in place since 1992, and stated in proposal 3.3 that

[e]very federal review tribunal should have an effective professional development program with stated goals and objectives. This should include access to induction and orientation programs, mentoring programs, and continuing education and training programs. In particular, legal training in areas relevant to decision making should be made available to members of tribunals who do not have legal qualifications.<sup>569</sup>

2.211. The President of the AAT, Justice Deirdre O'Connor, has written that continuing education is no less important for tribunal members than judges, although professional development programs also may be important to wean some tribunal members away from over reliance on legal techniques.

Members of the Administrative Appeals Tribunal ... have on-going developmental needs, although the nature of these needs will obviously be different to those of judges ... The Tribunal can deliver better decisions through on-going professional development of members ... Much has been said and written about the legalism in the Tribunal ... It has to be acknowledged that when members are appointed from the legal profession and other areas of the law, they are likely to bring with them a lawyer's way of doing things ... Professional development can be a useful means of equipping members with different, non-legal techniques which they can use in conducting matters in the Tribunal. Without knowledge of such techniques, the culture of legalism cannot be changed.<sup>570</sup>

2.212. Submissions were strongly supportive of this proposal, including those from the President of the ARC, Ms Bettie McNee (on behalf of the ARC),<sup>571</sup> the Law Council of Australia,<sup>572</sup> Professor Ralph Simmonds,<sup>573</sup> and Professor Neil Rees (a former President of the Victorian Mental Health Review Tribunal).<sup>574</sup>

2.213. Unlike the position with respect to judges, there are fewer sensitivities about independence in relation to the control and provision of education and training programs for tribunal members. As discussed above, an Australian judicial college would be well placed to offer such programs from time to time. Some universities

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567. ALRC DP 62 para 3.122.

568. AAT *Submission 144*; see also J Dwyer 'Smoothing the sharp corners of the adversarial system – The experience of the Administrative Appeals Tribunal' in C Sampford et al (eds) *Educating lawyers for a less adversarial system* Federation Press Sydney 1999, 27.

569. ALRC DP 62 proposal 3.3.

570. D O'Connor 'Future directions in Australian administrative law: the Administrative Appeals Tribunal' in P Bayne (ed) *AAT essays 1976–1996* AAT Sydney 1996, 13, 16.

571. Administrative Review Council *Submission 307*.

572. Law Council *Submission 375*.

573. R Simmonds *Submission 368*.

574. N Rees *Submission 363*.

also have the existing expertise and infrastructure, and could provide the economies of scale, to offer attractive programs. For example, Monash University is developing a Graduate Certificate in Tribunal Procedures for tribunal members, with a pilot program scheduled to commence in July 2000.<sup>575</sup> Topics under consideration are the concepts of separation of powers, merits review, and natural justice; statutory interpretation; confidentiality; ethics; dealing with unrepresented parties; and providing reasons for decisions. It is intended that the program will be available online, to overcome problems of the geographic dispersal of members and their differing decision making backgrounds.

2.214. The Commission also understands that the University of Wollongong, Monash University and the Australian National University are planning to collaborate on the design and implementation of education and training programs, including induction and orientation programs. Although primarily aimed at tribunal members, many of the planned programs are thought to be sufficiently 'generic' that they can also be used by primary decision makers. Similarly, the well regarded software developed by the Canberra based SoftLaw Corporation to improve the quality of primary decision making could be adapted in the other direction, for use by tribunal members.<sup>576</sup>

**Recommendation 9.** Every federal review tribunal should have an effective professional development program with stated goals and objectives. This should include access to induction and orientation programs, mentoring programs, and continuing education and training programs. In particular, training in administrative law principles relevant to decision making should be made available to members of tribunals who do not have legal qualifications.

## **Tribunals, agencies and independence**

2.215. While review tribunals are part of the executive arm of government, tribunal members must bring the same quality of independent thought and decision making to their task as do judges. It is crucial that members of the community feel confident that tribunal members are competent and of the highest integrity, and that they perform their duties free from undue government or other influence.

2.216. Review tribunals have an important, complex and ongoing relationship with government agencies whose decisions they review. Agencies can influence (or be perceived to influence) review tribunals in subtle ways.

575. P O'Connor, Monash University *Personal communication* 27 November 1999.

576. Softlaw's software packages are aimed at social welfare type decision making, and provide templates/checklists to lead the decision maker through the process. See also para 5.168.

2.217. Perceptions about the independence of tribunals have contributed to artificial barriers between agencies and tribunals which may be to the detriment of quality decision making. For example, sensitivity to perceptions of independence may contribute to reluctance to appoint tribunal members with experience of high level agency primary decision making<sup>577</sup> and the absence, in many review

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577. A notable exception is the appointment of executive members of the Social Security Appeals Tribunal (SSAT).

jurisdictions, of adequate conduits for communication between the tribunal and the agency, which may be needed to assist in adequate investigation and resolution of the review application.

2.218. Several of the Commission's recommendations aim to strengthen the relationship between agencies and tribunals, to enable more effective investigative assistance to be given by agencies to review tribunals and by placing new duties on agencies and their representatives to assist tribunals (see recommendations 121 and 122 in chapter 9). The Commission does not see placing an emphasis on agency and review tribunal cooperation in administrative decision making as threatening independence, if handled with proper sensitivity. Review tribunals should work with agencies in promoting normative change and enhancing the quality of decision making across the board. Professor Marcia Neave, former President of the ARC, has stated

[t]here needs to be more dialogue between tribunals and Government agencies, both for the purposes of increasing understanding of the benefits of review in the bureaucracy and to ensure that tribunal members understand administrative processes and agency policy approaches which provide the context within which particular decisions are made.<sup>578</sup>

2.219. In the current climate of change in administrative review, poor communication and limited cooperation between agencies, tribunals and advocates can handicap effective structural and procedural reform.

### **A new council on tribunals**

2.220. In DP 62, the Commission proposed that a Tribunals Council should be established to promote and facilitate the sharing of professional information and experience amongst administrative review tribunal members, as well as assisting in education and training for administrative decision makers.<sup>579</sup>

2.221. Following further consideration and consultation, the Commission now makes more detailed recommendations for the establishment of a council on tribunals, comprised primarily of the principal members of federal and state review tribunals.

2.222. The Commission also suggests, in addition, that there should be a broad based organisation, with a membership drawn from the major players interested in the appropriate development of the administrative justice system, including federal and state tribunal members, registrars, case officers and federal and state

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578. M Neave 'Bureaucratic rationality versus individualised justice – new developments in Australian federal administrative tribunals' *Paper* Council of Canadian Administrative Tribunals Best Practice in Administrative Justice International Conference Vancouver 10–12 October 1999.

579. ALRC DP 62 proposal 3.4.

agency decision makers. The reasons why these new institutions are considered desirable, their possible roles and memberships and ideas on how they might be established are discussed below.

*Changes in administrative review*

2.223. The Commission considers that administrative justice is advanced by mechanisms that allow agencies and review tribunal decision makers to work together to identify problems and solutions regarding the governing legislation, process or structure of administrative decision making.

2.224. Such mechanisms are particularly important in a context of rapid change and changing roles and practices in administrative justice including

- the establishment, abolition, restructuring and proposed amalgamation of specialised courts, tribunals, investigative and regulatory agencies
- the privatisation and contracting out of government services, affecting the framework for public sector employment and administrative review rights
- developments in a 'best practice' public service that have stressed outsourcing, benchmarking, strategic risk management, contestability, user pays and market testing
- the public's higher expectations of, and the increased public accountability of, tribunal services which has seen the development of benchmarks, performance standards and government measures of efficiency for tribunals
- the development and implementation of case management in tribunals
- the 'privatisation' of certain dispute resolution processes, and the expanded use of ADR within and outside tribunal systems
- the continuing technological revolution, with its potential to alter dramatically the practice of law and dispute resolution and the operation of tribunals
- the increasing number of unrepresented parties appearing before tribunals, and
- the growing awareness of the impact of cultural and linguistic differences, Aboriginality and disability.<sup>580</sup>

2.225. These factors characterise an administrative review system which is changing dramatically, and herald a new system in which the demarcation between primary decision makers and tribunals is diminished. Changes within tribunals also undercut hierarchies and modify work practices. The advent of case officers within the Migration Review Tribunal, for example, requires new cooperative arrangements between registry staff and members.

2.226. Leaving aside questions concerning the efficacy of these changes, the new arrangements call for better communication between participants within the administrative justice system and open debate and discussion to afford understanding and acceptance of new practices. The changes can seem threatening.

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580. AAT *Submission 144*.

They can be seen to undercut traditional notions of the independence of adjudicators. They challenge notions about where tribunals fit in our justice system

– on the edges of the judicial system or outside the portfolio departments. The new circumstances also require new skills, and members and registry staff require education to assist in developing such skills.<sup>581</sup>

2.227. While the activities of organisations such as the ARC, AIJA and the Australian Institute of Administrative Law already assist in this regard, a new standing institution with a specific brief in this area, such as a council on tribunals, is needed.

### *The model for a council on tribunals*

2.228. There has been recognition in Australia of the need for peak bodies in administrative review to liaise, facilitate the exchange of information and ideas, and secure training and education opportunities for tribunal members and staff. In its *Better decisions* report, the ARC recommended the establishment of a Tribunals Executive, comprising at least the principal members of each federal merits review tribunal.<sup>582</sup> The Tribunal Executive would identify areas appropriate for cooperation between the tribunals, plan these cooperative arrangements and, where appropriate, organise for the provision of services common to all tribunals. There is obvious merit in such a proposal.

2.229. Principal members already explicitly undertake responsibility to ensure the quality of member's work, via performance standards and performance evaluations or, as in the *Migration Act 1958* (Cth),<sup>583</sup> have express authority to give directions to apply efficient processing practices. Cooperation and coordination would be enhanced under the leadership of the President and Executive Members of the divisions of the new federal Administrative Review Tribunal (ART), which will be created by the planned amalgamation of the AAT with other existing specialist tribunals. The federal government also has amended the relevant legislation expressly to give the ARC new functions

- (g) to facilitate the training of members of authorities of the Commonwealth and other persons in exercising administrative discretions or making administrative decisions; and
- (h) to promote knowledge about the Commonwealth administrative law system.<sup>584</sup>

2.230. However, the Commission also envisages a broader collective of tribunal principal members (the council on tribunals) which might operate much in the same way as the Council of Chief Justices does in relation to the superior courts –

581. See K Cronin 'The role of legal education in achieving administrative justice' *Paper AIAL National Administrative Law Forum 'Administrative justice – The core and the fringe'* Canberra 29-30-April 1999.

582. ARC 39 rec 85.

583. s 353A(2).

584. *Law and Justice Legislation Amendment Act 1998* (Cth) Sch 1, which amended s 51 of the *Administrative Appeals Tribunal Act 1975* (Cth), substituting a new paragraph (g) and adding paragraph (h).



that is, as a national forum for tribunal leadership to consider and secure research on matters of common interest. The membership of the council on tribunals should include the heads of state tribunals engaged in administrative review and the President of the ARC, to ensure that a strong link is maintained with the ARC,

which has a continuing responsibility to provide advice to the federal government through the Attorney-General on strategic and operational matters relating specifically to the Commonwealth system of administrative law.

2.231. Some of the areas appropriate for closer cooperation and coordination between tribunals, to which a council on tribunals might contribute,<sup>585</sup> include

- developing tribunal codes of conduct and charters
- developing benchmarks for best practice in tribunal management
- developing policies on tribunal member selection, appointment and induction
- developing research and information services for decision making
- facilitating tribunal member and staff education, training and professional development, including through staff exchanges
- developing guidelines for performance management<sup>586</sup>
- improving data collection for reporting and performance management purposes
- improving liaison with tribunal user groups and the developing information services for review applicants.

2.232. Another important policy role for the council on tribunals could be in developing appropriate understandings of the independence of review tribunal decision making, given that many contemporary changes can be seen to undercut traditional notions of the independence of adjudicators.

2.233. While the Commission envisages that the focus of the council on tribunals would be on administrative review tribunal functions, the council should include membership from major tribunals such as VCAT and the New South Wales ADT, which also make original decisions in areas such as anti-discrimination, guardianship, tenancy, consumer affairs and professional regulation. Thus, the council on tribunals also could deal appropriately with policy and management issues common to first instance decision making and review, recognising that what has been established over time in the States and Territories<sup>587</sup> is something akin to an alternative or second arm of the judiciary.

2.234. In practice, the establishment of a national council on tribunals may require the support of federal and State Attorneys-General, through the framework of the SCAG. A sensible initial step might be the establishment of an ad hoc committee,

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585. See ARC 39 para 7.49. See also M Priest 'Fundamental reforms to the Ontario administrative justice system' in Ontario Law Reform Commission *Rethinking civil justice: research studies for the civil justice review* Vol 2 OLRC Toronto 1996, 561.

586. See eg SOAR recommendations referred at para 2.207 above.

587. But less so federally, due to the strictures of Chapter III of the Constitution. However, in practice, the NSW ADT may be more involved in original decision making than in review of administrative decision making.

including representatives from federal and state tribunals, to develop a detailed proposal.

2.235. The Law Council did not support the establishment of council on tribunals, stating that

Whilst the Law Council agrees with the objective of promoting the sharing and facilitating of experience and professional information amongst Tribunal members, it does not consider that a new and separate body should be established to undertake this. It cannot see why the Administrative Review Council (ARC) could not be reconstituted to undertake this function. The Commission refers to the proposed expanded role and function of the ARC in paragraph 3.128 of Discussion Paper 62. As the Commission suggests in paragraph 3.127, this body could assume the dual roles of determining education training for Tribunals members as well as facilitating communication between Tribunals and primary decision makers. This would need to be done in consultation with the proposed national judicial education institute.<sup>588</sup>

2.236. However, the ARC's own submission supported the establishment of a separate council on tribunals, but with ex officio membership for the President of the ARC.<sup>589</sup> The submission refers to the government's proposed expansion of the statutory functions of the ARC,<sup>590</sup> which would include 'facilitating the training of members of authorities of the Commonwealth and other persons making administrative decisions'. The ARC states that, for reasons of resources and expertise, it will likely limit itself to an advisory and monitoring role in the development of relevant training, and should not be involved directly in the operation of such programs.

#### *A society of administrative decision makers?*

2.237. In some other jurisdictions, broader membership based bodies<sup>591</sup> also have emerged from collaboration among tribunal heads. In Ontario, SOAR is an organisation of individuals (rather than institutions) drawn from all agencies involved in the administrative justice system, including those that make decisions at first instance, merits review tribunals and tribunals that act as industry regulators. The society's goal is simply the improvement of the administrative justice system.

2.238. The work of SOAR illustrates the kind of contribution such a body might make to augment that of governmental policy advisers such as the ARC. The activities of SOAR have included preparing a statement of principles of administrative justice; a code of professional conduct; a service equity policy; a

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588. Law Council *Submission* 375.

589. Administrative Review Council *Submission* 307.

590. To be contained in *AAT Act 1975* (Cth) s 51(1)(g) as amended.

591. Different organisational models exist to serve the needs of tribunals and tribunal members. The US and the UK have developed executive models, while others jurisdictions have developed membership models, of which SOAR is a leading example.

performance management strategy; and sample rules of practice. SOAR has an education advisory committee and an education coordinator, appointed to establish training programs for associated agencies.

2.239. In Australia, such a broad based body could emerge from the membership and activities of AIJA, perhaps beginning as a division of AIJA. In this context, it is important to note that the phenomenon appears to be developing in Australia of 'career tribunal decision makers', who move from one tribunal to another, or work concurrently (part time) for two or more tribunals – sometimes simultaneously for both state and federal bodies. A membership based body could co-exist easily with the council on tribunals and have a role in

- promoting the concept of an administrative justice system and the role of review tribunals
- representing the interests of tribunals and tribunal members to governments
- acting as a representative body to liaise with government and interest groups to present the case for the model system of administrative justice
- facilitating communication between tribunals and portfolio departments and between tribunal executive management and members.

2.240. The Commission would probably favour a membership model in time, but believes that the push for this must come from within the community itself. For the moment, the Commission is content to recommend as a first step the establishment of a council on tribunals.

**Recommendation 10.** A Council on Tribunals should be established as a national forum for tribunal leadership to develop policies, secure research and promote education on matters of common interest. The membership of the Council on Tribunals should include the heads of federal and State tribunals engaged in administrative review and the President of the Administrative Review Council. The functions of the Council on Tribunals should include: developing performance indicators, charters, benchmarking, and best practice standards in tribunal management, practice and procedure, and professional development; improving and coordinating data collection arrangements; developing research and information services for decision making; and developing policies on tribunal member selection, induction and training.

## **Accountability measures for federal judicial officers**

### **Introduction**

2.241. One of the major thrusts of this report is that the civil justice system operates more effectively and efficiently when judges take a more active role in managing litigation before them. In DP 62 (and see chapter 1) the Commission rejected the complete abandonment of the common law tradition of adversarial justice in the courts in favour of the Continental tradition of inquisitorial practice in the courts. Rather, the Commission noted that the stereotyping of stark differences between these two systems bears little resemblance to the actual position today, in which common law judges take a much more active role in managing litigation (as do the lawyers in civil code jurisdictions) as the two systems move towards each other.

2.242. The Commission's confidence in the ability of federal judges to manage the system (with a concomitantly somewhat more circumscribed, but nevertheless still large and critical, role for lawyers) stems in part from the evident quality and integrity of our bench. In recommendation 8, which calls for the establishment of an Australian judicial college, the Commission acknowledges that an enhanced role for judges must be supported properly with publicly funded programs of high

quality judicial education. At the same time, the maintenance of public confidence in the judiciary also requires the development of a transparent system of accountability for judicial officers who are invested with such enormous authority.

## Complaints against judicial officers

### *The trend towards greater accountability*

2.243. Any system of accountability for judicial officers must be premised upon the fact that the independence of the judiciary is a cornerstone of our system of justice and democracy.

2.244. Traditionally, judicial accountability is seen to be fully provided for in the common law system by having judges functioning in open courts; hearing both sides of the question in dispute; providing written reasons for their decisions; and subject to review by higher courts.<sup>592</sup> Professor Shetreet's classic study of judicial accountability in England found that this institutional scrutiny is supplemented in practice by other mechanisms (formal and informal) used for 'checking' judges, including the parliament, the media,<sup>593</sup> appellate courts, the legal profession and the writings of academic commentators.<sup>594</sup>

2.245. The Commission's consultations also found that informal means of accountability exist, such as peer pressure and the moral and administrative authority of the chief judge of each jurisdiction.<sup>595</sup> For example, Justice Michael Black, Chief Justice of the Federal Court, wrote to the Commission that

The history of the federal judiciary in Australia ... has demonstrated that [within the Chapter III protection of the independence of the judiciary] the traditional mechanisms of accountability and consensual internal governance of courts [have] maintained a system in which bona fide complaints are extremely rare. Within the federal judiciary, self-administration has had a powerful role in enhancing judicial accountability. The governance of the Federal Court is essentially collegiate in character, involving committees of judges and senior registry staff and meetings of the whole Court from time to time, and an Annual Report to Parliament. This form of governance is a

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592. M Gleeson 'Who do judges think they are?' (1998) 22 *Criminal Law Journal* 10, 13. See also M Gleeson 'The state of the judicature' *Address Australian Legal Convention Canberra* 10 October 1999, 1 <<http://www.hcourt.gov.au/speeches.htm>> (17 January 2000); M Beazley 'Judicial independence and accountability: A discordant couplet' *Paper 17th AIJA Annual Conference Adelaide* 6-8 August 1999; D Malcolm 'Independence with accountability' *Paper 17th AIJA Annual Conference Adelaide* 6-8 August 1999.

593. See eg D Malcolm 'Independence with accountability' *Paper 17th AIJA Annual Conference Adelaide* 6-8 August 1999.

594. S Shetreet *Judges on trial: A study of the appointment and accountability of the English judiciary* North-Holland Publishing Company Amsterdam 1976.

595. F Jevons *Submissions* 321 and 387 noted the danger that loyalty to colleagues can act as a counterbalance to peer pressure.

powerful, positive influence, through peer and collegiate pressures, upon individual performance and accountability.<sup>596</sup>

2.246. The Commission heard (in general terms) of instances in which judicial officers were called in for counselling, or made subject to special administrative arrangements (for example to complete long delayed written judgments), or chose to resign rather than face the possibility of public scrutiny and removal by parliament — described by Justice Margaret Beazley as ‘testament to the power of public disgrace’.<sup>597</sup> The Law Council also has expressed its view that

the most effective way of dealing with perceived recalcitrant judicial behaviour is exposure of that behaviour and peer-pressure. Sanctions in any form (including mandatory judicial education) are neither desirable nor appropriate. By ‘exposure’, the Law Council means through the transparency afforded by the publication of court data which demonstrate judicial performance through indicators such as sitting days, sitting times, numbers of outstanding judgments and periods of time for outstanding judgments.<sup>598</sup>

2.247. Traditionally there has been no formal, transparent process for lodging or investigating complaints against federal judicial officers for poor performance,<sup>599</sup> nor a code of conduct against which judicial behaviour may be measured, nor have there been sanctions available short of removal from office by a vote of both houses of parliament.

2.248. Although bona fide serious complaints against federal judicial officers are very rare, and complaints often confuse disappointment over the outcome with impropriety on the part of the court,<sup>600</sup> the existence of proper complaint procedures is important both for reasons of providing a further measure of democratic accountability and providing the information needed to make continuous improvements to systems. It should be recognised that

[c]omplaints are a measure of client dissatisfaction, but the inverse does not necessarily apply — low levels of complaints may not equal high levels of satisfaction. Many organisations make assumptions based on negative data, particularly complaints. It is very difficult to develop a client-focused organisation without good quality information

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596. M Black *Submission* 386.

597. M Beazley ‘Judicial independence and accountability: A discordant couplet’ *Paper* 17th AIJA Annual Conference Adelaide 6–8 August 1999, 10–12.

598. Law Council *Submission* 375.

599. However, there are now some well-established mechanisms in most courts, including the Federal Court, for dealing with concerns about delays in the delivery of judgments. These often involve an approach from the head of the bar to the head of jurisdiction, in order to avoid a direct dispute between counsel and the judge in a particular matter.

600. Federal Court *Submission* 393.

on client satisfaction. Measures of satisfaction should be both direct and detailed enough to indicate which areas of process, product or service require most urgent attention.<sup>601</sup>

2.249. Over the past few decades, measures ensuring transparency and accountability have become commonplace in the public sector (as well as those parts of the private sector subject to the substantial regulation in the public interest), with the advent of freedom of information laws;<sup>602</sup> Ombudsman's

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601. A Phelan 'Strategic uses of client feedback by courts: The experience of the Family Court of Australia' *Paper AIJA Court Administrators' Conference Adelaide 6 August 1999*, 11.

602. For example the *Freedom of Information Act 1982* (Cth).



offices,<sup>603</sup> 'watchdog' commissioners associated with the Human Rights and Equal Opportunity Commission<sup>604</sup> and other bodies, and specific industry ombudsman's offices.<sup>605</sup>

2.250. In recent years, courts have come under pressure to operate with a greater degree of efficiency, transparency and accountability. Chief Justice Murray Gleeson has acknowledged both the imperatives and the difficulties.

Our society attaches importance to accountability on the part of all governmental institutions. People seek ways of evaluating the performance of judges at a personal level, and of courts at an institutional level. This is appropriate, so long as the mechanics of evaluation are not permitted to define the objectives of the courts ...<sup>606</sup>

All aspects of government are subjected to demands for accountability, and the judicial branch is no exception. There are, however, two issues that need to be addressed. First, reconciliation of the requirements for accountability with the constitutional imperative of judicial independence can give rise to difficulties. Secondly, there is little agreement upon the appropriate measures of court performance ...

The most important measure of the performance of the court system is the extent to which the public have confidence in its independence, integrity and impartiality.<sup>607</sup>

2.251. In DP 62, the Commission canvassed the overseas experience. For example, in the United States,<sup>608</sup> all the states have judicial codes of conduct<sup>609</sup> and commissions or councils to investigate and determine complaints about judicial conduct.<sup>610</sup> In Canada, some jurisdictions have developed judicial codes of

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603. The office of the Commonwealth Ombudsman is established under the *Ombudsman Act 1976* (Cth).

604. The Human Rights and Equal Opportunity Commission (HREOC) operates under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), and there are currently Commissioners with specific responsibility for human rights, disability discrimination, sex discrimination, race discrimination, Aboriginal and Torres Strait Islander social justice, and privacy (see also the *Privacy Act 1988* (Cth)).

605. Such as the Australian Banking Industry Ombudsman and the Telecommunications Industry Ombudsman. See also para 4.6.

606. M Gleeson 'The state of the judiciary' *Address Australian Legal Convention* Canberra 10 October 1999, <<http://www.hcourt.gov.au/speeches.htm>> (17 January 2000).

607. id 5-6.

608. ALRC DP 62 para 3.136-3.139.

609. Many of which are based on the American Bar Association's Model Code of Judicial Conduct.

610. A recent controversial use of judicial commission power occurred in California, where the California Commission on Judicial Performance accused a senior appeals court judge of 'wilful misconduct' for recording a dissent in a judgment, 'as a matter of personal conscience', notwithstanding the clarity of the prevailing precedent with which he disagreed. See H Weinstein 'Panel Contends Judge's Dissent Was Misconduct' *Los Angeles Times* 6 July 1998 and Editorial 'A witch hunt in the courts' *Los Angeles Times* 9 July 1998.

conduct, a Canadian Judicial Council operates federally, and there are also provincial judicial councils.<sup>611</sup>

2.252. In the United Kingdom, the 1993 Royal Commission on Criminal Justice expressed concern at the absence of any satisfactory monitoring of judges' work to ensure that standards are maintained, and recommended the institution of 'an effective formal system of performance appraisal'.<sup>612</sup> The Woolf report on the civil justice system<sup>613</sup> made similar recommendations, arguing that appraisal would help promote performance standards and consistency of decision making.<sup>614</sup>

2.253. Within Australia, New South Wales has pioneered an American-style system of judicial accountability, through its Judicial Commission of New South Wales (JCNSW). The JCNSW is an independent, statutory corporation established in 1986 under the *Judicial Officers Act 1986* (NSW).<sup>615</sup> In terms of its conduct function, the JCNSW receives all complaints made against NSW judicial officers, and is required to conduct a preliminary investigation of all formal complaints.<sup>616</sup> On the basis of this investigation, the JCNSW may summarily dismiss the complaint; classify the complaint as 'minor'; or classify it as 'serious'.

2.254. A minor complaint may be referred to the appropriate head of jurisdiction or to a Conduct Division, which consists of a panel of three judicial officers, or two judicial officers and a retired judicial officer. A complaint is regarded as 'serious' where, if substantiated, the grounds would justify parliamentary consideration of the removal from office of the judicial officer in question.

2.255. In cases where a complaint is wholly or partly substantiated, and the Conduct Division is of the view that the matter may justify parliamentary consideration of the removal of the judge or magistrate from office, the NSW

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611. Canadian Judicial Council *A place apart: Judicial independence and accountability in Canada* Canada Communication Group – Publishing Ottawa 1995, 143.

612. Royal Commission on Criminal Justice *Report* (Cmnd Paper 2263) HMSO London 1993 ch 8 para 99.

613. Lord Woolf *Access to justice – Final report to the Lord Chancellor on the civil justice system in England and Wales* HMSO London 1996 ch 8, para 1.

614. See K Malleson 'Judicial training and performance appraisal: The problem of judicial independence' (1997) 60 *Modern Law Review* 655, 656. In 1985, the American Bar Association also produced Guidelines for Judicial Performance Evaluation, which imply a set of 'core competencies' for judicial officers that also would be of value in designing judicial education programs. See Scolbran *Submission* 309.

615. The JCNSW has a staff of 28 headed by a Chief Executive and an annual budget of \$2.5 million. Judges and magistrates have a significant input into the continuing judicial education program and through various education committees determine the content of the program. There is a Standing Advisory Committee on Judicial Education and education committees of each of the state's six courts: Judicial Commission of New South Wales *Annual report 1997–98*.

616. That is, those supported by a written statutory declaration. The description of the JCNSW's complaints process is derived from the Judicial Commission of New South Wales *Annual report 1997–98*, 37–44.

Attorney-General is required to lay the report before both houses of parliament. Unlike some American judicial commissions, the JCNSW has no power to impose penalties or otherwise discipline judicial officers. The JCNSW ordinarily does not consider allegations of criminal conduct (for example, corruption), which are left to prosecuting authorities or the Independent Commission Against Corruption. All serious complaints must be referred to a Conduct Division, which investigates the matter and prepares a report to the Governor setting out its conclusions.

2.256. In Queensland, the Fitzgerald report recommended the establishment of a Criminal Justice Commission (CJC), with an Official Misconduct Division which would, subject to authorisation by the CJC Chairman,

investigate complaints of official misconduct in relation to judges which are sufficiently serious to warrant removal from office, if established, subject to appropriate conditions and in accordance with appropriate procedures, settled in consultation with the Chief Justice.<sup>617</sup>

2.257. This recommendation was implemented in the *Criminal Justice Act 1989* (Qld) s 29(4), in the following terms.

To the extent that an investigation by the [Official Misconduct] division is, or would be, in relation to the conduct of a judge of, or other person holding judicial office in a court of the State, the authority of the division to conduct the investigation –

- (a) is limited to investigating misconduct such as, if established, would warrant his or her removal from office;
- (b) shall be exercised by the commission constituted by the chairperson;
- (c) shall be exercised in accordance with appropriate conditions and procedures settled in continuing consultations between the chairperson and the Chief Justice of the State.

2.258. A lengthy definition of ‘official misconduct’ is contained in s 32, but generally refers to conduct which, directly or indirectly, adversely affects (or could adversely affect) ‘the honest and impartial discharge of functions or exercise of powers or authority’. Section 28 makes clear that

- (1) A report of the CJC is not sufficient ground for an address of the Legislative Assembly<sup>618</sup> for removal from office of a Supreme Court or District Court judge.
- (2) If the Assembly resolves that further action in respect of a judge should be taken having regard to a report of the commission, it shall –
  - (a) appoint a tribunal of serving or retired judges of any 1 or more of the State and Federal superior courts of Australia to inquire into the matter dealt with in the commission’s report in relation to the judge; and

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<sup>617.</sup> G Fitzgerald QC *Report of a Commission of Inquiry pursuant to Orders in Council into possible illegal activities and associated police conduct* Government Printer Brisbane 1989 (Fitzgerald report), rec 10(j). See also CJC *Report on the implementation of the Fitzgerald recommendations relating to the Criminal Justice Commission* CJC Brisbane 1993.

<sup>618.</sup> Queensland’s parliament is unicameral.

- (b) defer any other further action until the findings and recommendations of such tribunal are known.
- (3) When such tribunal is appointed the commission shall furnish to it such number of copies of its report as the tribunal requires and all material in the commission's possession relevant to the subject of the tribunal's inquiry.

2.259. In 1991, the Australian Bar Association released a statement on 'the independence of the judiciary',<sup>619</sup> which recommended that machinery ought to be established by statute for the preliminary investigation of complaints against judicial officers.<sup>620</sup> The recommended process<sup>621</sup> was for the convening of a tribunal, when required, comprised of not less than three judges or retired judges. The Australian Bar Association noted that disgruntled litigants invariably would be a problem in this area, so proper vetting mechanisms must be in place to filter out complaints which are frivolous, vexatious, or lacking in substance. Where the

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619. Australian Bar Association *The independence of the judiciary* 1991. The Commission understands that the Australian Bar Association proposes to update this statement soon.

620. The Australian Bar Association statement does not distinguish between federal, state and territory judges for these purposes: Australian Bar Association *The independence of the judiciary* 1991.

621. Australian Bar Association *The independence of the judiciary* 1991, 5-6.

tribunal finds that an allegation is substantiated and could justify removal, its report would be placed before both houses of parliament. The misbehaviour in question should be limited to that which would undermine public confidence in the fitness of the judge to perform judicial functions, and should be detailed as specific allegations. Removal of the judicial officer would occur in keeping with constitutional requirements; that is, upon an address by the two houses of parliament to the Governor (or, federally, the Governor-General).

*The special position of federal judges under the Constitution*

2.260. Section 72 of the Constitution provides that

The Justices of the High Court and of the other courts created by the Parliament –

...

- (ii) Shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity.<sup>622</sup>

No formal complaints procedure is provided for elsewhere in the Constitution, nor in any of the Acts establishing the various federal courts.

2.261. The Australian Constitutional Commission, which reported in 1988,<sup>623</sup> considered the appointment and removal of federal judges. The Constitutional Commission recommended

That the Constitution be altered to provide

- (i) that there be a Judicial Tribunal established by the Parliament to determine whether facts established by it are capable of amounting to proved misbehaviour or incapacity warranting removal of a judge; and that the Tribunal should consist of persons who are judges of a federal court (other than the High Court) or of the Supreme Court of a State or a Territory;
- (ii) that an address under section 72 of the Constitution shall not be made unless:
  - the Judicial Tribunal has reported that the facts are capable of amounting to misbehaviour or incapacity warranting removal and
  - the address of each House is made no later than the next session after the report of the Tribunal.<sup>624</sup>

2.262. In relation to the conduct which would warrant the removal of a judge, the Constitutional Commission reported that this should include

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622. The concept that removal of judges only be on address of both Houses of Parliament dates back to the *Act of Settlement 1701*.

623. Constitutional Commission *Final report of the Constitutional Commission* Volume One AGPS Canberra 1988.

624. id 402.

misconduct in carrying out the duties of office and any other conduct that, according to the standards of the time, would tend to impair public confidence in the judge or undermine his or her authority as a judge.<sup>625</sup>

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625. *id* 403.

2.263. The Constitutional Commission's recommendations in this area did not form part of any of the four referendum questions put to the Australian people, and convincingly defeated, in 1988; nor have the recommendations since been taken up in any other constitutional reform initiatives.

2.264. In DP 62, the Commission recognised that

The balancing act for courts may be more difficult than for most other public institutions. Great weight must be accorded to maintaining judicial independence, while at the same time moving the judiciary to accept an increased level of scrutiny and an increased premium placed on efficiency. The experience in other jurisdictions suggests that this balance can be achieved.<sup>626</sup>

2.265. Accordingly, the Commission proposed for consideration that

The Commonwealth should establish an independent judicial commission, modelled on the Judicial Commission of New South Wales, to receive and investigate complaints against federal judges and magistrates.<sup>627</sup>

2.266. However, apart from the normal delicate balancing act involved, the Commission now accepts that there are special requirements which arise in Australia under Chapter III of the Constitution with respect to the federal courts, and which were not given sufficient weight in DP 62.

2.267. The Federal Court of Australia's submission pointed out that

There are at least two fundamental problems with respect to the establishment of a judicial commission with general 'jurisdiction' over complaints about the federal judiciary. The first involves Chapter III of the Constitution and the second, related to the first, involves the operation of the appellate process.

Chapter III of the Constitution and the principles of independence of the judiciary that it reflects and supports, provide substantial limitations upon what can validly be done by way of the establishment and operations of a Judicial Commission. Secondly, where complaints concern essentially matters that (if they have substance) fall within the appellate jurisdiction of a court they must be dealt with in the appellate process. With some possible exceptions (presently irrelevant) the appellate process is the exclusive method for correcting judicial errors, including alleged errors by reason of matters such as bias or apprehended bias. Close analysis will reveal that the range of matters that, *on the widest view*, could permissibly be the subject of an inquiry by a body operating anywhere within the reach of Chapter III of the Constitution are limited indeed.

The nature and extent of those limitations can readily be tested by imagining specific complaints in relation to matters that would not lead to the imposition of the

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626. ALRC DP 62 para 3.135.

627. ALRC DP 62 proposal 3.5. See also C Merritt 'The courts and the media: What reforms are needed and why?' (1999) 1 *UTS Law Review* 42, 46-7, which argues for a judicial commission model.

constitutional sanction of removal from office, and then asking what a Judicial Commission might lawfully be authorised to do in respect to those specific complaints. The Court would suggest that the answers will point to the merit and effectiveness of [an] internal, collegiately supported, mechanism ... It all comes back, of course, to the necessary independence of the judiciary as protected by Chapter III of the Constitution. The history of the federal judiciary in Australia, however, has demonstrated that within that protection the traditional mechanisms of accountability and consensual internal governance of courts have maintained a system in which bona fide complaints are extremely rare.

Within the federal judiciary, self-administration has had a powerful role in enhancing judicial accountability. The governance of the Federal Court is essentially collegiate in character, involving committees of judges and senior registry staff, meetings of the whole Court from time to time, and an Annual Report to Parliament. This form of governance is a powerful, positive influence, through peer and collegiate pressures, upon individual performance and accountability.

In substance, therefore, the Court suggests that the Commission should recommend examination of a proposal to establish a statutory framework for constituting a Federal Judicial Commission, but only as and when required to consider bona fide complaints which, if made out, might warrant the invocation of constitutional procedures for removal from office. So far as other complaints are concerned, it is the Court's view that consistently with the Constitution and with appropriate allocation of resources, other complaints should be dealt with through a transparent and accountable complaints mechanism within the Court itself.<sup>628</sup>

2.268. The Law Council noted that, at the time s 72 was framed, 'there was one Chapter III court contemplated, namely the High Court of Australia, with three justices'.<sup>629</sup> However, as discussed above, there are currently 109 federal judicial officers (Chapter III judges) serving in the High Court, the Federal Court and the Family Court,<sup>630</sup> with an additional 16 magistrates scheduled to be appointed to the new Federal Magistrates Court.<sup>631</sup>

2.269. The Law Council expressed concern at the lack of clear, standing procedures to deal with serious allegations against federal judicial officers, but also cautioned against the establishment of a judicial commission which might run foul of Chapter III guarantees and processes.

There are no formal complaints procedures provided for in either the Constitution or the legislation establishing the federal courts. As has happened in the past, special legislation could be enacted (albeit with some Constitutional uncertainty) for the provision of assistance to the Houses of Parliament when they are engaged in a Section 72 Inquiry.

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628. Federal Court *Submission* 393.

629. Law Council *Submission* 375.

630. M Gleeson 'The state of the judiciary' *Address* Australian Legal Convention Canberra 10 October 1999, 3 <<http://www.hcourt.gov.au/speeches.htm>> (17 January 2000).

631. D Williams 'Federal magistrates legislation passes parliament' *Media release* 8 December 1999.



In light of the federal experience with the late Justice Murphy and the more recent experience in New South Wales with Justice Bruce, the Law Council considers that Section 72 of the Constitution is clearly inadequate to meet the problems of complaints against the judiciary, especially in the context of the significant increase in the number of Chapter III judges. This is particularly the case, if no procedure is provided to improve the ways in which the two Houses of Parliament discharge their duties under Section 72.

The large question is whether a standing body should be created by legislation to interpose between the complaining public and the Houses of Parliament. Such a proposal should not be assumed to be possible under the Constitution.

Even if a federal judicial complaints body were established, its effectiveness in receiving and investigating complaints must be clearly understood. The Law Council cautions:

‘Statutory complaint and disciplinary authority such as the New South Wales Judicial Commission with all the risks they present to judicial independence, may be the only practical expedient. But they are a very crude method and are a form of retrospective discipline that does not assist the individual litigant’.<sup>632</sup>

On balance, the Law Council agrees with the Commission that there is a need to establish a federal body to receive and investigate complaints against judicial officers. The Law Council is not averse to the federal judicial complaints body being modelled on the conduct division of the Judicial Commission of New South Wales ... This is on the basis that the role of any federal judicial complaints body would be to report to and to inform both Houses of Parliament.<sup>633</sup>

2.270. A further complication is that any refined proposal for a standing judicial commission would probably need to exclude the justices of the High Court. As the Law Council stated in its submission

The justices of the High Court of Australia should be excluded expressly from any legislation establishing a federal judicial complaints body.

This is because of the High Court’s essential apex role in Australia’s justice system. Given the High Court’s role under the Commonwealth Constitution, the Law Council considers it singularly inappropriate that the High Court justices should be placed in a position where they may have to consider a justiciable complaint against one of their number, arising from a complaint made about that High Court judge to the federal judicial complaints body. Even worse, by analogy with the litigation [in relation to Justice Bruce and the JCNSW] the prospect of the High Court judicially reviewing the work of a federal judicial complaints body in relation to one of its own number, is too appalling to contemplate.

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632. B Walker ‘Judicial time limits and the adversarial system’ in H Stacy and M Lavarch (eds) *Beyond the Adversarial System* Federation Press Sydney 1999, 87, 98–99.

633. Law Council *Submission* 375.

The Law Council considers it imperative that the conduct of a High Court judge should remain firmly for sole consideration and scrutinisation by the two Houses of Parliament.<sup>634</sup> In the Law Council's view, given that a federal judicial complaints body would form part of the Executive, it is essential for the true maintenance of the separation of powers doctrine, that the power to recommend removal of a High Court justice is not delegated to the Executive.<sup>635</sup>

2.271. In the course of the Commission's consultations, senior judges (including some heads of jurisdiction) also cast serious doubt on the constitutional viability of establishing a standing judicial commission for the federal courts.<sup>636</sup> Although the Commission believes that it is arguable that a judicial commission, with carefully drafted enabling legislation, could pass constitutional muster, it is inevitable that its status would be challenged upon its first use, and would become drawn into the controversy over the potential removal of a judicial officer – thus adding complexity and uncertainty to the proceedings rather than facilitating a smooth process.

2.272. The Commission does not believe that the move away from consideration of a standing federal body designed along the lines of the JCNSW, as suggested in DP 62, represents a significant retreat from achieving better accountability. For example, until recently there was only one officer at the JCNSW dedicated to handling complaints,<sup>637</sup> and it is still the case that there is no recurrent funding available for the establishment of a Conduct Division each time there is a 'serious complaint' – this must be done on an ad hoc basis. The existence of a mechanism for the appointment of a committee of inquiry, where appropriate, is critical and this is dealt with in recommendation 12, below.

### **The Commission's preferred arrangements for judicial accountability**

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634. Law Council *Submission 375*: 'The Law Council expresses one rider to this, namely that in its view, section 72 of the Commonwealth Constitution could be amended to make it clear whether the ground of "proved misbehaviour" relates to post-appointment conduct only and does not apply to conduct prior to the Justice's appointment. There is considerable legal controversy as to whether conduct other than in the course of carrying out judicial duties could be regarded properly by Parliament as "proved misbehaviour". Opinions have been expressed to several different effects on that issue by a number of eminent constitutionalists since Federation and especially when the conduct of the late Justice Murphy was in question. It was also raised when the conduct of Justice Callinan was brought to public attention following the judgment of Justice Goldberg in *White Industries (Qld) Pty Ltd v Flower and Hart* (1998) 156 ALR 169'.

635. Law Council *Submission 375*.

636. The Commission's terms of reference, as amended on 2 September 1997, expressly preclude consideration of any changes to the federal justice system which would or might require amendment of the Constitution. See page 5 for the amended terms of reference.

637. The dispersed nature of the federal courts and tribunals would present obvious logistical difficulties in siting a federal judicial commission, and ensuring accessibility for complainants.

2.273. As a consequence of the submissions and consultations, the Commission has reshaped its approach in this area, endeavouring to fashion a complaints and discipline system which meets all of the needs for transparency, improved accountability, and certainty of process, and which is more clearly compatible with the system of tenure and removal of federal judges set down in Chapter III. In serious cases, the aim of the suggested new arrangements is to enhance — and certainly to avoid compromising — the location of the entire removal process in the parliamentary chambers, with those houses remaining masters of their own procedures. Accordingly, the Commission has refrained from recommending anything which could be seen to limit the capacity of the chambers to seek information or advice from outside, to consider matters in committee, or to convene committees jointly — flexible powers presently possessed by the House of Representatives and by the Senate. As contemplated in the Constitution, debate and decision making about the removal of a federal judge will be matters to be conducted openly by the people's elected representatives, rather than by any part of the executive government (as a judicial commission would be). Elected representatives remain free to enlist whatever technical assistance (for example, from current or retired judges, or others) they may regard as useful from time to time.

2.274. Below, the Commission outlines a recommended two-stage process for ensuring greater judicial accountability, based upon

- the development of transparent internal systems of complaints handling by the various federal courts and
- the development by parliament of a mechanism to ensure the smooth transfer and handling of serious complaints against federal judicial officers, such as may warrant removal from office.

*Developing inhouse mechanisms for handling complaints*

2.275. The Commission, in an earlier report, recommended that federal courts and tribunals develop court charters (or 'service charters') to promote a more systematic and comprehensive approach to the delivery of services with a client focus – particularly, but not limited to, the special needs of women and children.<sup>638</sup> The federal Access to Justice Advisory Committee (AJAC), chaired by Mr Ron Sackville QC (now Justice Sackville of the Federal Court), considered the matter of court charters in some detail,<sup>639</sup> and recommended that

[e]ach federal court and tribunal should develop and implement a charter specifying standards of service to be provided to members of the public coming into contact with the court or tribunal.<sup>640</sup>

2.276. Among other things, AJAC proposed that court charters should deal with 'timeliness and efficiency in the delivery of services, including the delivery of judgments', 'courtesy towards members of the public', and 'access to the courts'.<sup>641</sup> AJAC also recommended that a report on implementation and review of the standards should form part of the annual report of the relevant court or tribunal.<sup>642</sup>

2.277. The federal courts and tribunals have begun work in this direction. For example, the Family Court launched its service charter in April 1999, developed in accordance with the Government's Charter of Public Service in a Culturally Diverse Society, and containing 'qualitative performance standards against which service standards and the quality of relationships with clients can be evaluated'.<sup>643</sup> The Federal Court has for some years had a published standard for the timely delivery of judgments and, since 1992, one of the stated objectives of the Court (as

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638. Australian Law Reform Commission *Equality before the law: Women's access to the legal system* ALRC Report 67 (Interim) AGPS Canberra 1994, para 4.42.

639. AJAC report ch 15.

640. id 370 action 15.1.

641. *ibid.*

642. id 371 action 15.2.

643. Family Court of Australia *Annual report 1998–99*, 56.

noted in successive annual reports) includes the resolution of disputes according to law 'promptly, courteously and effectively'.

2.278. It is now commonplace in Australia for both public agencies and private sector industry associations to develop such service charters and industry codes of conduct, which typically include the specification of complaints handling and dispute resolution processes.

2.279. A national standard for the management of complaints, AS 4269,<sup>644</sup> already has been developed in Australia, and has gained widespread acceptance and use. Although oriented towards the resolution of consumer disputes, the standard is sufficiently generic (and adaptable) to have application to systems designed for handling complaints against judges, judicial officers and court staff. In developing protocols for such complaints handling, as the Commission recommends below, federal courts and tribunals should have regard to AS 4269.

2.280. For these purposes, relevant elements from AS 4269 include

- a commitment to efficient and fair resolution of complaints, set down in writing, and an organisational culture which acknowledges consumers rights to complain and actively solicits user feedback
- an ethos of fairness
- adequate resources devoted for this purpose
- well publicised rights and processes
- accessibility (in all senses, including physical, linguistic, and financial)
- assistance for the formulation and lodgment of complaints
- responsiveness – complaints dealt with quickly and courteously
- proper data collection systems
- attention to systematic and recurrent problems, as well as to the immediate complaint or dispute
- a transparent and accountable system, including a requirement to report regularly.

2.281. In DP 62, the Commission noted that

The federal courts have established their own informal complaints mechanisms with usually the head of the jurisdiction ultimately responsible for deciding the response to a complaint and any subsequent action.<sup>645</sup>

2.282. The report *Courts and the public*,<sup>646</sup> produced by Professor Stephen Parker for the AIJA, looked at (among other things) complaints handling systems – although mainly in the context of complaints against court staff and operations,

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644. First released by Standards Australia in 1995. The President of the ALRC, Professor David Weisbrot, was a member of the Technical Committee which developed this standard.

645. ALRC DP 62 para 3.149.

646. S Parker *Courts and the public* AIJA Inc Carlton South 1998.

rather than against judicial officers. The report recognised that while complaints mechanisms are important sources of information for courts, such mechanisms had not yet been widely established on a formal basis in Australia. The report noted that 'courts may be responsive to complaints and they may objectively learn from them, but complaints mechanisms are not always formally established as part of a service improvement system' and many courts do not actively advertise the fact that they do actually have a complaints system in place.<sup>647</sup> Parker recommended that all courts should have a complaints system for court users which also clearly sets out how complaints will be dealt with.<sup>648</sup>

2.283. In recent times, the federal judicial system has come to recognise the importance of establishing more formal complaints mechanisms and systems. The AAT and the Family Court have led the way in this respect. A recent paper by the Family Court's General Manager for Corporate Services, Mr Andrew Phelan, outlines both the nature of the system and the underlying philosophy.

The Court defines a complaint as 'an expression of dissatisfaction concerning its policy, practices, charges or service delivery'. Complaints are not limited to matters of administration; the Court considers complaints about judicial processes as well.

Complaints may be received directly by the Court or referred by another agency or department such as the Attorney-General's Department, the Ombudsman's Office or as a representation through a local Member of Parliament. Most complaints are dealt with at the Registry or Area Office level. More complex complaints and representations are forwarded to the Chief Executive Officer who assesses the matter and, if necessary, refers the matter for a report and draft response.

The Court takes complaints very seriously and, depending on the nature or seriousness of the issues raised, the Chief Justice or the Chief Executive Officer may respond to the complaint. The Court employs a full-time Complaints Officer, working direct to the Chief Executive Officer, and maintains a central database register of all complaints received.

The Court believes that having a credible and responsive complaints system is essential to the maintenance of community confidence and understanding. Credibility in dealing with client feedback can also facilitate strong responses to unreasonable complaints. The Court's comprehensive and strategic focus on using client feedback also tends to objectify complaints and produce a constructive approach to improving processes. The result is a tendency to de-personalise complaints, the nature of the jurisdiction notwithstanding ...

While many people would object to Courts being described as 'businesses', Courts which are self-governing (such as the Family Court of Australia) increasingly must act in a business-like way. Indeed, many alternatives to Courts are developing and progressing rapidly; and, in many areas or processes traditionally regarded as Court

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647. id 64.

648. id 165 rec 7.

monopolies, clients now do have real alternatives. While business analogies can be overstated, it is the view of the Family Court of Australia that community confidence and understanding is an essential goal and that its achievement requires embracing client views and values across the range of strategic, performance measurement, process improvement and complaints handling processes.

The experience of the Family Court of Australia is that these processes do not in any way diminish or impugn judicial independence. While the Courts will receive extreme or unreasonable viewpoints, credibility in dealing with all viewpoints should enhance community confidence and understanding. However, where Courts do not deal meaningfully with client concerns or views, they run the risk that others may establish mechanisms to deal with public comment or establish alternative mechanism to address client needs.<sup>649</sup>

2.284. The submission from the Federal Court is also positive in this regard.

... the Court favours the development of a broad complaints mechanism with full collegiate support within the Court. Transparency of such a mechanism can be achieved by publication of the protocol establishing it and defining its procedures and notification to the complainant in each case of the outcome of a complaint. Models for this mechanism exist already within the Family Court and the Administrative Appeals Tribunal. A Complaints mechanism so established, could work in conjunction with and be similar in nature to, the complaints mechanism now being set up by the Federal Court as part of the development of its Service Charter.

There are procedures already in place in the Federal Court, and in other courts, to deal with concerns that arise from time to time in delivering reserved judgments. These concerns are not, of course, necessarily 'complaints', although they may be such. A published protocol (recently republished) provides that litigants who have a concern about a reserved judgment can raise the matter with the President of the relevant Law Society or Bar Association who will then raise the matter (without identifying the inquirer) with the Chief Justice. The Chief Justice then raises the matter with the judge and replies to the Law Society or Bar Association. This is a transparent and effective procedure. It works in conjunction with an already published performance standard for the delivery of judgments. It places the ultimate responsibility for solving the problem upon the judge concerned and the Chief Justice. In the case of the Chief Justice, he/she has, of course, ultimate responsibility for the management of the Court's lists and the power to reallocate cases, if necessary. The mechanism works with the full cooperation of the law's professional bodies throughout Australia.<sup>650</sup>

2.285. Interestingly, the Federal Court did not identify here its Individual Docket System (IDS) as an important aspect of the Court's commitment to transparency and accountability. The Commission believes nevertheless that this may be the case – that is, IDS (or other effective case management strategies) can play a role in

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649. A Phelan 'Strategic uses of client feedback by courts: The experience of the Family Court of Australia' *Paper AIIA Court Administrators' Conference Adelaide 6 August 1999*, 11-14.

650. Federal Court *Submission 393*.

ensuring (and recognising) effective performance and enabling court managers to identify more readily problems with judicial performance.<sup>651</sup>

2.286. The Commission leaves to the federal courts and tribunals the task of defining, to suit their own circumstances, what is meant by a bona fide 'complaint'. As a general matter, the term should not comprehend mere expressions of disappointment or disagreement with a decision or outcome (or the state of the substantive law), in which no discernible impropriety is alleged. Similarly, matters which really amount to an allegation of appellable error will be outside any formal complaints handling process. The appropriate means for dealing with these and for providing an effective remedy lie within the appellate process – a transparent, public process leading to a decision in writing.

2.287. It may be that the single term 'complaint' is too blunt an instrument for these purposes. At one level, any information provided to courts and tribunals which apprises them of dissatisfaction with their operations, and enables to improve the quality of their systems, is valuable. These sorts of complaints about court systems and processes may be distinguished from complaints about the performance of individual judges, judicial officers and members which may reflect on the fitness or capacity of the person for such office. The protocols developed by the courts and tribunals must be able to deal with both categories of 'complaint', but should be designed to distinguish clearly between them.

2.288. In accordance with AS 4269 and best practice in this area, court complaints handling mechanisms should build in a 'loop' which permits courts to learn from the complaints experience and to effect improvements in processes (including education and training) as a result.

2.289. As an incident of the need for transparency, the complaints handling experience of federal courts and tribunals should be published in their annual reports, with detailed information about the number of complaints received, the categories of complaints (for example, allegations of delay in delivering judgment, bias, discourtesy), outcomes, and any referrals to Parliament under s 72(ii) of the Constitution. The Family Court's format for the reporting of these matters provides a useful model for future reference and further refinement.<sup>652</sup>

**Recommendation 11.** Each federal court and review tribunal should develop and publish a protocol for defining, receiving and handling bona fide complaints against judges, judicial officers and members, as well as complaints about court systems and processes.

651. At least with respect to managing caseloads and delay in writing judgments. See also para 7.14–7.16 and 7.22.

652. eg Family Court of Australia *Annual report 1997–98*, 54–55, and *Annual report 1998–99*, 60–1. See also A Phelan 'Strategic uses of client feedback by courts: The experience of the Family Court of Australia' *Paper AIJA Court Administrators' Conference Adelaide 6 August 1999*, 12–13.



In its annual report to Parliament, each court and review tribunal should provide statistical details of its complaints handling experience under its protocol. This should include the number of complaints received, to the extent possible a breakdown by categories (for example, allegations of delay in delivering judgment, or discourtesy), and outcomes.

An Australian Judicial College and a Council on Tribunals (see recommendations 8 and 10) should have regard to these reports in developing and refining orientation, education and training programs.

### *A Parliamentary protocol for handling serious complaints*

2.290. As discussed above, the preceding recommendation is predicated on the Commission's present view that the terms of the Constitution prevent the development in Australia of any formal mechanisms for disciplining federal judicial officers by way of interposing a judicial commission or other body which is a creature of the executive branch of government. Rather, s 72(ii) of the Constitution limits such formal discipline to removal from the bench by the 'Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity'.

2.291. Thus, the Commission has recommended above, for the great run of matters which fall far short of any thought of removal, a system which involves the federal courts and tribunals in developing their own 'best practice' systems and publicly reporting their complaints handling experience.

2.292. For those very rare matters which do raise serious issues about 'misbehaviour or incapacity', no standing procedures exist to ensure the smooth handling and effective consideration of the issues. Ad hoc arrangements must be determined in each case. For example, the federal Parliament had to enact special legislation to establish a statutory body, comprised of retired judges, to inquire into and report to Parliament on allegations made against the late Justice Lionel Murphy, of the High Court of Australia.<sup>653</sup>

2.293. The Commission believes it is important for the federal Parliament to establish a general standing procedure in advance of any controversy or 'crisis atmosphere' surrounding a particular allegation. The danger in the present position is that when a particular case arises, the process itself becomes a major issue, with the potential for the merit or otherwise of the substantive allegations to

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653. *Parliamentary Commission of Inquiry Act 1986* (Cth). See similarly the *Parliamentary (Judges) Commission of Inquiry Act 1988* (Qld), which related to the Queensland Parliament's investigation into allegations of misconduct against then Justice Angelo Vasta.

become lost in the skirmishing. Every interim decision in these circumstances has the potential for added controversy – such as whether to establish an advisory committee to investigate and report, whether to use sitting or retired judges (or others) for this purpose, the particular identity of the persons appointed (for example, with respect to any prior political affiliations they may have had, or any political or social views expressed – including any views about the ‘proper’ role of judges), the powers of such a committee to compel evidence, whether it operates in the open or is closed to the public, and so on.

2.294. Given that it will generally be the case that Parliament will seek outside assistance in fulfilling its constitutional role, the Commission suggests that consideration be given to whether a protocol or standing order should be developed which provides for the establishment of an independent committee, drawn from a panel of distinguished retired judges (or other suitably qualified persons), to investigate the complaint and prepare a report to assist parliament with its deliberations. The existence of such a panel, composed of persons who already have the confidence of the nation, would be reassuring at a time of inevitable stress upon our institutions.

2.295. The Commission has not sought to define further, beyond the very general terms of s 72(ii), the nature of a ‘serious complaint’ for these purposes. Rather, this should remain within the debating and deciding competence of the two houses of Parliament, and exclusively so.<sup>654</sup> The extreme rarity of inquiries under s 72(ii) in Australia suggests that, in practice, the distinction is well understood between matters which cause some unease with a judge’s performance on the bench or conduct outside of office, and matters which are so serious as to warrant consideration of removal.

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654. By way of analogy, in the impeachment process of President Clinton, the US Congress (both in determining the bill of impeachment in the House of Representatives and the trial in the Senate) resisted developing a more refined definition of ‘high crimes and misdemeanours’, preferring to deal with the issue in context.

2.296. Similarly, the Commission has not sought to articulate or limit the process by which an allegation of misconduct or incapacity may come to the attention of the parliament. It may be assumed that, in practice, these rare allegations will arise by way of a referral from a head of jurisdiction, or from the Attorney-General.<sup>655</sup>

2.297. The Federal Court's submission supports the Commission's preference for these arrangements, rather than a standing federal judicial commission.

The Court has no difficulty in principle with the establishment of a statutory framework for constituting, from time to time as required, a Judicial Commission to provide advice to Parliament in relation to any bona fide complaint which, if made out, would warrant the invocation of constitutional procedures for removal from office. The formulation of the detail of the legislative framework for such a structure would require close attention to a range of difficult questions. The functions of any such body would have to be consistent with the provisions of Chapter III of the Constitution, reflecting the constitutional framework for the independence of the judiciary and the separation of powers. Attention would have to be given to the way in which any body within such a structure would be constituted and to the provision of a filtering mechanism so that the exceptional procedures leading to its constitution were only invoked in the cases for which they were intended. The Court does not accept however that under current constitutional arrangements a standing judicial commission authorised to entertain complaints generally against federal judges would have any constitutionally meaningful role.<sup>656</sup>

**Recommendation 12.** The federal Parliament should develop and adopt a protocol governing the receipt and investigation of serious complaints against federal judicial officers. For these purposes, a 'serious complaint' is one which, if made out, warrants consideration by the Parliament of whether to present an address to the Governor-General praying for the removal of the judicial officer in question, pursuant to s 72 of the Constitution.

Parliament should give consideration to whether, and in what circumstances, the protocol might provide for the establishment of an independent committee, drawn from a panel of distinguished retired judges (or other suitably qualified persons), to investigate the complaint and prepare a report to assist Parliament with its deliberations. Such a provision should not derogate from the flexible powers presently possessed by the two Houses to fashion and control their own procedures.

655. However, the Commission does not propose to limit the traditional right of citizens of common law countries to petition the parliament.

656. Federal Court *Submission* 393.

### 3. Legal practice and model litigant standards

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#### **Introduction**

3.1. This chapter considers lawyers' professional conduct and practice standards with particular reference to the federal civil justice system. Legal practice standards were discussed in chapter 5 of Discussion Paper 62.<sup>657</sup> While discussion of professional practice standards cannot easily be restricted to federal matters, the Commission has focussed on particular forms of conduct and reforms which are directly relevant to the federal civil justice system. This chapter also discusses model litigant standards, a matter which was reviewed as part of a general discussion of the role of the federal government as a litigant in chapter 8 of DP62.

3.2. The subject of practice standards covers broad philosophical and ethical issues and concern all parties in litigation. Factors such as client demands and expectations, case management, court practices, local legal cultures and the approach of government all contribute to the setting and adherence to appropriate standards of conduct. Certain of these matters are dealt with in the following chapters. Ethical issues relevant to practitioners' fee arrangements and costs are dealt with in chapter 4. Within this chapter, the Commission has approached the topic by reference to professional practice rules. Rules alone cannot deliver high ethical standards but they are important and fulfil a number of roles.

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657. Australian Law Reform Commission Discussion Paper 62 *Review of the federal civil justice system* Sydney August 1999 (ALRC DP 62).

3.3. Professional practice rules provide a basis for education, practical guidance to practitioners, and an agreed standard of behaviour to which disciplinary bodies can refer. Lawyers' practice obligations are sometimes defined in statute or court or tribunal rules or in practice directions; more often they are set down in rules developed by legal professional associations. For professional practice rules to be useful, the rules should be clear and realistic, set attainable standards, reflect the continuing ethical dilemmas of professional life, command respect and be enforceable. Practitioners need to know the rules, take them seriously, apply them and understand the consequences of breach.<sup>658</sup>

3.4. While the context of legal practice has changed, the paradigm reflected in the traditional rules of legal ethics is rooted in an earlier era and assumes a smaller, more provincial, generalist legal profession and a civil justice system in which litigation is the dominant mode of dispute resolution. The Commission recommends that the profession evaluate and elaborate the practice rules, directed to the full array of advisory and representational roles undertaken by lawyers, and provide additional guidance on the meaning and application of the standard in commentary appended to, or supplementing, the rules. Such rules and commentary should deal with the competing and changing roles and responsibilities of lawyers, for example, as advisers, advocates, negotiators, and, within ADR processes, as neutrals facilitating, or representatives for parties participating in, such processes. This would provide guidance to practitioners dealing with distinctive issues and dilemmas not covered by general practice rules. Some of these issues have been taken up by the profession. The Commission recommendations endorse and are intended to promote such initiatives.<sup>659</sup>

3.5. While practice rules assist to define appropriate conduct for lawyers, many of the conduct issues associated with litigation concern not lawyers, but the litigants themselves. The justice system would operate quite differently if all litigants were reasonable, prudent, cooperative and fair. Rule 1 of the United Kingdom Civil Procedure Rules seeks to mandate this; requiring parties and lawyers to assist the Court to deal justly with a case. Case management and court compliance rules also seek to engender appropriate behaviour by parties. In this regard, the federal government initiative to legislate model litigant rules defining good practice for government departments, agencies and lawyers in tribunal and court proceedings, represents an important development. The government is a significant repeat player in federal court and tribunal proceedings. Government's role and responsibility within the justice system is different from other litigants. It has no private self interest.<sup>660</sup> The model litigant principles set an appropriate

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658. I Freckelton 'Enforcement of ethics' M Coady and S Bloch (eds) *Codes and ethics and the professions* Melbourne University Press Melbourne 1996, 164.

659. Issues of education and training generally are dealt with in ch 2.

660. Federal Court *Submission* 393.

standard for government parties and, notwithstanding government's singular role, may have broader application to the conduct of the parties in litigation and dispute resolution.

## Lawyers in federal jurisdiction

3.6. Lawyers are active in all facets of federal jurisdiction. One indication of this is the fees generated by federal civil work. The Commission estimates that approximately one third of lawyers' non-conveyancing income is attributable to federal civil work, that is \$1508 million.<sup>661</sup> These fees are generated from individuals, business and government. The distribution of this work across the profession is of course, very uneven. Smaller firms which focus on property conveyancing, personal injury and crime do very little work in federal jurisdiction. Large commercial firms do a great deal. Family law practice is perhaps the area of federal legal work that touches the largest number of lawyers – and members of the public.

3.7. Most litigants surveyed as part of the Commission's research had access to, or had utilised the services of, lawyers for specialist advice and/or advocacy. In the Commission's survey of Federal Court cases, 85% of applicants and 97% of respondents were fully represented.<sup>662</sup> In Family Court cases, 84% of applicants and 68% of respondents in applications for final orders were fully represented, and 93% of applicants and 70% of respondents in applications for consent orders were fully represented.<sup>663</sup> In the Administrative Appeals Tribunal (AAT), 67% of applicants were recorded as represented (mostly by lawyers, some by customs or migration agents and accountants)<sup>664</sup> and all respondent government agencies were represented by agency officers, outsourced lawyers from private firms or the Australian Government Solicitor (AGS) or, on occasion, by counsel.<sup>665</sup>

3.8. There were relatively few complaints from litigants whom the Commission surveyed, concerning lawyers' conduct in their cases. However, in general submissions to the Commission the following complaints were made concerning practitioner conduct:

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661. For further discussion see ALRC DP 62 para 4.38-4.46.

662. T Matruglio & G McAllister *Part one: Empirical information about the Federal Court of Australia* ALRC Sydney March 1999, para 9.1 table 35 (T Matruglio & G McAllister, Federal Court Empirical Report Part One).

663. ALRC DP 62 table 11.9; T Matruglio & G McAllister *Part one: Empirical information about the Family Court of Australia* ALRC Sydney February 1999, 69 (T Matruglio & G McAllister, Family Court Empirical Report Part One).

664. ALRC DP 62 para 12.11; ALRC *Part one: Empirical information about the Administrative Appeals Tribunal* ALRC Sydney June 1999, table 7.1 (ALRC, AAT Empirical Report Part One).

665. ALRC, AAT Empirical Report Part One, para 9.66.

- fostering or encouraging litigation for financial benefit<sup>666</sup>
- abandoning clients when the money runs out<sup>667</sup>
- pressuring a client to accept a result that does not meet the client's needs or desires<sup>668</sup>
- failing to act on the client's instructions<sup>669</sup>
- competitive strategies to win the case at expense of efficacy and equity<sup>670</sup>
- frustrating the client and the legal process by conduct designed to maintain conflict<sup>671</sup>

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666. J McIlwraith *Submission 37*; E Davies *Submission 103*; Family Law Reform and Assistance Association Inc (FLRAA) *Submission 157*; S Boscolo *Submission 188*; K May *Submission 220*; Legal Aid NSW family law practitioners *Consultation Sydney 14 September 1998*; Albury Law Society *Consultation Albury 2 December 1998*.

667. FLRAA *Submission 157*.

668. NSW Bar Association *Submission 88*; FLRAA *Submission 157*.

669. Lone Fathers NT *Submission 123*; Lone Fathers WA *Submission 156*; FLRAA *Submission 157*.

670. D Brown *Submission 66*; NRMA *Submission 81*.

671. J Wade *Submission 86*; E Davies *Submission 103*.

- lack of understanding or sympathy for the client's specific situation<sup>672</sup>
- failure to inform the client about the progress or status of the case<sup>673</sup>
- abuse of subpoenas<sup>674</sup>
- controlling, obstructing or discouraging communication between disputants<sup>675</sup>
- delays in correspondence<sup>676</sup>
- lacking relevant knowledge of issues or facts<sup>677</sup>
- ignorance of ADR processes.<sup>678</sup>

A number of submissions to the Commission criticised lawyers' 'win at all costs' attitudes.<sup>679</sup> The majority of complaints in submissions concerned practitioners dealing with family law matters. This is not surprising given the high level of emotion and distress inherent in this jurisdiction. It is difficult to distinguish cases in which there was a genuine grievance concerning inappropriate practice standards from those in which the litigant was simply aggrieved at the case outcome.

3.9. The complaints raise serious issues which are considered in the following analysis of practice rules and in the chapters on case management in the Federal Court, the Family Court and federal review tribunals.<sup>680</sup> Notwithstanding such complaints, as stated, in all jurisdictions, the Commission found that parties with legal representation were significantly advantaged in relation to their capacity to secure a negotiated settlement in their cases. In certain jurisdictions, where successful case outcomes could be measured, the presence of lawyers in a case also signified the party's greater chance of securing a successful outcome.<sup>681</sup>

3.10. A report conducted on behalf of the Business Working Group on the Australian Legal System noted that interlocutory processes, such as discovery and interrogatories, are often used as a delaying tactic, a 'fishing' expedition or a means to increase litigation costs.<sup>682</sup> Concern about the use of such tactics against financially or emotionally weaker opponents was raised in a number of

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672. B Boettcher *Submission 84*; FLRAA *Submission 157*; S Boscolo *Submission 188*; Helping All Little Ones (HALO) *Submission 225*.

673. FLRAA *Submission 157*.

674. Insurance Council of Australia (ICA) *Submission 85*.

675. J Wade *Submission 86*.

676. FLRAA *Submission 157*.

677. M Nasser *Submission 10*; D Brown *Submission 66*; K Grezel *Submission 73*; Medical Consumers Assoc of NSW *Submission 185*; S Boscolo *Submission 188*; RRT *Submission 211*; HALO *Submission 225*; Federal Court practitioners *Consultation Sydney 23 June 1999*.

678. Womens Legal Resource Group Inc (Vic) *Submission 162*.

679. P Heerey *Submission 73*; NRMA *Submission 81*.

680. See ch 6–9.

681. See ch 9. The figures concern represented parties in proceedings before the AAT. Most representatives were lawyers.

682. Business Working Group on the Australian Legal System *Trends in the Australian legal system – avoiding a more litigious society* Allen Consulting Group Sydney 1998, 29. See ch 6.



submissions to the Commission.<sup>683</sup> Parties can, by tactical play, force settlement on terms unduly favourable to the stronger party, or create high costs (sometimes ruinous costs) for the weaker party.<sup>684</sup>

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683. eg Legal Aid NSW *Submission 71*.

684. K Grezl *Submission 73*. See also ACCI *Submission 61*, G Gibson *Submission 141*.

## Diversity of practice

3.11. The legal profession has undergone dynamic change in recent years. There are approximately 38 000 lawyers in Australia today compared with less than 3000 at the beginning of the century,<sup>685</sup> and the ratio of lawyers in the population has fallen even more dramatically, from 1:1508 in 1911 to 1:693 in 1985.<sup>686</sup>

3.12. A predominant public image of a lawyer is a person engaged in advocacy work before a court.<sup>687</sup> In fact, only about 20%–25% of practitioners hold themselves out as courtroom advocates.<sup>688</sup> Solicitor surveys conducted in New South Wales and Victoria give some indication of the diversity of practice. There is a trend towards the creation of larger firms, with increasing percentages of practitioners employed in firms with 21 or more partners.<sup>689</sup> There are also increasing numbers of practitioners employed by government agencies or corporations.<sup>690</sup> However, most lawyers still work in small firms or operate as sole practitioners.<sup>691</sup>

3.13. The increasing trend towards specialisation has created a need for small and specialist practices which are developing their own cultures and practice norms.<sup>692</sup> There is a need for further research into the practice norms of different specialty groups within the legal profession and the development of better,

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685. F Dixon *Presidential address* 31st Australian Legal Convention Law Council Canberra 10 October 1999.

686. D Weisbrot *Australian lawyers* Longman Cheshire Melbourne 1990, 63, table 2.

687. id 238.

688. Eleven per cent of practitioners hold themselves out to practise as a 'barrister': statistics supplied by Law Council June 1998, collated for inclusion in the *Australian legal directory* 1998 edition. However, there are a number of practitioners, particularly in States such as Tasmania, South Australia, Western Australia and in the Northern Territory, who specialise as courtroom advocates but do not consider themselves to be 'barristers'.

689. In 1998 in NSW only 0.6% of firms had more than 20 partners, but 25% of all NSW solicitors were working in these firms: Law Society of NSW Research Report No 2 *Profile of the Solicitors of New South Wales 1998* Law Society of NSW Sydney 1998, 24.

690. Government lawyers include legal aid practitioners and practitioners in prosecution agencies, as well as other qualified practitioners employed in various agencies undertaking work ranging from litigation to research and policy. See para 3.19 below for rate of growth of government lawyers. In 1993, 3% of practitioners in Australia were employed by corporations, with the figures higher in New South Wales and Victoria. The number of inhouse corporate lawyers in NSW has doubled in eight years, with inhouse corporate lawyers now comprising more than 10% of the membership of the Law Society of NSW: P Fair 'Corporate practice in a deregulating environment' (1997) 7(2) *Australian Corporate Lawyer* 10.

691. Sole practitioners constituted 19% of New South Wales solicitors in 1998, and sole practitioner firms (with only one principal) constituted 79% of all firms, a 66% increase in the number of sole practices in New South Wales since 1988: Law Society of NSW Research Report No 2 *Profile of the Solicitors of New South Wales* Law Society of NSW Sydney 1998, 24, 28.

692. G Gibson *Submission 141*.

specialist practice models. Remarkably little research has been done in Australia in this important area, particularly compared with the United States and Canada.

3.14. In a 1998 survey of Victorian solicitors,<sup>693</sup> civil litigation ranked as the third dominant area of practice, with 29% of solicitors claiming more than 25% of their time was spent on civil litigation matters. Advocacy work for solicitors ranked 16th, with 6% of solicitors undertaking such work. Other dominant areas relevant to federal jurisdiction included commercial law (ranked first, 37%) and family law (ranked fifth, 16%). Similar results were found in the 1998 survey of New South Wales solicitors.<sup>694</sup> There are indications that lawyers are increasingly involved in representing clients in arbitration, mediation, and conciliation, as well as performing as independent, professional arbitrators, mediators and conciliators.<sup>695</sup>

3.15. Commerce, business and industry are served by large commercial firms and by some specialist small and medium 'boutique' practices. Legal work is a competitive business. Practitioners generally work long hours for variable returns. A Victorian study showed that 61% of solicitors worked more than 50 hours a week (24% working 60 or more hours per week).<sup>696</sup> Legal professional associations are now concerned about 'burnout', and courses about time management and stress management feature prominently in continuing legal education programs. At the same time, the financial rewards are considerable for some lawyers. Recent surveys showed that partners in elite law firms now earn an average of \$550 000 a year, and that high quality lawyers in commercial areas of law are also commanding higher salaries.<sup>697</sup> At the same time, in 1997-98, 36% of New South Wales solicitors<sup>698</sup> and 40% of Victorian solicitors<sup>699</sup> were earning less than \$50 000.

3.16. In federal jurisdiction, family law is undertaken by a mix of small, specialist and generalist firms providing legal advice and representation. In the family cases analysed by the Justice Research Centre (JRC), the firms involved

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693. 'LIV annual survey of legal practitioners' (1999) 73(3) *Law Institute Journal* 53.

694. Civil litigation ranked as the third dominant area of practice, with 29% of solicitors claiming that more than 25% of their time was spent on civil litigation matters. Advocacy work for solicitors ranked number 10, with 9% of solicitors undertaking such work. Other dominant areas relevant to federal jurisdiction included commercial law (ranked number two, 31.1%) and family law (ranked number six, 15%): Keys Young *Practising certificate survey 1998-99* Law Society of NSW Sydney 1999. For further discussion on the changing profession, see ch 2.

695. As an example of this, the membership of Lawyers Engaged in Alternative Dispute Resolution (LEADR) has increased from 815 in 1993 to 1385 in 1996 and 1822 in 1999 (including approximately 500 New Zealand members): LEADR *Correspondence* 15 July 1999.

696. 'LIV annual survey of legal practitioners' (1999) 73(3) *Law Institute Journal* 53.

697. A Burrell 'Lawyers notch up record year for income increases' *Aust Fin Rev* 28 July 1999, 3.

698. In NSW these percentages increase to 57% of suburban and 43% of country solicitors earning less than \$50 000: Law Society of NSW Research Report No 2 *Profile of the Solicitors of New South Wales* Law Society of NSW Sydney 1998, 37, 41.

699. 'LIV annual survey of legal practitioners' (1999) 73(3) *Law Institute Journal* 54.

were predominantly small (not more than four partners), specialist practices and around two thirds of the firms had at least one family law accredited specialist.<sup>700</sup> Legal aid commissions provide advice and representation in family law matters, however, the great majority of legal aid family law work is referred out to private practitioners.<sup>701</sup> Administrative law cases are dealt with by a number of firms that specialise in compensation, welfare, veterans' and migration matters.

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700. R Hunter *Family law case profiles* JRC Sydney June 1999, table 3.1, 63, 67.

701. id 11.

## Changing government practice

3.17. Traditionally the Attorney-General's Department was the primary provider of legal services to the federal government. That situation has gradually changed.<sup>702</sup> From 1 July 1997 federal government agencies and departments could instruct private firms to conduct Commonwealth litigation, except for certain categories of reserved work, but such outsourcing required specific approval. From 1 September 1999 the approval of the Attorney-General's Department was no longer required to use private firms for government legal work. Work that involves constitutional law, national security issues, cabinet matters and public international law work continues to be reserved for the AGS.

3.18. These changes increased the level of competition and allowed private firms 'to contribute their expertise to the delivery of almost all Commonwealth legal services'.<sup>703</sup> The Attorney-General stated that

[a]gencies will have greater flexibility to choose from a market that will be competing to provide quality services at the best value, whilst ensuring that appropriate safeguards are in place.<sup>704</sup>

3.19. A complementary development has seen enhanced government agency recruitment and utilisation of inhouse lawyers who provide internal legal advice, handle legal transactions, act as advocates before tribunals, and brief and liaise with external legal service providers.<sup>705</sup> In 1998, the Law Society of New South Wales reported that since 1988, the number of government lawyers practising in New South Wales had grown by 43%.<sup>706</sup> Other estimates suggested a 27% increase in the number of legal officers employed by federal government departments and agencies between 1989 and 1998, a significant increase when compared with the declining numbers of other professionals employed in the public service.<sup>707</sup>

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702. Since 1995, federal departments and agencies have been able to use private sector legal services for general legal advice, concerning legal agreements, and for tribunal matters.

703. D Williams 'Greater competition for Commonwealth legal work' *Balance* August 1999, 6.

704. *ibid.*

705. An alternative being used by some agencies is the outplacement of AGS or private firm lawyers in government client offices. This option provides the convenience that inhouse lawyers provide, and can be a more cost effective way of obtaining external legal services. There is also a high turnover of lawyers participating in outplacement assignments for career development reasons, which, it is said, can lead to less than optimal service arrangements: S Gath 'Managing the inhouse legal function in an environment of contestability' (1999) 91 *Canberra Bulletin of Public Administration* 23, 24.

706. Law Society of NSW Research Report No 2 *Profile of the solicitors of New South Wales 1998* Law Society of NSW Sydney October 1998, 15. Note these figures relate only to NSW and do not provide a breakdown of federal and State government agencies and departments.

707. Figures provided by the Public Service and Merit Protection Commission Canberra in November 1998. See ALRC DP 62 para 8.12.

3.20. In 1997, the Logan report utilising figures from the 1995-96 financial year and surveys conducted from December 1995 to February 1996 calculated that, excluding costs of private counsel, 11% (\$1.6million) of legal services expenditure on tribunal services went to private law firms, 36% (\$5.2 million) to inhouse lawyers, and 53%(\$7.8 million) to the Attorney-General's Legal Practice (now

AGS). In relation to court litigation expenditure, again excluding private counsel costs, 6% (\$2.2million) was expended by government on private law firms, 10% (\$3.9million) on inhouse lawyers, and 84% (\$31.3 million) on the Attorney-General's Legal Practice.<sup>708</sup>

3.21. Data from the Commission's AAT case file survey is consistent with such trends. Of the 1502 AAT cases analysed, 67% of government agency representation was provided by inhouse advocates, 16% by private practitioners, and 17% by the AGS.<sup>709</sup> The type of representation used by agencies varied between case types. For example, in veterans' affairs cases, the Department of Veterans' Affairs was most often represented by a departmental advocate while in compensation cases, the government respondent usually retained a solicitor from the AGS or a private sector firm, with counsel briefed in some cases.

## A changing profession

3.22. Another major change, subject to much academic and judicial commentary, is characterised as a shift in professional practice from a 'service' ideal to one based on business imperatives.<sup>710</sup> This shift has occurred to meet the needs of a changing business environment in which the profession operates and the application of competition policy to legal practice. New technology, which allows legal advice to be offered as generic or tailored services through the internet, will also impact on the service ideals of the legal profession. Small firms processing standard transactions will face competition from online interactive legal services which will have the advantage in terms of cost (based on economies of scale for routine matters) and convenience.<sup>711</sup>

3.23. As stated, government legal practice has also changed significantly as government departments, agencies and business entities now utilise private legal practitioners, who may be more competitive, strategic and focussed on winning the case.<sup>712</sup>

3.24. The 'globalisation' of markets and commercial business practices has likewise impacted on legal practice. The Australian profession is regulated on a State and Territory basis, but in practice, lawyers are competing and advising across territorial boundaries.

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708. B Logan et al *Report of the review of the Attorney-General's Legal Practice* AGPS Canberra 1997, 62.

709. ALRC, AAT Empirical Report Part One, table 7.3.

710. M Solomon 'Client relations: Ethics and economics' (1991) 23 *Arizona State Law Journal* 155; D-Dawson 'The legal services market' (1995) 5 *Journal of Judicial Administration* 147; M Kirby 'Legal professional ethics in times of change' *Paper* St James Ethics Centre Forum on Ethical Issues Sydney 23 July 1996.

711. N Reece 'Sultans of cyber take a swing at the suburbs' *Aust Fin Rev* 26 November 1999, 33.

712. See para 3.140.

[A] number of Australian law firms have grown to a size which is large even by world standards. Additionally, we have seen the development of many other smaller practices which also cross state boundaries either as part of a national firm structure or by way of some looser association. At the same time, the market for legal services has changed dramatically. Clients no longer consider themselves bound to one law firm but frequently 'shop around' to find the firm which can provide the services for the price which they consider acceptable. Tendering for work is now a commonplace activity in all large and many smaller law firms ... Even in the largest firms, day-to-day professional life is filled with uncertainty, pressure and competition.<sup>713</sup>

3.25. The proposed changes to New South Wales legislation<sup>714</sup> to allow multi-disciplinary partnerships and relax restrictions on solicitor corporations, if implemented, will further change the structure of the profession. These changes have been supported by the Law Council.<sup>715</sup> One prediction has the 'big five' accounting firms actively undertaking legal practices, some five or six national law firms instead of 11 or 12, and 'a large gap' emerging between first and second tier law firms.<sup>716</sup>

3.26. Changing professional practices and ethics are frequently described and lamented in American law journals and books.<sup>717</sup> It is not clear that Australia is experiencing a similar (putative) decline in professional standards. However, the Australian legal profession, as with the American, is no longer a small, homogenous association of people undertaking similar types of work. In the case of multi-disciplinary partnerships, practices may be predominantly engaged in accounting and governed by accounting professional standards as well as legal professional practice rules. The American Bar Association's (ABA) Commission on multi-disciplinary partnerships recently recommended that the ABA's Model Rules of Professional Conduct be amended to permit multi-disciplinary partnerships on certain conditions, including that non-lawyers should not be permitted to deliver legal services and that rules of professional conduct that apply to a law firm should also apply to a multi-disciplinary partnership. However, this recommendation was rejected by the full Association.<sup>718</sup>

713. E Nosworthy 'Ethics and large law firms' in S Parker and C Sampford (eds.) *Legal ethics and legal practice: contemporary issues* Clarendon Press Oxford 1995, 57.

714. The NSW Attorney-General has proposed changes to Part 10A of the *Legal Profession Act 1987* (NSW) to enable a corporation and its solicitors to offer legal services to the public, provided that the corporation includes on its board a solicitor who holds an unrestricted practising certificate. The corporation will be able to engage in other activities besides legal work. See J Shaw 'Incorporation of legal practices under the Corporations Law' (1999) 37(10) *Law Society Journal* 67.

715. F Dixon *Presidential address* 31st Australian Legal Convention Law Council Canberra 10 October 1999.

716. M Brown 'Accounting for change' (1999) 73(10) *Law Institute Journal* 30. The move by accounting firms to take on legal practices has already begun with Anderson Legal and the merger of Dunhill, Madden & Butler's Sydney office with PricewaterhouseCoopers.

717. eg see A Kronman *The lost lawyer - failing ideals of the legal profession* Harvard University Press Massachusetts 1993.

718. This report was presented at the ABA conference in Georgia, August 1999, but was not adopted at the conference. Further consideration of the report was deferred to allow further debate within



3.27. In the context of an increasingly diverse, competitive and changing profession, concern has been expressed that the ethic and culture of professional service is being eroded or lost.<sup>719</sup> In the past, when the profession was smaller, wrongdoing was more readily detected and peer sanction was an effective deterrent.<sup>720</sup> Chief Justice Gleeson has warned that professional associations need to ensure that ethical standards include such matters as: not encouraging fruitless or merely tactical litigation, however profitable it may be to the corporate client or employer; accepting an obligation to undertake a reasonable share of pro bono work; and insisting upon full observance of duties to the court, as well as to clients, in all aspects of the administration of justice.<sup>721</sup> The federal Attorney-General also has noted that the changing environment will require vigilance on the part of professional bodies and lawyers themselves, to ensure that the core attributes of responsible legal professional practice are preserved and enforced.<sup>722</sup> The Law Council has acknowledged that it is vital to ensure that the competition reforms do not undermine lawyers' ethical duties.<sup>723</sup>

3.28. The Commission advocates changes to the text and format of legal practice rules in response to challenges presented by specialisation, growing corporate and inhouse practice, multi-disciplinary practices and the competitive and international focus of legal services. The tenor and content of the new rules should be drafted to accommodate and to encourage a national legal profession. They should reflect the diversity in practice in the profession and the changing nature of the organisation and control of legal work.

3.29. The trend in a number of overseas jurisdictions has been to provide commentary to professional practice rules.<sup>724</sup> Explanatory text is an essential aid for the now compulsory legal ethics practice component for young lawyers. The use of commentary to the rules allows fuller exposition of the purpose and spirit of the rule and the provision of practical examples to better ensure consistent understanding and application of rules in a changing legal environment. The commentary need not be appended to, but could be issued as a supplement to, the

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the profession: M Gawler 'MDPs – what in the world is going on?' (1999) 73(10) *Law Institute Journal* 3 and see also <<http://www.abanet.org/cpr/multicom.html>> (5 Jan 2000).

719. M Kirby 'Legal professional ethics in times of change' *Paper* St James Ethics Centre Forum on Ethical Issues Sydney 23 July 1996, 2.

720. D Ipp 'Reforms to the adversarial process in civil litigation – Part I' (1995) 69 *Australian Law Journal* 705, 726–7. See also D Dawson 'The legal services market' (1996) 5 *Journal of Judicial Administration* 147.

721. M Gleeson 'The changing paradigm' *Paper* Women Lawyers' Association of NSW Sydney 11–November 1999.

722. D Williams 'Past, present & the future' *Address* 31st Australian Legal Convention Canberra 10 October 1999.

723. F Dixon *Presidential address* 31st Australian Legal Convention Law Council Canberra 10 October 1999.

724. See para 3.74.

rules. The Commission strongly supports the development of a 'rules plus commentary' approach. In terms of the new information technology, commentary – as well as related statutes, cases and secondary literature – easily could be provided on the internet as hypertext links to the rules, providing a very useful and convenient resource.

## Adversarialism

3.30. Many submissions from individual litigants, corporations and consumer groups expressed the view that the adversarial system was unsuitable for many types of disputes, particularly family law disputes,<sup>725</sup> because it was concerned with ‘winning at all costs’,<sup>726</sup> exacerbated conflict,<sup>727</sup> victimised the poor and less powerful<sup>728</sup> and left children out of the process.<sup>729</sup>

The adversarial nature of proceedings in the Family Court promotes antagonism between litigants and can have the effect of greatly expanding the duration of litigation.<sup>730</sup>

By its very nature, the adversarial culture suggests winners and losers.<sup>731</sup>

3.31. There were a number of complaints by litigants, overwhelmingly in the family law area, that lawyers were unaccountable,<sup>732</sup> went ‘for the jugular’,<sup>733</sup> wanted to ‘score points’,<sup>734</sup> exacerbated or encouraged disputes,<sup>735</sup> enjoyed winning as a ‘personal contest against other lawyers’,<sup>736</sup> didn’t use ADR sufficiently,<sup>737</sup> and were overly motivated by profit.<sup>738</sup>

3.32. Lawyers’ education, professional training<sup>739</sup> and on the job training<sup>740</sup> were regarded as contributing to this prevailing adversarial culture. It also was suggested that many law students have an ‘adversarial focus’ or ‘mindset’<sup>741</sup> or at least a strong sense of competitiveness<sup>742</sup> before they begin law school. In chapter 2 the Commission pays particular attention to legal and judicial education as a

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725. A Buchanan *Submission 124*; FLRA (NSW) *Submission 134*; FLRAA *Submission 157*; R Kelso *Submission 159*; Burnside *Submission 160*; Children’s Interest Bureau *Submission 170*; R Cook *Submission 322*. There was some suggestion that the AAT was overly adversarial, eg Public Policy Assessment Society *Submission 325*. For further discussion on the nature of, and reforms to, adversarialism, see ch 1, para 1.111–1.134.

726. Australian Chamber of Commerce and Industry *Submission 61*.

727. N Pasqua *Submission 132*; J Weingarh *Submission 52*.

728. Taxi Employees League *Submission 128*.

729. Burnside *Submission 160*.

730. National Council of Single Mothers and their Children *Submission 137*.

731. Legalcare *Submission 50*.

732. Medical Consumers Association of NSW *Submission 329*.

733. V Silverlock *Submission 101*.

734. FRLAA *Submission 157*.

735. E Davies *Submission 103*; Lone Fathers Association NT *Submission 123*; R Wilson *Submission 143*; Australian Chamber of Commerce and Industry *Submission 61*; C McArdle *Submission 290*; Allen Consulting Group *Submission 219*.

736. C Stephen *Submission 117*.

737. Legalcare *Submission 50*; Lone Fathers Association NT *Submission 123*.

738. Lone Fathers Association NT *Submission 123*; R Kelso *Submission 159*; K May *Submission 220*; Confidential *Submission 331*.

739. Legalcare *Submission 50*.

740. NRMA *Submission 81*.

741. M Le Brun *Submission 75*; J Goldring *Submission 76*.

742. H Gamble *Submission 260*.

critical part of changing and improving legal culture – and thus legal practice and dispute resolution.

3.33. The NRMA stated

the culture of general legal practice encourages adversarial legal relationships because lawyers are trained to protect their clients' own interests and generally take a defensive rather than a cooperative attitude towards another party ...

Our impression is that the culture of the legal profession and particularly, of litigators, is adversarial as the culture in litigation, is to distrust the opposing party and not to divulge information or openly discuss matters for fear that it may prejudice their clients' interests in a latter hearing ... The behaviour of the profession is often directed towards ensuring their clients' position is not prejudiced in the event of a hearing, rather than working cooperatively towards settlement of a matter.<sup>743</sup>

However, Justice Heerey of the Federal Court observed that

[m]y general experience ... is that litigants do not particularly enjoy litigation, find it stressful and very expensive, but want to win. Settlement usually involves a substantial reduction of the desired objective in the light of risk and cost and is seen very much as a second best outcome ... It very often happened in my experience that it was the lawyer who urged the client to accept settlement and the client who wanted to fight. If anything, there may be a criticism that lawyers are sometimes not adversarial enough. But ... I do not see that courts (certainly the Federal Court) as captured by an adversarial mindset.<sup>744</sup>

Certainly clients want to win. Professor Zuckerman noted

[i]t is natural that litigants should seek to exploit procedure to their advantage. Litigants do not resort to legal proceedings for altruistic disinterested motives. They go to law in order to advance their own interests. In so doing they will take whatever advantage the rules of court afford. Litigants want to win, and they can be hardly condemned for having such a desire or, indeed, for following the course which is most conducive to their objective.<sup>745</sup>

The theme is repeated by Chief Justice Gleeson.

Some of the most adversarial and non-cooperative litigants I have encountered have not been represented by any lawyers at all. And many lawyers who are regarded as exponents and exploiters of the adversarial system in practice devote a large part of their energies to restraining their clients' enthusiasm for conflict.<sup>746</sup>

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743. NRMA *Submission 81*.

744. P Heerey *Submission 49*.

745. A Zuckerman 'Reform in the shadow of lawyers' interests' Ch 3 in A Zuckerman and R Cranston (eds) *Reform of civil procedure: Essays on 'Access to justice'* Clarendon Press Oxford 1995, 63.

746. M Gleeson 'Commentary on paper by Lord Browne-Wilkinson' *Conference paper* Supreme Court of NSW Judges Conference 11 September 1998, 3 <<http://www.hcourt.gov.au/cj2.htm>> (23 April 1999).

3.34. A common misconception in the adversarial-non adversarial debate is to equate partisanship by lawyers with excessive, adversarial behaviour. It is a common precept of both the common law and civil code systems that a lawyer will be partisan and is required to advocate the case of the client.<sup>747</sup> Justice Rowlands of the Family Court has noted

on the Continent of Europe lawyers in pursuit of their clients' interests are now more inclined ... to question witnesses as this is what their clients expect of their adviser who understands their case and knows what material should be obtained from the witness if it is to be advanced.<sup>748</sup>

3.35. The Law Council suggested that the duty to independently and courageously advance a client's case necessarily involves some degree of adversarial behaviour. The Law Council also stated that

what in fact drives lawyers is the duty owed to the client to give sensible and correct advice which meets the client's needs. The tendency to cover every circumstance and eventuality, is also the product of the nature of the duty that courts have imposed on lawyers.<sup>749</sup>

3.36. The Law Council commented that there is an 'enormous diversity of attitudes, views and backgrounds of lawyers'.<sup>750</sup> The Australian Corporate Lawyers Association stated that a 'cultural change' has been occurring in the legal profession with a growing acceptance of ADR.<sup>751</sup> The Law Society of South Australia stated that

[I]tigation culture is in a constant state of development. There have always been, and always will be, disputes as to whether there is a duty upon a lawyer to take advantage of a perceived weakness of the other side in his 'interest'.<sup>752</sup>

It was also noted that

[i]t is undoubtedly true that some lawyers tend to revert immediately to an adversarial style of dispute resolution. However ... a great deal of lawyering in the private profession and in government, is about dispute prevention or avoidance ... and has nothing to do with disputes.<sup>753</sup>

3.37. The Victorian Bar and the New South Wales Bar Association submitted that lawyers facilitate resolving disputes and promote settlement.<sup>754</sup> The New

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747. J Elkind *Submission 11*. See ch 1, para 1.116–1.125.

748. A Rowlands *Submission 35*.

749. Law Council *Submission 126*.

750. *ibid.*

751. Australian Corporate Lawyers Association *Submission 70*.

752. Law Society of SA *Submission 94*.

753. Centre for Legal Education *Submission 92*.

754. Vic Bar *Submission 57*; NSW Bar Assoc. *Submission 88*.

South Wales Bar Association commented that the adversarial system was oriented to the resolution of disputes by consensual means and that litigation often involved a high degree of cooperation between lawyers for the parties to ensure that issues in dispute are isolated and put before the court.<sup>755</sup> The Law Society of Western Australia stated that lawyers only used adversarial skills 'when required'.<sup>756</sup>

3.38. In the Woolf Report, much of the blame for 'adversarial excesses' in the system was laid at the feet of lawyers and their clients.<sup>757</sup> Lord Woolf saw judicial case management as the solution to inhibit the worst of 'excessively adversarial' conduct by parties and their legal advisers. Case management can be effective in limiting overservicing, tactical play and litigation excesses. To be effective, case management requires the cooperation, or at least compliance, of lawyers and litigants.<sup>758</sup>

3.39. As stated, the Civil Procedure Rules (UK) include an obligation that parties and their legal advisers assist the court to deal with cases justly, including by dealing with a matter in ways *proportionate* to the value, importance and complexity of the claim and the financial position of each party.<sup>759</sup>

- Dealing with a case justly includes, so far as is practicable –
- (a) ensuring that the parties are on an equal footing;
  - (b) saving expense
  - (c) dealing with the case in ways which are proportionate –
    - (i) to the amount of money involved;
    - (ii) to the importance of the case;
    - (iii) to the complexity of the issues; and
    - (iv) to the financial position of each party;
  - (d) ensuring that it is dealt with expeditiously and fairly; and
  - (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.<sup>760</sup>

However, the wording of Rule 1.1 invokes a broad and largely unguided judicial discretion. For example, while judges can ensure that both parties comply with court rules and procedures, it can be difficult for a judge to ensure, so far as is practicable, that the parties are on an equal footing. It is unclear on what basis the importance of the case should be decided; the importance of the case to society, the parties or the development of the common law? It is also difficult for a judge to obtain information about the parties' true financial positions.

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755. NSW Bar Assoc. *Submission 88*.

756. Law Society of WA *Submission 78*.

757. Lord Woolf *Access to justice: Final report to the Lord Chancellor on the civil justice system in England and Wales* HMSO London 1996, section I.

758. See ch 6 on litigants and issues in case management, and ch 8 on lawyers and litigants in family law practice.

759. Civil Procedure Rules 1998 (UK) Part 1, 1.1, 1.3.

760. *id* Part 1, 1.1.

3.40. While there is no doubt that the litigation system would work better if lawyers and litigants followed the 'proportionality principle' set out in Rule 1.1, application of this rule by a judge is not easy. There is also the question of how this general obligation fits with the lawyer's obligation to be a partisan advocate for the client. As the following discussion makes clear, the Commission does not support such a broad statement of lawyer, litigant and litigation objectives but statements of the express obligations which lawyers owe the administration of justice.

3.41. It is important to distinguish between the adversarial system itself and behaviour of lawyers or their clients described as 'adversarial'. Much of the behaviour characterised as excessive adversarialism is probably unsatisfactory professional conduct or professional misconduct. It is not a necessary part of the adversarial system. Professional practice rules allow parties to compete vigorously as adversaries while ensuring maintenance of ethical standards. They also encourage negotiation and settlement. Changes are necessary to the substance of rules to militate against the pressures to 'win' at all costs. Certainly such conduct can conflict with countervailing pressures to resolve disputes quickly, effectively and in a cost efficient manner.

### **The need for professional practice rules**

3.42. There has been a trend throughout Australia towards professional self-regulation based on industry codes of practice. The move towards written compilations of legal professional practice rules in Australia gained momentum in the early 1980s.

3.43. The Law Society of Western Australia adopted a structured set of rules in 1983, followed by the law societies of South Australia and the Australian Capital Territory in 1984, and the Law Society of the Northern Territory in 1985. The Law Institute of Victoria published its statutory practice rules in 1984. In 1992, Queensland's *Solicitors handbook* provided a comprehensive guide to conduct, although not in a rule format. The Law Society of New South Wales did not adopt a comprehensive set of rules until 1994,<sup>761</sup> although a basic form of solicitors' rules were in place and the Law Society published *Riley's manual*, which compiled the different rulings and decisions relating to procedure and professional conduct.<sup>762</sup>

3.44. The New South Wales Bar Association has had a fairly comprehensive set of rules for a number of years,<sup>763</sup> and the Western Australian Bar since 1991. Most

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761. The Law Society of NSW acquired power to make rules binding upon solicitors on 1 July 1994 as a result of amendments to the *Legal Profession Act 1987* (NSW).

762. F Riley *New South Wales solicitors manual* Law Society of NSW Sydney 1994; although this publication is currently out of print.

763. The NSW Bar Assoc. has proposed changes to its Bar rules including rules which are aimed at increasing the efficiency of administration of justice.  
<[http://www.nswbar.asn.au/proposed\\_changes\\_to.htm](http://www.nswbar.asn.au/proposed_changes_to.htm)> (6 Sept 1999). For further discussion see para 3.89-3.92.



bar associations in Australia adopted uniform rules developed by the Australian Bar Association in 1993. The Victorian Bar, the South Australian Bar Association and the Northern Territory Bar Association have rules based on the 1993 *Code of Conduct*. However, a new set of uniform rules, known as the 1995 *Advocacy Rules*, has been endorsed by the Australian Bar Association and adopted by the Bar Associations in New South Wales, Queensland and the Australian Capital Territory.<sup>764</sup>

3.45. As stated, professional practice rules play an important role in regulating the conduct of practitioners, and in contributing to the proper administration of justice. The rules themselves do not, and cannot, provide a solution to poor practice. Indeed, one practitioner (now a judge) noted, concerning the distillation of ethical principles into legal practice rules, that

[I]awyers tend to see rules as things to be circumvented in the pursuit of the client's interests. They may be honoured in the letter but ignored in the spirit. This is a potentially dangerous situation, for if lawyers approach codes of professional ethics in the same way they approach, say, revenue law then the underlying aim soon becomes avoidance rather than compliance.<sup>765</sup>

3.46. Practitioners in each State and Territory are admitted as officers of the relevant Supreme Court, and these courts generally have inherent and statutory jurisdiction to regulate and discipline practitioners. Legal professional rules comprise statements concerning ethical principles and practice standards derived from the common law, statutes, rules of courts, and the rules, guidelines and principles drafted and approved by legal professional associations. Professional practice rules provide a comprehensive (but not exhaustive) guide to members of the profession about expected conduct. A breach of the rules may be considered 'unsatisfactory professional conduct' or 'professional misconduct' subject to sanction, including, for the most severe cases, striking off the roll of practitioners.

3.47. While the legal profession has developed its own practice standards, there is also a trend towards regulating practitioner conduct by court rules and legislation. This has often occurred where existing professional practice standards are inconclusive or silent on particular matters. It reflects the failure by the legal profession to set out the correct balance to be maintained by a legal practitioner between the duty to the client and the duty to the administration of justice. For example, some practitioner obligations are defined or given legal force in legislation, in the *Family Law Act 1975* (Cth). Rules of court increasingly detail professional practice issues.<sup>766</sup>

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764. The 1995 *Advocacy Rules* were originally developed by the NSW Bar Assoc.

765. K Crispin 'Professional ethics and the prosecutor' *Unpublished paper* DPP Canberra 1992, 7.

766. See also United States Federal Rules of Civil Procedure referred to in para 3.93-3.96.

3.48. There are disadvantages to the use of rules of court to regulate matters of professional practice including that

- rules of court apply to litigation only and not to the whole of legal practice, most of which is non-litigious
- it can be difficult for the court to ascertain relevant facts and to enforce such rules<sup>767</sup>
- the United States experience suggests that such standards, when framed as rules of court, may be utilised as part of the battle of litigation<sup>768</sup>
- it removes the onus from the profession to take these matters seriously and keep them under continuous review.

## A national market and national rules

### Existing professional practice rules

3.49. In Australia, the legal profession is essentially regulated on a State and Territory basis.<sup>769</sup> In New South Wales, Queensland and Victoria, the profession is divided into solicitors and barristers and, for most purposes, solicitors and

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767. See for example discussion of new English Rules of Civil Procedure at para 3.39-40.

768. Law Council *Submission 375*; J Resnik 'Changing practices, changing rules: judicial and congressional rulemaking on civil juries, civil justice, and civil judging' (1997) 49 *Alabama Law Review* 133, 194.

769. The United States is also a federal jurisdiction. Model Rules of Professional Conduct, containing a rule-commentary format and combining a concise rule with explanatory guidance, serve as a national framework for the implementation of standards of professional conduct. They have been adopted, with local variations, by professional associations and courts in most US State and federal jurisdictions.

barristers are regulated separately.<sup>770</sup> In accordance with the *Judiciary Act 1903* (Cth), a person entitled to practise as a barrister or solicitor or both in the Supreme Court of a State or Territory is also entitled to practise in any federal court,<sup>771</sup> or any court exercising federal jurisdiction.<sup>772</sup>

3.50. Under the *Mutual Recognition Act 1992* (Cth),<sup>773</sup> a person registered to practise a profession or occupation in one State (or Territory) is able to practise in any other State,<sup>774</sup> subject to registration with the relevant regulatory authority in the other State.<sup>775</sup> Interstate practitioners are required to apply for recognition, pay admission fees, and maintain practising certificates in each jurisdiction in which they wish to practise.

3.51. The Hilmer National Competition Policy Review recommendations of 1993 (the Hilmer report) accelerated the development of a national market for legal services.<sup>776</sup> The Trade Practices Commission released its report on competition and the regulation of the legal profession in March 1994 (the TPC final report)<sup>777</sup> and, consistent with the Hilmer report, recommended an integrated national legal services market with formal recognition in each State and Territory of the practising rights of lawyers admitted in any other jurisdiction.<sup>778</sup>

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770. However, in NSW and Victoria many of the regulatory and disciplinary functions are now the same for solicitors and barristers. At present there is no statutory regulation of barristers in Queensland, although the Queensland government has recently proposed common admission and regulation of Queensland practitioners: Queensland government 'Legal profession reform' *Green paper* June 1999. There is no statutory regulation of ACT barristers. Bar associations now exist in all other States and Territories, although they are generally voluntary organisations and professional regulation is primarily conducted through the law societies. The case is different in Western Australia where the Legal Practice Board has primary powers of regulation, but the Law Society and the Bar Association have both established their own sets of professional practice rules.

771. *Judiciary Act 1903* (Cth) s 55B(1).

772. *id* s 55B(4).

773. Complementary legislation was passed in all States. This followed a 1989 decision in the High Court which determined that an interstate practitioner could not be prevented from practising in a Queensland court on the basis of a residency requirement

It is a matter of national importance that, if they wish, State residents should be able to utilise the services of interstate practitioners in conducting litigation in the courts of their State. The practice of law also plays an increasingly important part in the national economy and contributes to maintaining the single economic region which is a prime object of federalism: *Street v Queensland Bar Association* (1989) 168 CLR 461, 589 (McHugh J).

774. *Mutual Recognition Act 1992* (Cth) s 17.

775. *id* s 19. In most jurisdictions there are, however, specific residency requirements if a practitioner or firm wishes to register a legal office or firm in the new jurisdiction.

776. National Competition Policy Review *National competition policy* AGPS Canberra 1993 (Hilmer report).

777. Trade Practices Commission *Study of the professions – legal* Final report 1994 (TPC final report).

778. The AJAC Committee also supported a national market for legal services: AJAC report, 124–128. See para 3.58 below.

3.52. The Law Council supported the principles of the Hilmer report and the TPC final report, particularly the objective of a national legal services market. In 1995, the Law Council released its *Blueprint for the structure of the legal profession*,<sup>779</sup> which endorsed a national legal services market.

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<sup>779</sup>. Law Council *Blueprint for the structure of the legal profession: A national market for legal services* Law Council Canberra 1994, 2.

3.53. The concept of a 'driver's licence' type or 'portable' practising certificate, issued by one jurisdiction but recognised in all other Australian jurisdictions, has been supported in principle by all professional associations in Australia, although the States and Territories with smaller professions have been concerned to maintain their identity, competitiveness and market share. Presently, legislation recognising a travelling practising certificate regime is in effect in New South Wales, Victoria and the ACT.<sup>780</sup> Protocols for indemnity insurance and discipline for such 'travelling' lawyers are being developed by the Law Council.<sup>781</sup> While a cooperative approach, and retention of independent regulation in each jurisdiction, was the preferred option of the professional bodies,<sup>782</sup> the option of a federal regulatory body responsible for licensing and regulating lawyers throughout the country is still being canvassed.<sup>783</sup>

3.54. The professional practice rules in place in the States and Territories are similar, but have differences which must be noted by practitioners moving from jurisdiction to jurisdiction. There are no national professional practice rules in force, although the Law Council and the Australian Bar Association have model rules which they have sought to have adopted on a national basis.<sup>784</sup>

### The United States experience

3.55. The United States legal profession is similarly dispersed across different jurisdictional boundaries, with the conduct of lawyers regulated by disciplinary agencies under the supervision of State Supreme Courts.<sup>785</sup> This has created disparate systems of regulation of professional practice, as in Australia. However, the American Bar Association Model Rules of Professional Conduct (ABA Model Rules) operate as an influential code of conduct for lawyers in all jurisdictions.<sup>786</sup> Many jurisdictions have adopted the ABA Model Rules as the basis for professional practice, achieving some simulation of a national set of professional practice rules. However, recent indications from the United States show that the standards in each jurisdiction are gradually diverging, by local adaptations to ABA Model Rules in some jurisdictions, and a failure to adopt the ABA Model Rules in

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780. Legislation was passed in South Australia in early 1999, but is not to take effect until a number of procedural matters, including recognition of disciplinary procedures, are finalised. The Law Society of NT has agreed to enter the scheme, and is working with the NT government to introduce legislation for a travelling practising certificate regime. The Law Society of WA has similarly agreed to participate in the scheme.

781. The Law Council collectively refers to these issues, and other issues of a national nature, under the rubric of National Cooperation.

782. These options were discussed in the AJAC report: AJAC report, 127–128. See para 3.58 below.

783. R Heinrich 'Centralised regulation of the legal profession' (1998) 36(5) *Law Society Journal* 19.

784. See para 3.69, 3.70.

785. Although it can be argued that other forms of disciplinary sanction, including court orders and negligence actions are becoming more influential in the regulation of lawyer conduct in the USA: DWilkins 'Who should regulate lawyers?' (1992) 105 *Harvard Law Review* 799.

786. id 810.

others. This is causing problems for lawyers and clients in an increasingly national market.<sup>787</sup>

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787. 'Uniform federal rules of attorney conduct: A flawed proposal' (1998) 111 *Harvard Law Review* 2063.

3.56. In 1997, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States drafted uniform Federal Rules of Attorney Conduct to apply to all lawyers appearing before federal courts, intended as a guide for attorneys on which standard a federal court will apply to their conduct. This approach has been criticised, on the grounds that

- it fails to deal with state responsibility for regulating and disciplining lawyers
- with the exception of government lawyers, there are few lawyers that have a truly 'federal' practice, thus increasing disparity of practice rules rather than creating uniformity
- it creates difficulties for lawyers with multi-jurisdictional practices, who must determine which rules are applicable at what time
- lawyers appearing before federal tribunals nevertheless also remain subject to state rules and disciplinary processes.<sup>788</sup>

3.57. The experience in the United States highlights the problems that can arise with disparate professional practice standards across the same national market, even in the situation where the ABA Model Rules provide some focus for uniformity. Specific rules for practice in federal courts have the potential to create greater disparity and confusion rather than the intended consistency and clarity. The Commission has therefore focussed on recommending generalist, national rules, not particular ones for federal practice.

## Regulation and discipline

3.58. The Access to Justice Advisory Committee (AJAC) supported the option of a single regulatory body, responsible for licensing and regulating all practitioners in Australia with one set of professional practice rules and a disciplinary process to apply across all jurisdictions.<sup>789</sup> However, it acknowledged that a cooperative approach to achieve such an adoption would be preferred due to expected opposition by the States and Territories and the difficulties of securing uniform or harmonised legislation.<sup>790</sup>

3.59. With respect to the arrangements for such regulatory bodies, a number of submissions to the Commission were concerned with a lack of adherence to and enforcement of the professional practice rules.<sup>791</sup> Certain submissions observed that the disciplinary systems protected the legal profession rather than the complainant.<sup>792</sup>

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788. id 2072.

789. AJAC report, 127–128.

790. id 128.

791. eg Lone Fathers WA *Submission 156*.

792. eg Medical Consumer Association of NSW *Submission 185*.

3.60. It is important that members of the public feel that their complaint will be dealt with in a fair and unbiased manner. However much professional associations may endeavour to do this, complaints handling by the legal profession gives the perception that the system is run by and for lawyers.<sup>793</sup> Non-lawyer

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793. NSWLRC Report 70 *Scrutiny of the legal profession: complaints against lawyers* Sydney 1999, 67–71.



participation in disciplinary systems is one method of providing a measure of independence and accountability to ensure public confidence in such systems. This principle is now well accepted, and has been introduced in varying degrees in all of the States and Territories.

3.61. The establishment in New South Wales of the Office of the Legal Services Commissioner (OLSC (NSW)) in 1994, and in Victoria the Legal Ombudsman in 1997, represented major change to the structure of legal professional regulation. Significant regulatory power was transferred from the professional associations to, or shared with, an independent statutory officer.<sup>794</sup> In Victoria, the Legal Ombudsman must not be a lawyer and has wide powers to investigate complaints about the conduct of practitioners.<sup>795</sup>

3.62. A review of the *Legal Profession Act 1987* (NSW) by the New South Wales Attorney-General's Department as part of the application of national competition policy has highlighted issues relating to the disciplinary system, including a comparison of the powers and functions for handling and investigating complaints in New South Wales and Victoria.<sup>796</sup> The review focussed on compliance with the Competition Principles Agreement endorsed by the Council of Australian Governments (COAG), but the results may provide a basis for the development of a disciplinary model to be implemented in each State and Territory.

3.63. The recent discussion paper released by the Queensland Attorney-General and Department of Justice suggests the introduction there of a legal practice authority managed by a chief executive who need not be a legal practitioner.<sup>797</sup> Independence of the disciplinary body from the legal profession is stated to be an advantage of the proposed new structure in Queensland, with the disciplinary body, the Legal Practitioners' Disciplinary Board, subject to the supervision of the Supreme Court.<sup>798</sup> However, the new regime has been criticised by the Queensland Law Society as complex, costly and inappropriate. It is

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794. The establishment of the Office of the Legal Services Commissioner was the direct result of recommendations made by the NSW Law Reform Commission as a result of its inquiry into the legal profession. See NSWLRC Report 70 *Scrutiny of the legal profession: complaints against lawyers* Sydney 1993. After the OLSC (NSW) has made its report, a matter may be referred to the Administrative Decisions Tribunal (formerly the Legal Services Tribunal). OLSC (NSW) *Annual report 1997-98*, 5-16.

795. The Legal Ombudsman may and, in certain circumstances, must refer matters to the Legal Profession Tribunal, an independent tribunal supervised by the Supreme Court, which hears lawyer-client disputes and disciplinary matters: Legal Ombudsman (Vic) *Annual report 1998*.

796. A-G's Dept (NSW) Issues Paper Vol 3 *National competition policy review of the legal profession Act 1987* A-G's Dept (NSW) Sydney 1998, ch 9.

797. Queensland Government 'Legal Profession Reform' *Green paper* Queensland Department of Justice and the Attorney-General June 1999 and comment by R Bond 'Strange events in Queensland' *Aust Fin Rev* 16 July 1999, 31. The paper is available at <<http://www.justice.qld.gov.au/pdfs/green1.pdf>>(19 July 1999).

798. Queensland Government 'Legal Profession Reform' *Green paper* Queensland Department of Justice and the Attorney-General June 1999, 12.

suggested that the model should follow more closely that of the Legal Services Commissioner of New South Wales.<sup>799</sup>

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799. I Muil 'The Green Paper fails to deliver' (1999) 19(8) *Proctor* 13.

3.64. In DP 62 the Commission proposed that the Law Council be requested to investigate the feasibility of establishing a single, regulatory body for all Australian practitioners. The Commission found some support for this proposal in submissions and consultations.<sup>800</sup> However, in its submission the Victorian Bar expressed reservations about this proposal on the basis that there are differences between the States and Territories and between the nature of practice as a barrister and as a solicitor and that these are best dealt with by the existing system of self-regulation within each State and Territory.<sup>801</sup> The Victorian Bar also was concerned that a new federal regulatory body would result in over administration which would increase the costs of practice, resulting in higher costs to consumers, and inhibit a free, competitive market in legal advocacy services.<sup>802</sup> The OLSC (NSW) recommended establishing protocols between the existing regulatory bodies rather than creating a new infrastructure which duplicates existing structures in the States and Territories.<sup>803</sup>

3.65. The Law Council previously advocated a single national body to govern the legal profession.<sup>804</sup> However, in its submission the Law Council questioned the feasibility of a single regulatory body, noting that this would require a significant cooperative scheme among the federal, State and Territory governments and might require a referral of power in respect of the legal profession by a State government to the federal government under s 51(xxxvii) of the Constitution.<sup>805</sup> The Law Council also questioned the powers and purpose of the regulatory body and whether or not a uniform disciplinary process was required. Instead, the Law Council favoured schemes tailored to fit the profile and size of the profession in each jurisdiction.<sup>806</sup>

3.66. The Commission continues to support the development of a national profession and harmonised regulatory arrangements for legal practice in each State and Territory. The Commission encourages States and Territories to adopt cooperative regulatory models which facilitate this result.

### **A national code of practice**

3.67. In DP 62, the Commission proposed national model rules for legal practitioners. In its submission, law firm Freehill Hollingdale & Page strongly supported investigation into the need for and the scope of legal professional

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800. Freehill Hollingdale & Page *Submission* 339; SA Bar Assoc *Consultation* 10 August 1999.

801. Vic Bar *Submission* 367.

802. *ibid.*

803. OLSC (NSW) *Submission* 379.

804. F Dixon *Presidential address* 31st Australian Legal Convention Law Council Canberra 10 October 1999; Law Council *Submission* 375.

805. Law Council *Submission* 375.

806. *ibid.*

practice rules.<sup>807</sup> However, it noted that those rules would only be beneficial to the practice of law and the promotion of justice if they have certain characteristics. It warned that inappropriate rules have the potential to cause great damage to the legal profession and hence to the rule of law.

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807. Freehill Hollingdale & Page *Submission* 339.

Properly framed practice rules have a number of characteristics:

- (a) They preserve the hallmark of the professional, namely, their independence of judgement. It is important that lawyers not be subject to threat of disciplinary action by reason of his or her stand on matters which go to the administration of justice, including vigorous defence or attack in contentious business. This is not to say that rules should not exist, but only that the rules should be neutral in their application to different points of view and as between plaintiffs and defendants.
- (b) They do not confer a competitive advantage or impose a competitive disadvantage upon legal practitioners. In particular, the rules should recognise that lawyers owe special duties as officers of the Court and that their competitive behaviour is thereby constrained. As a correlative, lawyers should be given special rights (immunities). If they are not, other professionals (who are not officers of the Court and not subject to those disadvantages) will be able to undermine the system of justice by undermining the competitive viability and position of lawyers.
- (c) They do not discriminate between different types of law practices. This does not mean that law practices should be treated all alike. A principle of non-discrimination may require that different rules apply to different types of practices. It requires a recognition that, for example, a large city commercial law practice which deals with sophisticated commercial clients, has different pressures and needs than a small suburban conveyancing practice. Contentious business may need to be treated differently to non-contentious business. Non-discrimination may therefore require unequal treatment to achieve the objective of treating like cases alike and not treating unlike cases alike.<sup>808</sup>

3.68. The Freehills submission also stated that professional practice rules should recognise that, as officers of the court, lawyers are subject to the court's supervision and ultimate authority. It noted that professional bodies have their own sectional interests and that it is unhelpful to have professional bodies promulgating and enforcing detailed rules. The submission agreed that there are benefits to a code of professional practice but warned of the following problems

- the process of codification can result in misinterpretation of the common law; the great merit of the common law is that it forges its rules after extensive testing in actual matters, with advocates testing the proper limits of the proposed rule; the tendency to 'fix' the common law should be resisted
- codes risk becoming long and prolix if they are the product of different interest groups within the one professional body and may lose their coherence as sectional interests are accommodated within the one rule
- codes can be used to oppress fearless advocacy
- without a national set of rules, States and Territories will be seeking to protect their own interests rather than the national interest
- a national set of rules would be difficult to amend because of the need for consultation with the States and Territories
- codes could be used in damages actions against professionals

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808. *ibid.*

- there are disputes over common values, therefore, rules should be limited to a small number of essential items which express general principles
- the existence of codes can be used as an excuse for failing to engage in moral reasoning.<sup>809</sup>

3.69. As a part of its national professional blueprint, the Law Council has developed and adopted *Model rules of professional conduct and practice* (the Model Rules), to serve as a model for national practice rules in Australia.<sup>810</sup>

3.70. The Australian Bar Association likewise has been working to achieve uniformity of professional practice rules for barristers across jurisdictions.<sup>811</sup> The 'Advocacy rules' included in the Law Council's Model Rules are based on the 1995 *Advocacy rules* adopted by the Australian Bar Association.<sup>812</sup>

3.71. The Commission supports such initiatives to introduce national model professional practice rules.

**Recommendation 13.** Legal professional associations and regulatory bodies should give priority to the development and implementation of national model professional practice rules.

## The form of professional practice rules

3.72. The form of legal practice rules can affect the extent to which the rules are understood and complied with by legal practitioners. Professional practice rules

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809. *ibid.*

810. The Model Rules were developed for the Law Council by the Law Society of NSW. The conduct rules of the Law Society of NSW and the Law Society of ACT are compatible with these Model Rules. Other professional associations have supported the Model Rules, in some cases adopting them in principle, and are working towards official adoption in the near future. The Law Council is planning a 'plain English' rewrite of the rules in anticipation of national adoption.

811. The 1993 *Code of conduct* was adopted by all local bar associations except in Tasmania. In some cases the *Code of conduct* was adopted in principle only, such as in WA where the 1991 Conduct Rules continue in force as the official rules of the WA Bar Assoc. However, the NSW Bar Assoc. subsequently rejected the 1993 *Code of conduct* and adopted its own rules. The Australian Bar Assoc. then adopted the NSW rules as the basis for its 1995 *Advocacy rules*, which are intended to supersede the 1993 Code. The Qld and ACT Bars have adopted the 1995 *Advocacy rules*.

812. There has been an *International code of ethics* supported by the International Bar Association (IBA) since 1956, with the current version dating from 1988. The Code contains a simple outline of the expected conduct of practitioners and applies to any lawyer of one jurisdiction to his or her contacts with a lawyer of another jurisdiction or to his or her activities in another jurisdiction. The Code does not absolve a practitioner from the obligation to comply with any local professional conduct requirements. The IBA may bring incidents of alleged violations to the attention of relevant organisations. The Code is attached as an appendix to the Law Society of New Zealand's Rules of Professional Conduct for Barristers and Solicitors.

may be structured as rules only, or as rules with supporting commentary. In theory, professional practice rules may be 'prescriptive' (duty-directed), stating specific duties; or 'aspirational' (virtue-directed), stating desirable aims even though actual conduct may fall short of this ideal.<sup>813</sup> The major function of aspirational codes is to educate and encourage high standards. Aspirational codes cannot mandate compliance. Compliance, deterrence, punishment, or protection are best achieved through a prescriptive code.<sup>814</sup> In practice, most sets of practice rules contain elements of both, although Australian practice rules tend towards the prescriptive.

3.73. In one submission to the Commission, it was argued that standards of 'good practice' should not be incorporated into professional practice rules.<sup>815</sup> However, another submission was in favour of professional practice rules including aspirational elements.<sup>816</sup> Professor Luban warns against the legalisation and 'demoralization' of ethical rules and emphasises the importance of encouraging individual moral judgment.<sup>817</sup> He states that

... moral decision making involves identifying which principle is most important given the particularities of the situation ...<sup>818</sup>

The Commission supports the incorporation of aspirational ideals in professional practice rules. It is important that high ethical standards to which all practitioners should strive be stated as principles of practice. Commentary to the rules can provide the right balance between rules and ideals while assisting practitioners in making individual moral decisions.

3.74. Professional practice rules in a number of overseas jurisdictions incorporate the 'rule-commentary' approach referred to in paragraph 3.29 above. The New Zealand Rules of Professional Conduct for Barristers and Solicitors, the ABA Model Rules, and a number of practice rules in Canadian jurisdictions including Alberta's Code of Professional Conduct,<sup>819</sup> are examples of the rule-commentary approach. In addition the ABA Model Rules include general ethical principles in a preamble to the rules.<sup>820</sup>

3.75. The Legal Profession Advisory Council in New South Wales has recommended to the Attorney-General that the Law Society of New South Wales

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813. L Skene 'A legal perspective on codes of ethics' M Coady and S Bloch (eds) *Codes and ethics and the professions* Melbourne University Press Melbourne 1996, 111.

814. *ibid.*

815. Vic Bar *Submission 367*.

816. R Simmonds *Submission 301*.

817. D Luban and M Millemann 'Ethics teaching in dark times' (1995) 9 *Georgetown Journal of Legal Ethics* 31.

818. *id* 39.

819. Law Society of Alberta *Code of Professional Conduct* Law Society of Alberta.

820. For further discussion and an example of the ABA rule-commentary approach see ALRC DP 62 para 5.48.

adopt a principle-rule-commentary approach to its professional conduct rules.<sup>821</sup> The OLSC (NSW) supports such an approach.<sup>822</sup>

3.76. However, the Law Society of New South Wales, in its submission to the Advisory Council, expressed reservations regarding this proposal, stating that any attempt to cover all situations might result in practitioners adopting a legalistic, rather than an ethical, approach.<sup>823</sup> The Law Council supported this view noting that the principle-rule-commentary approach could evolve into a prescriptive, exhaustive code.<sup>824</sup> The Law Council agreed that professional practice rules should provide appropriate and sufficient guidance to practitioners and cover relevant areas of practice,<sup>825</sup> supporting the current command-prohibition form of

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821. Legal Profession Advisory Council 'Report and recommendation of the Legal Profession Advisory Council pursuant to sections 57H(1) and 59(2)(b) of the Legal Profession Act' *Unpublished Attorney-General's Dept (NSW) Sydney 1997.*

822. OLSC (NSW) *Submission 379.*

823. Submission by Law Society of NSW to the Legal Profession Advisory Council.

824. Law Council *Submission 375.*

825. *ibid.*



professional practice rules as providing appropriate and sufficient guidance to practitioners. It noted the advantages of having professional practice rules incorporated into simple, brief statements.<sup>826</sup>

3.77. A principle-rule-commentary approach to professional practice rules is not the same as a code. Commentary provides guidance for practical interpretations of the rules and examples of application. A commentary style is currently utilised in the New South Wales legal practice guide *Riley's*.<sup>827</sup> Law societies and bar associations in other jurisdictions publish similar commentary material aimed at assisting practitioners in their daily practice.

3.78. A principle-rule-commentary approach to professional practice rules combines appropriate features of these varied publications in one document, provides a more accessible and authoritative guide to professional conduct and improves the relevance of professional practice rules to the daily work of practitioners.

3.79. Criticism of the principle-rule-commentary approach in submissions to the Commission raised the following additional issues:

- what force should be given to the commentary portion of the rule
- inconsistencies may arise between the commentary and the rule itself
- commentary is given less scrutiny in comparison to rules in relation to its ethical implications
- commentary causes rules to be long and prolix
- commentary may lead to litigation time being spent on debating the application of the rule, resulting in greater cost for clients
- adoption of a commentary approach may result in practitioners adopting a legalistic rather than ethical approach
- commentary can quickly become out of date and there is no Australian body equivalent to the American Bar Association with the resources to monitor and update the commentary.<sup>828</sup>

3.80. The Commission believes that fears over the force to be given to the commentary are unfounded, since the commentary is a guide to practice not a practice rule. Concerns about lengthy or prolix rules can likewise be dealt with by publishing the rules separately as rules only and as rules with full commentary. The two sets can be consulted according to the circumstances. Students and practitioners uncertain about appropriate practice in a particular situation will utilise the rules and commentary. For most purposes, the rules alone can suffice. While there is no Australian equivalent to the American Bar Association to deal

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826. *ibid.*

827. F Riley *New South Wales solicitors manual* Law Society of NSW Sydney 1994.

828. Freehill Hollingdale & Page *Submission 339*; see also Vic Bar *Submission 367*.

with and update the rules and commentary, the working group suggested by the Commission<sup>829</sup> to draft the commentary could take on the role of monitoring and updating the commentary to the rules.

3.81. The Commission considers that the advantages of a commentary approach to professional practice rules outweigh the disadvantages raised above. Those advantages are

- it assists to develop a common service ideal and sense of professionalism in an increasingly diverse profession
- better guidance to legal practitioners in the application of legal ethical rules, including in difficult situations where practitioners weigh their responsibilities to a client against their obligations to the proper administration of justice
- better suited to teaching legal ethics, whether at law schools, practical legal training (PLT) or in continuing legal education (CLE) programs
- clarification of the application of a rule in particular circumstances, where the rule itself is broadly stated and its application to a particular situation is unclear
- use of the commentary is not compulsory but is available to those needing extra guidance.

3.82. While the Law Council agreed that commentary on rules can be useful, it suggested that such commentary was best provided through professional education and Continuing Legal Education.<sup>830</sup> However, the Commission considers that it is important that the legal profession take responsibility for ensuring that all practitioners fully understand the extent of ethical rules; and that such understanding should not be available only to those undertaking continuing education courses. The Law Council commented that drafting of the commentary would be time consuming and difficult.<sup>831</sup> The Commission agrees but suggests that the importance of this work merits the effort, and that a single purpose working group could be convened to oversee preparatory research and drafting. In consultations it was suggested that legal educators should have a role in drafting the commentary.<sup>832</sup> The Commission suggests that the Law Council coordinate the drafting of the commentary and that legal academics and officers from legal complaints handling authorities (such as the OLSC (NSW) and the Victorian Legal Ombudsman) be included in the working group. There are several useful commentaries utilised in common law jurisdictions to serve as examples in this exercise.

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829. See recommendation 14.

830. Law Council *Submission 375*.

831. Law Council *Consultation 21 July 1999*.

832. Law School Deans *Consultation Perth 22 September 1999*.

3.83. The Commission notes that completion of a course in legal ethics is compulsory before issue of a practising certificate. Commentary to the rules would help to ensure full and consistent understanding and training in ethical rules.

**Recommendation 14.** The Law Council of Australia should convene a working group to coordinate the drafting of commentary to legal practice standards. Legal academics and officers of legal complaints handling authorities should be included in the working group. Legal professional associations should develop commentary which can be issued as part of, or a supplement to, national model professional practice rules.

### The content of professional practice rules

3.84. The content of professional practice rules in Australia tends to be limited in scope to a range of matters relevant to the proper workings of the administration of justice. The rules tend to be overly directed to litigation and court advocacy rather than to the full array of advice and representation undertaken by lawyers for clients. However, even in this context, the rules often fail to address particular practice problems, including whether practitioners should encourage or assist litigation or claims which have little or no merit, or which are instigated simply to win time or harass the opponent. Similarly, the rules do not explicitly proscribe discovery tactics designed to obscure or 'drown' relevant documents.<sup>833</sup>

### The administration of justice and the duty to the client

3.85. The Law Council submitted that its Model Rules adequately deal with the duty to the administration of justice (the duty to the court), and that the rules adequately state that the duty to the court predominates in situations of conflict with the duty to the client.<sup>834</sup> While these principles are clearly stated, the Commission notes that the rules provide limited guidance as to circumstances when this conflict arises.<sup>835</sup>

3.86. Specifically in relation to advocacy, a number of rules require a practitioner

... to advance and protect the client's interests to the best of the practitioner's skill and diligence, uninfluenced by the practitioner's personal view of the client or the client's

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833. Practice rules regarding pro bono work are discussed at para 5.12–5.20 and 5.180–190.

834. See for example Law Council *Submission 126*.

835. For further discussion of content of professional practice rules see ALRC DP 62 para 5.55–5.67.

activities, and notwithstanding any threatened unpopularity or criticism of the practitioner or any other person.<sup>836</sup>

All of the various Australian practice rules on conduct in court include rules which state that

- a practitioner should not knowingly make a misleading statement to a court
- a practitioner should take steps to correct, as soon as possible, any misleading statement for which the practitioner or his/her client or witness was responsible
- practitioners shall ensure the court is informed of any relevant decision on a point of law or any legislative provision which maybe relevant, or any misapprehension by a judge as to the effect of an order being made.

3.87. The practice rules set out a number of limitations on conduct, and in some cases assert positive duties, which are aimed at upholding the practitioner's duty to the administration of justice. A number of rules compel a practitioner to be

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836. See NSW Solicitors' Rules, r 23.A.16; Law Society of ACT Conduct Rules, r 17.1; NSW Barristers' Rules, r 16; Qld Barristers' Rules, r 16; Vic Bar Rules, r 10.

more than a 'mouthpiece' of the client (or in the case of counsel, the instructing practitioner) by using his or her own forensic judgment independently, after appropriate consideration of instructions.<sup>837</sup>

3.88. Practitioners can be under positive duties to provide information to the court in *ex parte* applications,<sup>838</sup> and in cases where the practitioner knows, or is told by the client, that the client has information required by a rule or order of the court, or where the client has committed perjury.<sup>839</sup> There are reported cases of unmeritorious *ex parte* injunctions undertaken with limited merit in order to secure a collateral business advantage.<sup>840</sup> This kind of behaviour, and the need for regulation, was highlighted in one submission to the Commission.<sup>841</sup> Consultations in Melbourne indicated that it would be helpful for practitioners if case law principles governing the more exacting duty of candour to the court in *ex parte* injunctions were written expressly into ethical rules of practice.<sup>842</sup>

3.89. The New South Wales Bar Association has proposed important changes to the New South Wales Barristers' Rules which will require barristers

- to complete work within the time restraints set down by the court
- to limit the presentation of a case to genuine issues
- to have the case ready to be heard as soon as practicable
- to present the issues clearly and succinctly
- to limit the evidence to that which is reasonably necessary to advance and protect the client's interests
- to occupy as short a time in court as is reasonably necessary to advance and protect the client's interests and

837. NSW Solicitors' Rules, r 23.A.18; Law Society of ACT Conduct Rules, r 18.1; Law Council Model Rules, r17.3; NSW Barristers' Rules, r 18; Qld Barristers' Rules, r 18; Vic Bar Rules, r 16.

838. A practitioner is under a duty to disclose all matters within the practitioner's knowledge which are not protected by legal professional privilege, and should seek the client's waiver of the privilege for relevant issues: NSW Solicitors' Rules, r 23.A.24-24A; Law Society of ACT Conduct Rules, r 19.4-5; Law Council Model Rules, r 17.9-10; NSW Barristers' Rules, r 24-25; Qld Barristers' Rules, r 24-25.

839. The practitioner should seek to have the client reveal the true information, but the practitioner may not reveal the information to the court himself or herself. A practitioner in this situation should terminate the retainer: NSW Solicitors' Rules, r 17, 23.A.32; Qld Solicitors' Handbook, 4.06; Law Society of ACT Conduct Rules, r 12.1, 15, 20.1; Law Council Model Rules, r 11.1, 15, 17.18; NSW Barristers' Rules, r 32; Qld Barristers' Rules, r 32; Vic Bar Rules, r 29.

840. For an overview of abuse of process cases resulting in findings of lawyers in contempt see M-Chesterman and P Kearney 'Lawyers in contempt' (1988) 26(5) *Law Society Journal* 42. The *White Industries* case (*White Industries (Qld) Pty Ltd v Flower & Hart* (1998) 156 ALR 169) has been cited as authority of abuse of process in a number of subsequent decisions eg *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) ATPR 141-679 (Merkel J); *Abriel v Australian Guarantee Corp* (unreported) [1999] FCA 50 (5 February 1999) (Branson J).

841. Arthur Robinson *Submission* 189.

842. Federal Court industrial law practitioners *Consultation* Melbourne 8 September 1999. For further discussion see ch 7.

- to inform the opponent and, with the opponent's consent, the court as soon as possible of any adjournment application.<sup>843</sup>

3.90. The New South Wales Bar Association also proposed to extend the duty of barristers in relation to allegations of criminality, fraud or other serious misconduct. This is to deal with issues and controversies raised by the *White Industries* case which exemplified some of the limitations of existing practice rules.<sup>844</sup> The case concerned the breach of a rule clearly stated in practice rules, forbidding practitioners alleging fraud unless the practitioner has reasonable grounds for believing that the factual material provides a proper basis for the allegation, the material will be admissible, and the client has been advised of the seriousness of the allegation. The case also involved a breach by the solicitor of the duty owed to the Court to act with propriety, not to be a party to an abuse of process and not to obstruct or defeat the administration of justice. This obligation is not specifically stated in the rules. Justice Goldberg observed that

[t]he fact that [the client] had a robust approach to litigation, did not believe anything was impossible and was unconcerned about entering into litigation with limited prospects made it all the more important for Flower & Hart [the solicitors] to have regard to the manner in which it instituted and conducted proceedings on his behalf and on behalf of his companies and to be conscious of its duty to the Court.<sup>845</sup>

3.91. Under the new rules proposed for New South Wales, barristers must not make any allegations of fact without reasonable grounds for so doing.<sup>846</sup> It is also proposed to extend the duty of the barrister to ensure that the court is not misled and that an injustice does not occur as a result of an opponent's error.<sup>847</sup> This goes further than the Law Society of Western Australia Conduct Rule 18.2 which states that if a practitioner observes another practitioner making a mistake or oversight

843. Proposed new NSW Barristers' Rules., r 41-42A. The proposed changes to these rules were made available for discussion on 26 August 1999:

<[http://www.nswbar.asn.au/docs/proposed\\_changes\\_to.htm](http://www.nswbar.asn.au/docs/proposed_changes_to.htm)> (6 Sept 1999). Further changes were made to that draft and a final form approved by the NSW Bar Council on 8 December 1999, which will commence operation in March 2000.

844. *White Industries (Qld) Pty Ltd v Flower & Hart* (1998) 156 ALR 169. For further discussion see ALRC DP 62 para 5.68, 5.69.

845. id 249-250. An appeal against this case was dismissed by the Full Court of the Federal Court: *Flower & Hart v White Industries (Qld) Pty Ltd* (1999) 163 ALR 744.

846. Proposed new NSW Barristers Rules, r 15, r 36-39.

847. The existing r 23 of the NSW Barristers' Rules states

A barrister will not have made a misleading statement to a court simply by failing to correct an error on any matter stated to the court by the opponent or any other person.

The proposed new rule 23 states

A barrister must take all necessary steps to correct any express concession made to the court in civil proceedings by the opponent in relation to any material fact, case-law or legislation:

- only if the barrister knows or believes on reasonable grounds that it was contrary to what should be regarded as the true facts or the correct state of the law;
- only if the barrister believes the concession was an error; and
- not (in the case of a concession of fact) if the client's instructions to the barrister support the concession.

which 'may involve the other practitioner's client in unnecessary expense or delay', that mistake or oversight should not be fostered and, *unless it would prejudice his or her own client*, a practitioner should draw the mistake or oversight to the attention of the other practitioner.<sup>848</sup>

3.92. The Commission commends and supports the New South Wales Bar Association proposals which make more explicit the ethical obligations of candour to the court and the efficient administration of justice. The rules encapsulate the proportionate, fair, just treatment of cases sought to be achieved in the Civil Procedure Rules (UK). The Commission sees these principles as more appropriately reserved to practice rules. The proposed rule, limiting the presentation of a case to genuine issues, should provide appropriate guidance for lawyers whose instructions otherwise support advancing meritless arguments – a difficult issue for practitioners. Such cases generate costs for opposing parties and to the publicly funded justice system.

**Recommendation 15.** The Law Council of Australia should ensure that the the proposed rules of the New South Wales Bar Association concerning practitioners' obligations to further the proper administration of justice should be adopted as part of national model professional practice rules. These models also should contain explicit rules stating the more exacting obligation of candour to the court required of lawyers advancing applications for ex parte injunctions.

### United States Federal Rules of Civil Procedure and practice rules

3.93. Proposal 5.3 of DP 62 suggested that Rule 11 of the United States Federal Rules of Civil Procedure be incorporated in Australia within the Federal Court and Family Law Rules. Rule 11 deals with representations made to the court, and requires a pleading, written motion or other paper to be signed by at least one lawyer, or by the party if he or she is unrepresented. The rule then includes particular requirements relating to such representations.

By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, –  
(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or increase in the cost of litigation;

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848. Law Society of WA Conduct Rules, r 18.2.

- (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

The rule provides the court with positive authority to impose sanctions against lawyers, law firms, or parties who have violated the rule.

3.94. Proposal 5.4 of DP 62 also suggested that rules consistent with Rules 3.1 and 3.2 of the ABA Model Rules be included in professional practice rules in Australia as Rules 3.1 and 3.2 provided clearer and more positive duties concerning litigation practice than do Australian rules at present. Commentary to the ABA Model Rules provides guidance on the interpretation of the rule and its practical application.



**Rule 3.1.** A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

**Comment.** The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure ... The action is frivolous ... if the client desires to have the action taken primarily for the purposes of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of the existing law.

**Rule 3.2.** A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

**Comment.** Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain the rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of the action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.<sup>849</sup>

3.95. The submission of the OLSC (NSW) supported proposals 5.3 and 5.4 of DP62.<sup>850</sup> The Law Council warned against adopting rule 11 in its entirety. In particular, it expressed concern at the suggestion that advocates should believe the allegations and factual contentions their clients are making. The Law Council stated that this confuses the role of an advocate with that of an investigator.<sup>851</sup> The Law Council also stated that it is inappropriate for legal practitioners to have conduct regulated through costs orders. One submission argued that the ethical principles described in proposals 5.3 and 5.4 already exist in common law rules.<sup>852</sup> It warned against allowing rules of ethics and professional practice being used to pursue political and consumer concerns.<sup>853</sup> Other submissions noted that ethical principles such as those described in proposal 5.3 would be better as rules of professional conduct than as rules of court.<sup>854</sup>

3.96. The Commission concludes that the thrust of Rule 11 of the United States Federal Rules of Civil Procedure should be incorporated into Australian federal court and tribunal rules and professional practice rules, although the requirement should be couched in terms of 'to the best of the practitioner's knowledge or information' rather than 'to the best of his or her knowledge, information or belief'. The Commission continues to support the principles stated in ABA rule 3.1 and 3.2. As stated above, the New South Wales Bar Association proposed rules incorporate

849. American Bar Association *Annotated model rules of professional conduct* 3rd ed ABA Chicago 1996, 297, 303.

850. OLSC (NSW) *Submission* 379.

851. Law Council *Submission* 375.

852. Freehill Hollingdale & Page *Submission* 339, 16.

853. *id* 15.

854. Vic Bar *Submission* 367; Law Council *Submission* 375.

the substance of these rules. Indeed some may see the New South Wales Bar Association formulation as a stricter, clearer recitation of principle than the ABA version. The Commission supports and commends their formulation.

**Recommendation 16.** The Law Council of Australia should ensure that national model professional practice rules

- incorporate a rule consistent with Rule 11 of the United States Federal Rules of Civil Procedure, which requires practitioners and unrepresented parties to consider the purpose and content of pleadings and other papers before presentation to the court or tribunal. The standard applied should be 'to the best of the practitioner's knowledge and information'.
- are consistent with proposed New South Wales Bar Association rules, requiring practitioners to limit presentation of their case to genuine issues and to complete work in time constraints set by the court and occupy as short a time in court as is reasonably necessary to advance and protect the client's interests.

**Recommendation 17.** Federal courts and tribunals should develop rules to require practitioners and parties to certify to the best of their knowledge and information, that any allegations, claims and contentions contained in pleadings or forms presented to the court or tribunal are supported by evidence.

## Overservicing

3.97. Another aspect of questionable practitioner conduct raised in some submissions to the Commission concerns overservicing, which refers to practitioners providing services above and beyond what is required for the efficient and effective conduct of a matter. The reasons for this may include financial incentives (that is, the desire to run up costs), inexperience and concern about possible negligence actions. Practitioners tend to see concern about negligence actions as the primary cause of overservicing.<sup>855</sup>

3.98. One suggested method of protecting practitioners from negligence actions is to provide legislative exemption, or capping, of liability for negligence for practitioners whose clients have sued claiming that the lawyer failed to pursue certain points in a case or did not act with sufficient zeal. The Commission cautions against broader exemption of liability for practitioners without further discussion of the public interest issues involved.

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855. Law Council *Submission 197*, Law Council *Submission 126*; G Gibson *Submission 147*. See also recent case of *NRMA Ltd v Morgan* (1999) Aust Torts Rep ¶81-505 (Giles J), in which a number of practitioners were found liable to pay damages to NRMA for the handling of the failed NRMA float proposal and subsequent litigation in part because they ostensibly failed to advise clients about the possibility of existing law being overturned by the High Court in a separate matter. Overservicing represented 1.2% of complaints and consumer disputes relating to the 'quality of service' provided by solicitors: OLSC (NSW) *Annual report 1997-98*, 55.

3.99. Effective judicial oversight of the conduct of litigation offers a partial solution to some forms of overservicing. The Commission's support for the Federal Court individual docket system is premised on the assumption that this type of case management system allows a judge, informed by a knowledge of the issues in the case, to make appropriate directions to limit the ambit of discovery or confine issues. Such directions can be relied upon by the practitioner in a claim of professional negligence to obviate the need to 'leave no stone unturned'. In the Commission's view, such case management systems, combined with procedural reforms (such as limitations on general discovery) and the recommended professional practice rules, offer the best way to control overservicing in litigious matters. Other, more comprehensive, methods to control overservicing already exist such as taxation of costs, consumer claims (in some jurisdictions), legal ombudsmen, disciplinary bodies and education.

### **Prehearing conduct and conduct in non-litigious matters**

3.100. There are a number of areas which are dealt with either perfunctorily or not at all in Australian professional practice rules. Two of those areas are the prehearing conduct of practitioners involved in litigation and conduct in matters that do not involve litigation. In DP 62 the Commission proposed that

Professional practice rules should include a clear indication of accepted standards of conduct and practice in relation to advising and assisting clients in prehearing and non-litigation matters, including standards that practitioners shall, as early as possible

- advise clients of relevant non-litigious avenues available for resolution of a dispute
- when in their client's best interests, endeavour to reach a solution by settlement out of court rather than commence or continue legal proceedings
- must notify the client if, in the practitioner's opinion, it is in the client's best interests to accept a compromise or settlement and that, in the practitioner's opinion, the compromise or settlement is a reasonable one
- in cases of unexpected delay, provide an explanation of such delay and whether or not the client may assist to resolve the delay.

Such rules should apply equally to barristers and solicitors.<sup>856</sup>

3.101. The Law Council agreed that prehearing conduct ought to have the same degree of attention in professional practice rules as the advocacy rules have now received.<sup>857</sup> The Commission supports this approach. Further, as noted by the Law Council, many of the rules apply to advocates, but are silent in relation to the instructing practitioner. Both advocates and instructing practitioners should have clear guidance on appropriate conduct in prehearing and non-litigious matters.

3.102. There are few jurisdictions which require practitioners to advise clients about ADR processes and the potential benefits of ADR. In Western Australia there

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856. ALRC DP 62 proposal 5.5.

857. Law Council *Submission 126*.

is a positive obligation on legal practitioners to seek to resolve appropriate disputes without resort to litigation.<sup>858</sup> Queensland solicitors are specifically required when acting in contentious business to inform clients of relevant avenues available for settlement and the resolution of issues in dispute.<sup>859</sup>

3.103. The proposed amendments to the New South Wales Bar rules include rule-17A, which states

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858. Law Society of WA Conduct Rules, r 5.7. See also Family Law Rules discussed in ch 8, para 8.60.

859. Qld Solicitors' Handbook, 7.00.

[a] barrister must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the barrister believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation.<sup>860</sup>

3.104. The Law Society of New South Wales guide to good practice advises practitioners to advise clients about ADR processes and the benefits of ADR.<sup>861</sup> The Business Working Group on the Australian Legal System also supports the imposition of ethical obligations on practitioners to advise clients of alternatives to litigation.<sup>862</sup>

3.105. United States and Canadian jurisdictions place greater emphasis on advising clients of options for dispute resolution, and require practitioners to attempt to use these processes. For example, the Code of Professional Conduct of the Law Society of Alberta includes the following rule.

A lawyer must recommend that a client accept a compromise or settlement of a dispute if it is reasonable and in the client's best interests.<sup>863</sup>

The commentary to this rule also states that in addition to conventional legal process, a lawyer should consider ADR.

[I]t is to the general benefit of society and the administration of justice that lawyers discourage unmeritorious suits and seek the early resolution of disputes ... Determining whether settlement or compromise is a realistic alternative requires objective evaluation and the application of a lawyer's professional judgement and experience to the circumstances of the case. The client must then be advised of the advantages and drawbacks of settlement versus litigation. Due to the uncertainty, delay and expense inherent in the litigation process, it is often in the client's interests that a matter be settled. On the other hand, because a lawyer's role is that of an advocate rather than adjudicator, going to trial is justified if the client so instructs and the matter is meritorious ... In addition to conventional legal process, a lawyer should consider alternative dispute resolution.

3.106. There was support for the Commission's proposal regarding advising and assisting clients in prehearing and non-litigation matters in some submissions.<sup>864</sup> One submission urged that practitioners should be required to further advise

860. Proposed new rule 17A of the NSW Barristers' rules. See para 3.89 above for discussion of proposed NSW Barristers' Rules.

861. F Riley *New South Wales Solicitors Manual* Law Society of NSW Sydney 1994, para 2255A.

862. Business Working Group on the Australian Legal System *Trends in the Australian legal system – avoiding a more litigious society* Allen Consulting Group Sydney 1998, 28.

863. Law Society of Alberta *Code of Professional Conduct* Law Society of Alberta, ch 9 r 16.

864. NADRAC *Submission 343*; J Weingarth *Submission 353*; National Legal Aid *Submission 360*; OLSC (NSW) *Submission 379*.

clients of the advantages and disadvantages of particular ADR processes, taking into account the needs of the client and the nature of the dispute.<sup>865</sup>

3.107. However, another submission commented that the reference to delay in the proposal requires substantive law reform rather than regulation of legal practitioners.<sup>866</sup> It was argued that the matters raised by the proposal were adequately covered by existing practice rules,<sup>867</sup> and noted that while many of the ideas in the proposal have merit, they would be more appropriate as best practice guidelines rather than professional conduct rules, the breach of which may have disciplinary consequences.<sup>868</sup>

3.108. The Law Council also warned against the use of the words 'in the client's best interests' on the basis that what the practitioner may consider to be in the client's best interests may be different from the client's view of his or her best interests, and that the client's autonomy in litigation must be preserved.<sup>869</sup> The proposal relates to prehearing and non-litigation matters and involves making options available to clients rather than substituting the practitioner's opinion for the client's instructions. The Law Council also expressed reservations about the proposed rules applying equally to barristers and solicitors since barristers do not always receive the same level of instruction as solicitors.<sup>870</sup> This comment is noted, and the Commission agrees that the rules should be drafted to reflect such differences in level of instruction as may arise. However, this does not remove the need to apply the rule to both barristers and solicitors.

3.109. The inclusion in the professional practice rules of specific obligations, such as those outlined above from Western Australia and Alberta on settlements and from the Australian Capital Territory on delay, can ensure that all practitioners are aware of the accepted standard of conduct in relation to advising and assisting clients in prehearing procedures and non contentions matters. The standards should also address the need for the timeliness of such advice and assistance.<sup>871</sup>

**Recommendation 18.** The Law Council of Australia should ensure that national model professional practice rules include a clear indication of accepted standards of conduct and practice in relation to advising and assisting clients in matters, including standards that practitioners shall, as early as possible, advise clients of relevant non-litigious avenues available for

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865. J Weingarth *Submission* 353.

866. Freehill Hollingdale & Page *Submission* 339.

867. Vic Bar *Submission* 367 referring to Rules 14 and 17 Vic Bar Rules.

868. Law Council *Submission* 375.

869. *ibid.*

870. *ibid.*

871. See para 9.143 for discussion in relation to timeliness of settlement in the AAT and para 8.38 in relation to the Family Court of Australia.

resolution of the dispute which are reasonably available to the client. Such rules should apply equally to barristers and solicitors.

### Conduct during negotiation

3.110. Practitioners play a vital role in negotiating and settling matters, yet professional practice rules traditionally have provided little or no guidance on the conduct expected of practitioners in this context. This is of particular importance given that, to be most effective for the client, the approach to negotiation may require partisan tactics and behaviour.<sup>872</sup>

3.111. The Professional Conduct Rules of the Law Society of Alberta give detailed rules and commentary about the lawyer's duty to seek a resolution of a dispute in accordance with the client's instructions, rules, and accompanying commentary. The rules are as follows<sup>873</sup>

1. A lawyer must not lie to or mislead an opposing party.
2. If a lawyer becomes aware during the course of a negotiation that
  - (a) the lawyer has inadvertently misled the opposing party, or
  - (b) the client, or someone allied with the client or the client's matter, has misled an opposing party, intentionally or otherwise, or
  - (c) the lawyer or the client, or someone allied with the client or the client's matter, has made a material representation to an opposing party that was accurate when made but has since become inaccurate,
 then (subject to confidentiality) the lawyer must immediately correct the resulting misapprehension on the part of the opposing party.
3. (a) A lawyer must not make a settlement offer on behalf of a client except on the client's instructions.  
 (b) A lawyer must promptly communicate all settlement offers to the client.
4. A lawyer must not negotiate an agreement that the lawyer knows to be criminal, fraudulent or unconscionable.
5. When negotiating with an opposing party who is not represented by counsel, a lawyer must:
  - (a) advise the party that the lawyer is acting only for the lawyer's client and is not representing that party; and
  - (b) advise the party to retain independent counsel.

3.112. The extensive commentary on these rules offers guidance to practitioners about appropriate and inappropriate conduct in relation to negotiations. For example, in relation to Rule 3, the commentary states

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872. J Parke 'Lawyers as negotiators: Time for a code of ethics?' (1993) 4 *Australian Dispute Resolution Journal* 216, 222. See also R Harris 'Contrasting "principled negotiation" with the adversarial model' (1990) 20 *Victoria University of Wellington Law Review* 91.

873. Law Society of Alberta *Code of Professional Conduct* Law Society of Alberta, ch 11.



... the issue of whether to settle a dispute is so fundamental to a lawyer's representation that it must be the subject of discussion with and direction from the client. Every offer received from an opposing party must be presented to the client for consideration, regardless of the client's earlier instructions. Similarly, the client's approval must be obtained before an offer originating with the lawyer is communicated to an opposing party.

3.113. Australian professional practice rules state that a practitioner has a duty not to make, or to rectify if made, a false statement to the opponent in relation to the case, including its compromise.<sup>874</sup> The rule is directed to advocates, but should apply to all practitioners undertaking any kind of oral or written correspondence with another party. As with the Alberta example, such rules need to be given elaboration or commentary and advertised widely within the practising profession. A number of federal statutes include requirements to negotiate in good faith.<sup>875</sup>

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874. NSW Solicitors' Rules, r 23.A.51-52; Law Society of ACT Conduct Rules, r 23.1-3; Law Council Model Rules, r 17.36-38; NSW Barristers' Rules, r 51-53; Qld Barristers' Rules, r 51-53; Vic Bar Rules, r 50-51.

875. eg *Native Title Act 1993* (Cth) s 31(1)(b). See also *Western Australia v Taylor* (1996) 134 FLR 211; and D Spencer 'Complying with a requirement to negotiate in good faith' (1998) 9 *Australian Dispute Resolution Journal* 226.

3.114. DP 62 suggested that professional practice rules provide guidance in commentary on expected standards of conduct and that a standard of ‘good faith’ be required in negotiations on behalf of a client.<sup>876</sup> There was some support for this proposal.<sup>877</sup> One submission commented that the standard for good faith in negotiation was inherently uncertain and was a concept that courts struggled with in contract and tort cases. It was submitted that lawyers could not be expected to face disciplinary action for failing to meet such a standard.<sup>878</sup>

3.115. The Law Council commented in its submission that the term ‘good faith’ was too unclear and unrealistic and that a rule prohibiting ‘misleading or deceptive’ conduct was more appropriate.<sup>879</sup> The Commission continues to prefer the ‘good faith’ standard. Such a standard is clarified in case law and in legislation, and addresses the broader issues associated with negotiation.<sup>880</sup> It is important that parties do not mislead or deceive their opponents in negotiation – it is also important that they genuinely seek a compromise and act in good faith. The commentary should provide a practical explanation of what is required to act in good faith in these circumstances.

**Recommendation 19.** The Law Council of Australia should ensure that national model professional practice rules provide guidance, by way of explanatory commentary, on expected standards of conduct and practice of practitioners negotiating any civil matter on behalf of a client. Where practitioners negotiate on behalf of a client, the rules should require that practitioners act in ‘good faith’. The commentary to the rules should include a practical explanation of what is meant by acting in good faith in these circumstances. The commentary also should emphasise the practitioner’s obligation to inform the client of every offer of settlement from the opposing party and to obtain explicit approval from the client before communicating an offer or acceptance to an opposing party.

### Provisions relating to ADR practitioners

3.116. The need for improved guidance on the proper conduct of lawyer-mediators and lawyers representing clients in ADR processes has been recognised in

876. ALRC DP 62 proposal 5.6.

877. National Legal Aid *Submission 360*; OLSC (NSW) *Submission 379*.

878. Freehill Hollingdale & Page *Submission 339*.

879. Law Council *Submission 375*.

880. For a discussion of the meaning of ‘good faith’ see *State of South Australia and Another v Clark* (1995–96) 66 SASR 199, 230–31. For a list of indicia to assist in determining whether negotiations are in good faith see *Western Australia v Taylor* (1996) 134 FLR 211; ALRC DP 62 para 5.97. On the meaning of ‘misleading or deceptive’ see, eg, *Hornsby Building Information Centre Pty Ltd v Sydney Building Information Centre Ltd* (1977–1978) 140 CLR 216, 227–228 (Stephen J).

Australia and overseas.<sup>881</sup> A number of professional associations have published rules or guidelines for the conduct of practitioners involved in mediation or arbitration but the rules are not comprehensive and differ from state to state.<sup>882</sup> 3.117. In 1996, the Law Council approved ethical standards for lawyer-mediators.<sup>883</sup> In 1997, the Law Society of New South Wales adopted 'The Law Society of NSW charter on mediation practice: A guide to the rights and responsibilities of participants', setting out the expected behaviour of parties as well as lawyer-mediators. Further, the Law Society published a 'Mediation and evaluation information kit' in 1999, which provides information and extensive guidance to legal practitioners with the aim of promoting mediation.

3.118. ADR professional organisations, to which many legal practitioners with ADR accreditation belong, have independently formulated their own practice standards stating the responsibilities and codes of conduct applicable to their members. These guidelines and codes of conduct are more comprehensive than the legal professional bodies' ADR guidelines but, in the event of members breaching rules, ADR associations have limited powers of sanction.

3.119. DP 62 suggested that professional practice rules should be adopted for lawyer-neutrals and lawyers acting for clients in ADR matters.<sup>884</sup> The Law Council did not support national professional practice rules for lawyer neutrals.<sup>885</sup> The federal government's National Alternative Dispute Resolution Advisory Council (NADRAC) supported national professional practice standards for the practice of ADR, whether by lawyers or non lawyers.<sup>886</sup> NADRAC stated that practice rules for lawyer-mediators are needed so that parties can understand the role of the mediator and the type and level of service to expect. It also noted that, as standards for ADR practitioners develop, there may be separate non-legal standards for ADR as well as relevant legal conduct rules. The OLSC (NSW) noted that lawyers acting in ADR processes may not be acting as lawyers and therefore may not attract the operation of professional conduct rules. This point should be taken into consideration when drafting the relevant professional conduct rules.<sup>887</sup>

3.120. The Commission supports harmonisation of relevant standards and rules of ethical conduct for legal and non-legal ADR practitioners. The Commission sees a need for a national model practice rule relating to lawyer- neutrals and lawyers

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881. M Gaines 'A proposed conflict of interest rule for attorney-mediators' (1998) 73 *Washington Law Review* 699; J Parke 'Lawyers as negotiators: Time for a code of ethics?' (1993) 4 *Australian Dispute Resolution Journal* 216, 226. For further discussion on practice standards see IP 25, para 8.8.

882. NSW Barristers' Rules, r 74(d) and (g), r 87(h); Qld Barristers' Rules, r 74(d) and (g), r 87(h); Vic Bar Rules, r 92(h); Law Society WA Conduct Rules, r 7A, Sch 2; Rules of Practice Tas, r 9.

883. Law Council 'Ethical standards for mediators' (1997) 32(2) *Australian Lawyer* 29.

884. ALRC DP 62 proposal 5.7.

885. Law Council *Submission* 375.

886. NADRAC *Submission* 343.

887. OLSC (NSW) *Submission* 379.

acting for clients participating in ADR processes, in order to provide guidance as to appropriate practice in this growing area.

**Recommendation 20.** The Law Council of Australia should ensure that national model professional practice rules include provisions relevant to the practice of lawyer-neutrals in ADR processes and lawyers acting for clients participating in ADR processes and should include a rule requiring practitioners to participate in 'good faith' when representing clients participating in such processes.

## Family law proceedings and representing children

3.121. In *Seen and heard: priority for children in the legal process*, the Commission and HREOC found that there is a need for national standards or practice guidelines for practitioners representing children in family law, care and protection, juvenile justice and other civil and administrative matters.<sup>888</sup> Such standards would promote consistent, high quality representation. Guidelines should deal with issues such as

- determining the basis of representation and the degree to which a child should direct litigation
- ensuring direct contact between child and legal representative
- interviewing and providing information to child parties and clients
- development of lawyer-client relationship and advocacy of the child's legal rights.<sup>889</sup>

3.122. The Victorian Law Foundation has produced *Guidelines for lawyers acting for children and young people in the Children's Court*<sup>890</sup> which have been endorsed by the Senior Magistrate of the Children's Court of Victoria. These are aimed at legal practitioners acting in proceedings in the Family Division or the Criminal Division of the Children's Court of Victoria.

3.123. The Victorian Guidelines cover such matters as

- the role of the lawyer
- interviewing and communicating with the client
- a child's capacity to give instructions
- confidentiality and privilege
- client's access to documents
- conflict of interest
- the general conduct of the case.

3.124. A number of legal professional associations have produced practice guidelines in the area of family law,<sup>891</sup> but there is limited guidance for

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888. ALRC and HREOC *Seen and heard: priority for children in the legal process* ALRC Sydney 1997, para-13.82-13.87 (ALRC 84).

889. *id* rec 70-72.

890. L Akenson *Guidelines for lawyers acting for children and young people in the Children's Court* Victoria Law Foundation Melbourne 1999.

891. The Law Society of NSW's Family Law Advisory Code of Practice, for example, contains guidelines on dealing with clients who have suffered domestic violence, the paramount interest of children in family law disputes, conflicts of interest issues, approaches to settlement and advising on settlement options, dealing with unrepresented parties, as well as outlining particular obligations set out in the Family Court Rules. The Law Society of Western Australia has appended family law guidelines to its professional conduct rules. Other associations are considering introducing guidelines for practitioners of family law.

practitioners representing children. The Law Society of New South Wales has recently released draft principles for practitioners representing children, which are being circulated within the profession for further comment. Other professional associations, such as the Law Society of South Australia, have indicated an interest

in developing similar guidelines. These guidelines, to be read in conjunction with existing professional conduct rules, would provide a much needed source of professional guidance for practitioners in this area. They would not, however, be binding.

3.125. DP 62 suggested that professional practice standards be developed for practitioners in family matters and practitioners representing children.<sup>892</sup> The OLSC (NSW) supported this proposal and recommended that such practice standards deal with principles concerning relationships with other parties.<sup>893</sup> In particular, the OLSC (NSW) submitted that attention should be given to communication by practitioners with opposing, unrepresented parties. It noted that the practitioner's duty not to communicate with another practitioner's client has resulted in practitioners being reluctant to communicate or give any information to opposing, unrepresented parties, causing difficulty for the growing numbers of unrepresented parties in the Family Court.

3.126. The Law Council commented that it was important to distinguish between a legal practitioner acting in family law matters and one acting as the 'children's representative'.<sup>894</sup> It did not support separate professional standards for the former group; however, it did support separate professional standards or best practice guidelines for separate representatives because the separate representative is not in a traditional lawyer/client relationship with the child.

3.127. The Commission supports national model professional practice rules for family practitioners and practitioners representing children, both directly and as a separate representative, and for those rules to be incorporated into national model professional practice rules. The Commission notes that there is a variable standard of proficiency amongst family law practitioners and that proficiency in this practice area could be improved by introducing a mentoring system. This possibility has been raised within the Law Council by former President Fabian Dixon, who is an experienced family law practitioner. The Commission supports this proposal.

3.128. Under a mentoring system, the Law Council, for example, could institute an arrangement whereby experienced specialists in family law agreed to be on roster to provide advice and assistance for less experienced practitioners for a particular period of time – it may be a week or two weeks each year. During that time those family law specialists would field telephone calls from practitioners seeking their advice or guidance in dealing with a matter. The mentor role could be taken as the pro bono contribution by the experienced practitioners.<sup>895</sup> Junior practitioners could be provided with a mentor to give longer term guidance, much as in reader-

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892. ALRC DP 62 proposal 5.8.

893. OLSC (NSW) *Submission* 379.

894. Law Council *Submission* 375.

895. See para 5.12–5.20 for further discussion of pro bono work.

ship or pupillage for new barristers. Other schemes may have specialists acting as mentors to a defined group of junior lawyers over a particular period of time. Alternatively, mentoring classes could be organised where junior practitioners could ask questions and obtain practice advice. There are a variety of ways to



provide the advice and guidance needed and, based on the comments of the Family Court, some litigants and practitioners, there is a real need for the profession to seek to improve practice standards in this jurisdiction.<sup>896</sup>

**Recommendation 21.** Legal professional associations should develop national model professional practice rules focussing on issues of particular concern for family practitioners and practitioners representing children.

**Recommendation 22.** The Law Council of Australia should coordinate the development of a family law practitioner mentoring program by legal professional associations.

## Enhancing the model litigant role

3.129. The text to date has concerned lawyers' practice standards. Effective administration of justice also requires appropriate litigant conduct. In this regard the federal government's model litigant rules are a significant and, one hopes, influential development.

### The revised rules

3.130. Recent legal services directions issued by the Attorney-General stated that

In essence, being a model litigant requires that the Commonwealth and its agencies, as parties to litigation, act with complete propriety, fairly and in accordance with the highest professional standards.<sup>897</sup>

3.131. The principle of the government operating as a model litigant is widely recognised and well established. The courts have a settled expectation that the federal government and its agencies will act in accordance with the principle.<sup>898</sup>

<sup>896.</sup> See ch 8, para 8.23, 8.236.

<sup>897.</sup> Attorney-General's Dept *Legal Services Directions* Issued by the Attorney-General under s55ZF of the *Judiciary Act 1903* (Cth), with effect from 1 September 1999 (the Legal Services Directions). The Commission did not receive any submissions to the effect that the Commonwealth should not behave as a model litigant or that it should not be bound by a model litigant policy. Freehill Hollingdale & Page commented that

As a general principle, the contention that the Federal Government should act as a model litigant is difficult to argue against. However, it is critical to the ability of the federal Government to act in a model fashion that it has the necessary commitment to appropriate education, knowledge and culture to enable this to occur: *Submission 339*.

<sup>898.</sup> eg see *Melbourne Steamship Limited v Moorhead* (1912) 15 CLR 133, 342; *Kenny v South Australia* (1987) 46 SASR 273.

3.132. The directions require the Commonwealth and its agencies to act honestly and fairly in handling claims and litigation. They also mandate that the government should

- not take advantage of a claimant who lacks the resources to litigate a legitimate claim
- not rely on technical defences unless the Commonwealth's interests would be prejudiced by the failure to comply with a particular requirement
- not undertake and pursue appeals unless the Commonwealth or the agency believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest; and
- apologise where the Commonwealth is aware that it or its lawyers have acted wrongfully or improperly.<sup>899</sup>

### **Differing views on the performance of the government as a litigant**

3.133. In the course of this inquiry, the Commission received a number of comments in survey responses and in consultations from some practitioners and applicants criticising the conduct of government parties or their legal representatives in particular cases. Most of these comments concerned cases before the AAT and the criticisms alleged excessive adversarial behaviour,<sup>900</sup> undue focus on technicalities,<sup>901</sup> incivility from legal representatives and a lack of interest in pursuing negotiations.<sup>902</sup> Certain government agencies were openly self-critical of the standards of certain of their inhouse advocates. The Department of Veterans' Affairs (DVA), for example, admitted to the Commission that a recent review of its inhouse advocates had found the standard of some inhouse advocacy to be poor.<sup>903</sup> This matter was the subject of department review and reform.

3.134. In relation to matters before courts, the Commission received mixed comments as to the conduct of government representatives. Some practitioners praised the competence and integrity of lawyers representing government (particularly AGS practitioners) and their adherence to model litigant obligations.<sup>904</sup> Practitioners stated that the majority of Commonwealth officers and

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899. A full copy of the rules can be found at the homepage of the Office of Legal Services Coordination at <<http://law.gov.au/aghome/legalpol/olsc/modellit.htm>> (14 December 1999).

900. AAT case file survey response 35 (solicitor for the applicant in a taxation case).

901. eg Law Institute of Vic Administrative Law Group *Consultation* Melbourne 24 August 1999.

902. AAT case file survey response 289 (solicitor for the applicant in a compensation case); AAT case file survey response 596 (solicitor for the applicant in a social welfare case); AAT case file survey response 37 (solicitor for the applicant in a taxation case); AAT case file survey response 1464 (solicitor for the applicant in a veterans' entitlements case); AAT case file survey response 69 (solicitor for the applicant in a veterans' entitlements case); see also Legal Aid NSW *Submission 71*; G Gibson *Submission 141*.

903. DVA *Consultation* 27 September 1999.

904. Federal Court practitioners involved in representative proceedings *Consultation* Sydney 2 June 1999.

representatives were competent and reasonable, occasionally conservative in approach,<sup>905</sup> but, as in any large organisation, the level of motivation and competence of individual staff members varied.<sup>906</sup>

3.135. The most frequent criticisms concerning lawyers representing government were their reluctance to settle matters, tardiness in complying with orders and interlocutory steps, undue focus on process and procedure, and over-reliance on

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905. Trade Practice practitioners *Consultation* Melbourne 7 September 1999.

906. NSW Bar Assoc. *Consultation* Sydney 24 September 1999.

external counsel.<sup>907</sup> One view expressed in consultations was that the government tended to waste resources on hopeless points and cases and failed to take pragmatic short cuts in cases.<sup>908</sup> Lawyers told the Commission that in immigration cases government solicitors could be obstructive by pressing technical points.<sup>909</sup>

3.136. Another concern was that government lawyers often lacked authority or instructions to settle until litigation was approaching trial.<sup>910</sup> It was suggested that agency officers were often reluctant to take responsibility for a difficult decision for fear of criticism from within their agencies.<sup>911</sup>

3.137. Freehill Hollingdale & Page submitted that federal government agencies have a

reticence to take responsibility for decision making, and an inability to take properly into account the implications of litigation risk on resources and outcomes, as private litigants must do. The common experience of this firm, consistent with what is probably a widely held perception in legal circles, is that the Crown often goes to trial because it is easier for the bureaucracy to accept a judgment from the courts, than it is for someone to take responsibility for, and to justify, an outcome reached by settlement negotiation.<sup>912</sup>

3.138. Freehills submitted that the common justification for the government's approach — public interest and policy concerns — was often a 'lame excuse for taking an easier path through litigation, than taking proper responsibility and accountability for resolving the issue'.<sup>913</sup>

3.139. The AGS observed that such critical comments on government litigants often derive from practitioner or party misunderstanding of government model litigant obligations.<sup>914</sup> The model litigant rules require fair play, but not acquiescence, and government lawyers must press hard to win points and defend decisions they believe to be correct. The Australian Taxation Office commented that there was often a misconception that its lawyers will assist the other side or not press a claim.<sup>915</sup> They also suggested that on occasions the courts unfairly criticised

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907. Arthur Robinson *Submission 189*. See also Legal Aid NSW *Submission 71*; G Gibson *Submission 141*; PMeadows 'The Commonwealth government as a litigant' *Paper The management of disputes involving the Commonwealth. Is litigation always the answer?* Conference Canberra 22 April 1999.

908. Legal Aid ACT *Consultation 27* September 1999.

909. Law Institute of Vic *Consultation* Melbourne 30 August 1999.

910. ACT Bar *Consultation* Canberra 28 September 1999.

911. NSW Bar Assoc. Administrative Law Section *Consultation* Sydney 17 September 1999.

912. Freehill Hollingdale & Page *Submission 339*.

913. *ibid.*

914. AGS practitioners *Consultation* Canberra 6 July 1999.

915. ATO *Consultation* Canberra 29 September 1999.

government litigants.<sup>916</sup> This suggestion was echoed in the submission from the Department of Immigration and Multicultural Affairs, which stated that such criticisms should not be used to support tightening model litigant rules or imposing significant new restraints.<sup>917</sup> AGS solicitors stated to the Commission that in their experience, the government is more often than not praised by the Court for its dealings with unrepresented litigants.<sup>918</sup> AGS also reported that its reputation for fair play in accordance with the model litigant rules afforded it a tactical advantage, insofar as courts gave considerable weight to AGS undertakings and submissions.<sup>919</sup>

3.140. AGS officers in consultations commented that higher standards were expected of the government and its representatives than other parties, that model litigant rules should be extended to apply to all parties,<sup>920</sup> and that the model litigant rules are sometimes used against government lawyers as a litigation tactic. The ACCC commented that if model litigant direction is to be accorded the status of law, then the requirement for the government and its agencies to act with complete propriety, fairly and in accordance with the highest professional standards leads to unrealistic assumptions in the mind of respondents about how the ACCC should behave, about the terms of the model litigant rules and in reviewing and enforcing standards of compliance with the rules.<sup>921</sup> The AGS indicated that they give assessments on the risks, and the commercial and policy implications of litigation.<sup>922</sup> Agencies had to consider policy and the need to set precedents. Private parties tended to look at their own cases in isolation.<sup>923</sup> The ACCC told the Commission that it prefers the term 'responsible litigant' to 'model litigant'. It considers itself to be a very interventionist client but is careful to avoid the 'take no prisoners approach' which it said was often encouraged by private sector lawyers.<sup>924</sup>

## The Commission's proposals

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916. For example, in *Scott v Handley* the Full Court of the Federal Court found the AGS at fault for not advising the court that affidavits had been filed out of time: *Scott v Handley* (1999) FCA 404. AGS stated to the Commission that this was despite the fact that the unrepresented party had wanted an adjournment, not because affidavits had been served out of time by the AGS, but because the unrepresented party was unprepared. The AGS stated that the late filing had no effect on the outcome of the case and the applicants knew what was in the affidavit material: AGS *Consultation* Canberra 29 September 1999. The AGS and the Office of Legal Services Coordination noted that their offices rarely receive complaints concerning the conduct of government parties or legal representatives: Comments by I Govey and D Boucher at 'The management of disputes involving the Commonwealth. Is litigation always the answer?' Conference Canberra 22 April 1999.

917. DIMA *Submission* 385.

918. AGS *Consultation* Canberra 29 September 1999.

919. AGS *Consultation* Melbourne 25 August 1999.

920. AGS *Consultation* Adelaide 5 August 1999; Canberra 29 September 1999.

921. ACCC *Submission* 396.

922. AGS *Consultation* Darwin 6 October 1999.

923. *ibid.*

924. ACCC *Consultation* Canberra 28 September 1999.

3.141. In DP 62, the Commission proposed that a principle-rule-commentary approach (as discussed above) be adopted with respect to the model litigant rules, as an aid to understanding and applying these rules — particularly since a much wider pool of lawyers now act for the government.

3.142. The Commission proposed that the model litigant rules explicitly state that they relate to all conduct with respect to legal disputes — to matters litigated in courts or reviewed before tribunals; to prehearing conduct, negotiations and involvement in dispute resolution processes; as well as trial and hearing practice.<sup>925</sup> The revised model litigant rules released after DP 62 explicitly state that they apply to ‘claims and litigation’ and ‘litigation (including before courts, tribunals, inquiries, and in arbitration and other alternative dispute resolution processes) involving Commonwealth agencies’.<sup>926</sup>

3.143. The Commission also proposed that the text of the model litigant rules should include additional commentary explaining required standards of fairness, and giving examples concerning ‘unnecessary delay’, ‘technical defences’, and how ‘not to take advantage of an under-resourced litigant’. Such an approach was consistent with the proposals in relation to general legal practice standards.<sup>927</sup>

3.144. Submissions and consultations in response to these proposals were supportive.<sup>928</sup> Practitioners in the AGS, Canberra Office, for example, considered that commentary would assist practitioners to place the rules in context. The SSAT supported clarification of the model litigant rules as proposed because

[a]mendment of the text of model litigant rules to include additional commentary ... would further enhance our objectives in establishing practice directions — in that the rules would emphasise standards of conduct that recognise the power and resource imbalance between the parties.<sup>929</sup>

3.145. The National Welfare Rights Network submitted that the model litigant rules should be clearly stated to apply to non-lawyer advocates, such as those based in Centrelink, and information about the standards expected from government advocates should be made available to consumers.<sup>930</sup>

3.146. One submission stated that clarification was needed of criteria defining the standards of fair play including what constitutes taking advantage of a less well

925. ALRC DP 62 proposal 8.4.

926. Attorney-General’s Dept (Cth) *Legal services directions* 1999, appendix B fn 1: <<http://law.gov.au/aghome/legalpol/olsc/legalservices/legalservices.html#appb>> (20 January 2000).

927. See ALRC DP 62 ch 5 and para 3.72–3.83 of this report.

928. Vic Bar *Submission* 367; Freehill Hollingdale & Page *Submission* 339. AGS *Consultation* Adelaide 5-August 1999; P Gray *Submission* 317; Law Society of NSW *Submission* 361; ACCC *Submission* 396.

929. SSAT *Submission* 365.

930. National Welfare Rights Network *Submission* 380.

resourced litigant.<sup>931</sup> Other terms such as the 'Commonwealth's interests' would also need clarification. Officers of the AGS, Canberra Office noted that there is current debate and difficulty about taking technical points.<sup>932</sup> The ACCC commented that trade practices litigation, especially restrictive trade practices matters, are often technically complex and there is considerable scope for allegations against the government agency based on a technical application of the model litigant rules.<sup>933</sup> There is a wide range of views about whether, for example, it is appropriate to take points objecting to the form of affidavits or the correct identification of a government party. Therefore the ACCC supported the introduction of commentary to the model litigant rules to clarify the rules, prevent abuse of the rules and to enable government lawyers to deal with challenges to their tactics and decisions in the course of litigation. Such commentary is not simply helpful explanation but a necessary protection against attempts to use the model litigant rules inappropriately against government parties and their lawyers.

3.147. The Commission continues to support a rule-commentary approach as giving clearer, more practical guidance on the working and application of the rules. This is essential where varied, inhouse and private lawyers and non-lawyers now provide legal services for the federal government. The understanding and application of a number of broad terms and criteria in the model litigant rules should be clarified. Such terms and criteria include 'technical defence', 'Commonwealth's interests', and 'taking advantage of a claimant who lacks resources'.

**Recommendation 23.** The text of the model litigant rules should include commentary and examples explaining the required standards of conduct of lawyers (and others) representing government, and giving examples concerning 'unnecessary delay', 'technical defences', and avoiding 'taking advantage of a claimant who lacks resources'.

## Compliance and enforcement

3.148. The Attorney-General has sole power to enforce compliance with the legal services directions.<sup>934</sup> The Office of Legal Services Coordination is an organisation within the federal Attorney-General's Department which provides advice to government agencies in relation to the supply and procurement of legal services to the Commonwealth and assists the Attorney-General in the development and administration of legal services directions. The Office of Legal Services

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931. I Stewart *Submission 298*.

932. AGS *Consultation Canberra 29 September 1999*.

933. ACCC *Submission 396*.

934. See *Judiciary Act 1903* (Cth) s 55ZG(2) as amended by *Judiciary Amendment Act 1999* (Cth).

Coordination can assist agencies in relation to the operation of directions but does not provide substantive legal advice to agencies or officials. The Office of Legal Services Coordination indicated to the Commission it has a 'watchdog' role rather than a policing role in monitoring legal services and developing strategies for enhancing enforcement of the legal service directions.<sup>935</sup>

3.149. Non compliance with the directions can be raised in proceedings only by or on the application of the Commonwealth.

Any other approach could give rise to technical arguments and result in additional costs and delay in litigation involving the Commonwealth. For example, it is not intended that a litigant be able to argue that the Commonwealth was making a technical

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935. I Govey 'The Commonwealth as a litigant – How the Commonwealth should behave as a litigant' *Paper* The management of disputes involving the Commonwealth – Is litigation always the answer? Conference Canberra 22 April 1999. The Office of Legal Services Coordination was established as a result of the recommendations of the Logan Report: see fn 53 above.



argument in breach of the model litigant obligation (if this were provided in the Legal Services Directions). The alleged breach could, however, be raised by the litigant with the Attorney-General or the Office of Legal Services Coordination.<sup>936</sup>

3.150. Where a private lawyer breaches the model litigant rules, the agency may cease instructing the lawyer or the Attorney-General may direct cessation. Breach of the rules by an inhouse representative could be a disciplinary and education matter. A formalised system for lodging and investigating complaints about government conduct would provide an appropriate avenue for airing criticisms and provide more accurate information as to the level of non compliance with the rules. Such a system would enhance the need for government departments and agencies, and their legal representatives, to adhere to the model litigant policy. Some arrangements are already in place, as the Office of Legal Services Coordination investigates and is referred comments or complaints about government litigation and review matters.

3.151. In DP 62, the Commission proposed that, as the agency responsible for developing schemes for enhancing compliance with model litigant rules, the Office of Legal Services Coordination is best placed to oversee a formal complaints system relating to government conduct in legal proceedings. The Office of Legal Services Coordination would require some additional resources to undertake this function.

3.152. The revised legal services directions require Commonwealth agencies which are subject to the *Financial Management and Accountability Act 1997* (Cth) to report as soon as possible to the Attorney-General or the Office of Legal Services Coordination on 'significant issues' that arise in the provision of legal services, especially in handling claims and conducting litigation. The Chief Executive of such an agency is responsible for ensuring that any breaches of the Directions are remedied, or details reported to the Attorney-General or the Office of Legal Services Coordination. Such reporting requirements assume that government agencies and lawyers understand the application of model litigant obligations. The Commission's recommendations for enhancing the content of the rules would assist with this.

3.153. The Commission expressed reluctance in DP 62 to propose particular sanctions for findings of non compliance. However, where investigations have led the Office of Legal Services Coordination to conclude that there has been non compliance, the Office should be able to respond so as to improve compliance. Such responses may include requiring education and training courses, or a recommendation that a particular firm have its legal services contract terminated or not renewed.

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936. Judiciary Amendment Bill 1998 *Explanatory Memorandum*, 9.

3.154. There was a mixed response to this proposed expanded role for the Office of Legal Services Coordination. Some submissions expressed support for more formal complaints handling.<sup>937</sup> Others were concerned at the level of resourcing needed and potential conflicts of interest between the Office of Legal Services Coordination and legal professional bodies concerned with complaints and disciplinary action covering all lawyers, including government lawyers. The ACCC commented that allegations of non compliance with the model litigant rules should not be ventilated in court during litigation as this would encourage pedantic challenges designed to delay the ultimate course of the trial.<sup>938</sup> Therefore, the ACCC supported the proposal to expand the role of the Office of Legal Service Coordination to include complaints handling.

3.155. An enhanced role for the Office of Legal Services Coordination was supported in some submissions because the model litigant rules apply not only to legal practitioners acting on behalf of the government but to the government agencies themselves. Lawyers have professional obligations to follow their client's instructions. Ministers or departments giving instructions in breach of model litigant rules can place lawyers in a difficult position.<sup>939</sup>

3.156. Legal professional bodies cannot investigate agency default or misconduct.<sup>940</sup> One view was that the clarification of rules and a conferral of related investigative powers on the Office of Legal Services Coordination should be supported principally

because it cannot be assumed that all private sector firms will boast the model litigant culture which is ingrained in the office of the AGS. Practices ensuring accountability for lapses from model litigant behaviour may not exist. The profit motive may not be entirely absent from decisionmaking.<sup>941</sup>

The Federal Court also emphasised this in its submission.

Given that government legal services are being outsourced, private sector lawyers acting for government must be made aware that their client is not simply to be equated with an ordinary private sector client. Government, unlike private sector clients, does not have a private self interest. This last comment is particularly important, given that the Court is already seeing examples of law firms treating government bodies as if they were just private sector clients.<sup>942</sup>

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937. eg National Welfare Rights Network *Submission 380*.

938. ACCC *Submission 396*.

939. AGS *Consultation* Canberra 29 September 1999; Law Council *Consultation* Canberra 29 September 1999.

940. AGS *Consultation* Canberra 29 September 1999.

941. P Gray *Submission 317*.

942. Federal Court *Submission 393*.

3.157. A contrary view was that an expanded disciplinary role for the Office of Legal Services Coordination would swamp or overwhelm that Office.<sup>943</sup> The task of policing the model litigant rules could be difficult.<sup>944</sup> The Law Council submitted that the disciplinary, enforcement role should be left to the normal disciplinary authorities including the legal professional associations. A significant number of complaints issues could be conceptually difficult and complex. If the Office of Legal Services Coordination were to take up this role it would require staffing of skilled and experienced legal practitioners.

3.158. There was also concern at sanctions imposed on inhouse or retained lawyers for non compliance with the model litigant rules.<sup>945</sup> In assessing non-compliance with the rules, assessments need to be made on the extent to which the practitioner concerned properly could be held to be individually responsible for the non-compliance. This may require consideration of the individual's position in an organisation, the level of his or her knowledge of the circumstances of the breach and the instructions that were provided by the client and by any superiors.

3.159. Officers of the Department of Veterans' Affairs expressed concern about the potential level of complaints if the Office of Legal Services Coordination was given investigative powers which extended to inhouse advocates.<sup>946</sup> The resources of the Department would be stretched in dealing with such complaints and appeals.

3.160. Another concern expressed was that if the Office of Legal Services Coordination investigated complaints relating to non-compliance there was a risk that government litigants may not pursue cases sufficiently vigorously because their lawyers might be too concerned about the possibility of sanctions for breaching the model litigant rules.<sup>947</sup>

3.161. The Law Council was concerned that, because the Office of Legal Services Coordination has the role of advising the Attorney-General on developing and implementing litigation policies for the Commonwealth and providing a framework for the delivery of Commonwealth services it would face 'an inherent conflict' if it was also required to manage the Commonwealth's litigation and receive and investigate complaints regarding breaches of the model litigant rules. The Commission does not agree with this view. The Office of Legal Services Coordination provides broad policy advice to government agencies. It does not conduct litigation itself. It is not a party to proceedings. It is administratively and legally removed from agencies which do conduct litigation. The Commission considers that the Office of Legal Services Coordination's policy role on

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943. AGS Consultation Canberra 29 September 1999; DVA Consultation 27 September 1999.

944. AGS Consultation Brisbane 22 September 1999.

945. I Stewart Submission 298.

946. DVA Consultation Canberra 27 September 1999.

947. I Stewart Submission 298.

government litigation, in fact, gives it the requisite experience to investigate breaches of the model litigant rules.

3.162. The Law Council offered three other reasons for its concern about the proposal

- it is inappropriate for the federal government to be involved in professional disciplinary issues — the federal Government like any client could make a complaint to the relevant professional disciplinary body if a disciplinary issue arises
- there may be situations where a lawyer's obligation to the model litigant rules may conflict with his or her professional conduct obligations — for example, if the instructing Department or Minister instructed a legal practitioner to proceed in manner which breached the model litigant rules, it is unclear which instructions would override the other

- a formal complaints mechanism may focus too much on the actions of the legal practitioners and not sufficiently on the Department or agency which manages the litigation, that is the instructing client.<sup>948</sup>

3.163. The Commission considers that it is appropriate for an agency of the federal government to be involved in disciplinary matters. The model litigant rules serve a vital function in promoting high levels of ethical conduct from the federal government which is the major architect and a primary user of the justice system. The Government is realistically the only entity which can develop and enforce those obligations against its own agents and representatives. Further, as stated, the model litigant rules apply beyond government lawyers to government clients and parties.

3.164. The Commission does not believe that there are likely to be major areas where a lawyer's obligations to the model litigant rules will conflict with professional conduct rules. Many government representatives are not lawyers. Legal professional practice standards do not apply to these non-lawyer representatives. The ATO pointed out that a disciplinary role for the Office of Legal Service Coordination would be beneficial in those cases where advocates are non lawyers and thus not subject to regulation by professional bodies.<sup>949</sup> The Office of Legal Services Coordination and professional disciplinary bodies could develop protocols for sharing information and resolving conflicts and ambiguities.

3.165. The Commission supports the Office of Legal Services Coordination having primary responsibility for the investigation of complaints relating to the model litigant rules. The rules are fundamental to the conduct of government litigation and as such they require a dedicated investigatory and monitoring body. It would not be appropriate to leave the investigation function entirely to the legal professions because some complaints will involve the conduct of client agencies or complaints against both client agencies and their legal representatives.

3.166. Additional resources should be provided to the Office of Legal Services Coordination to ensure that complaints are dealt with properly. In assessing the need for resources it should be borne in mind that not all complaints will require formal investigation – some may be trivial, vexatious or misguided, or in effect amount to requests for clarification or referral. As with complaints handling systems developed in relation to lawyers and judicial officers, little weight should be given to complaints which merely reflect the complainant's disappointment with the outcome, or which are really matters for the appellate process.

3.167. The Office of Legal Services Coordination and disciplinary authorities should develop protocols for the sharing of information, subject to confidentiality

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948. Law Council *Submission 375*.

949. ATO *Consultation* Canberra 29 September 1999.

requirements, and where appropriate the coordination of complaints investigations. The Office of Legal Services Coordination should be able to refer complaints to the professional disciplinary authorities for investigation and action.

3.168. The Commission considers that the rules as prescribed do not prevent government litigants and their representatives from the vigorous conduct of cases. The rules themselves specify that the obligation

does not prevent the Commonwealth and its agencies from acting firmly and properly to protect their interests. It does not therefore preclude all legitimate steps being taken to pursue claims by the Commonwealth and its agencies or defending claims against them.

**Recommendation 24.** The federal Attorney-General should provide the Office of Legal Services Coordination with authority to investigate complaints relating to non compliance with the model litigant rules. The model litigant rules should state that non compliance could justify termination of a legal services contract, disciplinary measures in relation to an employed lawyer or agency representative, or a direction that the lawyer or agency representative undertake specified legal education and training.

## Education and training

3.169. In DP 62 the Commission proposed that appropriate education and training programs be developed to support agency dispute avoidance and management plans and the model litigant rules.<sup>950</sup>

3.170. As DP 62 stated, model litigant rules and dispute avoidance and management plans will be ineffective without appropriate education and training of agency officers involved in managing and resolving disputes. Officers, as well as legal representatives, need to be aware of the existence of the rules, and guided through the content of the rules. Adoption of a rule-commentary structure will assist this process, but specific education and training measures may be necessary to provide guidance relevant to the particular agencies and officers within the agency.

3.171. Training could be aimed at noting the complementary features of the rules and the agency's individual dispute avoidance and management plan. In some cases, the training could introduce officers to new dispute resolution techniques to be adopted under the dispute management plan. Conferences such as the annual government lawyers' conference offer ideal opportunities for such training and

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950. ALRC DP 62 proposal 8.7.

discussion. The Office of Legal Services Coordination has given wide publicity to the rules, but several judges and barristers professed not to have heard the term 'model litigant' or seen the text of the rules.<sup>951</sup>

3.172. Submissions and consultations in response to DP 62 supported the need for education and training in relation to dispute management and model litigant rules. The Law Council submitted that the 'method that would have the greatest and most immediate impact in strengthening the model litigant rules is wider publicity and education about the rules'.<sup>952</sup> Freehill Hollingdale & Page stressed that dispute resolution planning and model litigant rules must be accompanied by education and training, including education and acceptance of economic and commercial responsibility and risk/benefit analysis to change the existing culture to support the aspiration of best practice. Its submission also argued that the focus should not just be 'reactive to complaints' but

proactive in terms of ongoing education and training, supervision, and auditing of case handling to ensure that the rules and principles are not only adhered to, but fully understood and accepted. An important issue here is the need for the government to heed and follow properly given legal advice when considering the appropriate course to take.

3.173. Appropriate education and training is fundamental to the effective operation of these important rules.

**Recommendation 25.** The Office of Legal Services Coordination should facilitate appropriate education and training programs to support dispute avoidance and management plans for government agencies and to promote awareness of the content and importance of the model litigant rules.

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951. The management of disputes involving the Commonwealth. Is litigation always the answer? Conference *Comment* ALRC, Australian Competition and Consumer Commission and the Commonwealth Ombudsman Canberra 22 April 1999.

952. Law Council *Submission* 375.

## 4. Legal costs

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### Introduction

4.1. The Commission's terms of reference direct that it give particular attention to the causes of excessive costs in legal services and to the need for a simpler, cheaper and more accessible legal system. To assist in identifying the scale of legal costs, the Commission undertook empirical research to document the costs of cases in federal jurisdiction, notably in the Federal Court and Family Court of Australia and the Administrative Appeals Tribunal (AAT), as well as the costs to government of financing the federal civil justice system.<sup>953</sup>

4.2. Such research can provide a measure of the legal costs. Questions remain concerning how one determines generally, or in a particular case, whether the legal costs incurred were reasonable or excessive. Related questions concern the driving factors that add to legal costs and how such factors might be controlled. These are not easy questions to answer for the disparate case types in federal civil jurisdiction. The factors which impact on legal costs relate to case complexity, settlement outcomes, the number and nature of case events, length of hearing, expenditure on discovery and experts, as well as the lawyer's charging practices. The cost of legal services in the Commission's research varied, depending on whether the fees for legal services were evaluated by reference to the time spent on the matter or to set scale rates, including legal aid scales.

4.3. These cost factors are easier to identify than to control. The Commission's research and consultations made clear that there is no single, simple solution which will significantly reduce legal costs in federal jurisdiction, although the Commission has identified a number of strategies for government, courts, tribunals and practitioners which could assist to contain costs in many cases. This chapter addresses those issues.

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953. See para 1.27-1.35.



4.4. The impact of the Goods and Services Tax (GST) also should be considered in relation to the cost of legal services. The Law Council has estimated that costs for legal services will increase by around 8%. There will be a small offset from input tax credits, but most of the full effect of the tax will be passed on to clients as increased fees.<sup>954</sup>

## Research findings on legal costs

4.5. The Commission's study of matters in the Federal Court, Family Court and the AAT, information from annual and other reports of courts and government departments and agencies, the Australian Bureau of Statistics (ABS), the Productivity Commission and other sources form the basis for the conclusions on the cost of legal services in federal jurisdiction presented below.<sup>955</sup>

## Public cost

4.6. The public cost of financing federal courts, federal review tribunals, the Australian Industrial Relations Commission (AIRC) and the National Native Title Tribunal (NNTT), and related dispute resolution arrangements in federal commissions and ombudsmen, was approximately \$350 million in 1997-98.<sup>956</sup> Of that sum, the total net cost of federal courts in 1997-98 was \$144 million<sup>957</sup> and federal review tribunals and the Australian Industrial Relations Commission cost the government a further \$107 million.<sup>958</sup> Other dispute resolution agencies in

954. Law Council submission to the Senate Select Committee on a New Tax System: Law Council of Australia *Tax reform: not a new tax, a new tax system: goods and services tax issues* Law Council of Australia 5 February 1999, 6-7.

955. Further details can be found in ALRC DP 62 *Review of the federal civil justice system* ch 4 (ALRC DP-62); T Fry *Costs of litigation in the Family Court of Australia and in the Federal Court of Australia* ALRC November 1999 (T Fry, Family and Federal Courts Costs Report); T Matruglio *Part two: The costs of litigation in the Federal Court of Australia* ALRC Sydney 1999 (T Matruglio, Federal Court Empirical Report Part Two); T Matruglio *Part two: The costs of litigation in the Family Court of Australia* ALRC Sydney June 1999 (T Matruglio, Family Court Empirical Report Part Two); ALRC *Part two: Empirical information about the Administrative Appeals Tribunal* ALRC Sydney June 1999 (ALRC, AAT Empirical Report Part Two). These papers are available at <<http://www.alrc.gov.au>>.

956. \$327 million for 1996-97: ALRC DP 62 tables 4.3, 4.5, 4.10. This figure includes the High Court, Federal Court, Family Court of Australia, Family Court of Western Australia, Administrative Appeals Tribunal (AAT), Immigration Review Tribunal (IRT), Refugee Review Tribunal (RRT), Social Security Appeals Tribunal (SSAT), Veterans' Review Board (VRB), National Native Title Tribunal (NNTT), Australian Competition Tribunal, Copyright Tribunal, Defence Force Discipline Appeal Tribunal, Federal Police Disciplinary Tribunal, Superannuation Complaints Tribunal, Australian Industrial Relations Commission (AIRC), Human Rights and Equal Opportunity Commission (HREOC), Australian Competition and Consumer Commission (ACCC), Commonwealth Ombudsman, Private Health Insurance Ombudsman (PHIO), Migration Internal Review Office (MIRO), the Australian Taxation Office (ATO) Problem Resolution Service and family relationship support organisations. The figures quoted in this paragraph were derived from the annual reports of these organisations. Figures for 1998-99 for all organisations were not available at the time of publication.

957. ALRC DP 62 para 4.8, table 4.3.

958. id para 4.12, table 4.5.

federal jurisdiction cost \$98 million.<sup>959</sup> When the federal government's funding of legal aid commissions and community legal centres for that year is included in the cost,<sup>960</sup> the total expenditure by the federal government on federal civil justice

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959. *id* para 4.18–4.37, table 4.10. These bodies include the NNTT, HREOC, ACCC, and the Commonwealth Ombudsman.

960. Legal Aid NSW *Annual report 1997–98*, 60, 68, 69; Legal Aid Victoria *Annual report 1997–98* <<http://home.vicnet.net.au/~viclegal/aboutvla/annual/>> (22 April 1999); Legal Aid Qld *Annual report 1997–98*, 6, 39, 46; Legal Services Commission SA *Annual report 1997–98*, 27, 32, 33; Legal Aid Tasmania *Annual report 1997–98*, 30, 34; Legal Aid WA *Annual report 1997–98*, 50, 61, 62; Legal Aid ACT *21st Annual report 1997–98*, 36, 41, 46; NT Legal Aid *Annual report 1997–98*, 44, 60.

amounted to \$470 million.<sup>961</sup> These are the public costs of the justice system. The figure does not include the costs for the government's own legal services. In terms of government expenditure the figure of \$470 million is a relatively modest outlay. The services provided by federal courts, tribunals, and related investigative and dispute resolution agencies are significant. Government figures show that approximately 145 000 disputes were lodged in federal courts and review tribunals in 1997–98<sup>962</sup> and approximately 37903 federal civil cases were approved by legal aid in 1998–99.<sup>963</sup> Significant numbers of complaints and disputes were also received by other dispute resolution agencies in federal jurisdiction.<sup>964</sup> Taking the federal civil justice system as a whole, the courts, tribunals, commissions and ombudsmen undertook the consideration, resolution and determination of close to 300 000 complaints, disputes and matters in 1997–98.

### Jurisdiction costs

4.7. Summary adjudication in lower courts is clearly less expensive than superior court litigation. This is not to say that lower courts are suitable for all matters; however, it is important to ensure that the jurisdiction of lower courts is sufficiently broad to allow parties access to less expensive adjudication for appropriate matters. In fact, a substantial proportion of Australian civil litigation is lodged in lower courts. Productivity Commission data establishes that in 1997–98, 90.3% of all Australian civil cases were filed in State and Territory magistrates courts, 5.2% in State and Territory district and county courts and 4.5% in the State and Territory supreme courts, the Federal Court, the Family Court of Australia and

961. The figure for legal aid includes federal government funding for civil and criminal legal aid. The total public expenditure figure was \$466 million for 1996–97: ALRC DP 62 para 4.4.

962. High Court *Annual report 1997–98*; Federal Court *Annual report 1997–98*; AAT *Annual report 1997–98*; IRT *Annual report 1997–98*; RRT *Annual report 1997–98*; SSAT *Annual report 1997–98*; Federal Police Disciplinary Tribunal *Annual report 1997–98*; Superannuation Complaints Tribunal *Annual report 1997–98*; VRB *Annual report 1997–98*. In the Family Court, interim or procedural orders (21 161) were not included as they do not represent separate applications: Family Court *Submission 348*. The Commission has included in this figure applications such as consent applications in the Family Court and bankruptcies in the Federal Court, which are discounted in later consideration of case management issues because they are dealt with by registrars not judges. However, they do represent part of the caseload of the courts for this global figure.

963. Family and legal assistance division, Attorney-General's Dept *Correspondence* 18 November 1999.

964. AIRC (58 362) *Annual report 1997–98*, 27, table C1; HREOC (1522) *Annual report 1997–98*, 37, table 1; NNTT (2877) *Annual report 1997–98*, 10, table 1; ACCC (13 189) *Annual report 1997–98*, 204, applicant 4; Commonwealth Ombudsman (4447 written; 37 380 oral complaints) *Annual report 1997–98*, 38, table 1; Commissioner of Taxation (ATO – Problem Resolution Service) (592) *Annual report 1997–98*, 53. See also Telecommunications Industry Ombudsman (TIO): 52138 contacts and 2351 complaints; Telecommunications Industry Ombudsman *Annual report 1997–98*, 16; Australian Banking Industry Ombudsman (ABIO): 45 032 contacts and 3595 complaints; Australian Banking Industry Ombudsman *Annual report 1997–98*, 30. The ABIO and the TIO are industry financed and do not receive federal government funding.

the Family Court of Western Australia.<sup>965</sup> Several States and Territories also have small claims tribunals for low claim civil disputes. This reflects a general trend for governments to expand the civil and criminal jurisdictional limits of lower courts. Federal jurisdiction is also well served, with ombudsmen who attend to consumers' complaints about government or industry, tribunals to review

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965. Steering Committee for the Review of Commonwealth/State Service Provision *Report on government services 1999 – Volume 1: Education, health, justice* AusInfo Canberra 1999, 471, table 7.2.

government decision making and subsidised counselling services for family and relationship disputes. Costs in federal jurisdiction appear to reflect the complexity and value of the claims. There are some matters suitable for lower court adjudication currently heard in the Federal Court and the Family Court. The establishment of the federal magistracy should provide an appropriate summary forum for such cases.

### Costs indicators

4.8. Research for the Commission, utilising regression analysis of case costs data, showed that the significant indicator of private legal costs was case complexity. In the Federal Court the significant drivers of case costs were

- the number of parties involved
- whether 'end of discovery' was reached
- the number of experts
- the total number of court events
- whether ADR was attempted.<sup>966</sup>

In the Family Court the cost of a case was driven by

- the total number of court events
- whether the case went to hearing or not
- whether there was legal aid funding or not
- the number of experts involved.<sup>967</sup>

4.9. In the Federal Court, on the Commission's cost data, and utilising a prototype case as a model, \$10 014 was added to the cost for each party involved. If the 'end of discovery' was reached, \$85629 was added to the cost. Each expert added \$28 817 and each court appearance \$2761. Use of ADR by the parties, which on Federal Court figures had a high success rate for matters referred by a judge, reduced the costs by \$63 552.<sup>968</sup>

4.10. In the Family Court, utilising a similar methodology, the Commission's data showed a directions hearing added \$685 to the cost of a case and each court event, other than a directions hearing, added \$3473. If the case went to a hearing \$8640 was added to the cost. Each expert involved in the case added \$1360. If legal aid was provided the case costs were reduced by \$5154.<sup>969</sup> For example, a 'typical'

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966. T Fry, Family and Federal Courts Costs Report, 1.

967. *ibid.*

968. *id* 7.

969. *id* 6.

case with one directions hearing, three other court events, a hearing, one expert and no legal aid, had an estimated cost of \$19524.<sup>970</sup>

4.11. There were significant differences in case costs depending on the mechanism used by the lawyer to assess charges for services; that is, whether the lawyers charged according to item based scales rates, by reference to the time spent

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970. id 6-7.

on the matter or by legal aid scale rates. The Commission's data on family law proceedings showed that solicitors' fees and disbursements were significantly lower when the Family Court scale was used, as compared with cases where costs agreements were calculated by reference to time spent or some other basis. The median solicitors' fees charged at scale were \$1730, while the median fees for charging on a time basis under a written costs agreement was \$3000.<sup>971</sup> In the Commission's study, 14% of applicants and 7% of respondents were charged at the Federal Court scale.<sup>972</sup> In the Family Court, 46% of applicants and 35% of respondents were charged on the basis of the Family Court scale.<sup>973</sup>

### Indicative median costs

4.12. Generally, in the Commission's research, the median costs of litigation or review proceedings in federal courts or the AAT appeared reasonable. The median total legal costs for represented parties in the Commission's survey samples were as follows.

- Federal Court: \$15 820 (applicants) and \$8463 (respondents).<sup>974</sup>
- Family Court of Australia: \$2209 (applicants) and \$2090 (respondents).<sup>975</sup>
- AAT: \$2585 (applicants) and \$4006 (respondents).<sup>976</sup>

4.13. In each of these forums there is a wide range of case types, and case costs varied considerably. This is particularly true of the Federal Court and the AAT. The range of total legal costs in the case sample comprised the following.

- Federal Court: \$350–\$1 011 042 (applicants) and \$55–\$1 130 884 (respondents).<sup>977</sup>
- Family Court of Australia: \$40–\$126 361 (for applicants) and \$8–\$160 532 (respondents).<sup>978</sup>

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971. Justice Research Centre Family Court Research Part Two, table 2B, 5. See table 2C, 5 for figures for disbursements. These tables are reproduced in ALRC DP 62 113, tables 4.14, 4.15.

972. T Matruggio, Federal Court Empirical Report Part Two, 40, table 2. The sample comprised 152-applicants and 137 respondents.

973. T Matruggio, Family Court Empirical Report Part Two, 47, table 2. The sample comprised 175-applicants and 95 respondents.

974. T Matruggio, Federal Court Empirical Report Part Two, 57, table 1. The table does not provide a median total legal cost figure. The figure has been calculated using the same data.

975. T Matruggio, Family Court Empirical Report Part Two, 54, table 8.

976. ALRC, AAT Empirical Report Part Two, table 5.1.

977. T Matruggio, Federal Court Empirical Report Part Two, 57, table 1. The table does not provide a median total legal cost figure. The figure has been calculated using the same data.

978. T Matruggio, Family Court Empirical Report Part Two, 54, table 8.

- AAT: \$50–\$131 696 (for applicants) and \$375–\$29 586 (respondents).<sup>979</sup>

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979. ALRC, AAT Empirical Report Part Two, table 5.1.



4.14. Case costs varied, as one would expect, according to case type, the stage in proceedings at which the case was resolved and the process used. For example, in relation to different case types, median total legal costs were reported as follows.

- Federal Court applicants: \$8020 for migration cases (range: \$350–\$14 431), \$39 190 for trade practices cases (range: \$8625–\$600 000), and \$43 000 for intellectual property cases (range: \$13093–\$500 000).<sup>980</sup>
- Family Court of Australia: \$1731 for children only cases, \$2482 for property only cases and \$3184 for cases involving both children and property.<sup>981</sup>
- AAT: \$1487 for social welfare cases, \$1500 for taxation administration cases, \$2455 for veteran's affairs cases and \$4622 for compensation cases.<sup>982</sup>

### Types of litigant

4.15. In order to derive some measure of the accessibility of the federal civil justice system, the Commission sought to identify the means or backgrounds of the parties in the case samples studied. In the Federal Court and AAT, the best information available was indicated by the type of proceedings (migration, social welfare or intellectual property) and the names and status of the parties (government agency, small or large corporation). In family jurisdiction, where the matter concerned financial proceedings, the case file contained concrete data on the income and property of the parties. Such data indicated that there is a diversity of parties using the federal courts and tribunals. Contrary to the popular view, parties include, but are not limited to, the very poor and the very wealthy.<sup>983</sup>

4.16. Corporate entities and the government were major litigants in the Federal Court. In addition, a small proportion of Family Court litigation involved major property interests. A small proportion of tribunal review claims involved property and commercial interests or corporations seeking review of taxation, customs and excise and business regulation decisions.

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980. T Matruglio, *Federal Court Empirical Report Part Two*, 59–60, tables 2–3. These tables do not provide a median total legal cost figure. The figure has been calculated using the same data. Note that the numbers for each case type was low: migration, n = 18; trade practices, n = 24; intellectual property, n = 9.

981. Justice Research Centre *Family Court research part two: The costs of litigation in the Family Court of Australia* ALRC Sydney June 1999, 12, table 3 (Justice Research Centre Family Court Research Part Two).

982. ALRC, *AAT Empirical Report Part Two*, table 5.2.

983. See ALRC DP 62 ch 4, para 4.55; ch 1, para 1.48–1.49.

4.17. The presence of 'the poor' is evidenced in litigation and review by court and tribunal fee waivers and exemptions which are granted on the grounds of financial hardship, and by grants of legal aid which are subject to strict means tests. In the Federal Court 9% of fees were waived in 1997-98.<sup>984</sup> The Commission's case file survey data showed that Federal Court filing fees were waived or the applicant exempted in 17% of the sampled cases; almost half of these involved review under the Migration Act.<sup>985</sup> Only a small number of sampled Federal Court litigants received legal aid funding.<sup>986</sup> In the Family Court in 1997-98, 48% of fees were waived or the parties exempt from payment.<sup>987</sup> A sizeable proportion of parties in the Family Court received some legal aid funding.<sup>988</sup> In the AAT in 1997-98, 57% of fees were waived or the parties exempt from payment.<sup>989</sup> AAT applicants include social welfare claimants and veterans' pension or workers' compensation claimants (social welfare, for example, accounted for around 25% of AAT decisions in 1997-98). A proportion of applicants received some legal aid funding<sup>990</sup> or were eligible for an award of costs from Comcare if their compensation claim was successful.<sup>991</sup>

4.18. In the Family Court, the Commission's case file survey data showed the median estimated property value at issue in proceedings to be \$151 059.<sup>992</sup> Recent studies indicated that the income of parties in Family Court property proceedings is not distinctly higher or lower than that of the general population.<sup>993</sup> The study by the Justice Research Centre found a median annual income for all parties in the Family Court sample of \$25 000 to \$28 000.<sup>994</sup>

#### Fee arrangements

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984. 9% of total potential fees: ALRC DP 62 table 6.2; Federal Court *Annual report 1997-98*, 64, 83.

985. *Migration Act 1958* (Cth). T Matruglio & G McAllister *Part one: Empirical information about the Federal Court of Australia* ALRC Sydney March 1999 (T Matruglio & G McAllister, Federal Court Empirical Report Part One), 7.

986. An exact figure is unavailable. However, 9% (n=14) of 152 applicant solicitors responding to the Commission's survey of solicitors reported that their client received some legal aid funding in their Federal Court proceedings. None of the respondent solicitors responding reported any legal aid funding in their case: T Matruglio, Federal Court Empirical Report Part Two, 38, table 1.

987. 48% of total potential fees: ALRC DP 62 table 6.2; Family Court *Annual report 1997-98*, 43.

988. An exact figure is unavailable. However, 17% (n=67) of 385 applicant solicitors and 25% (n=67) of respondent solicitors responding to the Commission's survey of solicitors reported that their client received some legal aid funding in their Family Court proceedings: T Matruglio, Family Court Empirical Report Part Two, 46, table 1.

989. 57% of total potential fees: ALRC DP 62 table 6.2; AAT *Annual report 1997-98*, 123.

990. Those receiving legal aid comprise small numbers of social welfare claimants and applicants in veterans' affairs cases. Veterans' affairs clients are not subject to means tests. See also para-5.139-5.142.

991. See para 9.176-9.185.

992. Where female applicant and male respondent: T Matruglio & G McAllister, Family Court Empirical Report Part One, 11, table 5.

993. id para 5.4.

994. R Hunter *Family law case profiles* Justice Research Centre Sydney 1999, para 299-303.

4.19. The Commission's research also showed a significant level of pro bono and contingency and speculative fee arrangements operating in federal jurisdiction.<sup>995</sup> Contingency and speculative arrangements, in which the lawyer

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995. For the extent of pro bono work in Australia, see para 5.12–5.20. In the Commission's survey, in the Federal Court, 13 (10%) respondent solicitors indicated that they allowed clients to defer payment until the end of the case, and 4 (3%) had a speculative fee arrangement. 20 (13%) of applicant solicitors had speculative fee arrangements. Solicitors also indicated a large proportion of work not charged for: TMatruglio, *Federal Court Empirical Report Part Two*, 39–40. In the Family Court, 184(54%) of applicant solicitors and 101 (46%) respondent solicitors said they deferred payment of fees until the end of the case. 214 (63%) applicant solicitors and 142 (65%) respondent solicitors said they spent some time on the case without charge: TMatruglio, *Family Court Empirical Report Part Two*, 47.

carries the financial risk of the litigation, assist to promote parties' access to litigation processes.<sup>996</sup> Contingency arrangements were common in Federal Court representative proceedings and speculative arrangements were utilised in a variety of case types, including migration and refugee cases in the Federal Court and compensation and veterans' matters in the AAT. Lawyers undertook such cases in the expectation of recovering their fees from government parties, where costs rules or, in administrative proceedings, legislation so provides.<sup>997</sup> In family matters, lawyers commonly delay billing the client until the matter is concluded.<sup>998</sup> The Commission found such arrangements are an established part of federal practice and represent an important form of subsidised legal assistance in this jurisdiction.

### Case management and costs

4.20. Lawyers, litigants and courts see benefits from effective case management. It is not clear that such efficiencies in case processing positively impact on the costs to be paid by litigants or whether particular forms of case management are more or less effective in reducing such costs. Increased demands on parties at earlier stages may increase and 'front end load' costs for matters. Such increased costs are said to result from

- requirements for additional documentation
- an emphasis on early case preparation, resulting in lawyers having to back track over work at a later date
- the complexity of case management systems, resulting in senior lawyers being unable to delegate case work.<sup>999</sup>

4.21. The Commission's research showed repeat case events can add significantly to costs.

The court has to be mindful that every new conference it creates, every new procedure, every new form, is potentially a billable event.<sup>1000</sup>

This was particularly noted in family jurisdiction where, in the Commission's case sample, 33% of contested applications (Form 7) had five or more case events and

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996. For a discussion of contingency fees, see para 5.21– 5.25.

997. See para 9.176.

998. See fn 43; T Matruglio, Family Court Empirical Report Part Two, 47.

999. See T Matruglio & J Baker *An implementation evaluation of differential case management: A report on the DCM program in the Common Law Division of the Supreme Court of New South Wales* Civil Justice Research Centre Sydney 1995, 20. Research by the RAND Institute in the United States found that case management had a substantial effect on time to disposition of cases but, with the exception of discovery cut off, increased litigants' costs as early judicial management led to an increase in lawyer work hours responding to and preparing for case management events: J Kakalik et al *Just, speedy and inexpensive? An evaluation of judicial case management under the Civil Justice Reform Act* RAND Santa Monica California 1996. See para 6.30–6.31.

1000. 'Maureen Solomon: persuading the sceptics' (1996) 464 *Lawtalk* 9.

7% had 10 or more events.<sup>1001</sup> 16% of such contested applications had more than three directions hearings (4 cases had 11 or more) and 10% of contested

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<sup>1001</sup>. Family Court survey datafile, Commission analysis. See also para 8.48.

applications had more than three interim hearings (with 8 cases having 11 or more).<sup>1002</sup> A directions hearing was the cheapest event for parties and the Court,<sup>1003</sup> but multiple case events added significantly to costs for family litigants, most of whom have modest means.<sup>1004</sup> To these legal costs, one must also add travel costs, costs involved in taking time off work, and paying for childcare.<sup>1005</sup>

4.22. The cost effectiveness of case management depends upon the extent to which it helps control the ambit of discovery, the use of experts and facilitates earlier settlement of cases.<sup>1006</sup> The Federal Court's individual docket system has resulted in counsel becoming involved earlier in many cases. This can front end load costs,<sup>1007</sup> but also contributes to earlier settlements. In the Commission's case sample, 41% of Federal Court cases settled early; only 4% settled at the door of the court.<sup>1008</sup>

4.23. Australian research is needed to assess the cost effectiveness of case management. In the Commission's consultations there was a clear consensus among lawyers that Federal Court case management was cost effective; case events were considered to be appropriate and effective for most cases. There was a similar consensus that Family Court case management and delayed disclosure added to costs for some cases due to repeat case events and delayed settlement. In the Commission's Family Court case sample over 50% of matters resolved at a first or subsequent directions hearing, 19% went to hearing and 10% of these cases settled on the day of or during the hearing. Only 8% received judgment.<sup>1009</sup> AAT case management was also said to add to party costs in certain instances. However, the tribunal's instigation of compulsory conciliation in compensation cases has reduced the late and costly settlements in such cases. Issues relating to the efficiency and effectiveness of case management are dealt with in chapters 6, 7, 8 and 9.

## Disclosure of legal fees

1002. T Matruglio, Family Court Empirical Report Part One, 39, table 22.

1003. Each directions hearing added \$685 to the cost of a case: T Fry, Family and Federal Courts Costs Report, 6.

1004. For information on the income of litigants, see para 4.17-4.18.

1005. S Strickland in B Lane 'Report puts Family Court in the dock' *Australian* 20 August 1999, 2.

1006. The NRMA has found that while case management encourages earlier settlement it may also increase costs: NRMA *Submission 81*. The ACCC has stated that while the Federal Court's docket system may increase costs, the benefits outweigh those increases: ACCC *Submission 67*. See C Guest & T Murphy *An economic evaluation of differential case management* Civil Justice Research Centre Sydney 1995 for consideration of the relationship between the value of settlements and case management costs.

1007. W Soden *Consultation* Sydney 6 April 1999; ACCC *Submission 67*.

1008. That is, at the hearing stage – after listing, on the first day of hearing, or during the hearing: T-Matruglio, Federal Court Empirical Report Part One, 27-9, table 21. On the cost-effectiveness of case management see para 6.30-6.31.

1009. T Matruglio & G McAllister *Part one: Empirical information about the Family Court of Australia* ALRC Sydney February 1999, 49, table 28.

4.24. All Australian jurisdictions regulate the contractual arrangements between lawyers and their clients. Legislation variously provides for lawyers to inform clients about potential costs and allows costs agreements to be cancelled or

varied, or prevents enforcement of costs agreements which are unfair or unreasonable. In addition, professional practice standards provide that gross overcharging may amount to professional misconduct.<sup>1010</sup>

4.25. Fee agreements between lawyers and clients specify the amount and manner of payment of lawyers' fees,<sup>1011</sup> inform clients of the basis on which they will be billed, the fee rates to be charged, and, in certain jurisdictions, provide an estimate of the total bill likely to be charged by the lawyer. The disclosure requirements are set out in legal practice rules and legislation.

### Disclosure requirements

4.26. Most jurisdictions have practice rules or legislation which require lawyers to inform clients of potential costs as soon as practicable after receiving instructions, and the basis of calculating those costs.<sup>1012</sup>

4.27. In Queensland it is mandatory to have a costs agreement with a client.<sup>1013</sup> As a result of the abolition of fee scales in New South Wales, most legal work is carried out under such agreements. In New South Wales a practitioner must disclose to the client the basis of calculating costs, billing arrangements, the client's rights to receive a bill and to obtain a review of costs. Where costs cannot be quantified in this way the practitioner must provide an estimate of the likely total amount of the costs. Any 'significant increase' in that estimate must also be disclosed.<sup>1014</sup>

4.28. In Victoria a practitioner must give the client details of the method of costing, billing intervals and arrangements, the client's right to negotiate a costs

1010. See para 4.47–4.50. On professional misconduct see para 3.46.

1011. *Legal Profession Act 1987* (NSW) s 184(10); *Legal Practice Act 1996* (Vic) s 96; *Legal Practitioners Act 1981* (SA) s 42(6); *Legal Practitioners Act 1970* (ACT) s 190(2); *Legal Practitioners Act 1974* (NT) s 129(2); *Legal Profession Act 1993* (Tas) s 129(1); *Legal Practitioners Act 1893* (WA) s 59(1).

1012. Qld Solicitors Handbook, 8.01; Law Society SA Conduct Rules, r 9.14(a) and (b); Rules of Practice Tas, r 13(2); Law Institute Vic Conduct Rules, r 12(2)(a); Law Society WA Conduct Rules, r 10.3; Law Society ACT Conduct Rules, r 3.1(6); *Legal Profession Act 1987* (NSW) s 175–183; *Legal Practice Act 1996* (Vic) s 86(2); *Legal Practice Act 1996* (Vic) s 86(1); *Queensland Law Society Act 1952* (Qld) s 48.

1013. *Queensland Law Society Act 1952* (Qld) s 48. This section does not apply to urgent work or work for which the charges are \$750 or less.

1014. *Legal Profession Act 1987* (NSW) s 175, 177. A practitioner need not disclose the costs information prescribed by s 175 and s 177 if costs (excluding disbursements) are estimated to be no more than \$750 for an individual or private company or \$1500 for a public company or authority; NSW Solicitors' Rules, r 1.2. Nondisclosure of estimated costs is capable of being unsatisfactory professional conduct or professional misconduct: *Legal Profession Act 1987* (NSW) s 183. For a discussion of the implications of failing to give an estimate in NSW see S Pattison 'Costing: Is failure to give an estimate, the kiss of death on practitioner own client assessment?' (1999) 37(3) *Law Society Journal* 32.



agreement, an estimate of total costs or a range of estimates, and the client's avenues of complaint.<sup>1015</sup> If disclosure is not made, the bill may be reduced by an

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<sup>1015</sup> *Legal Practice Act 1966 (Vic)* s 86.

assessor or tribunal proportionate to the seriousness of the failure to give the information.<sup>1016</sup> Similar legislation exists in Queensland<sup>1017</sup> where non compliance with the disclosure requirements renders the agreement void.<sup>1018</sup>

4.29. Practice rules in Tasmania, South Australia and the Australian Capital Territory require disclosure of an estimated range of costs and disbursements, the method of calculating costs and the billing arrangements.<sup>1019</sup> In Tasmania the client must be informed of any court scale applying to the costs. In South Australia the client must be informed of the likely minimum net amount that the client will receive if a matter is settled.<sup>1020</sup> The rules in South Australia and Tasmania provide for a review of estimated costs and disbursements only if the client requests it.<sup>1021</sup>

4.30. In Western Australia a practitioner must inform a client of the basis of calculation of costs and any circumstances likely to affect the amount.<sup>1022</sup> The Law Reform Commission of Western Australia has recommended that solicitors should be required to advise their clients regularly – not less than once every 12 months – of the estimated cost of resolving the dispute. Failure to comply with this obligation would prohibit the solicitor from recovering fees from the client.<sup>1023</sup>

4.31. There are no disclosure obligations for practitioners in the Northern Territory.<sup>1024</sup>

4.32. The Family Law Rules state that, before a solicitor enters into a costs agreement with a client, the solicitor must give the client a copy of a costs brochure published by the Family Court. This sets out the Family Court scale of costs, the procedure for handling costs disputes and information about the availability of independent legal advice. The cost agreement must set out the basis for calculating costs.<sup>1025</sup>

4.33. The Family Law Rules require practitioners to give their clients, at designated stages, a written memorandum setting out costs incurred up to that stage, and an estimate of costs up to and including each further designated stage,

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1016. *Legal Practice Act 1966* (Vic) s 91.

1017. *Queensland Law Society Act 1952* (Qld) s 48. The practitioner must give the client a copy of any scale for the work provided.

1018. *Queensland Law Society Act 1952* (Qld) s 48F.

1019. Rules of Practice Tas, r 13; Law Society of ACT Conduct Rules, r 3; Law Society of SA Conduct Rules, r 9.14.

1020. Law Society of SA Conduct Rules, r 9.14.

1021. Law Society of SA Conduct Rules, r 9.14; Rules of Practice Tas, r 13

1022. Law Society of WA Conduct Rules, r 10.3.

1023. Law Reform Commission of Western Australia *Review of the criminal and civil justice system in Western Australia – Final report* LRCWA September 1999, rec 121.

1024. *Legal Practitioners Act 1983* (NT); Law Society of NT Conduct Rules.

1025. Family Law Rules O 38 r 27.

including up to the conclusion of the final hearing.<sup>1026</sup> The practitioner is required to provide each other party and the registrar or the Court with a copy of that memorandum and to disclose the source of the funds for the costs to be paid.<sup>1027</sup>

4.34. Disclosure requirements do not apply equally to barristers and solicitors in each state. In Tasmania, the Australian Capital Territory and South Australia, where there is a merged profession and voluntary bar, the costs disclosure requirements are the same for barristers and solicitors.<sup>1028</sup> In New South Wales and Victoria a barrister is not required to disclose estimates of costs directly to the lay client, but must provide this information to the instructing solicitor. The barrister's costs must be included in the solicitor's disclosure to the client.<sup>1029</sup> In practice, such disclosure requirements are not always complied with by barristers.<sup>1030</sup> There are no disclosure requirements for barristers in Queensland, Western Australia and Northern Territory. The Law Council supports mandatory fee disclosure for solicitors and barristers.<sup>1031</sup>

4.35. There are also differences in the times set for objections to fees charged by barristers. Lay clients and solicitors do not have the same opportunity to object to barristers' fees. In New South Wales a lay client has 12 months in which to apply to have a disputed bill with a legal practitioner assessed by a costs assessor.<sup>1032</sup> A practitioner who retains another solicitor or barrister on behalf of a client has only 30 days to apply to have a disputed bill assessed.<sup>1033</sup> A solicitor has three months

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1026. That is, before the directions hearing, first conciliation conference, prehearing conference and final hearing: Family Law Rules O 38, Div 1A. Family Court of Australia *Practice direction 2/91 and Case management guidelines*, para 2.8, 7.13, 8.4, 9.5 contain similar provisions. Similar provisions also exist in the Family Court of Western Australia: Practice directions – Family Court of Western Australia No46 – *Notification as to costs*:

1027. Disclosure of the source of funding is not required where the source is a third party and the Court or registrar directs that the source not be disclosed to the other party: O 38, Div 1A, r 4F(3). Unrepresented litigants and separate representatives are also required to provide the Court or registrar and each other party with a statement of costs incurred up to and including each stage and the estimated future costs to the conclusion of the final hearing: O 38, Div 1A, 4F(3). See also para 8.62.

1028. Rules of Practice Tas, r 13; Law Society of ACT Conduct Rules, r 3; Law Society of SA Conduct Rules, r 9.14.

1029. *Legal Profession Act 1987* (NSW) s 175–183; *Legal Practice Act 1996* (Vic) s 86–92.

1030. P Mazurek 'The duty to pay counsel: practical lessons from complaints' (1999) 37(2) *Law Society Journal* 34. The NSW Bar Association has conducted a publicity campaign to raise awareness of the disclosure required: I Harrison 'Obligations to make fees disclosure under part 1 of Legal Profession Act' (1999) 64 *Stop Press* 14. A member of the South Australian Bar suggested that many barristers would be surprised to know that they have disclosure obligations: South Australia Bar Association *Consultation* 10 August 1999.

1031. Law Council *Submission* 375.

1032. *Legal Profession Act 1987* (NSW) s 199(2).

1033. *Legal Profession Act 1987* (NSW) s 200(3). There is no provision for extension of time.

in which to dispute a barrister's fee in South Australia,<sup>1034</sup> and 45 days in Queensland.<sup>1035</sup>

4.36. The New South Wales Law Society stated that compulsory costs disclosure has led to a reduction in complaints about overcharging from 304 in 1995–96 to 4 in 1997–98.<sup>1036</sup> The Insurance Council of Australia agreed that

the more information that is provided to litigants about actual and prospective costs, the greater the possibility of amicable resolution of disputes. It should be an obligation of lawyers for all litigating parties to provide two critical cost estimates to their clients as follows before commencement of proceedings and before trial:

1. On the assumption that the litigation proceeds to a full trial and the client succeeds, an estimate of the client's liability for costs after deducting the probable amount of recovery of party and party costs from the opposite party/parties.
2. On the assumption that the matter proceeds to a full trial and the client loses, an estimate of the client's liability for solicitor and client costs and the party and party costs of other parties.

It is our experience that mere knowledge of these parameters is a powerful incentive towards amicable resolution of disputes.<sup>1037</sup>

4.37. The Commission agrees that costs disclosure can assist with settlement providing clear evidence of the risk of litigation.<sup>1038</sup> Disclosure requirements should be ongoing and apply equally to barristers and solicitors.

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1034. Law Society of SA Conduct Rules, r 11.7.

1035. 'Relations with the Bar – Fee disputes' (September 1997) *Proctor* 4. Clients have three years to bring a complaint against a solicitor for overcharging.

1036. Law Society of New South Wales *Early Dispute Resolution (EDR) Task Force Report* <[http://lawsocnsw.asn.au/practice/edr\\_taskforce\\_report/print-index.html](http://lawsocnsw.asn.au/practice/edr_taskforce_report/print-index.html)> (8 November 1999).

1037. Insurance Council of Australia *Submission 85*. The Law Society of NSW Early Dispute Resolution Task Force has recommended greater disclosure:

Recommendation 18. That Courts give consideration in each jurisdiction to issuing the following direction to parties:

'The solicitor for each party shall in the week prior to the hearing file provide the Court with a written assurance that he/she has given to his/her client:

- (a) a document detailing costs incurred up to the commencement of the hearing; and
- (b) an estimate of the costs likely to be incurred representing the client at hearing'.

Law Society of New South Wales *Early Dispute Resolution (EDR) Task Force Report*

<[http://lawsocnsw.asn.au/practice/edr\\_taskforce\\_report/print-index.html](http://lawsocnsw.asn.au/practice/edr_taskforce_report/print-index.html)> (8 November 1999).

1038. In a recent review of cases the Chief Justice of the Family Court of Western Australia required parties in over 300 cases to appear before him with a status report. Many settled after the Chief Justice gave them an estimate of the legal costs that would be involved in continuing:

Judges are constantly dismayed by what people spend on lawyers, accountants and other experts which they should be spending on themselves and their children – money that was hard earned in happier days: 'Long waiting list slashed' *West Australian* 15 July 1999, 9.

A similar practice is followed in the Canberra registry of the Family Court of Australia: Family Court of Australia *Consultation* Canberra 28 September 1999; Legal Aid ACT *Consultation* 27 September 1999. In response to a proposal for more extensive disclosure requirements in DP 62 (proposal 4.2)

**Recommendation 26.** The federal Attorney-General, through the Standing Committee of State and Commonwealth Attorneys-General, should encourage all States and Territories to enact similar legislation to harmonise the requirements for solicitors and barristers to disclose actual, expected or charged fees, with the additional requirement that solicitors

*Recommendation 26 cont'd*

and barristers advise their lay and professional clients from time to time, and not less than once every six months, of costs incurred to date and provide an estimate of the future cost of resolving the dispute. Nondisclosure of estimated costs should constitute grounds to cancel or rescind the agreement and a finding of professional misconduct. Where barristers are directly briefed by a lay client, the disclosure rules should be equivalent to those for solicitors.

## Measuring and evaluating legal costs

### Reasonable fees

4.38. Complaints made to legal service bodies commonly relate to fees. Several submissions to the Commission concerned fees charged by lawyers which were said to be excessive for the services provided.<sup>1039</sup>

4.39. The reasonableness of the terms of costs agreements is a separate issue from the reasonableness of any account or bill calculated in accordance with those terms. In *Weiss v Barker Gosling (No 1)*<sup>1040</sup> Fogarty J concluded that there is a common law requirement that the costs agreement be fair and reasonable and that the onus of proof is on the solicitor. The agreement must be fair and reasonable as to its terms. In *Schiliro v Gadens Ridgeway*<sup>1041</sup> the Full Court of the Family Court

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the Law Council expressed their support for mandatory disclosure for both solicitors and barristers: Law Council *Submission 375*. Support for this proposal was also expressed by the ACCC: ACCC *Submission 396* and National Legal Aid *Submission 360*.

1039. NSW Legal Reform Group *Submission 357*; H Bienstein *Submission 390*. In 1997–98 there was a fall in the percentage of complaints in NSW raising costs or fees as a specific concern, from more than 40% of complaints in 1996–97 to 34.5% in 1997–98. This change may be due to the value of written disclosure becoming apparent to practitioners and the impact of the educative and disciplinary role of the Office of the Legal Services Commissioner (NSW); Office of the Legal Services Commissioner *Annual report 1997–98*, 7. See also Legal Ombudsman (Vic) *Annual report 1998*, 28; Legal Practitioners Conduct Board (SA) *Annual report 1998*, 27.

1040. *Weiss v Barker Gosling (No 1)* (1993) 16 Fam LR 728.

1041. *Schiliro v Gadens Ridgeway* (1995) 19 Fam LR 196.

found that the requirement of fairness was satisfied if the client understood and appreciated the agreement when it was entered into.

A solicitor bears the burden of establishing that a contract was entered into freely in an informed and independent way. The essential nature of the agreement must be explained, understood and accepted ... the solicitor has to rebut the presumption of undue influence.<sup>1042</sup>

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<sup>1042</sup>. id 197.

**Requirements by courts**

4.40. Courts have jurisdiction to supervise fees charged by legal practitioners to their clients,<sup>1043</sup> and inherent powers to supervise the ethical conduct of legal practitioners.<sup>1044</sup> Courts can vary or set aside agreements if they are unfair,<sup>1045</sup> unreasonable,<sup>1046</sup> unjust,<sup>1047</sup> or entered into by fraud or misrepresentation.<sup>1048</sup> In the Family Court costs agreements may be challenged on a number of grounds including undue influence, uncertainty, unfairness or unreasonableness.<sup>1049</sup> Gross overcharging is professional misconduct.<sup>1050</sup>

4.41. It can be difficult to secure agreement about whether particular fees are fair and reasonable. Mahoney AJ in *Veghelyi v Law Society of New South Wales* noted that

the organisation of the legal profession has changed, the nature and extent of legal services now extend over a wide spectrum, and fees may be fair and reasonable notwithstanding that they are at the opposite ends of a correspondingly wide spectrum.<sup>1051</sup>

4.42. In *Foreman Kirby P* (as he then was) noted

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1043. *Judiciary Act 1903* (Cth) s 26; *High Court Rules* O 71, r 1; *Federal Court of Australia Act 1976* (Cth) s-43; *Supreme Court Act 1993* (ACT) s 23; *Supreme Court Rules (ACT)* O 65, r 1; *Supreme Court Act 1970* (NSW) s 76; *Supreme Court Act 1979* (NT) s 86; *Supreme Court Rules (NT)* r 63.03; *Supreme Court Act 1867* (Qld) s 58; *Supreme Court Rules (Qld)* O 91, r 1; *Supreme Court Act 1935* (SA) s 40; *Supreme Court Rules (SA)*, r 101; *Supreme Court Civil Procedure Act 1932* (Tas) s 12; *Supreme Court Rules (Tas)* O 80, r 1; *Supreme Court Act 1986* (Vic) s 24; *Supreme Court Act 1935* (WA) s 37; *Supreme Court Rules (WA)* O 66, r1.
1044. See Ipp J's discussion of this jurisdiction in *D'Alessandro v Legal Practitioners Complaints Committee* (1995) 15 WAR 198, 209.
1045. Fairness refers to the circumstances surrounding the making of the agreement, such as the client's level of understanding of the agreement.
1046. Reasonableness refers to the terms of the agreement and in particular whether the fees are reasonable having regard to the kind of work to be performed: *NSW Crime Commission v Fleming* (1991) 24 NSWLR 122, 122-124.
1047. *Legal Profession Act 1987* (NSW) s 208D sets out matters which a costs assessor may have regard to in determining whether a costs agreement is unjust, such as the relative bargaining power of the parties, the economic and educational circumstances of the parties, the form and intelligibility of the language of the agreement, and whether undue pressure or influence was exerted on the applicant.
1048. *Legal Practice Act 1996* (Vic) s 103.
1049. A costs agreement must be fair and reasonable: *Family Law Rules* O 38 r 27(2). See para 4.39 above. The agreement must be entered into by the client without undue influence: see *Re P's Bill of Costs* (1982) 8 Fam LR 489.
1050. *Legal Profession Act 1987* (NSW) s 208Q; *Legal Practice Act 1996* (Vic) s 137(a)(v); *Legal Practitioners Act 1993* (NT) s 45(2)(d)(iii); *Queensland Law Society Act 1952* (Qld) s 3B(1)(b); *Re Veron; Ex parte Law Society of New South Wales* (1966) 84 WA (Pt1) (NSW) 136, 144.
1051. (Unreported) Court of Appeal (NSW) 6 October 1995.

if costs of this order in a single matrimonial property case between a married couple are truly regarded as reasonable, there may be something seriously wrong in the assessment of reasonableness within the legal profession which the court should resolutely correct.<sup>1052</sup>

4.43. The court in *Veghelyi* said that the fairness and reasonableness of costs will be affected by factors such as size of the firm, the resources available, the value lawyers place on their skill and expertise and the urgency of the client's needs.<sup>1053</sup> Fee scales can provide an appropriate, objective starting point as to whether fees charged are reasonable.<sup>1054</sup> Evidence of fees charged by other practitioners in the jurisdiction is also relevant.<sup>1055</sup>

4.44. The Federal Court can order taxation of a solicitor-client bill notwithstanding the existence of a costs agreement, but this remedy is not available in all jurisdictions.<sup>1056</sup>

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1052. *Council of the Law Society of NSW v Foreman* (1994) 34 NSWLR 408. This case, which involved a complaint about costs in the vicinity of \$500 000 in a Family Court matter, was dismissed by the Legal Professional Disciplinary Tribunal on the grounds that the solicitor and client had a valid costs agreement. Misconduct was proved because the solicitor had altered client documents after the event. In *Weiss v Barker Gosling (No 2)* (1993) 17 Fam LR 626 Fogarty J granted an application for a declaration that the costs agreement was invalid on the ground that the agreement was unreasonable. In *Raphael v Symonds* (unreported) Family Court of Australia 5 March 1998, Moss J set aside a fee agreement, finding that the client could not possibly have understood the implications of the agreement she had signed with her solicitor, that it had not been properly explained to her, and that she had been grossly overcharged. This decision was overturned on appeal as the client had delayed too long in challenging the validity of the costs agreement.
1053. For a detailed analysis of the 'new approach' in deciding if there has been overcharging, see R-Quick 'Overcharging' (1999) 19(7) *Proctor* 14.
1054. In *Weiss v Barker Gosling (No 2)* 17 Fam LR 626, 643 Fogarty J observed that the question of determining the reasonableness of a particular charge is not an easy one, and expressed the view that scale is a legitimate, objective starting point in this exercise. This view is implicit in most of the reported cases over many years; for recent examples, see *McInnes v Twigg* (1992) 16 Fam LR 185; and *In the Marriage of Kohan* (1992) 16 Fam LR 245, 258. In *New South Wales Crime Commission v Fleming* (1991) 24 NSWLR 116, 143, Kirby P referred to the scale as 'a useful guide' for the amounts to be allowed for 'reasonable legal expenses'. What are 'reasonable' legal expenses must be objectively determined. In *Schiliro v Gadens Ridgeway* (1995) 19 Fam LR 196, 204–5 the Full Court confirmed that scale charges are a primary factor in determining reasonableness: 'they may represent a starting point, but not a finishing point.' The case went on to say that evidence of market rates and market forces was relevant to an enquiry of reasonableness.
1055. *Re Veron; Ex parte Law Society of New South Wales* (1966) 84 WN (NSW) 136. Just because costs are independently assessed at a lower amount than in the lawyer's bill does not sustain a complaint that fees were unreasonable: *Meuz v Lloyd* (1857) 2 CB (NS) 409; 140 ER 476; *D'Alessandro v Legal Practitioners Complaints Committee* (1995) 15 WAR 198; R Quick and D Haber 'Overcharging' (August 1999) 19(7) *Proctor* 14, 15.
1056. Taxation is an independent assessment or quantification of an appropriate level of lawyers' charges. If parties, or a solicitor and client, disagree about the amount of costs payable they can seek to have those costs taxed. Rules of court provide for the taxation of bills of costs in different jurisdictions: High Court Rules O 71 r 74; Federal Court Rules O 62; Family Law Rules O 38 r 47. The rules relating to taxation in the High Court and the Federal Court ordinarily apply to party-party costs disputes. Disputes between solicitors and clients about costs usually are dealt with under State legislation and the rules of the Supreme Courts. The Family Court taxes



4.45. A 1993 report from the Lay Observer in Victoria (now the Legal Ombudsman) stated that a valid costs agreement between practitioner and client was no answer to a prosecution for professional misconduct constituted by gross overcharging.<sup>1057</sup> In response, the Council of the Law Institute of Victoria stated that a valid costs agreement should not expose a solicitor to disciplinary action for misconduct by reason only of the fact that the agreement seeks to commit the client to fees which may be greatly in excess of scale fees.<sup>1058</sup>

4.46. The Commission agrees with the Lay Observer's approach that gross overcharging misconduct should not be answered simply by proof of contract.<sup>1059</sup>

### *Legislative and professional requirements*

4.47. With the exception of Tasmania and Western Australia, legal professional rules do not explicitly require lawyers to charge a reasonable fee.<sup>1060</sup> The Law Council submitted that it is implicit in legal professional legislation and professional conduct rules that legal practitioners should charge fees which are reasonable in the circumstances.<sup>1061</sup> Where costs agreements between lawyers and clients are not fair and reasonable, legislation in most states provides that the

party-party and solicitor-client bills. In *Keith Hercules & Sons v Steedman* (1987) 78 ALR 353 the Full Court held that the power existed, exercisable only in extraordinary circumstances, to direct the taxation in the Federal Court of a disputed solicitor and client bill relating to Federal Court proceedings. In *Burgundy Royale Investments Pty Ltd (in liq) v Westpac Banking Corp Ltd* (1991) 28 FCR 308 Einfeld J held that 'the existence of an agreement does not exempt it from examination as to fairness, possible overcharging and therefore enforceability'.

1057. A Macken 'Gross overcharging: Do scale fees rule?' (1995) 69 *Law Institute Journal* 192. The Victorian Legal Ombudsman reaffirmed to the Commission that, in Victoria overcharging and the existence of a fee agreement are not mutually exclusive: Legal Ombudsman *Consultation* Melbourne 24 August 1999.

1058. *id* 193. See also *D'Alessandro v Legal Practitioners Complaints Committee* (1995) 15 WAR 198, 209-211 (Ipp J). The court found that the existence of a costs agreement between practitioner and client is no bar to disciplinary proceedings against the practitioner involving complaints of overcharging. It found that the test for determining whether excessive or unreasonable overcharging constitutes professional misconduct generally was more stringent than the test applied in taxation to determine that the costs of a bill should be reduced. For the situation in Queensland see K-Thompson 'Queensland Law Society Legislation Amendment Act 1997' (1998) 18(1) *Proctor* 12, 13.

1059. National Legal Aid also commented that 'It should not be the case that the existence of a valid cost agreement overrides the requirement that fees have to be reasonable': National Legal Aid *Submission* 360.

1060. The Law Society of WA Conduct Rules state that [a] practitioner shall charge no more than is reasonable by way of costs for his services having regard to the complexity of the matter, the time and skill involved, any scale costs that might be applicable and any agreements to costs between the practitioner and his client.

Law Society WA Conduct Rules, r 16.5. In Tasmania the rules require a practitioner to charge a 'reasonable' fee for work done. This rule applies only to non contentious business: Rules of Practice Tas, r 85.

1061. Law Council *Submission* 375.

agreement may be cancelled, rescinded or varied.<sup>1062</sup> When a bill is assessed or taxed and there is no costs agreement or relevant scale, the amount allowed will be that which is fair and reasonable.<sup>1063</sup>

4.48. The Commission proposed in DP 62 that legal professional conduct rules provide criteria for determining reasonableness of fees.<sup>1064</sup> It was suggested that these could be similar to the American Bar Association (ABA) Model Rules of Professional Conduct (ABA Rules).<sup>1065</sup>

A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

- the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- the fee customarily charged in the locality for similar legal services;
- the amount involved and the results obtained;
- the time limitations imposed by the client or by the circumstances;
- the nature and length of the professional relationship with the client;
- the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- whether the fee is fixed or contingent.

4.49. These factors are not intended to be exhaustive or prescriptive, but indicative of the matters to be taken into account. The Law Council did not object to this proposal, and in stating that the ABA rules provide a useful model,

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1062. In New South Wales an assessor, having regard to a comprehensive range of factors set out in the Act, may determine whether a term of a particular costs agreement was unjust: *Legal Profession Act 1987* (NSW) s 208D. In Victoria a costs agreement may be cancelled if it is not fair and reasonable: *Legal Practice Act 1966* (Vic) s 103. In Western Australia if an agreement is found by the Supreme Court to be unreasonable the amount payable may be reduced or the agreement cancelled: *Legal Practitioners Act 1893* (WA) s 59(1). In South Australia the Supreme Court may rescind or vary an agreement if it considers that any term of the agreement is not fair and reasonable: *Legal Practitioners Act 1981* (SA) s 42(6). In Tasmania an agreement may be set aside or amended by a taxing officer or arbitrator if it appears unfair and unreasonable in the circumstances: *Legal Profession Act 1993* (Tas) s 129. In the Northern Territory where a court considers a contract not fair and reasonable, it may direct the amount payable under the agreement to be reduced, or may declare that the agreement is not binding: *Legal Practitioners Act 1993* (NT) s 130. In the ACT where a court is satisfied an agreement is not fair and reasonable it may reduce the amount or declare the agreement not binding on the parties: *Legal Practitioners Act 1970* (ACT) s 191.

1063. For example, in Victoria costs are recoverable 'according to the reasonable value of the legal services provided': *Legal Practice Act 1996* (Vic) s 93. In New South Wales an assessor must consider the fairness and reasonableness of the amount of costs: *Legal Profession Act 1987* (NSW) s 208A. In Northern Territory, ACT and Queensland there is legislation in similar terms: *Legal Practitioners Act 1993* (NT) s 123; *Legal Practitioners Act 1970* (ACT) s 183; *Queensland Law Society Act 1952* (Qld) s 48I.

1064. ALRC DP 62 proposal 4.6.

1065. American Bar Association *Annotated model rules of professional conduct* 3rd ed ABA Chicago 1996, r-15.

suggested an additional factor: ‘the commercial experience and sophistication of the client’.<sup>1066</sup> While National Legal Aid favoured the proposal, with reservations,<sup>1067</sup> the Victorian Bar responded that it does not regard it as appropriate to incorporate ‘good practice’ rules into professional practice rules, which are primarily concerned with ethical standards.<sup>1068</sup> The Australian Capital Territory Bar also opposed the proposal.<sup>1069</sup> One law firm expressed the view that rules should be a statement of general principle only, and that the supervision and amplification of the rules should be left to the court in its supervisory capacity.

The great merit of the common law in establishing appropriate professional practice is that it forges its rules after extensive testing in actual matters, and that professional rules with commentary risk becoming long and prolix.<sup>1070</sup>

4.50. The Commission sees value in professional associations setting criteria relevant to determining whether a fee is ‘reasonable’ and invoking sanctions of unsatisfactory professional conduct<sup>1071</sup> or professional misconduct for breach.<sup>1072</sup> Such guidance is appropriate for practitioners, is symbolically important in confirming the profession’s concern and responsibility in this area, and in the public interest.

**Recommendation 27.** The Law Council of Australia should ensure that national model professional practice rules include a rule setting out the factors

1066. Law Council *Submission 375*.

1067. National Legal Aid raised concerns about including the fee rates charged by other practitioners in the list of factors to be considered in determining whether fees are reasonable as this fails to address incidents of overcharging; National Legal Aid *Submission 360*.

1068. The Victorian Bar was also of the view that any advantages to a principle-rule-commentary structure to practice rules are outweighed by the danger of confusion and prolixity; Victorian Bar *Submission 367*.

1069. ACT Bar Association *Submission 370*.

1070. Freehill Hollingdale & Page *Submission 339*. See also para 3.72–3.96.

1071. For example, unsatisfactory professional conduct includes conduct (whether consisting of an act or omission) occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner or interstate legal practitioner: *Legal Profession Act 1987* (NSW) s 127(2).

1072. For example, professional misconduct includes

- (a) unsatisfactory professional conduct, where the conduct is such that it involves a substantial or consistent failure to reach reasonable standards of competence and diligence, or
- (b) conduct (whether consisting of an act or omission) occurring otherwise than in connection with the practice of law which, if established, would justify a finding that a legal practitioner is not of good fame and character or is not a fit and proper person to remain on the roll of legal practitioners, or
- (b1) conduct (whether consisting of an act or omission) occurring otherwise than in connection with the practice of law which, if established, would justify a finding that an interstate legal practitioner is not of good fame or character or is not a fit and proper person to remain on the roll in the practitioner’s home State that corresponds to the roll of legal practitioners: *Legal Profession Act 1987* (NSW) s 127(1).

relevant to a determination of whether legal fees charged are reasonable. The American Bar Association model rule on reasonable fees should serve as a guide in drafting such a rule. The rule should explicitly state that charging unreasonable fees could constitute unsatisfactory professional conduct and gross overcharging could constitute professional misconduct.

## Proportionality

4.51. The proportion of the value of a claim that was expended on legal costs was a focus of the Woolf inquiry in the United Kingdom<sup>1073</sup> and featured strongly in the recent report by the Law Reform Commission of Western Australia.<sup>1074</sup> In both inquiries there was a concern that costs were disproportionate to the value of the claim.

4.52. Although, as in the Commission's data quoted above, the average or median or range costs for federal matters can be measured, it is a different matter to evaluate whether such fees were reasonable, prudent or excessive in particular circumstances. One measure tested by Professor Genn in examining British case samples for the Woolf inquiry was whether the costs incurred were proportionate when measured against the money value of the claim. Professor Genn found the median costs among the lowest value claims in High Court jurisdiction in England and Wales (£12500 or \$31 489)<sup>1075</sup> represented more than 100% of claim value. In cases involving between £12500 and £25000 (\$65 978) average costs ranged from 41% to 96% of the claim value. The highest value claims (more than £250 000 or \$629 778) had costs ranging from 1% to 19% of the claim.<sup>1076</sup> As noted, Australian jurisdictional limits mean that, with the exception of Family Court matters, most low value claims are litigated in the lower courts.<sup>1077</sup> Lower courts generally adopt summary processes which are less expensive for parties. On this basis, there should be fewer disproportionate costs for low value claims in Australia.

4.53. An evaluation of the proportionality of costs and the legal claim is difficult to test in federal jurisdiction. A significant proportion of the litigation in the Federal Court and Family Court and federal review tribunals does not concern quantifiable money claims. A case may have no amount in dispute or a notional or unquantified amount, for example, a trademark, allegations of misleading and deceptive conduct, an administrative decision concerning a visa or benefit, or a family dispute concerning finances with related questions about parental contact with, or residence of, children.

4.54. The Commission did evaluate legal costs as against the value of family property in Family Court matters where such information was noted on the file.

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1073. Lord Woolf *Access to justice: Final report to the Lord Chancellor on the civil justice system in England and Wales* HMSO London 1996 (Woolf final report), ch 7.

1074. Law Reform Commission of Western Australia *Review of the criminal and civil justice system in Western Australia – Final report* Project 92 LRCWA September 1999, ch 16.

1075. Conversions based on the exchange rate at 7 January 2000 (£1 = \$A2.52).

1076. Woolf final report, 17, annex III, para 19. The research was based on 2184 cases sampled from those submitted to the Supreme Court Taxing Office in 1990–95. The sample cases were divided roughly equally into 10 case types: medical negligence, personal injury, profession negligence, Official Referees', breach of contract, Chancery, Queen's Bench, 'other', commercial, and bankruptcy/Companies Court cases.

1077. See para 4.7.

Several judges and the Family Court submission observed that, in their experience, parties' litigation costs substantially eroded the equity in family property and that some children's matters also involved disproportionate expenditure, having regard to the complexity of the issue involved.<sup>1078</sup> The Commission's data showed, however, that the median legal costs expressed as a percentage of property value was 3% (n=151) and 12% at the 90th percentile. That is, only one in ten of the sampled family litigants expended more than 12% of the value of the property in issue on legal costs.<sup>1079</sup> This is not to say there is not disproportionate expenditure on legal costs. On the basis of the British study,<sup>1080</sup> disproportionate legal costs arise when simpler cases are dealt with in superior courts. The federal magistracy and Family Court summary processes should help in this regard.<sup>1081</sup>

## The impact of government

4.55. Government has a limited capacity to influence private legal costs. Government can regulate the processes for, and mandate fair and reasonable contracts between clients and their lawyers, it can set up lower level and lower cost courts,<sup>1082</sup> subsidise alternative dispute resolution processes, raise, lower or exempt filing or hearing fees for courts and tribunals, and work indirectly to influence legal costs through competition policy principles within the legal profession. Governments also impact on legal charges and fees via the scales set for costs awards in litigation. Radical proposals initiated by the federal Attorney-General and federal courts could have a significant impact on fee charging and assessment.

## The impact of legislation

4.56. The government also affects litigation and legal costs through the legislation it passes. Justice McHugh has noted that in Australia the number of Acts has steadily increased,<sup>1083</sup> and legislation is now significantly more complex.<sup>1084</sup> One measure of complexity is indicated by the sheer size of the

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1078. This occurred notwithstanding the cost disclosure requirements to parties required in family litigation. See Family Court of Australia *Submission 348*. The Family Court plans to implement summary procedures for such matters. See also para 8.79, 8.264.

1079. Property values were derived from the average of the values declared by the husband and the wife or the value of the property declared by the husband or the wife, if only one party provided a figure: TMatruglio & G McAllister, *Family Court Empirical Information Part One*, 11.

1080. See fn 123.

1081. See para 8.151.

1082. For example, by requiring routine work to be conducted by the proposed federal magistracy rather than in a superior court of record: D Williams 'Federal magistrates bills pass the House of Representatives' *News release* 20 October 1999 <[http://law.gov.au/aghomes/agnews/1999newsag/631\\_99.htm](http://law.gov.au/aghomes/agnews/1999newsag/631_99.htm)> (26 October 1999).

1083. 17 Acts were passed in 1901, 82 in 1951, 182 in 1981, 216 in 1991, and 135 in 1998: Statute Stocktake Bill 1998 *Explanatory memorandum* Parliament of Australia 1998.

1084. M McHugh 'The growth of legislation and litigation' (1995) 69 *Australian Law Journal* 37, 38.

legislation. In 1973, 221 Acts comprising 1624 pages were passed. In 1991, 216 Acts comprised 6905 pages, a 325% increase. This complexity is also reflected in secondary legislation. In 1980, 407 instruments were tabled on 1199 pages. In 1991, the 489 instruments tabled comprised 3144 pages.<sup>1085</sup> Justice McHugh suggested a direct correlation between the quantity and scope of legislation and a growth in litigation and stated that

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1085. *ibid.*

[c]omplex legislation increases litigation because it becomes harder, if not almost impossible for people to know their rights and duties under the law without recourse to litigation.<sup>1086</sup>

4.57. There are clear signs that government is attentive to this relationship between legislation, rights based and regulatory regimes and subsequent litigation pressures. One example in federal jurisdiction concerns the varied legislative roles and arrangements for dispute resolution of the Australian Competition and Consumer Commission (ACCC). Since 1992 the ACCC has had the ability, through s 87B of the Trade Practices Act, to accept written undertakings from a person in connection with breaches of the Act. The ACCC accepted 285 such undertakings from February 1993 to May 1999, which comprise significant and effective non litigious outcomes. Further the ACCC has an arbitration role concerning particular disputes relating to access to services.<sup>1087</sup> In addition, industry codes of conduct such as the Franchising Industry Code, Oil Code, National Electricity Code and benchmarks for dispute avoidance and resolution are increasingly focussed upon the resolution of disputes without recourse to litigation.<sup>1088</sup>

4.58. The Ontario Legal Aid Review stated that the complexity of the law may 'impose an obligation on the state to facilitate access to the effective use of that law'.<sup>1089</sup> When changing legislation, the government should consider the impact this may have on litigation.<sup>1090</sup>

4.59. Presently there are two committees which examine legislation and legislative instruments before federal parliament. The Senate Scrutiny of Bills Committee examines all bills and is required to report on whether bills or Acts

- (i) trespass unduly on person rights or liberties;
- (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

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1086. id 42. See also High Court *Annual report 1987-1988*, 21; High Court *Annual report 1997-98*, 57; Federal Court *Annual report 1989-1990*, 59; Federal Court *Annual report 1997-98*, 97; Family Court of Australia *Annual report 1989-90*, 129; Family Court of Australia *Annual report 1997-98*, 74; AAT *Annual report 1989-1990*, 171; AAT *Annual report 1997-98*, 109.

1087. Trade Practices Act Pt IIIA (Access to services), Pt XIC (Telecommunications access regime), s-152CT: S Bhojani 'The Australian Competition and Consumer Commission's ADR experience' *Conference paper The management of disputes involving the Commonwealth - Is litigation always the answer?* Canberra 22 April 1999, 79, 92.

1088. See also Treasury *Directory of consumer dispute resolution schemes and complaint handling organisations 2000* AusInfo 1999; A Fels 'The growing importance of conflict management' *Conference paper The management of disputes involving the Commonwealth - Is litigation always the answer?* Canberra 22 April 1999, 1.

1089. Ontario Legal Aid Review *Report of the Ontario Legal Aid Review: a blueprint for publicly funded legal services* Queen's Printer for Ontario 1998, ch 5  
<<http://www.attorneygeneral.jus.gov.on.ca/olar/ch5.htm>> (18 June 1999).

1090. B Walker SC *Speech* ALRC Cost of Justice seminar Sydney 19 May 1999.



- (iv) inappropriately delegate legislative powers; or
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.<sup>1091</sup>

4.60. The Senate Standing Committee on Regulations and Ordinances examines delegated legislation 'to ensure their compliance with non-partisan principles of personal rights and parliamentary propriety.'<sup>1092</sup> The Committee is required to examine delegated instruments to ensure

- (a) that it is in accordance with the statute;
- (b) that it does not trespass unduly on personal rights and liberties;
- (c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and
- (d) that it does not contain matter more appropriate for parliamentary enactment.<sup>1093</sup>

4.61. The Access to Justice Advisory Committee (AJAC) considered the role of such committees and the Commission agrees with AJAC's observations on the need for improved scrutiny of legislation. AJAC recommended the need for these committees to have better resources to fulfil their role<sup>1094</sup> and the Commission endorses this view. However, the Commission notes that there is presently no requirement on either Committee to consider the impact new legislation may have on cost, complexity and volume of litigation or administrative review, and recommends that the Committees' functions be expanded to have regard to this.<sup>1095</sup>

**Recommendation 28.** The Senate Scrutiny of Bills Committee and the Senate Standing Committee on Regulations and Ordinances should have their standing orders modified, directing them, when considering new legislation, to have regard to the likely impact of the proposed legislation, ordinance or regulation on the cost, complexity and volume of litigation or administrative review.

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1091. Senate Standing Order 24(1)(a) <<http://www.aph.gov.au/senate/pubs/orders97/ch5-1.htm>> (15 December 1999). See also Senate Scrutiny of Bills Committee 'Information about the Committee' <<http://www.aph.gov.au/senate/committee/scrutiny/index.htm>> (15 December 1999).
1092. Senate Regulations and Ordinances Committee 'Information about the Committee' <[http://www.aph.gov.au/senate/committee/regord\\_ctte/index.htm](http://www.aph.gov.au/senate/committee/regord_ctte/index.htm)> (15 December 1999).
1093. Senate Standing Order 23(3) <<http://www.aph.gov.au/senate/pubs/orders97/ch5-1.htm>> (15-December 1999).
1094. Access to Justice Advisory Committee *Access to justice – an action plan* AGPS Canberra 1994 (AJAC Report), para 21.47, rec 21.4. See also Senate Standing Committee on Legal and Constitutional Affairs *The cost of justice – Checks and imbalances – Second report* Senate Printing Unit Canberra 1993, para 2.29-2.34, rec 4-7.
1095. The Justice Research Centre is presently undertaking a study on the impact of the form of legal rules, specifically into the effect of fixed rules versus discretionary principles: JRC 'JRC awarded two major research grants' (August 1998) 11 *Justice Issues* 1.

### **Improving the legal market**

4.62. The application of competition policy is one way the Commonwealth has sought to enhance access to justice and reduce the private costs of federal litigation.<sup>1096</sup> The AJAC report supported this approach.<sup>1097</sup> In 1994 the Trade

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1096. The National Competition Policy (NCP) reform package is stated to have been designed to improve the efficiency of the Australian economy, leading to lower prices for consumers and raised living standards, whilst recognising that the public interest must be taken into account in pursuing the reforms: National Competition Council *National competition policy: Some impacts on society and the economy* AusInfo Canberra 1999, 3.

1097. AJAC report, 12-13.

Practices Commission recommended that the Trade Practices Act should apply in full to the legal profession.<sup>1098</sup> An early application of competition policy took place in New South Wales and as a result

conveyancing fees in NSW fell 17 percent between 1994 and 1996, after the abolition of the legal profession's monopoly and the removal of price scheduling and advertising restrictions, leading to an annual saving to consumers of at least \$85million.<sup>1099</sup>

4.63. At a seminar on competition policy in 1997,<sup>1100</sup> Dr John Tamblyn<sup>1101</sup> spoke of deregulation reforms and promotion of competition in the legal services market, stating that the effects of the reforms in New South Wales suggest that there is effective competition at the big business end of the market but there may be market failure problems where there are small clients involved. This view is shared by New South Wales Legal Services Commissioner Steve Mark,<sup>1102</sup> who noted that deregulation cannot work if consumers do not have access to price information.<sup>1103</sup> In the Commission's recommendations relating to consumer information the Commission seeks to rectify this position.<sup>1104</sup>

4.64. The New South Wales Attorney-General's report<sup>1105</sup> on competition policy noted additional failings of competition reforms, namely: widespread non compliance with disclosure requirements; disclosure of an hourly rate only; the failure of consumers to compare prices; the incidence of lawyers charging contingency fees for cases where success is almost assured; and the lack of any restriction on lawyers changing their fee estimate. The report concluded that the

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1098. Trade Practices Commission *Study of the professions – Legal* Final report TPC Canberra 1994 (TPC final report), 7–12. See also A Fels 'Can the professions survive under a national competition policy? – The ACCC's view' *Paper* Joint conference – Competition law and the professions 11-April 1997 <<http://www.accc.gov.au/docs/speeches/sp10of97.htm>> (3 August 1999).

1099. A Fels 'Can the professions survive under a national competition policy? – The ACCC's view' *Paper* Joint conference – Competition law and the professions 11 April 1997 <<http://www.accc.gov.au/docs/speeches/sp10of97.htm>> (3 August 1999).

1100. Parliament of New South Wales, Legislative Council Standing Committee on Law and Justice, Proceedings of the Seminar on the Motor Accidents Scheme (Legal Costs) Report No 5 June 1997. The Chairman said

To my knowledge this seminar is the first occasion on which the actual effect of the application of the Hilmer competition policy framework to the legal profession has been reviewed, anywhere in Australia.

1101. J Tamblyn *Address* Parliament of New South Wales, Legislative Council Standing Committee on Law and Justice, Proceedings of the Seminar on the Motor Accidents Scheme (Legal Costs) Report No 5 June 1997.

1102. S Mark *Address* Parliament of New South Wales, Legislative Council Standing Committee on Law and Justice, Proceedings of the Seminar on the Motor Accidents Scheme (Legal Costs) Report No 5 June 1997.

1103. The A-G's Dept (NSW) *National competition policy review of the Legal Profession Act 1987: Report* A-G's Dept (NSW) Sydney November 1998 expressed concerns as to whether the reforms had produced a more competitive market.

1104. See para 4.65–4.71 and rec 29.

1105. The A-G's Dept (NSW) *National competition policy review of the Legal Profession Act 1987: Report* A-G's Dept (NSW) Sydney November 1998.

removal of scales had enhanced competition in certain areas of practice where the services are predictable, such as conveyancing, but it was not clear that competition has affected prices in areas involving non-routine work, such as litigation.

## Information on costs

4.65. The lack of consumer information on the costs of legal services is a major factor inhibiting downward pressure on legal fees, and thus retarding access to justice.<sup>1106</sup> Consumers informed about the range of legal services available and the likely charges and time commitments are in a better position to negotiate fee agreements and make informed choices about legal advisors.

4.66. This type of information is already available to institutional consumers of legal services such as government departments and agencies, insurance companies and other large corporations who are repeat players.<sup>1107</sup> It assists them to compare, assess and negotiate fees, and to drive hard and effective bargains with lawyers. Major repeat purchasers of legal services are also in a position to seek tenders for legal work, or to establish their own inhouse legal offices.

4.67. The information available to consumers of legal services is asymmetric. Due to disclosure requirements, people may have better, early information from their solicitor on how much their matter will cost, but little additional information to compare this with or to place it into a meaningful context.<sup>1108</sup>

4.68. There is some concern about price collusion arising from the publication of such information. The Commission considers that this is not a real problem in the legal services market. Information on legal costs is already available but is restricted to institutional or informed consumers. The Commission expects better information would assist consumers to make more informed choices about their spending on legal services.

### *Information for consumers*

4.69. The diversity of legal matters and the fluctuating costs involved are such that it is difficult to provide information to consumers and explain and present it in such a way that consumers are not misled as to the likely cost of their matter.

4.70. In DP 62 the Commission proposed that the government should legislate to require lawyers working in federal jurisdiction to advise clients of comparative

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1106. AJAC report, 129. See also TPC final report and Senate Standing Committee on Legal and Constitutional Affairs *The cost of justice, foundations for reform* AGPS Canberra 1993 (Cost of Justice 1st Report); Report of the review body on civil justice *Civil Justice Review* HMSO London 1988 (Hodgson report); American Bar Association *An agenda for justice: ABA perspectives on criminal and civil justice issues* ABA Chicago 1996.

1107. eg Telstra Corp expects annual savings of \$5 million from a recent tender for legal services work: ABurrell 'Telstra prunes its legal services' *Aust Fin Rev* 7 January 2000.

1108. S Pattison *Speech* ALRC Cost of justice seminar Sydney 19 May 1999, citing J Tamblyn *Address* Parliament of New South Wales, Legislative Council Standing Committee on Law and Justice, Proceedings of the Seminar of the Motor Accidents Scheme (Legal Costs) Report No 5 June 1997.

fee information at the time costs disclosure is made to the client.<sup>1109</sup> The Commission's proposal that practitioners provide comparative fee information to clients as part of costs disclosure was not well received by legal professional associations, but was supported by National Legal Aid and the ACCC.<sup>1110</sup> Practitioners indicated that it was too onerous, unfair and outside the knowledge of most practitioners. It was also considered to be contrary to normal commercial practice.<sup>1111</sup> Some practitioners stated that it could imperil the costs disclosure requirements if lawyers were obliged to indicate the full range of fees for services, including those for legal aid or inexperienced lawyers. The Family Court Rules deal with this problem by requiring disclosure of court costs brochures to clients. Such brochures could be published by federal merits review tribunals and distributed to all applicants. This information is particularly useful in the migration jurisdiction where the applicants are particularly vulnerable to overcharging from migration agents.

4.71. The Commission sees the force in some of these practical concerns from the profession and is anxious not to overload and defeat the present costs disclosure provisions as these impact on individual lawyers. However, the information is essential for consumers and while individual practitioners may not be charged with the responsibility to disseminate this, the Commission supports legal professional associations or legal ombudsmen undertaking a more active role publishing the range of charge rates for lawyers in different specialities, firm sizes, city, suburban and regional practices. This information could be published on the websites of the legal professional associations and in brochures distributed in courts and tribunals. As the information relates to existing practices and is intended to inform consumers it should not offend against the competition policy principles.

4.72. ***Federal Legal Services Forum.*** In DP 62 the Commission also proposed that a Federal Legal Services Forum (the Forum) be established, with a role to review and advise on improving the national legal services market for consumers, to

- coordinate data collection and issue information regarding fees and costs associated with various legal services in the federal jurisdiction
- facilitate the development of policies and benchmark standards to enhance legal services on a national basis

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1109. ALRC DP 62 proposal 4.3. This information was to include court scales and information published by the proposed Federal Legal Services Forum: see para 4.72– 4.78.

1110. ACT Bar Association *Submission 370*; ACT Bar *Consultation* Canberra 28 September 1999; Law Council of Australia *Submission 375*. National Legal Aid supported the proposal: National Legal Aid *Submission 360*, as did the ACCC: ACCC *Submission 396*.

1111. ACT Bar *Consultation* Canberra 28 September 1999; Law Council *Submission 375*.

- identify areas in need of reform in legal services provision and undertake or facilitate research in such areas.<sup>1112</sup>

4.73. The Forum also was envisaged as providing advice to the federal Attorney-General on consumer issues concerning the federal legal services market. The Commission considered that the Forum would provide a national consumer focus for users of legal services. For example, the Florida Bar Citizens Forum was set up to

provide a vehicle for two-way communication between Florida's major citizens constituencies and the [Bar] to inform and educate the public about significant legal-justice issues and to gain public understanding and support.<sup>1113</sup>

4.74. Submissions received by the Commission directly addressing the Forum proposal generally supported the functions proposed to be carried out by the Forum but questioned the need for another federal organisation.<sup>1114</sup> National Legal Aid submitted that it may be more effective and efficient to fund an existing organisation to undertake the functions envisaged for the Forum.<sup>1115</sup> National Legal Aid also questioned whether the Forum could benefit the most vulnerable consumers who may have difficulty accessing yet another source of information. The Victorian Bar Council argued that the Forum would not be necessary as existing State bodies, such as ombudsman's offices, can undertake the coordination of data and development of benchmark functions envisaged.<sup>1116</sup>

4.75. The Commission agrees that the functions proposed for the Forum are currently performed in varying degrees by a range of private and public organisations. The collection and publication of costs and fees data are carried out by bodies such as the Financial Management Research Centre (FMRC)<sup>1117</sup> and the ABS.<sup>1118</sup> The type of data collected and the restricted availability of the information limits the use for one-off consumers of legal services.

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1112. ALRC DP 62 proposal 4.4.

1113. Florida Bar Citizens Forum *Charter* Florida Bar 9 April 1999.

1114. National Legal Aid *Submission 360*; Victorian Bar Council *Submission 367*; Law Council *Submission-375*.

1115. National Legal Aid *Submission 360*.

1116. Victorian Bar *Submission 367*.

1117. The FMRC conducts annual surveys of legal practice charge out rates throughout Australia. It contains comparisons of charge out rates between different regions across Australia and between different sized firms in different areas of practice. The surveys are geared towards practitioners wanting to evaluate the charge rates, salaries and budgets of their practice. The sample size is usually small and the cost of survey (about \$160) limits its utility for many one-off consumers: Financial Management Research Centre *FMRC's 1998 legal practice charge rate, productivity and salary survey – participants' report* FMRC University of New England Armidale NSW 1998.

1118. The ABS, as part of its service industries survey program, regularly surveys legal (and accounting) services. The survey provides information on the size of the legal services industry, the size of firms and the income and expenses of firms across Australia. The most recent survey was for the years 1995-96 (ABS Catalogue No. 8678.0). While this is a useful picture of the industry it has limited application for consumers. See also ALRC DP 62 para 4.39-4.40.

4.76. At the state level, legal services ombudsmen are increasingly involved in educating consumers about legal services – particularly in relation to costs and consumers' rights.<sup>1119</sup> Statutory authorities such as the ACCC and Australian Securities and Investments Commission (ASIC) have a strong consumer focus aimed at informing and educating consumers about their rights and obligations under legislation. ASIC has a Consumer Advisory Panel comprised of representatives of consumer organisations involved in the financial services sector.<sup>1120</sup> Legal professional bodies, legal services ombudsmen, consumer groups and government are developing policies and benchmarks to enhance legal services.

4.77. Most law societies, bar associations, community legal centres and other consumer lobby groups have stated law reform objectives relevant to the cost of justice. For example, the Law Council's mission statement includes the promotion of 'the administration of justice, access to justice and general improvement of the law'. The Law Society of New South Wales has recently published its report on access to justice, recommending extensive changes that impact on consumers of legal services.<sup>1121</sup> Each year such professional organisations collect information from their members on charge out rates in the central business districts, and suburban and regional areas, and fees charged by barristers of varying experience.<sup>1122</sup>

4.78. *The Commission's view.* The Commission is reluctant to recommend the establishment of a new body if the functions envisaged for the Forum could be as efficiently and effectively carried out by existing agencies.

4.79. The Commonwealth Consumer Affairs Advisory Council (CCAAC) currently provides 'independent advice on the current or likely impact on consumers of development in the Australian market' to the Minister for Financial Services and Regulation.<sup>1123</sup> The members are drawn from a cross-section of

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1119. See eg *With respect* (July 1999) 6 – the official newsletter of the Victorian Legal Ombudsman, and costs fact sheets published by that organisation. Various legal ombudsmen, (for example, the Legal Ombudsman (Vic) and the Office of Legal Services Commissioner (NSW)), as part of their overall function, document emerging consumer issues relating to the provision of legal services and draw them to the attention of State Attorneys-General, law societies and bar associations.

1120. The Consumer Advisory Panel encourages 'consumers to identify issues that directly affect them' and is provided with opportunities to comment on proposed policies: ASIC *Consumer Advisory Panel* <<http://www.asic.gov.au/page-532.html>> (5 October 1999).

1121. Including, for example, a review of the advertising rules for the legal profession (rec 34) and the development and implementation of programs to educate consumers about their rights in relation to dealing with legal practitioners (rec 32): Access to Justice Taskforce *Access to justice – final report December 1998* Law Society of NSW Sydney 1998.

1122. That is, a barrister with under 5 years experience, 5–10 years, and over 10 years experience.

1123. The terms of reference provide for the CCAAC to

- investigate and report on consumer issues referred to it by the Minister
- advise on consumer education matters referred to it by the Minister



consumer, business and community organisations and meet at least three times a year. The current focus of the CCAAC does not extend to looking at consumer issues relating to the provision of legal services,<sup>1124</sup> although this would be within its power.<sup>1125</sup>

4.80. The Commission sees considerable benefit in CCAAC oversight and dissemination of consumer information on legal services. It is a broadly constituted consumer group with experience in a number of diverse areas. The issue of providing information on legal services to consumers is not a technical legal problem but a wide ranging consumer one, requiring a distinct consumer focus. Given the State and Territory divisions in the legal profession there is no national focus to the information. Further, legal costs to consumers represent the income for lawyers. The interests of legal professional associations do not equate to consumer interests and there may be a perception of a conflict of roles and interests.

4.81. The CCAAC is able to provide a consumer focus and continuing national oversight. It may need some limited additional funding to make legal services a priority issue. The CCAAC could bring together the various bodies and act as a clearing house, identifying gaps in the quality and substance of the information provided by the various legal, consumer and community organisations, and could work collaboratively with these organisations to identify issues and develop policies concerning consumers of legal services, as well as providing advice to government. The CCAAC has referred this issue to its responsible minister 'as an emerging issue of importance to consumers.'<sup>1126</sup>

**Recommendation 29.** The federal Minister for Financial Services and Regulation should ask the Commonwealth Consumer Affairs Advisory Council to assume responsibility for providing independent advice and information to consumers on consumer issues relating to the provision of legal services.

**Recommendation 30.** Legal professional associations, and legal services commissioners or ombudsmen should collect information on, and publish in a public, accessible form, the range of charge rates for lawyers in different specialities, firm sizes (including for firms situated in the central business

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- consider and report on the likely consumer impacts of reports or papers referred to it by the Minister
  - identify emerging issues impacting on consumers and draw those to the attention of the Minister: Minister for Financial Services and Regulation *Press release* 20 May 1999 <[www.minfsr.treasury.gov.au/pressreleases/1999/1999\\_014.asp](http://www.minfsr.treasury.gov.au/pressreleases/1999/1999_014.asp)> (5 October 1999).

1124. CCAAC *Telephone conversation* 5 October 1999.

1125. CCAAC *Consultation* 24 November 1999.

1126. CCAAC *Correspondence* 10 December 1999.

districts, and suburban and regional areas) and fees charged by barristers of varying experience.

**Recommendation 31.** Federal merits review tribunals should publish information concerning the costs and charges for representatives dealing with relevant case types and distribute this information to applicants when lodging their claims. This information is particularly important in the migration jurisdiction where applicants are vulnerable to overcharging. The information should be obtained from the Migration Institute of Australia, the peak representative body for migration agents.

#### *Information for government*

4.82. There is also a need for greater information in the public domain on government spending on legal services. Information on the extent of government expenditure on legal services can assist government to evaluate their spending on litigation or alternative dispute resolution services, and formulate appropriate strategies for dispute prevention, dispute resolution, and efficient use of legal services.

4.83. The change to a system of accrual accounting for federal agencies has increased individual agency and department responsibility and accountability for budgets. In federal jurisdiction where government is a key litigant, the government can be an important standard setter for fees. Government agency publication of median costs for case types would be a way for the government, advantaged as a repeat player, to disseminate consumer information on legal costs. This information is presently unavailable.

4.84. In DP 62 the Commission identified the difficulties in obtaining information on government expenditure on legal services and litigation. Figures on government spending on legal services are necessarily estimates. There is no systematic collection of these figures. Estimates of government expenditure on legal services range from \$75–\$198 million per annum.<sup>1127</sup>

4.85. The sources of information currently available comprise statistics compiled by the ABS,<sup>1128</sup> the Logan report,<sup>1129</sup> Commonwealth budget papers<sup>1130</sup> and annual reports of government departments and agencies. The yearly data from the budget papers and annual reports is deficient in detail on government spending on legal services. Information on legal services is generally included in the 'Compensation and legal expenses' component, and, for spending on services provided by the Australian Government Solicitor, in the 'running costs' component of the agency budget. The two items, 'compensation' and 'legal services' expenses, should be disaggregated, as some agencies make sizable and fluctuating compensation payments.<sup>1131</sup> All spending on legal services should be specifically noted as such. Although this information is presently not required in the annual reports of departments and agencies, it is available to the organisation itself.<sup>1132</sup>

4.86. The Commission recommends that information on government expenditure on legal services be disaggregated into 'Compensation' and 'Legal expenses' components. The 'Legal expenses' component should be divided into internal and external components to reflect inhouse legal work, salaries for inhouse lawyers, and the work that is referred out to AGS or private firms. This information should be reported in the annual reports of government departments and agencies and collected and reported on by the Office of Legal Services Coordination.

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1127. Australian Bureau of Statistics 1995–96 *Legal and accounting services* ABS Catalogue No 8678.0 1997, 11; B Logan et al *Report of the review of the Attorney-General's legal practice* AGPS Canberra March 1997 (Logan report), para 4.27. The difficulty of obtaining information on the spending of government on legal services was acknowledged in the Logan report at 60 and by the Attorney-General: J Clout 'Law firms eager to compete with AGS' *Aust Fin Rev* 20 March 1999, 54. The ACCC alone spent \$9.5 million on internal and external legal services in 1998–99, and \$6.9 million in 1997–98: ACCC *Submission* 396. Customs spent \$1.3 million of the \$2.1 million in the 'Compensation and legal services' component on legal services in 1997–98: Australian Customs Service *Correspondence* 27 May 1999.

1128. Australian Bureau of Statistics 1995–96 *Legal and accounting services* ABS Catalogue No 8678.0 1997.

1129. B Logan et al *Report of the review of the Attorney-General's legal practice* AGPS Canberra March 1997.

1130. See, for example, Commonwealth Public Account 1998–99 *Budget Paper No 4* AGS Canberra 1998.

1131. For example, the Department of Defence, which in 1997–98 spent \$121.8 million on 'Compensation and legal services'. Of this only \$5.8 million was spent on non-AGS legal fees; the rest was for compensation. Services from AGS of \$3.1 million were recorded in the 'Running costs' component of the budget: Department of Defence *Correspondence* 30 April 1999.

1132. As noted above, the Department of Defence, Australian Customs Service and the ACCC all provided this information to the Commission.

**Recommendation 32.** Federal government departments and agencies should be required to disaggregate the 'Compensation and legal services' component of their budgets to create separate 'Compensation' and 'Legal expenses' components. The legal expenses component should note the

*Recommendation 32 cont'd*

amounts spent on inhouse legal work and salaries and outsourced legal work. These amounts should be reported in the annual report of each department or agency and provided to the Office of Legal Services Coordination to prepare an annual report on the costs of legal services provided to the government.

## Fee scales

4.87. In federal jurisdiction the High Court, Federal Court and Family Court each have fee scales prescribed in regulations.<sup>1133</sup> These scales are used to determine the amount of costs to be paid to the successful party where a costs order is made at the conclusion of litigation (party-party costs) and the default amount the client pays to a solicitor if they had not made or complied with procedures for a costs agreement (solicitor-client costs). Although not explicitly designed for this purpose, scales also provide information on costs and assist some solicitors in price setting.<sup>1134</sup> Thus in setting scales, government indirectly affects the market price for legal services. The present scales are item based, with fees set for particular services; for example, photocopying charges. The scales have been criticised as 'badly structured'<sup>1135</sup> and as

- creating uncertainty about the amount a successful litigant will recover
- promoting litigation (rather than settling or controlling expenditure) with parties assuming they will recover most of the increased expenditure
- rewarding certain work (such as engrossing, drawing and photocopying) which may bias the activity of solicitors towards such work.<sup>1136</sup>

1133. No scales exist in the AAT. However, where the tribunal has the power to order or recommend that the respondent pay all or part of the costs of a successful applicant, the costs are assessed on a party and party basis at 75% of the Federal Court scale, unless the order otherwise determines: *AAT General practice direction* 18 May 1998.

1134. *Law Council Submission by the Law Council of Australia to the Attorney-General's Department in respect of report of the review of scales of legal professional fees in federal jurisdictions* Law Council July 1999, 16-17.

1135. P Williams et al *Report of the review of scales of legal professional fees in federal jurisdictions* A-G's Dept March 1998, 1 (Williams report).

1136. *id* 15-20. The Trade Practices Commission has also argued that item based scales reward inefficiency by encouraging work to be performed in outmoded ways, rather than passing on the benefits of new technology or practice management to consumers: TPC Final report, 157.

*The Williams proposal*

4.88. The Williams report, commissioned by the federal Attorney-General and the federal courts, proposed a fixed costs scheme with charges fixed for work of varying complexity as at particular case events.<sup>1137</sup> The scheme is to determine

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However, the Law Council rejects the suggestion in the Williams report that scales with hourly billing rates encourage overservicing or wasteful expenditure: Law Council *Submission by the Law Council of Australia to the Attorney-General's Department in respect of report of the review of scales of legal professional fees in federal jurisdictions* Law Council July 1999, 27–31.

1137. Williams report, 1.

party-party costs and, if there is no enforceable fee agreement, the solicitor-client costs. The proposed scheme envisages a judge deciding at an initial directions hearing the category of complexity for a particular case. For each category, costs are set and calculated by reference to stages in the process. For example, cost stages recommended for the Federal Court scale were

- instructions and close of pleadings
- close of pleadings and completion of discovery
- completion of discovery and fixing date for trial
- fixing date and start of trial
- during trial or at judgment.<sup>1138</sup>

4.89. This categorisation allows litigants to know from the outset the amount they will receive towards their legal costs from the other party if they are successful. This is expected to create incentives for litigants to control litigation costs because each litigant will have to bear the full cost of any extra expenditure they incur. The set fees proposed allow proportionately higher costs for work done in the early stages of the litigation, with recoverable costs decreasing as the case continues in order to encourage early settlement. If the case goes to hearing a daily amount would be added.<sup>1139</sup>

#### *Criticisms of the Williams report*

4.90. The scales proposed in the Williams report have been criticised by the profession because the amounts included in the proposed scale are said to be inadequate and do not reflect regional variations in charging practices.<sup>1140</sup> Comparative research by the Commission of its Family Court data showed that the figures used in the Williams proposal were lower than the amounts charged for

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1138. Williams report, 24, figure 2. For the Family Court the events were between

- instructions and initial directions hearing
- after initial directions and up to the conciliation conference
- after the conciliation conference and up to the prehearing conference
- after the prehearing conference and up to the start of the trial
- during trial or at judgment: Williams report, 23, figure 1.

1139. id 21-22.

1140. Law Council *Submission by the Law Council of Australia to the Attorney-General's Department in respect of report of the review of scales of legal professional fees in federal jurisdictions* Law Council July 1999, 38, 41.

cases in the Commission's sample.<sup>1141</sup> The Commission's data related to cases completed in 1998. The Williams data derived from 1994 case files.<sup>1142</sup> The difference in the figures may be explained primarily by this factor.<sup>1143</sup>

4.91. The Law Council also was concerned about whether a judge or registrar would be in a position to make an accurate assessment of the complexity of a matter at an initial directions hearing.<sup>1144</sup> Some cases become more complex as issues emerge. In Family Court matters, the Williams report used the court classification of direct, standard and complex track cases. Research by the Justice Research Centre utilised a categorisation of cases on the basis of whether the dispute concerned children's only matters, property only or children and property as a more accurate indicator of case costs. There were significant cost differences between property only and children's only matters and this typology would appear a more useful categorisation of the different case types.<sup>1145</sup>

4.92. In addition, it was feared that an indirect effect of the Williams scheme could be to erode the costs indemnity rule.<sup>1146</sup> The costs figures in the Williams report are seen to be low<sup>1147</sup> and in complex matters, in particular, this would increase the gap between the costs charged to the client and the costs recovered by the successful party. Only a small portion of the actual costs would be recovered. The retention of the costs indemnity rule in Australia for civil proceedings is strongly favoured<sup>1148</sup> as it 'ensure[s] appropriate and prudent use of scarce court resources' and 'is one of the important features which guards our system from

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1141. Justice Research Centre *Family Court research – Part three: Comparison with the report on 'The review of scales of legal professional fees in federal jurisdictions'* JRC June 1999, table 3. Reproduced in ALRC DP62, 112, table 4.13.

1142. Williams report, 27, 32. There was a lower response rate for the Williams survey questionnaires than those for the Commission. The Williams report had a 15% response rate for Family Court data (Williams report, 27) and a 10% response rate for Federal Court data (Williams report, 33). The Commission's response rates in the Family Court were: 25% of unrepresented applicants and 32% of applicant solicitors, 14% of unrepresented respondents and 28% of respondent solicitors: TMatruglio, *Family Court Empirical Information Part Two*, 2. For some case types and court registries the Commission's samples were smaller than those in the Williams study. In the Federal Court a response was received in 24% of applicant cases and 20% of respondent cases: T Matruglio, *Federal Court Empirical Information Part Two*, 3. See also T Fry, *Family and Federal Courts Costs Report*.

1143. T Fry *Correspondence* 18 October 1999.

1144. Law Council *Submission by the Law Council of Australia to the Attorney-General's Department in respect of report of the review of scales of legal professional fees in federal jurisdictions* Law Council July 1999, 38–40.

1145. See Justice Research Centre *Family Court research – Part three: Comparison with the report on 'The review of scales of legal professional fees in federal jurisdictions'* JRC June 1999, table 4. Reproduced in ALRC DP 62 104, table 4.11.

1146. Law Council *Submission* 375.

1147. Law Council *Submission by the Law Council of Australia to the Attorney-General's Department in respect of report of the review of scales of legal professional fees in federal jurisdictions* Law Council July 1999, 36–37; TWright, *JRC Consultation* 12 October 1999.

1148. Australian Law Reform Commission ALRC 75 *Costs shifting – who pays for litigation* ALRC Sydney 1995 (ALRC 75); AJAC report, para 5.58–5.67; TPC final report; Business Working Group





many of the excesses of the American legal system'.<sup>1149</sup> The Commission supported the retention of the costs indemnity rule in its *Costs shifting* report and continues to do so.<sup>1150</sup>

### *Implementation of the Williams proposal*

4.93. The High Court and the Federal Court are currently discussing implementation and modification of the proposed Williams report model with the federal Attorney-General and the Law Council. The Family Court is not involved in these deliberations, but concurs that time costing is inappropriate and has said that it looks favourably on the Williams model.<sup>1151</sup>

### *The Commission's view*

4.94. The event based scales employed by Professor Williams offer a useful model for the reform of fee scales. Fixed, event based fee scales are particularly effective for high volume, routine matters such as in the Family Court and certain case types in the Federal Court.<sup>1152</sup> It is appropriate but more difficult to structure such a scale to the diverse case types in the Federal Court and High Court. The Law Council has acknowledged that event based scales may be beneficial in promoting certainty and predictability of costs.<sup>1153</sup> Event based scales, in particular, give clients more concrete information on costs associated with litigation. National Legal Aid commented that uncertainty about costs is a great fear for many litigants<sup>1154</sup> and that event based scales, set at market rates, would provide valuable information for litigants.<sup>1155</sup> Victoria Legal Aid, in particular, commented that the Williams proposal has the potential to introduce certainty of

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1149. Business Working Group on the Australian Legal System *Trends in the Australian legal system – avoiding a more litigious society* Allen Consulting Group Sydney 1997, iii.

1150. ALRC 75 recommended the retention of the costs indemnity rule subject to the following exceptions to the general rules: the rules relating to discipline and case management costs orders; the court determining that the risk of having to pay the other party's costs if unsuccessful will materially and adversely affect the ability of a party to present his or her case properly or negotiate a fair settlement; the rules relating to public interest costs orders. In New South Wales the abolition of fee scales has narrowed the gap between party-party and solicitor-client costs. This has 'restore[d] the value of the costs indemnity rule which was being eroded by fee scales which fail to keep pace with commercial fee rates': National Legal Aid *Submission 360*.

1151. Family Court *Consultation* Sydney 21 December 1999; Family Court *Comments on the report of the review of legal professional fees in federal jurisdictions* Family Court 1998.

1152. Such as migration, judicial review and some trade practices matters.

1153. Law Council *Submission by the Law Council of Australia to the Attorney-General's Department in respect of report of the review of scales of legal professional fees in federal jurisdictions* Law Council July 1999, 4, 34.

1154. National Legal Aid *Submission 360*. It also precludes the development of a legal expenses insurance industry: see para 5.26–5.32.

1155. National Legal Aid *Submission 360*.

legal fees to assist individual litigant to make more accurate assessment of the financial risks involved in litigation.<sup>1156</sup>

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1156. *ibid.* On the significance of event based scales to the development of legal expenses insurance schemes, see para 5.27-5.33.

4.95. The Williams proposal could be greatly enhanced, if, as recommended by the Law Council, it provided for additional levels of case complexity and additional case events. These adjustments are particularly important in Federal Court matters because of the differences in case types within the court.<sup>1157</sup>

4.96. The Williams report stated

The new scales ... should not be used by legal aid to determine rates of pay; they should not be used by the courts to determine the reasonableness of fee agreements entered into by solicitors and their clients; nor should they be used by solicitors as a guide to setting prices<sup>1158</sup>

Fee scales are not designed for such purposes. However, given the limited information in the market on legal costs, such a scale almost certainly will be used as an indicative cost base, regardless of whether it was intended for that purpose. The Commission sees merit in this indicative cost function.

4.97. The Federal Costs Advisory Committee (FCAC) regularly adjusts the fee scales for federal courts by formula. In anticipation of the new event based fee scales regime the FCAC should be significantly revamped and include members with cost assessment skills, such as an econometrician and a costs assessor or expert, to enable them to undertake the work.<sup>1159</sup> Otherwise a new body should be established to perform these functions. With event based fees it is important that there is regular reconsideration of the fees and event categories, possibly every few years. It is important that the scales be set and maintained in consultation with experts on legal fees and in this regard FCAC should be assisted by an econometrician and costs expert to help evaluate market based fees and their impact. The scales set under the scheme should be calculated so as to provide a payment that accords with market rates for work of the kind set in the scale and reasonably required.

4.98. The current scales were based by the FCAC on a work value measure which the Committee used to determine charges for item based scales.<sup>1160</sup> Such a measure also could assist to determine charges for the work required for each case event. Professor Williams and the Commission undertook extensive and costly surveys of court and solicitor's files to obtain cost data. In both cases the data obtained was necessarily limited and skewed to particular case types or

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1157. See also Law Council *Submission by the Law Council of Australia to the Attorney-General's Department in respect of 'Report of the review of scales of legal professional fees in federal jurisdictions'* Law Council of Australia July 1999, 49.

1158. Williams report, 21, para 3.0.

1159. The adoption of event based fee scales and calculation and revision of them by the Federal Costs Advisory Committee was proposed in DP 62 (proposal 4.1) and was supported by the Law Council (*Submission 375*); National Legal Aid (*Submission 360*); and the ACCC (*Submission 396*).

1160. Federal Costs Advisory Committee *Consultation Melbourne* 1 December 1999.

parties.<sup>1161</sup> The explanatory power of the models used is reduced where the data is limited

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1161. For example, in the Federal Court where there is a diversity of case types, only low sample numbers were available for some case types from the collected data and in relation to survey responses. See TMatruglio, *Federal Court Empirical Report Part Two*, 58–60, table 2. See also fn 190.

and there is a significant diversity in cases. The Commission supports endeavours by the courts and the profession to obtain current, accurate data to allow introduction and regular updating of the scheme.

4.99. The Commission sees particular benefit in implementing fixed, event based scales in family jurisdiction. In cost terms family litigation is relatively undifferentiated.<sup>1162</sup> The litigants themselves are generally unsophisticated users of legal services and could benefit significantly from the clarity and predictability of such scales. The presumption in family jurisdiction is that the Court will not make a costs order.<sup>1163</sup> This appears to be changing as the Family Court seeks to engender a culture of compliance with court directions.<sup>1164</sup> As the Court is in the process of modifying its case management and case practices it would be appropriate to delay implementation of event based scales to the establishment of the new case management system.<sup>1165</sup> It is particularly important that this cost initiative is taken up for family matters when the changes to case management and procedures are implemented.

**Recommendation 33.** Event based fee scales should be introduced in all federal jurisdictions with the following features.

- The fee scale amounts set out in the Williams proposal should be recalculated to reflect market based fees paid to practitioners for work associated with case events and reasonably required.
- The judicial assessment of case complexity should be open to reassessment, by leave, at the conclusion of discovery.
- The fee scale matrix should be amended to allow for costs to be allocated to additional case events.

**Recommendation 34.** The federal Attorney-General should consider enhancing the role and resources of the Federal Costs Advisory Committee. Its resources and membership should be increased to include expertise on costs and econometrics. The FCAC role should include continuing revision of the amounts set in event based fee scales for federal jurisdiction. In addition to annual review in accordance with the consumer price index, there should be a triennial review of the scale amounts and categories to ensure the currency and effectiveness of the scales.

1162. The case types examined by the Commission were children, property, and children and property. Property only cases were found to be the most expensive: Justice Research Centre, Family Court Research Part Two, 12; T Matruglio, Family Court Empirical Report Part Two, 69.

1163. *Family Law Act 1975* (Cth) s 117(1).

1164. See para 8.236–8.238.

1165. The case events established through the implementation of the proposed report of the Future Directions Committee could be used as a basis for event based scales in the Family Court. See also para 8.249–8.257.



## Court fees and charges

4.100. The government has a direct impact on the cost of litigation through its fixing of court fees. These fees are charged for filing, hearing and other services in courts and tribunals and were traditionally imposed to discourage trivial, vexatious or unmeritorious claims. They are charged at a rate less than the real cost of using courts and tribunals. This reflects the responsibility of government to provide a justice system.

A policy which treats the civil justice system merely as a service to be offered at cost in the market place, and to be paid for by those who choose to use it, profoundly and dangerously mistakes the nature of the system and its constitutional function.<sup>1166</sup>

Chief Justice Gleeson stated that any notion of ‘user pays’ in this area

overlooks the role of the courts as instruments of the sovereign, enforcing legal rights and obligations as an alternative to self-help and the private redress of grievances.<sup>1167</sup>

4.101. While court fees do not, in federal jurisdiction, reflect full cost recovery to the government of providing the court or tribunal, they have become a significant source of revenue for the government.<sup>1168</sup> In 1997–98 the federal government received \$24.5million in fees from federal courts, tribunals and the Australian Industrial Relations Commission. Most of this amount was received from the Federal Court (\$8.1 million) and the Family Court (\$14.6 million).<sup>1169</sup>

4.102. In other areas of public expenditure there are institutional pressures to limit or reduce public spending, with an assumption that users of government services should pay for them. AJAC noted that the application of user pays to the services provided by courts is problematic. It is difficult to conceptualise who the users of the service are: whether respondents or applicants, either of whom may benefit from the outcome. There are community benefits in the effective operation of the court system and in precedents created by individual disputes.<sup>1170</sup> There are also practical difficulties in developing a court fee structure that reflects the actual costs of the services provided and takes into account the complexity and cost of different matters.<sup>1171</sup> Further, as discussed in chapter 1, the judicial system has a key role in the democratic system of government which goes well beyond the resolution of

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1166. R Scott, cited by Lord Ackner *Hansard* (H of L) 14 July 1997, 865. See also G Brennan ‘The state of the judiciary’ (1998) 72 *Australian Law Journal* 33.

1167. M Gleeson ‘Access to justice’ (1992) 66 *Australian Law Journal* 270, 272.

1168. Court fees are returned to the general funds of the government rather than being retained by the courts and tribunals which generated them.

1169. ALRC DP 62 table 4.2, para 4.11.

1170. AJAC report, 384–5.

1171. *id* 384. See also Senate Standing Committee on Legal and Constitutional Affairs *The cost of justice: Checks and imbalances* AGPS Canberra August 1993, 85–94.

individual disputes, encompassing progressive development of the law, providing a check on executive authority and protecting human rights.<sup>1172</sup>

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<sup>1172</sup>. See para 1.106-1.111.



4.103. Nevertheless governments in most western countries are looking to further recovery of costs from justice systems. The Lord Chancellor recently endorsed this principle

to recover the full cost of providing the civil courts, less an amount equivalent to the sum of exemptions and remissions.<sup>1173</sup>

4.104. Court fees in family proceedings in the United Kingdom have not been pushed to full cost recovery, however, due to concern that this would jeopardise the interests of children and victims of domestic violence.<sup>1174</sup>

4.105. The Commission has focussed on the structure, equity and utility of fees to promote cost incentives to litigants for early settlement. There are several ways to achieve this: the imposition of graduated fees, long hearing fees, hearing allocation fees, pay-as-you-go systems and staged payments, as well as differential fees which distinguish between wealthy and less wealthy litigants. These mechanisms are considered in turn.

#### *Fee exemption and waiver*

4.106. Federal courts and tribunals exempt from payment of court fees people who receive legal aid, social security or study assistance, or are in prison.<sup>1175</sup> Courts and tribunals also have the discretion to waive fees where payment would cause financial hardship, after consideration of the person's income, day to day living expenses, liabilities and assets.<sup>1176</sup> In 1997-98 the High Court, Federal Court, Family Court and the AAT together waived or exempted about 39% of the potential fees payable, amounting to roughly \$15.3 million.<sup>1177</sup>

4.107. It was suggested to the Commission that there be wider application of fee exemptions and waivers to middle income individuals and small businesses, to

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1173. Lord Irvine *Hansard* (H of L) 14 July 1997, cited in Lord Chancellor's Dept *Civil court fees – A discussion paper* Lord Chancellor's Dept February 1998  
<<http://www.open.gov.uk/lcd/consult/civ-just/fees.htm>> (23 March 1999).

1174. Lord Chancellor's Department *Consultation paper 'Fee levels and charging points'* November 1998, 3.2 <<http://www.gtnet.gov.au/lcd/consult/civ-just/civilfr.htm>> (29 June 1999).

1175. High Court of Australia (Fees) Regulations, reg 4, 4A, 5; Federal Court of Australia Regulations, reg 2, 2AA, 2A; Family Law Regulations 1984, reg 11, 16; Administrative Appeals Tribunal Regulations, reg 19. Similarly in the United Kingdom parties enrolled in various government social aid programs are exempt from paying some or all court fees. Additionally if the payment of a fee would involve undue financial hardship on a party the court may waive the fee: United Kingdom Supreme Court Fees Order 26 April 1999  
<<http://www.courtservice.gov.uk/scfees.htm>> (29 June 1999).

1176. High Court of Australia (Fees) Regulations, reg 4, 4A, 5; Federal Court of Australia Regulations, reg 2, 2AA, 2A; Family Law Regulations 1984, reg 11, 16; Administrative Appeals Tribunal Regulations, reg 19.

1177. ALRC DP 62 table 6.2.

counteract fee charges.<sup>1178</sup> Justice Sackville noted that broader discretion concerning exemptions and waivers would place court and registry staff in an 'invidious position', by giving them the responsibility, in effect, to assess the appropriateness of fees to be charged, not by the court, but by the government.<sup>1179</sup> The Commission does not support modification to the exemption or waiver provisions. Court registry staff could have real difficulties investigating and evaluating broader discretionary categories for exemption and waiver.

### *Graduated fees*

4.108. Australian federal courts and tribunals have set fee structures for filing and hearing fees.<sup>1180</sup> Daily hearing fees are charged in the Federal Court and the High Court. However, daily rates do not increase according to the length of the hearing.<sup>1181</sup> Graduated fees are utilised in Singapore, Germany, and most recently in the United Kingdom, as economic incentives to encourage settlement, promote ADR and to expedite hearing times.

4.109. For example, in the High Court of Singapore,<sup>1182</sup> the following daily hearing fees are charged.<sup>1183</sup>

Day 1	No fee	
Days 2-5	\$1500 per day	(\$A1377)
Days 6-10	\$2000 per day	(\$A1836)
Days 11-end	\$3000 per day	(\$A2754)

Thus, the Singapore scheme allows free access for the vast majority of claims which are heard within one day and charges higher fees for those cases that take up greater court resources. Germany also has a system of graduated court fees. Court fees there are fixed by law as units representing a percentage of the value of the claim.<sup>1184</sup> One unit is payable when the proceedings are commenced and two

1178. National Legal Aid *Submission* 360.

1179. R Sackville *Submission* 388.

1180. ALRC DP 62 161, table 6.1.

1181. High Court of Australia (Fees) Regulations, reg 4, 4A, 5, Sch 1; Federal Court of Australia Regulations, reg 2, 2AA, 2A, Sch. See also ALRC DP 62 table 6.1.

1182. The hierarchy of Singapore courts is as follows: the Supreme Court and the Subordinate Courts. The Court of Appeal and the High Court comprise the Supreme Court. The District Courts, Magistrate Courts, specialised courts and the Small Claims Tribunal comprise the Subordinate Courts: Singapore Judiciary *Annual report* 1997, 12.

1183. The Supreme Court and Subordinate Courts of Singapore *A charter for court users* Supreme Court and the Subordinate Courts Singapore 1997, 29. Conversions based on the exchange rate at 7-January 2000 (\$S1 = \$A0.92).

1184. A Zuckerman 'German litigation costs: Survey of German practitioners' *Lord Woolf's inquiry: Access to justice*, research conducted for the Final Report to the Lord Chancellor July 1996, 7.

payable on delivery of a judgment.<sup>1185</sup> Four and a half units are payable on appeals and up to five units may be payable for a further appeal.<sup>1186</sup>

4.110. A variation on these fee structures, which may be easier to calculate, is a long hearing surcharge. The United Kingdom has recently introduced a 'pay-as-you-go' system of court fees where the emphasis is on full recovery of the cost of the court system as well as on encouraging settlement.<sup>1187</sup> Fees are set for the three

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1185. These two units are not payable if the matter is withdrawn or if judgment is based on consent or settlement.

1186. A Zuckerman 'German litigation costs: Survey of German practitioners' *Lord Woolf's inquiry: Access to justice*, research conducted for the Final Report to the Lord Chancellor July 1996, 7-8.

1187. United Kingdom Court Service 26 April 1999 <<http://www.courtservice.gov.uk/feeguid.htm>> (29 June 1999).

primary stages of the court process, and charges imposed each time litigants choose to proceed further. The majority of court costs are recovered by an initial filing fee that is related to the value of the claim.<sup>1188</sup> A second fee is payable for filing an allocation questionnaire that reflects the increase in work required to review a case and allocate it to an appropriate track. A third fee is charged if a listing questionnaire is filed or if a case proceeds to trial.<sup>1189</sup> These fees are set at a flat rate which attempts to match the average cost of work to the court at each stage of the proceeding.

4.111. An alternative, recently introduced in the Supreme Court of New South Wales, is to impose a hearing allocation fee.<sup>1190</sup> This fee,<sup>1191</sup> similar in amount to the filing fee, is levied upon allocation of a hearing date. Such an approach may be particularly effective where there are many late settlements at the court door. Late settlement appears to be quite prevalent in the AAT and in the Family Court but does not appear to be a significant problem in the Federal Court. While hearing allocation fees may provide an incentive to consider settlement possibilities before the last moment, it also may encourage litigants to proceed with the hearing where they have paid the allocation fee. Where hearing dates are set well in advance, parties may refuse to entertain a settlement after paying fees for a hearing.

4.112. The Commission received a mixed response to the suggestion in DP62 that graduated hearing fees be introduced for federal courts and tribunals. The Victorian Bar agreed that graduated hearing fees may encourage shorter hearings, settlement, and the use of ADR.<sup>1192</sup> National Legal Aid commented that such fees should not be payable in cases where the circumstances genuinely require a long trial or where proceedings are prolonged by the defendant.<sup>1193</sup> A long hearing fee assumes that the length of a hearing is always within the control of the plaintiff.<sup>1194</sup>

4.113. The Law Council submitted that graduated hearing fees are unlikely to have any positive effect on settlement rates. The costs of lawyers and experts are generally greater than court fees and have a greater impact on the decisions made

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1188. Lord Chancellor's Department *Consultation paper 'Fee levels and charging points'* November 1998, 1.6 <<http://www.gtnet.gov.uk/lcd/consult/civ-just/civilfr.htm>> (29 June 1999).

1189. *id.* 2.1-2.5.

1190. Introduced 1 November 1999: Supreme Court of New South Wales 'Court fee changes from 1-November 1999' <[http://www.agd.nsw.gov.au/sc/sc.nsf/pages/ann\\_011199](http://www.agd.nsw.gov.au/sc/sc.nsf/pages/ann_011199)> (4 November 1999).

1191. Presently: corporation: \$2022, other: \$1011: Supreme Court of New South Wales 'Court fee changes from 1 November 1999' <[http://www.agd.nsw.gov.au/sc/sc.nsf/pages/ann\\_011199](http://www.agd.nsw.gov.au/sc/sc.nsf/pages/ann_011199)> (4 November 1999).

1192. Victorian Bar *Submission 367*.

1193. National Legal Aid *Submission 360*.

1194. *ibid.*

by litigants to settle.<sup>1195</sup> The Law Council also noted that a plaintiff might unfairly incur extra fees where proceedings are protracted by the defendant, and that case

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1195. Law Council *Submission 375*.

management and managerial judging are a more effective means of promoting settlement.<sup>1196</sup> These risks are of particular concern in family jurisdiction where proceedings may be open to manipulation or abuse.<sup>1197</sup>

4.114. The Commission shares these concerns that court fees designed for reasonable and prudent litigants might be manipulated by unreasonable litigants and produce inequitable outcomes.

4.115. The Commission does see merit in staging court fees to coincide with particular case events. Staged fees would sit well with events based costs scales set to be introduced in federal jurisdiction and also would provide litigants with greater certainty about their costs throughout the litigation. Events provide appropriate stages at which litigants can consider the costs incurred, possible outcomes, and likely future costs of their matter, and can provide an incentive to resolve matters early. The Williams report<sup>1198</sup> proposed five stages or events in the life of litigation on which to base the fee scales for the Federal Court and the Family Court.<sup>1199</sup> There may be too much court administration involved in fee collection if each of these events is subject to a fee charge, but a limited number of key events could be set for such charges.

4.116. Any change in court fees should be targeted at particular usage, such as the number of interlocutory hearings customarily associated with long cases.<sup>1200</sup> While some federal and State courts already have such fees,<sup>1201</sup> they generally do not provide an incentive to litigants to reduce the number of events. This could be achieved by increasing the fee amount after a certain number of interim motions or hearings. This approach could be applied to federal jurisdiction, including family jurisdiction, where certain disaffected litigants initiate repeat interim hearing applications at a high cost to the other party and the court.

4.117. The Commission cautions against seeking full costs recovery via court fees, and does not intend that recommendations for the introduction of staged fees should be used as an opportunity to increase fees generally. While it is appropriate to stage fees and require higher fees from parties instigating repeat interlocutory events, the charges should reflect the important principle of an open, accessible justice system. The benefits of the justice system devolve to society at large, not simply to the parties in litigation.

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1196. *ibid.*

1197. Family Court of Australia *Submission 348*; Law Council *Submission 375*; JMcCallum *Submission 304*.

1198. Williams report. For the Commission's response to the Williams report see para 4.94–4.99.

1199. See para 4.88.

1200. R Sackville *Submission 388*.

1201. For example, a fee for each notice of motion filed in the Federal Court and the Supreme Court of New South Wales.

*Corporations and small businesses*

4.118. The High Court, Federal Court and some State Supreme Courts distinguish between the fees charged to corporations and those charged to individuals.<sup>1202</sup> In the Federal Court and the High Court, where this distinction is made, fees charged to corporations are double those charged to individuals. The assumption is that corporations are able to pay higher fees.

4.119. The Law Reform Commission of Western Australia (LRCWA) recently recommended higher fees be imposed where the litigation involves a business.

Any distinction should be based upon whether the litigation concerns a business conducted by the applicant, that distinction corresponding with the tax deductibility of the fee.<sup>1203</sup>

4.120. The LRCWA rejected using the status of incorporation as the distinguishing factor because of 'the prevalence of small companies, through which natural persons trade these days'.<sup>1204</sup>

4.121. Submissions to the Commission were concerned that small businesses were included in the corporations category and were charged higher fees. Some submissions wanted a further lower category for court fees for small business litigants, or to allow small businesses to be included in the non-corporation category.<sup>1205</sup> The Victorian Bar submitted that while there should not be any court fees, it was opposed to the simple distinction between corporations and individuals and indicated that the differential treatment of small businesses might be tested.<sup>1206</sup> The Law Council likewise opposed distinctions on this basis and submitted that fees should be equal for all litigants and imposed at the current 'individual' rate.<sup>1207</sup>

4.122. The creation of a 'small business litigant' category creates definitional problems.<sup>1208</sup> The definition of 'small business' used by the ABS includes

Non-manufacturing businesses employing less than 20 people and manufacturing businesses employing less than 100 people.<sup>1209</sup>

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1202. High Court of Australia (Fees) Regulations, reg 4, 4A, 5, Sch 1; Federal Court of Australia Regulations, reg 2, 2AA, 2A, Sch; Supreme Court of New South Wales 'Court fee changes from 1-November 1999' <[http://www.agd.nsw.gov.au/sc/sc.nsf/pages/ann\\_011199](http://www.agd.nsw.gov.au/sc/sc.nsf/pages/ann_011199)> (4 November 1999). See also ALRC DP 62 table 6.1.

1203. Law Reform Commission of Western Australia *Review of the criminal and civil justice system in Western Australia – Final report* Project 92 LRCWA September 1999, para 16.2.

1204. *ibid.*

1205. National Legal Aid *Submission* 360; J McCallum *Submission* 304.

1206. Victorian Bar *Submission* 367.

1207. Law Council *Submission* 375.

1208. *ibid.*

Court and tribunal staff would have difficulty in collecting, investigating and assessing the information necessary to make these distinctions.

4.123. Generally the Commission opposes court fee distinctions predicated on an assumption about a party's means to pay. There are wealthy individuals who could afford to pay the corporate rates, and corporations and small businesses which may struggle to afford the corporate rates. It is preferable to establish a fee structure based on the usage of the court which is exacted to coincide with the major events in the court process. In many cases in the Federal Court large corporations make considerable use of the court's time and resources and should be paying higher fees – which would happen through the Commission's recommended fee structure.

**Recommendation 35.** The corporation/non-corporation distinction for the purpose of determining the rate of court fees should be abolished.

**Recommendation 36.** Court fees in federal jurisdiction should be set on a single scale applied to coincide with particular case events, with the fees increased along a sliding scale as a case progresses to hearing. Additional fees should be charged for each notice of motion or, in family jurisdiction, interim application – such fees increasing after the third notice of motion or interim application in a matter. The existing waiver and fee exemptions should continue to apply in order to safeguard access and equity interests.



## 5. Legal assistance

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### Introduction

5.1. Many of those concerned with litigation or review proceedings in federal jurisdiction receive or require assistance to meet the cost of proceedings. Such assistance is provided by legal practitioners and by government. It is secured through a variety of pro bono, litigation lending and insurance schemes, via legal aid and indirectly through tax deductible legal expenses. This chapter details the varied schemes and makes recommendations to enhance their efficiency and effectiveness.<sup>1210</sup>

5.2. Legal aid commissions (LACs) and community legal centres (CLCs) are key providers of legal assistance for those who cannot afford to pay for the services of a lawyer. The Commission also notes the role and contribution of lawyers in subsidising legal services. Contingency and speculative funding arrangements mean that lawyers carry much of the risk of litigation. Their pro bono<sup>1211</sup> assistance and continuing goodwill in providing the same is an essential factor in maintaining an effective legal system. It cannot be taken for granted. Although lawyers are popularly seen as self-serving, they have a strong record of pro bono service.

5.3. In Australia and overseas, public funds for legal aid have been steadily, some would say significantly, reduced.<sup>1212</sup>

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1210. Note that legal aid and assistance with legal costs were the subject of separate chapters in ALRC Discussion Paper 62 – *Review of the federal civil justice system* ALRC Sydney August 1999 (ALRC DP62), ch 6, 7.

1211. From the Latin *pro bono publico*, or 'for the public good'.

1212. F Regan 'Legal aid without the state: Assessing the rise of pro bono schemes' *Paper* Legal aid in the new millennium – Third International Legal Aid Conference Vancouver June 1999. The

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federal government disputes this: D Williams 'Legal aid funding – No impact on unrepresented litigants' *News release* 12 October 1999.

Legal aid is undergoing a profound change around the globe, State funded and organised schemes are in a process of dramatic decline ... The professions in Sweden, the USA, England, Australia and other societies are reinventing schemes to assist citizens with free or heavily discounted legal services.<sup>1213</sup>

5.4. The international decline in availability of legal aid is a function of the increasing cost to governments of providing legal aid services.<sup>1214</sup> The legal aid budgetary controls introduced in 1994 in Ontario were in response to an increase in the cost of legal aid from \$70 million to \$350 million in the preceding 10 year period.<sup>1215</sup> The cost of legal aid in the United Kingdom rose 22% between 1994 and 1998.<sup>1216</sup> The Lord Chancellor has stated that

[t]here is simply not enough money available to boost the legal aid scheme to meet everyone's needs. We have to look facts in the face. We have to accept that this has been the case for very many years. There is no point simply asserting that more people must be given access to legal aid. Legal aid is a valuable public benefit, but the public purse is not limitless. Legal aid has to compete for resources against education, health, transport. We have to be realistic. We have to find new and better ways of helping the ordinary taxpayer uphold his rights and defend his interests while, at the same time, protecting the interests of the poorest and most vulnerable in society.<sup>1217</sup>

5.5. In the Commission's consultations and submissions, the call for more funding for legal aid has come from a number of quarters, and debate among State and federal governments, courts, legal aid agencies and professional associations

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1213. id 1. In December 1997 it was estimated that only 18% of Australia's population was eligible for legal aid funding for representation. In comparison, in NSW in 1943, 75% of the population was eligible for assistance and 13% in 1973: R Sackville *Legal aid in Australia* 1975, 79, 140-1, cited in D-Weisbrot *Australian lawyers* Longman Cheshire 1990, 240. In other industrialised countries the proportion of people potentially eligible for legal aid is also in decline. Cuts to legal aid funding in Canada have reduced eligibility to 32%. In the Netherlands, eligibility has dropped from 68% in 1997 to 50% in 1999. In Sweden, eligibility has dropped from 90% in 1997 to 80% in 1999 and has been abolished altogether for family law matters: F Regan *Consultation* 8 July 1999. See also F Regan 'Australia's legal aid services in international perspective: How do we compare?' *Conference paper* State of Legal Aid Conference Melbourne 12 December 1997, 7. In the UK, legal aid, traditionally widely available – in 1997 at 48% – is also in decline: The Lord Chancellor *Speech* Justice and Legal Aid Group Conference 3 July 1998, 4 <<http://www.open.gov.uk/lcd/speeches/1998/lag.htm>> (30 November 1999).

1214. As one former Attorney-General has expressed it, 'the fiends from finance' seek to rein in and obtain justification for all 'demand-driven' government expenditure: M Lavarch 'Fighting the fiends from finance' in H Stacey & M Lavarch (eds) *Beyond the adversarial system* Federation Press Sydney 1999. See Ch 2.

1215. J McCamus 'The reshaping of legal aid' *Paper* Access to Affordable and Appropriate Law Related Services in 2020 Conference CBA Communications Ontario January 1999, 43.

1216. The Lord Chancellor *Speech* Justice and Legal Aid Group Conference 3 July 1998, 4 <<http://www.open.gov.uk/lcd/speeches/1998/lag.htm>> (30 November 1999).

1217. *ibid.* Similar comments were made by the former Attorney-General of Australia, Michael Lavarch, that 'in a Federal budget in which funding to higher education was being slashed, there was no chance that legal aid would be spared': M Lavarch 'Fighting the fiends from finance' in H Stacey & M Lavarch (eds) *Beyond the adversarial system* Federation Press Sydney 1999, 14.

has intensified.<sup>1218</sup> Anecdotal evidence and some recent qualitative research<sup>1219</sup> suggests that cuts to legal aid funding have led to an increase in the number of unrepresented parties before federal courts and tribunals and a diminution in the numbers of skilled and specialised lawyers undertaking legal aid work. The federal Attorney-General recently announced increased legal aid, including federal legal aid funding under new contracts with LACs.<sup>1220</sup> The federal Attorney-General noted 'the amount of legal aid that is sought will always be endless. What we have to do is strike a balance.'<sup>1221</sup> Target areas for such increased funding include the fees allocated private practitioners to undertake legal aid work.

There is evidence that some experienced private lawyers are unwilling to take on legal aid cases. The Government will work to improve the fees paid to the private profession who undertake legal aid work through the new agreements. This will encourage larger numbers of experienced lawyers to undertake legal aid cases.<sup>1222</sup>

5.6. Whatever the ultimate funding formula, the task of providing adequate services with fewer resources seems the reality for the foreseeable future. Government commitment to providing such services is noted,<sup>1223</sup> however, the Commission's recommendations are directed to a working legal system in which government assistance to litigants is controlled and confined. The Commission's recommendations are aimed at improving the efficacy and distribution of legal aid. Even so, demand will almost invariably outstrip funding.

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1218. eg Law Council *Submission 375*; ACT Bar *Consultation* Canberra 28 September 1999; Family Court *Submission 348*; Women's Legal Resource Centre *Submission 350*. See also Law Society of NSW *Access to justice – Final report* December 1998, 63 which recommends an increase of federal government funding of \$35 million for the triennium until 2002. See also 'Breaking News' *Sydney Morning Herald* 23 November 1999, which reported a statement of the Law Council that a minimum of \$126million additional funding is required for legal aid. The Victorian Bar Council has stated that an increase of \$12 million per year would compensate for inflation only: D Farrant 'Lawyers plead on aid' *Age* 24 November 1999, 6.

1219. ALRC DP 62 para 11.163, fn 369; J Dewar et al *The impact of changes in legal aid on criminal and family law practice in Queensland* Faculty of Law Griffith University 1998, 96. Department of Immigration and Multicultural Affairs (DIMA) statistics show an increase of unrepresented litigants of between 4% and 6% per year since changes to legal aid guidelines: DIMA *Submission 385*. The federal Attorney-General has stated

Data currently available does not enable us to reach any conclusions regarding changes to the level of self-representation in federal courts. However, this issue is being researched and the Government will be in a better position to comment once those reviews have been completed: D Williams 'Legal aid funding – No impact on unrepresented litigants' *News release* 12 October 1999.

1220. D Williams 'More money for legal aid' *News release* 15 December 1999. See also fn 112–113.

1221. A Burrell et al 'A-G rebukes aid lobbyists' *Australian Financial Review* 3 December 1999.

1222. D Williams 'More money for legal aid' *News release* 15 December 1999.

1223. *ibid.*

5.7. The number of unrepresented parties involved in litigation is seen to be large and increasing. In the Commission's research samples, around 18% of Federal Court cases,<sup>1224</sup> 41% of Family Court cases<sup>1225</sup> and 33% of Administrative Appeals Tribunal (AAT) cases<sup>1226</sup> involved one or more unrepresented or partially represented parties. The presence of unrepresented parties is associated with particular case types in each of these forums.

- In the Federal Court, 31% of applicants in migration matters were unrepresented, while only 6% of applicants in all other case types lacked representation. In trade practices, corporations law, taxation and intellectual property matters applicants had legal representation in more than 98% of cases.<sup>1227</sup> Increasing numbers of unrepresented parties are likely to be evidenced in the Federal Court's developing industrial and discrimination jurisdiction.<sup>1228</sup>
- In the Family Court, 7% of applicants and 18% of respondents in property cases had no representation or only partial representation compared with 21% of applicants and 44% of respondents in children's cases.<sup>1229</sup>
- In the AAT, the level of representation differed across review jurisdictions. While 71% of applicants in the social welfare jurisdiction were unrepresented in the Commission's case survey, only 10% of applicants in the veterans' affairs jurisdiction and 15% of the applicants in the compensation jurisdiction were without representation.<sup>1230</sup>

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1224. T Matruglio & G McAllister *Part one: Empirical information about the Federal Court of Australia* ALRC Sydney March 1999, table 35, n=678 (applicants), n=672 (respondents) (T Matruglio & G McAllister, Federal Court Empirical Report Part One).

1225. For Form 7 applications for final orders cases: T Matruglio & G McAllister *Part one: Empirical information about the Family Court of Australia* ALRC Sydney February 1999, table 40, n=967 (applicants), n=967 (respondents) (T Matruglio & G McAllister, Family Court Empirical Report Part One). The Family Court itself reported that either one or both parties is unrepresented in 40% of first instance and appeal matters: Family Court *Annual report 1997-98*, 21.

1226. See ALRC *Part one: Empirical information about the Administrative Appeals Tribunal* ALRC Sydney June 1999, table 7.1 (ALRC, AAT Empirical Report Part One).

1227. T Matruglio & G McAllister, Federal Court Empirical Report Part One, table 32.

1228. Significant numbers of unrepresented litigants appeared before the Industrial Relations Court, usually applicants in unlawful termination cases. 50% of applicants in unlawful termination cases were unrepresented, 33% had solicitors acting for them and 17% indicated that they were represented by unions. Industrial Relations Court *Annual report 1995-6*, 32.

1229. For Form 7 applications for final orders cases: T Matruglio & G McAllister, Family Court Empirical Report Part One, table 42. A US survey of court managers found that 59% of enquiries by pro se litigants concerned domestic relations: J Goldschmidt et al *Meeting the challenge of pro se litigation – a report and guidebook for judges and court managers* American Judicature Society Chicago, 20.

1230. See ALRC, AAT Empirical Report Part One, table 7.1.

5.8. The increase in unrepresented parties is not entirely attributable to legal aid changes.<sup>1231</sup> Some of these unrepresented litigants might, under former guidelines, have secured legal aid assistance. Others are outside the means test for

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1231. Figures on the numbers of unrepresented parties were not kept by courts and tribunals until recently. We have current figures but not data to document the rise in numbers.

legal aid and are unable to afford legal services.<sup>1232</sup> The rising and uncertain costs of litigation appear to have led to increased self-representation by 'middle-income' parties in circumstances where other forms of contingent assistance — speculative and contingency fee arrangements and the like — are unavailable or inappropriate. A small proportion of litigants in all jurisdictions choose to represent themselves, whether from distrust of lawyers or a conviction that they have the necessary skills to undertake the task. Simplification of family law originating processes and common assumptions concerning tribunal informality appear to have encouraged this trend,<sup>1233</sup> although it was not necessarily the intention to do so. In this context, the Commission examined the varied options for assistance for the traditional clients of legal aid and the growing number of middle-income earners who also need, but cannot afford, legal services.

5.9. The presence of unrepresented parties is credited with making litigation slower, settlement less likely, and increasing costs to the other party and the court or tribunal. There has been little empirical research to test these propositions.<sup>1234</sup> The Commission's empirical research concerning representation demonstrated that in the Family Court and AAT, cases where both parties were represented were more likely to be resolved by consent.<sup>1235</sup> The data suggests that settlement by negotiation, particularly in the 'shadow of the law', is more effective with representation. The corollary is that cases with unrepresented litigants may be inappropriately abandoned or unnecessarily prolonged, with additional expense to other parties, and to courts and tribunals. In the AAT the Commission also found that unrepresented parties were less likely to have a successful case outcome.<sup>1236</sup> The winning party is more difficult to identify in Federal and Family Court proceedings, where the claims are often complex and multi-faceted, and outcome data could not be collected from the case samples.

5.10. The cost of dealing with impecunious litigants impacts throughout the legal process. Governments bear the cost of legal aid, and the costs which flow from unrepresented litigants, who may be more time consuming for opponents and the courts. The High Court, Federal Court and Family Court have stated that

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1232. No doubt there are also many unrepresented litigants who fail the merit test but nevertheless wish to proceed. Such cases do not impact on the legal aid funding debate.

1233. See para 8.96, 8.103-8.110, 11.69, 9.106.

1234. The Senate Legal and Constitutional References Committee Inquiry into the Legal Aid System recommended that the Government should collect, analyse and publish annual data on unrepresented parties appearing in the Family Court, Federal Court, State and Territory Supreme Courts and District/County Courts and the appeal courts for all of these: Senate Legal and Constitutional References Committee *Inquiry into the Australian legal aid system – Third report* Senate Printing Unit Canberra June 1998, 30 (Senate Legal Aid Inquiry).

1235. See para 8.59, 9.100.

1236. See para 9.99.

the responsibility to ensure that unrepresented litigants present their case adequately and fairly creates difficulties for the courts.<sup>1237</sup> The Chief Justice of

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1237. eg *Cachia v Hanes* (1994) 179 CLR 403, 415 (Mason CJ, Brennan, Deane, Dawson J). The Federal Court stressed these difficulties recently in *Minogue v HREOC* (1999) 166 ALR 129, 483, noting the dilemma courts face in assisting unrepresented litigants without actual or perceived bias. The Family Court in *Johnson* prescribed a list of obligations of the Court to unrepresented litigants, which dictated that they must be informed of their rights in respect of procedure and evidence, but should not be given legal advice by the Court: *In the Marriage of Johnson* (1997) 22 Fam LR 141, 163 (Ellis, Baker, Lindenmayer J).



Australia has commented that the cost to governments of providing legal aid cannot be assessed without considering the costs incurred by not providing legal aid.<sup>1238</sup> As the Law Reform Commission of Western Australia (LRCWA) expressed it

[t]he presence of self-represented litigants in the civil justice system has the potential to increase costs for all court users ... from ... more pre-trial procedures; poor issue definition and clarification; greater time and expense in responding to unclear or irrelevant evidence; and excessive time spent in hearings.<sup>1239</sup>

5.11. However, the additional costs attributable to the presence of unrepresented litigants remain unsubstantiated and unquantified. Many unrepresented litigants have great difficulty preparing and presenting their case and consequently drop out of litigation before hearing,<sup>1240</sup> often early in proceedings. Research may in fact find that, overall, unrepresented litigants make few demands on judges' time or on that of lawyers for opposing parties. Tentative findings of the Justice Research Centre's (JRC) second stage study of legal aid family law cases indicate that, where the other party is wholly unrepresented, lawyers engage in less activity on their files – exchange less correspondence, peruse less material, file fewer documents, make fewer court appearances and resolve cases more quickly – than if the other party is represented.<sup>1241</sup>

## Legal assistance by lawyers

### Pro bono

The Court (recognises) with gratitude the substantial amount of pro bono work undertaken by the legal profession and the widespread support by the profession for the Federal Court's own pro bono scheme.<sup>1242</sup>

5.12. 'Pro bono' work refers to legal services provided in the public interest by lawyers for free or for a substantially reduced fee. There are many pro bono schemes operating throughout Australia. Some are attached to courts and others organised through practitioner associations and CLCs, and organisations such as the Public Interest Advocacy Centre and the Public Interest Law Clearing House. Many lawyers also provide pro bono services in individual cases outside such schemes.

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1238. See M Gleeson 'The state of the judiciary' *Speech* Australian Legal Convention Canberra 10-October 1999 <<http://www.highcourt.gov.au/speeches/cj/sta10oct.htm>> (11 October 1999). See ch 1.

1239. Law Reform Commission of Western Australia *Review of the criminal and civil justice system in Western Australia* Project 92 LRCWA Perth September 1999, para 18.3 (LRCWA report). Also R Sackville *Submission* 388.

1240. See para 5.119.

1241. Activity is greatest where the other party is partly represented: JRC *Consultation* 6 January 2000.

1242. Federal Court *Submission* 393.

5.13. The value of pro bono work done by lawyers in Australia is difficult to quantify. Much of the work is by private arrangement, often undocumented, on particular 'worthy' cases. Firms and legal professional associations often do not keep statistics on the quantity or value of the pro bono work they or their members undertake or coordinate.<sup>1243</sup> There are also different definitions of pro bono work. Some lawyers equate work done at legal aid rates as 'pro bono' because of the low level of remuneration. Others include matters in which they have substantially reduced, but not waived, their fees. In some such cases, lawyers continue to act where paying clients run out of funds. Others lawyers apply a strict test that pro bono work is for the public good, such as 'test case litigation', not simply work without or for reduced charges.<sup>1244</sup>

5.14. The Law Society of New South Wales, utilising data from their 1997-98 practising certificate survey, estimated the amount of pro bono work at around 63 000 hours,<sup>1245</sup> or about \$74million in value.<sup>1246</sup> The New South Wales Bar Association valued the pro bono work they referred to barristers in federal matters in 1998-99 at around \$85 000.<sup>1247</sup> The Commission's empirical research on Family Court matters showed that many privately funded clients received some pro bono assistance from their lawyers. In cases funded by legal aid a larger proportion of the time spent on the case was uncharged.<sup>1248</sup>

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1243. In Victoria, Voluntas coordinates information about pro bono services: Voluntas 'Building a pro bono culture' (1999) 73 (6) *Law Institute Journal* 9. Its first report demonstrates the difficulty in quantifying pro bono work because few law firms keep the necessary statistics. 91% of the firms surveyed did not keep records about the amount of pro bono work done by members of the firm: NGration *Pro bono survey report* Voluntas Melbourne June 1999, 8.

1244. Freehill Hollingdale & Page *Submission* 339. Freehills distinguished between those cases which may be appropriate for consideration on a pro bono basis, and those which simply represent the demand for a greater aggregate of available legal services to meet an unfunded need.

1245. Keys Young *Practising certificate survey 1997-98 Final report* September 1997, 33.

1246. Law Society of NSW 'Survey disproves "greedy lawyers" theory' *Media release* 29 September 1997. See also Law Society of NSW 'Unsung work of lawyers celebrated at 1998 Pro Bono Awards' *Media release* 27 October 1998. Compare this to the federal government's funding of LACs and CLCs which was in 1997-98 \$124 million: fn 110, 112.

1247. This comprised 69 matters in the Federal Court. The figure relates to 542 hours of work at \$156 per hour or 7.85 hours per matter: NSW Bar Association *Consultation* Sydney 12 July 1999. Note that much pro bono work is provided in State courts.

1248. Justice Research Centre *Family Court research part one: The costs of litigation in the Family Court of Australia* ALRC Sydney June 1999, para 10.5.1, tables 43A, 43B (Justice Research Centre Family Court Research Part One); Justice Research Centre *Family Court research part two: The costs of litigation in the Family Court of Australia* ALRC Sydney June 1999, table 3A (Justice Research Centre Family Court Research Part Two).

**Table 5.1 Proportion of uncharged time in ALRC sample Family Court matters by source of funding**<sup>1249</sup>

Time spent without charging	Source of funding		
	Private funding	Legal aid	Both
0%	203 (40%)	1 (4%)	0 (0%)
10–25%	266 (52%)	15 (54%)	14 (70%)
25–50%	30 (6%)	7 (25%)	3 (15%)
50–75%	5 (1%)	3 (11%)	2 (10%)
75–100%	8 (2%)	2 (7%)	1 (5%)
Total	512	28	20

5.15. A recent National Legal Aid survey of 260 private firms who do legal aid family law work showed that Australian solicitors in 1998–99 ‘provided a subsidy of at least \$17500000 and more likely in excess of \$20000000 if they had agreed to accept 80% of the ordinary professional rate of \$213 per hour’.<sup>1250</sup> On any one of these figures, the pro bono contribution is significant.

5.16. Pro bono work is encouraged but not mandated by legal professional associations. In DP 62 the Commission suggested that practitioners be required to complete a mandatory component of pro bono work each year,<sup>1251</sup> and that pro bono work be part of the course requirements of law students.<sup>1252</sup> While there is general support for pro bono schemes, there was opposition to mandatory pro bono work. There was concern that mandatory pro bono work would relieve governments of their legal aid responsibilities.

[T]he need for legal assistance for individuals in relation to issues which have no broad public interest implications in themselves are matters which should be publicly funded through an appropriate state-funded legal aid system ... We do not believe that the legal profession should assume the responsibilities of the State, nor do we believe that the provision of legal services on a pro bono basis should in any sense be seen as a substitute for the State’s responsibilities to provide a proper justice and legal aid system.<sup>1253</sup>

1249. id table 3A.

1250. National Legal Aid *Survey of legal firms doing legal aid family law work* in National Legal Aid *Correspondence* 6 January 1999.

1251. ALRC DP 62 proposal 6.3.

1252. ALRC DP 62 para 6.44–6.45.

1253. ... A balance needs to be struck between the obligations of the State to its citizens to provide a meaningful and affordable justice system, and to provide the assistance of those who genuinely could not otherwise access the system on the one hand; and the sense of obligation which the legal profession itself might feel in contributing services on a pro bono basis:

Freehill Hollingdale & Page *Submission* 339.

See also, National Legal Aid *Submission* 360; Victorian Bar *Submission* 367; ACT Bar *Consultation* Canberra 28 September 1999; Victorian Bar *Consultation* Melbourne 26 August 1999.

5.17. Others stated that mandatory schemes were contrary to the 'voluntarist' ethic of pro bono work and that such requirement could discriminate against smaller firms which lack the financial capacity to provide free services.<sup>1254</sup> It was also argued that it would place a requirement on lawyers beyond that required of any other service provider or profession.<sup>1255</sup>

5.18. In the United States pro bono service has emerged as an ethical aspiration. Every State has some provision in its rules of professional conduct focussing on the responsibility of each lawyer to provide pro bono public service.<sup>1256</sup> Thirty seven States have rules identical or similar to the American Bar Association (ABA) Model Rule<sup>1257</sup> which sets out the responsibility of lawyers to seek to provide the equivalent of one week's pro bono services per year.<sup>1258</sup>

A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

- provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to: persons of limited means or charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and
- provide any additional services through: delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic community, governmental and educational organizations in matters of furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate; delivery of legal services at a substantially reduced fee to persons of limited means; or; participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.<sup>1259</sup>

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1254. Centre for Legal Process *Future directions for pro bono legal services in New South Wales* Law Foundation of New South Wales Sydney 1998, 80; Freehill Hollingdale & Page *Submission* 339.

1255. Freehill Hollingdale & Page *Submission* 339.

1256. American Bar Association Standing Committee on Pro Bono and Public Service *Comments on professional responsibility of lawyers as set forth in rule 6.1 of the Model rules of professional conduct* 3rd ed Center for Professional Responsibility ABA  
<<http://www.abanet.org/scripts/oop/qfullhit?CiWebHitsFile=%2Fcr%2Fbillings1%2Ehtml>> (26 July 1999).

1257. *ibid.*

1258. The ABA recommended annual hourly standard is currently 50 hours. Other states adopt a different standard, for example, in Florida and Massachusetts there is an expectation that each lawyer contribute at least 25 hours each year. Some states have a provision that allows lawyers, by choice or inability to fulfil the standard, to make a monetary contribution.

1259. *ABA Annotated model rules of professional conduct* 3rd ed Center for Professional Responsibility ABA, 465, r 6.1.

5.19. Pro bono work is consistent with the service ideal of the legal profession, which 'requires that the normal commercial imperatives are subordinated to altruistic concerns of service to the client and to the community (sometimes including the State)'.<sup>1260</sup> It is an ideal which must not be lost sight of if lawyers are to retain a professional ethos and identity. Such culture could and should be encouraged in undergraduate education by introducing pro bono requirements for subjects or courses at law schools, thus a building a strong foundation of ethics and responsibility from which to engender commitment to future pro bono contributions from aspiring lawyers. Some Australian universities have already introduced such course requirements.<sup>1261</sup> Legal professional associations could assist in this process by providing opportunities for students to engage in pro bono work under supervision or by providing financial assistance for such endeavours. There is no doubt that lawyers and law firms are committed to such ideals. As stated, their goodwill in providing pro bono assistance should be acknowledged and not dissipated.

5.20. The Commission agrees with the criticisms of mandatory pro bono work. It has no wish to sour the professional good will which supports the justice system. Nevertheless, in a world which sees lawyers in less charitable lights and where the financial and professional imperatives of practice are increasingly demanding, it is appropriate to emphasise the service ideals which characterise the legal professional ideal. The Commission sees considerable merit in the American example, which emphasises the ethical ideal of pro bono legal service.

**Recommendation 37.** Legal professional associations should urge members to undertake pro bono work each year in terms similar to that stated in American Bar Association *Model rules of professional conduct* rule 6.1.

**Recommendation 38.** In order to enhance appreciation of ethical standards and professional responsibility, law students should be encouraged and provided opportunity to undertake pro bono work as part of their academic or practical legal training requirements.

## Contingency fees and litigation lending

5.21. Contingency fees, delayed billing arrangements and litigation lending provide financial assistance to those who can not otherwise afford legal services. These arrangements involve risk assessment by the lawyer. In some instances, there is little likelihood the claim will be unsuccessful and the returns more than compensate the lawyer's risk. Contingency arrangements cover a variety of

1260. D Weisbrot *Australian lawyers* Longman Cheshire Melbourne 1990, 4.

1261. Such as the Universities of Sydney and Wollongong.

agreements between the lawyer and the client.<sup>1262</sup> Under 'no win no fee' agreements, the lawyer receives a fee only if the client has a successful outcome.<sup>1263</sup> The fee agreed comprises a fixed sum or, more commonly, a fixed sum and a percentage uplift of the usual fee. In some overseas jurisdictions, especially in the United States, lawyers are also permitted contingency fee arrangements which involve an amount calculated as a percentage of the sum awarded by the court. Even in jurisdictions which apply a 'liberal' regime with respect to contingency fees, such fees almost always are prohibited in criminal and family law matters. Percentage fee agreements are not permitted in Australia. All Australian jurisdictions permit

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1262. Various reports have commented on uplift contingency fees in Australia. The Trade Practices Commission *Study of the professions – Legal* Final report TPC Canberra 1994 (TPC Final report) recommended that lawyers should be permitted to charge an uplift to a maximum of 25% but not a percentage of the award or financial outcome. The *Justice statement* recommended the introduction of contingency fees, except in family or criminal law cases, to be accompanied by safeguards for clients, such as a requirement that lawyers assess the risks of winning or losing a case and provide a written assessment of these risks to clients when proposing a contingency fee arrangement: A-G's Dept *Justice statement* A-G's Dept (Cth) Canberra May 1995, 48–50. The AJAC report recommended the introduction of contingency uplift fees (except in criminal and family matters, and subject to safeguards) with a maximum uplift factor of 100%, and noted that careful monitoring of contingency fee arrangements should take place: AJAC report, action 6.2. The Commission in its report *Grouped proceedings in the Federal Court* recommended contingency fees for group proceedings, subject to court approval: ALRC 46 *Grouped proceedings in the Federal Court* ALRC Sydney 1988, para 273–300. In the UK conditional fees have been permitted since 1995, allowing for success fees of up to 100%, and only permitted for personal injury claims, insolvency cases and for claims under the European Convention on Human Rights. In 1998 the range of proceedings was extended to all civil proceedings other than family cases. The Law Society of England and Wales has advised solicitors to apply a voluntary limit of 25% on the proportion of damages which a success fee should represent. It is intended to widen the scope of conditional fee arrangements further by making it possible for the winning party to recover the success fee from the losing party: Lord Chancellor's Dept (UK) *Conditional fees: sharing the risks of litigation* CP 7/99 – September 1999 <<http://www.open.gov.uk/lcd/consult/civ-just/confee/htm>> (19 January 2000). Contingency fees are widely used in the United States. Much of its litigation is based on claims for damages for personal injury. The United States schemes are usually percentage fee schemes which can provide windfalls out of proportion to the work involved in a case. The Business Working Group on the Australian Legal System opposed contingency fees on the basis that they can encourage applicants to file marginal suits for their possible nuisance settlement value: Business Working Group on the Australian Legal System *Trends in the Australian legal system – avoiding a more litigious society* Allen Consulting Group 1998.

1263. In *Clyne v NSW Bar Association* (1960) 104 CLR 186, 203 the High Court held that a lawyer may charge speculative fees provided the lawyer considers the client's case has a reasonable chance of success and that the lawyer does not have an interest in the proceedings other than the payment of the normal fee if successful.

lawyers to charge clients on a speculative fee basis to recover a fixed, agreed sum, if successful.<sup>1264</sup> Some jurisdictions permit an uplift fee<sup>1265</sup> in respect of certain types of work.<sup>1266</sup>

5.22. Uplift fees were considered by some lawyers to be unnecessary. The view was that lawyers do not need percentage uplift fees in order to undertake work on a contingency basis.<sup>1267</sup> Lawyers should be able to make a reasonable assessment of the risk involved before taking on a case, and are in a position to minimise their exposure. The possibility of 'windfall profits' eventuating, where the uplift fee greatly exceeds the work and risk involved, unfairly penalises clients and can bring the profession into disrepute.

5.23. In all such arrangements the litigant carries the risk of having to pay the costs of the other party if the claim is unsuccessful, and is responsible for paying disbursements incurred by their lawyer. Some lawyers arrange litigation loans for clients with a bank, usually for the purposes of disbursements only. One suggestion to the Commission was for LACs to implement a litigation guarantee scheme which fully funded disbursements and any adverse costs order, in return for a premium by way of percentage of any winnings.<sup>1268</sup>

5.24. Contingency fee arrangements are commonly offered in matters involving money claims, such as personal injury and workers compensation matters, and have limited application in federal jurisdiction. Contingency fees can facilitate access to justice.<sup>1269</sup> Their implementation has not created a flood of litigation, nor is there evidence that such arrangements encourage people to pursue unmeritorious claims. Conditional fee agreements may actually work to filter out unmeritorious claims, as lawyers will not bear the risk in such cases.<sup>1270</sup>

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1264. For discussion on legislation and professional rules which permit speculative fee agreements and prohibit percentage fee agreements see G Dal Pont *Lawyers' professional responsibility in Australia and New Zealand* LBC Information Services Sydney 1996, 310.

1265. A 25% uplift fee is allowable in NSW and Victoria: *Legal Profession Act 1987* (NSW) s 187(2), (3), (4); *Legal Practice Act 1996* (Vic) s 98; a 100% uplift fee is allowable in South Australia: *Professional Conduct Rules*, r 8.10. In Queensland a 50% uplift fee is allowed for barristers: *Barristers' rules*, r 102A(d). In Tasmania, the charging of uplift fees by barristers is expressly prohibited: *Rules of Practice 1994* (Tas), r 92(1). In Western Australia, the LRCWA report described uplift fees as a 'necessary evil' and recommended that they be allowed (except in criminal and family matters) only with leave of the court, the uplift to be calculated on the basis of the amount recovered from the other side: LRCWA report, rec 141-144.

1266. Contingency fee agreements are prohibited in criminal proceedings in all jurisdictions and in family proceedings in Victoria and South Australia.

1267. B Walker *Speech* ALRC Cost of Justice Seminar 19 May 1999; B Slade *Correspondence* 22 July 1999; National Legal Aid *Submission* 360.

1268. Legal aid group *Consultation* Sydney 28 May 1999.

1269. G Dal Pont *Lawyers' professional responsibility in Australia and New Zealand* LBC Information Services 1996, 308; KTokeley 'Taking a chance: A proposal for contingency fees' (1998) 28 *VUIWLR* 17.

1270. I Lawson 'No win — no fee' (1998) 23(6) *Alternative Law Journal* 283.

5.25. Generally, contingency fee arrangements are made between individual lawyers and their clients. Litigation funding schemes have been established to assist liquidators and trustees in bankruptcy, in insolvency and bankruptcy matters. These arrangements are sanctioned under federal legislation. A new organisation, Justice Corporation Pty Ltd, proposes to fund fees and disbursements incurred by litigants, in return for a percentage of the damages awarded, without any other involvement in the case.<sup>1271</sup> There are competing views about the legality of this scheme.<sup>1272</sup> The old common law tort or criminal offence of 'maintenance and champerty' prohibited litigation financing by parties unconcerned in the matter and without lawful justification, or such persons taking a share in the proceeds of litigation.<sup>1273</sup> These offences have been abolished by statute in some jurisdictions.<sup>1274</sup> In addition, under contract law, a champertous contract may be illegal and void if contrary to public policy.<sup>1275</sup> The Federal Court noted in *Magic Menu Systems Pty Ltd v AFA Facilitation Pty Ltd*<sup>1276</sup> that public policy considerations have continued to shape the law of maintenance and champerty, gradually alleviating its strictness. The Full Court said in that case that

concerns expressed earlier this century, as to the potential for the maintenance of actions to give rise to an increase in litigation, may now be considered of lesser importance than the problems which face the ordinary litigant in funding litigation and gaining access to the Courts.<sup>1277</sup>

5.26. The Commission supports an extension of litigation lending and contingency schemes in federal jurisdiction provided such schemes are carefully

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1271. Litigation lending schemes may be subject to strict disclosure requirements and compliance with the Consumer Credit Code.

1272. A Burrell and C Merritt 'Rivkin's new career – financing litigants' *Australian Financial Review* 21-June 1999, 3.

1273. Maintenance occurs where a person supports litigation in which he or she has no legitimate concern without lawful justification. Champerty is a form of maintenance where assistance is given in return for a share in the proceeds of litigation in the event of success: *Hill v Archibald* [1968] 1 QB 686; Lord Hailsham of St Marylebone (ed) *Halsbury's Laws of England* vol 9, 4th ed Butterworths London 1974, 272. See also *Clyne v NSW Bar Association* (1960) 104 CLR 186.

1274. Victoria, *Wrongs Act 1958* (Vic) s 32; New South Wales, *Maintenance, Champerty and Barratry Abolition Act 1993* (NSW); South Australia, *Criminal Law Act 1935* (SA); United Kingdom, *Criminal Law Act 1967* (UK).

1275. It is now accepted that uplift contingency fee arrangements are not champertous: *Bevan Ashford v Geoff Yeandle (Contractors) Ltd (in liq)* [1999] Ch 239, 250–2; *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) 166 ALR 731, 740; [1999] FCA 1363.

1276. *Magic Menu Systems Pty Ltd v AFA Facilitation Pty Ltd* (1997) 72 FCR 261, 267–8.

1277. (1997) FCR 261, 267. Under the *Corporations Law* (Cth) s 477(2)(c) the Federal Court has held that an arrangement whereby a liquidator accepts funding from an insurance company to fund litigation for recovery of debts and to indemnify the liquidator against any order for costs in return for a premium which was payable only if the litigation was successful, does not infringe the rule against maintenance and champerty. The liquidator had the right to sell or dispose of 'property of the company' and the prospective recovery of litigation constituted 'property of the company'. See *Re Tosich Construction Pty Ltd*; *Ex parte Wily* 23 ACSR 126 (1997); *Re Movitor Pty Ltd* (1996) 136 ALR 643; RBalachandran 'Funding of civil litigation by commercial organisations – is it against public policy?' (1999) 37(2) *Law Society Journal* 73.



controlled to protect consumers and the administration of justice. The Commission does not support the introduction of contingency fees based on a percentage of the outcome in any matters.

## Legal expenses insurance

5.27. Legal expenses insurance (LEI) provides, in exchange for some form of policy payment, funding for legal services for the individual consumer. The Law Foundation recently released a report based on its experience in developing, promoting and marketing a LEI product in Australia that provides useful documentation of existing LEI schemes.<sup>1278</sup> A limited benefits scheme involving members of the Public Service Association and the Australian Nurses Federation has been self-funding for a number of years in South Australia.<sup>1279</sup> Benefits vary under the different schemes but usually include access to a telephone advisory service. Most policies exclude cover for pre-existing matters, defamation, conveyancing, family law and serious criminal matters.

5.28. Schemes recently promoted in Australia include cover for family law disputes.<sup>1280</sup> These 'after the event' insurance schemes are similar to those which have been operating in the United Kingdom for some time and are a mixture of insurance and litigation loans. In these litigation lending schemes an applicant involved in litigation can apply for cover. The insurer seeks legal advice on the outcome and their likely exposure. The insurer may then, on payment of a premium, offer cover to secure the repayment of a litigation loan.<sup>1281</sup>

5.29. LEI has been well established overseas for many years. In Europe, policies cover a limited range of legal matters, and are generally sold to individuals. In the United States, schemes usually provide for pre paid legal expenses, offering protection for routine and predictable legal costs for groups of policy holders, often union members.<sup>1282</sup>

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1278. Law Foundation of NSW *Legal expense insurance – an experiment in access to justice* Law Foundation of NSW September 1999, 43 (Law Foundation report). A further scheme proposed to be offered by AFS Legal Access will provide telephone and internet-based access to lawyers: 'Amway moves into legal market' (1999) 19(8) *Proctor* 5; G Bullock 'Shopping for legal aid bargains' *Sun Herald* 15 August 1999, 59.

1279. Features of this scheme are described in the Law Foundation report, 45. Members have access to a telephone legal advisory service which assesses members' needs and recommends appropriate action, information brochures, and a free consultation with a lawyer. Legal representation is funded at the discretion of the fund managers.

1280. B Lane 'Divorce insurance proposed' *Australian* 9 August 1999, 1-2; G Malatesta 'Insurer courts divorce market' *West Australian* 10 August 1999, 2; S Monk 'Divorce insurance eases pain' *Courier Mail* 11 August 1999; Gresham Underwriting *Submission* 392.

1281. B Withers 'Funding litigation and legal services' *Paper* 31st Australian Legal Convention Canberra October 1999, 13

1282. Law Foundation report, 1.

5.30. A barrier to LEI in Australia has been the uncertainty over legal costs. The success of European LEI schemes, such as those in Germany, has been linked to their more predictable, fixed litigation costs.<sup>1283</sup> Recent federal initiatives in setting event based scales for cases in federal jurisdiction should go some way to providing a more predictable expense base.<sup>1284</sup>

5.31. A further challenge for providers of LEI in Australia has been the marketing of the product. A survey conducted by the Law Council in 1986 showed that, for most of the people surveyed, LEI had little or no appeal.<sup>1285</sup> The Law Foundation report concluded that if LEI is to enhance access to justice for low to

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1283. N Young 'Doubts over new justice scheme' *Sydney Morning Herald* 15 May 1998, 29; N Rickman and A Gray 'Access to the market for legal services' in A Zuckerman and R Cranston (eds) *Reform of civil procedure: Essays on 'Access to justice'* Clarendon Press Oxford 1995, 320.

1284. See para 4.87–4.99.

1285. They did not perceive themselves to be vulnerable to situations where legal costs would be incurred: Law Foundation report, 30.

middle-income earners, it must provide a broad, general coverage at an affordable cost, and remain commercially viable. Commercial viability requires bulk savings and risk spreading.<sup>1286</sup>

5.32. To the extent that LEI affords additional assistance with legal costs the Commission supports and encourages its development, although there may be less scope for LEI in federal civil jurisdiction than in state jurisdictions. Some litigation against government agencies is undertaken on a speculative basis, and may be amenable to LEI, but the high volume federal civil work is in family law and most LEI schemes exclude such claims. If 'after the event' insurance schemes become more widely available in Australia, these may provide assistance to family law litigants.

5.33. In DP 62 the Commission suggested that an LEI scheme developed for Commonwealth employees could serve as a model for other large employer groups or unions to encourage the growth of LEI.<sup>1287</sup> Submissions generally were supportive of LEI,<sup>1288</sup> however, there was little support for the Commission's proposal and the Commission considers it premature for such a scheme to be established. The government, however, can assist in this area by creating the predictable costs environment necessary for successful LEI by implementing event-based scales, particularly in the area of family law. This issue is dealt with in chapter 4.<sup>1289</sup>

## Tax deductions for legal expenses

5.34. Tax deductions for legal expenses are seen to be a public subsidy — indirect legal assistance provided to business. Losses or outgoings incurred by an individual or company in producing assessable income are tax deductible. Such losses or outgoings are not deductible to the extent that they are capital; of a capital nature; of a private or domestic nature; or incurred in relation to gaining or producing exempt income.<sup>1290</sup> Legal expenses incurred by businesses will usually be tax deductible as legal activity engaged in by a company is likely to be related to its income producing activities. Legal expenses of individuals are less likely to meet the tests, since the areas in which individuals seek advice or take legal action are less likely to be characterised as directly related to gaining assessable income, and may fall under capital or private and domestic exclusions.

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1286. *id* ix.

1287. ALRC DP 62 proposal 6.2; AJAC report, ch 10, action 10.2; B Withers 'Funding litigation and legal services' *Paper* 31st Australian Legal Convention Canberra October 1999, 17; Law Foundation report, 41; Law Council *Submission* 375.

1288. eg Law Council *Submission* 375; Legal Aid WA *Submission* 378.

1289. See para 4.88–4.99.

1290. *Income Tax Assessment Act* 1997 (Cth) s 8 (1).

## Equity arguments

5.35. The operation of the tax laws in this regard is said by some to produce unfair or undesirable consequences, reducing the economic cost of litigation for companies<sup>1291</sup> and operating effectively as a public subsidy of legal assistance to business taxpayers.<sup>1292</sup> Arguments in favour of the abolition or limitation of such tax deductible expenses primarily focus on social justice issues. There is a call to increase direct subsidies in the form of legal aid and to restrict indirect subsidies, as tax deductible legal expenses are termed. Many submissions to the Senate Legal and Constitutional References Committee on Legal Aid argued against tax deductions for legal expenses because

- it is an unfair subsidy, available only to one type of user of legal services
- unlike a grant of legal aid, tax deductions are not subject to means or merits tests, and may subsidise frivolous or oppressive litigation
- tax deductions may reduce the incentive for businesses to avoid or settle litigation and encourage businesses to litigate
- where a deduction is available to one side in a dispute this lowers the real cost of litigation to that party and this can be exploited as a tactical advantage
- it distorts the market for legal services in various ways; for example, by inflating the sums businesses are willing to pay for legal services, thereby raising the 'market price' for legal services.<sup>1293</sup>

5.36. The amount claimed in such deductions is substantial. One estimate, from 1992–93, was that tax deductions for legal costs incurred in litigation by business were approximately \$250 million.<sup>1294</sup>

## Policy arguments

5.37. There is a difference of opinion concerning whether tax deductibility of legal expenses affects party behaviour. As noted, those arguing for an exception to

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1291. Senate Legal Aid Inquiry, 186; Australian Law Reform Commission Report 75 *Cost shifting – who pays for litigation* ALRC Sydney 1995, para 3.33 (ALRC 75); AJAC report, 215–21.

1292. Legal Aid Commission of NSW *Submission 71*; ALRC 75, para 3.34. This argument was discussed in Trade Practices Commission *Study of the professions – legal* Draft report TPC Canberra 1993, 475–9; Trade Practices Commission *Study of the professions – legal* Final report TPC Canberra 1994, 214–6 (TPC Final Report).

1293. Senate Legal Aid Inquiry, 187.

1294. ALRC 75, para 3.33. The Commission noted that \$700 million is claimed as deductions from assessable income for legal costs incurred in litigation by businesses each year. At a tax rate of 36-cents in the dollar this was a loss of taxation revenue of \$250 million. The figure was based on research by the Civil Justice Research Centre which found that 43 per cent of time spent by lawyers working in commercial law is spent on commercial litigation work and the Australian Bureau of Statistics Legal and Accounting Services Survey 1992–93 which found that \$1637.4-million was earned from legal services in commercial, finance and business law during 1992–93.

the principle under which business legal expenses are deductible have argued that business taxpayers are more likely to pursue litigation as the real cost to them is reduced by the tax deduction. Those who argue for the removal of tax deductions state that removing such deductions would reduce the number of cases brought by

business litigants that have little or no merit.<sup>1295</sup> It has also been argued that a modified exception could be created to encourage the use of ADR processes rather than litigation in the courts. The Law Society of New South Wales Task Force<sup>1296</sup> recommended that tax deductions should be available for ADR expenses, but not for litigation expenses.

5.38. Business groups have rejected these propositions. A recent report by the Business Working Group<sup>1297</sup> argued that there are significant disincentives for business to litigate 'just as there are strong disincentives for business to incur other controllable expenses'.<sup>1298</sup> The report noted a number of arguments against creating an exception to the existing rule on deductibility.

- There is no clear policy reason to distinguish legal expenses from other deductible business expenses.
- Many business litigants are small businesses forced to litigate for legitimate business reasons. For these parties, and for any business litigants engaging in litigation for purposes of delay or harassment, the unavailability of tax deductions will not alter their litigation behaviour.
- Many business disputes involve money claims. While expenses incurred in litigation are deductible, amounts awarded as a result of the action may be assessable for tax. Amounts awarded to individual litigants (for example under personal injury claims) are not generally assessable.
- Removal of tax deductibility for non-contentious legal advice is undesirable as it could deter businesses from seeking early advice and engaging the services of lawyers. It will often be impossible to make a distinction in practice between such non-contentious legal advice and contentious or litigation-related legal work.<sup>1299</sup>

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1295. J Disney quoted in D Marr 'It's legal, but is it moral?' *Sydney Morning Herald* 21 December 1997.

1296. Law Society of NSW Task Force 'Access to the civil courts' in Law Society of NSW *Accessible justice summit: Summary of proceedings and selected papers* Law Society of NSW Sydney 1992, 48.

1297. Business Working Group on the Australian Legal System *Trends in the Australian legal system – avoiding a more litigious society* Allen Consulting Group 1998.

1298. id 25, quoting Law Society of NSW 'Legal services: a legitimate business expense' *Media release* 1-May 1997. Submissions to the Commission on its *Costs shifting* inquiry commented that, in practice, business litigants do not take tax deductibility into account when deciding whether to pursue litigation. It was also submitted that dispute resolution is an inevitable and essential part of running a business and it is appropriate for the tax system to recognise this: ALRC 75, para-3.33–3.42.

1299. Business Working Group on the Australian Legal System *Trends in the Australian legal system – avoiding a more litigious society* Allen Consulting Group 1998, 25–6. These points were repeated to the ALRC in a variety of submissions to its report ALRC 75, para 3.33–3.42.

5.39. Submissions from the New South Wales Bar Association and the Law Council also strongly opposed any proposal to remove or cap tax deductibility as it would not improve access to the courts by individual litigants, could discourage businesses from seeking early legal advice, and could ultimately result in more rather than less litigation.<sup>1300</sup> Some industries, such as the insurance industry,

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1300. New South Wales Bar Association *Submission 88*; Law Council *Submission 126, Submission 375*.

routinely and necessarily engage in litigation as part of their ordinary business. A submission to the Senate Legal Aid Inquiry argued that to disallow deductions for litigation expenses would be to treat the insurance industry differently from other industries able to deduct their day to day business expenses, and would increase premiums.<sup>1301</sup> The Law Council stressed that basic data should be collected before such a proposition is considered,<sup>1302</sup> arguing that altering the rule on tax deductibility for litigation expenses could increase the costs of doing business and make Australian business less competitive internationally.<sup>1303</sup>

5.40. This Commission, AJAC, the Trade Practices Commission, and the Senate Legal Aid Inquiry have all recommended that the availability of tax deductibility for litigation expenses be reviewed to ensure just and equitable tax treatment of those expenses.<sup>1304</sup> The Trade Practices Commission concluded that

an examination is warranted by appropriate authorities of the tax deductibility of legal and litigation expenses focusing on any adverse consequences for efficiency and equity that may result.<sup>1305</sup>

5.41. In DP 62 the Commission proposed that the Australian Taxation Office (ATO) should be asked to report on whether

- it is feasible to devise ‘benchmark’ amounts allowable as deductions for litigation expenses for certain types of case
- deductions for litigation expenses can be restricted, in some or all cases, to taxed costs, and on what basis such taxed costs should be calculated
- it is feasible to require taxpayers claiming deductions for litigation expenses to show these claims in a separate category on their tax return
- taxpayers claiming deductions for litigation expenses should be required to substantiate all such claims; and what form this substantiation should take.<sup>1306</sup>

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1301. Insurance Council of Australia *Submission 58 to Senate Legal and Constitutional References Committee Inquiry into the Australian legal aid system*, 526. The Insurance Council also pointed out that removing deductibility would increase costs to policyholders, and that to remove the deduction could place Australian businesses at a competitive disadvantage with businesses in other countries.

1302. Law Council *Submission 126*.

1303. *ibid.*

1304. Senate Legal Aid Inquiry, 185.

1305. TPC Final Report, 216. AJAC report, para 8.19, concluded that it could not make a firm recommendation on the tax deductibility of legal expenses as any consideration of this issue involves complex social and economic considerations requiring detailed analysis. The Committee recommended that the ‘Government should commission a review of the current law and practice governing the tax deductibility of litigation legal expenses.’ ALRC 75, para 3.42, concluded that ‘the impact of the tax system on litigation should be examined further’. The Commission recommended that data should be collected from the Australian Taxation Office or the Australian Bureau of Statistics indicating the amount of tax deductions claimed each year for legal and litigation expenses.

1306. ALRC DP 62 proposal 6.1.



5.42. The ATO, which has had pressing concerns associated with implementation of the goods and services tax and the business tax review, was not able to submit such a report to our inquiry. However, the Commission had an extended consultation with several ATO officers on this issue.

5.43. While social equity arguments have found favour in some aspects of tax law, it is widely acknowledged that it is preferable to achieve social equities by using direct subsidies, rather than by modifying rules which effect indirect subsidies.<sup>1307</sup> Exceptions to general rules are most commonly created in taxation policy where there is identified avoidance of tax liability.

5.44. The ATO identified difficulties in imposing and enforcing a benchmark that could cap the deduction permitted to be claimed for legal expenses. It is resource-intensive for the ATO to set and enforce benchmarks. There are confidentiality problems in collecting information to establish benchmarks, and they are difficult to set given the variety of litigation. Not enough cases are taxed – that is, formally costed by legal costs assessors – for such taxed costs to be the basis for setting benchmarks.<sup>1308</sup> Issues to be considered include the following.

- Inhouse legal expenses normally include salaries, which are deductible under general principles; these would have to be excluded from the calculation of a cap on legal expenses deductibility.
- There would be difficulties in calculation where, for example, litigation extended beyond the tax year.
- There may be policy difficulties as to when, and, with globalisation of legal practices, where, expenses were incurred for tax purposes.
- Such difficulties in calculation make benchmarks problematic, and would add to the compliance costs of business taxpayers.

5.45. As noted, the need for legal advice is a function of the nature of business activity and an inevitable result of business pressure between companies. Disputes are part of carrying on business and legal advice concerning such disputes is therefore an expense associated with conducting the business.<sup>1309</sup> No evidence was offered to the Commission that businesses litigate inappropriately because their legal expenses are deductible, and the ATO told the Commission that it has not found a problem in practice with unsubstantiated claims for legal expenses.<sup>1310</sup> The Australian litigation system, like those overseas, appears to have a limited

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1307. Australian Taxation Office *Consultation* Canberra 29 September 1999.

1308. *ibid.*

1309. *ibid.* See also para 1.71.

1310. *ibid.*

number of firms who are repeat litigants, frequently the respondents in torts litigation. In all the Commission's consultations with business litigants and their lawyers, businesses stressed they see litigation as a 'last resort' and are reluctant to be caught up in proceedings where they lose control over expenditure and litigation costs.<sup>1311</sup>

5.46. Tax deductibility of legal expenses is seen to be an integral part both of the taxation system and of business activity. The Commission sees real difficulties in removing or limiting the deductibility of such expenses.

5.47. Abolition of the deduction would raise problems concerning the definition of legal services: is it a legal service only when provided by lawyers? Such an approach could discourage businesses from utilising lawyers, possibly favouring accountants or the accountancy sections of multi-disciplinary partnerships. This could change the nature and composition of firms offering legal services for reasons unrelated to the need for their services or market forces.

5.48. Modification of the deduction, to quarantine litigation expenses but allow deductions for other legal assistance or ADR processes, would also be ineffective, as such a distinction would be impossible to maintain in practice. Such a move would also be inappropriate. The disincentive to litigate in court would provide a corresponding cost incentive to use private judging schemes, but would be likely to have little other effect. It would be unlikely to reduce the sums claimed as deductible expenses. Rather, it would simply alter the type of service generating such claims.

5.49. The development of benchmarks to limit the amount that can be claimed for deductions for legal expenses is equally problematic, as discussed. The Commission has little confidence that benchmark costs could be constructed to cap the legal expenses claimed. Such caps are only feasible for litigation expenses, a small proportion of legal expenses utilised by business. Event-based scales as described in the Williams report<sup>1312</sup> could be used to provide an indication of costs for the purposes of benchmarking deductions, but such scales are only set for implementation in the Federal and High Courts – again, this would cover only a small segment of the legal activity and expenses of businesses.

5.50. Concerns about equity of funding for legal assistance should be met by improving the resourcing of the public and community sector rather than by creating an exception to an established principle of tax law on the basis that it

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1311. Business Working Group on the Australian Legal System *Trends in the Australian legal system – avoiding a more litigious society* Allen Consulting Group 1998, 25; Arthur Robinson *Submission 189*, Freehill Hollingdale & Page *Submission 339*; G Gibson *The cancer in litigation* Blake Dawson Waldron Lawyers Melbourne 1997.

1312. P Williams et al *Report of the review of scales of legal professional fees in federal jurisdictions* A-G's Dept March 1998, 1 (Williams report). See para 4.87-4.99.

affects the business sector differently from individuals. The Commission considers that there are no clear policy reasons to justify special limitations on one category of deductible expenses, in this case legal expenses, over and above other deductible expenses, and that tax deductibility of legal expenses should not be altered or abolished.

## Legal aid

### Introduction

No person's access to justice and the legal system should be prejudiced by reason of their incapacity to obtain adequate information about the law or the legal system, or their inability to afford the cost of independent advice or legal representation.<sup>1313</sup>

A central question to be addressed is whether the litigant in person represents a problem for the court system, or whether the true problem is the inaccessibility and incomprehensibility of the court system and its procedures to ordinary people.<sup>1314</sup>

5.51. The limited and controlled funding for legal aid is the most controversial government policy associated with the justice system. Judges, legal practitioners and associated bodies have called for more and better funding. From within legal aid commissions (LACs) there has been a significant reform agenda to direct their limited services and funds most effectively. In this section, the Commission focusses on these reforms. As in overseas jurisdictions, research and public debate in Australia call for early identification of cases of greatest need, and mechanisms to ensure delivery of an appropriate, accessible legal assistance service. Public legal service providers are encouraged to evaluate applicant need, so that the level of assistance provided corresponds with client need. This process requires a coordinated approach by LACs with community legal centres (CLCs) and other service providers. While it is recognised by LACs that they have only limited power to manipulate the legal marketplace,<sup>1315</sup> their central role is also acknowledged.

In looking forward 5 years, one of VLA's principle objectives will be to reduce the length (and therefore the cost) of trials and judicial hearings. If the average cost of a grant of assistance can be reduced, it follows that VLA can make more grants or provide other forms of legal aid ... VLA is of the view that legal aid commissions have a key role to play as catalysts for or contributors to change in the legal system.<sup>1316</sup>

5.52. Improvement by LACs in managing their cases is only one part of the solution to effective delivery of legal assistance. Court and tribunal procedures and case management need to be effective and efficient. Government departments whose decisions are disputed need to be mindful of dispute management and resolution, to make litigation and administrative review processes more efficient. All participants are exhorted to identify and differentiate routine and difficult

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1313. R Percival et al *Simplicity versus targeting: a legal aid example* Discussion Paper No 25 NATSEM Canberra 1997.

1314. J Perry 'The unrepresented litigant' *Paper AIJA 16th Annual Conference Melbourne* 4-6 September 1998.

1315. Legal aid ACT *Correspondence* 23 December 1999.

1316. Victoria Legal Aid *Correspondence* 21 September 1999.

cases, to stream cases into appropriate processes, and to resolve disputes quickly and cost effectively.

5.53. Recognising and responding to the complex needs of serious cases is important, particularly where children are at risk, or the parties suffer intellectual or other disabilities and are unable to understand legal processes. Where the prospects of settlement are good, legal aid funds are most effectively deployed at the early stages of disputes for negotiation and document preparation or alternative dispute resolution, and for the provision of core evidence essential to clarify issues in dispute. In family law matters in particular, an appropriate early resolution is far preferable to a resolution, however well constructed, which takes multiple case events, many months, many thousands of dollars, and an artificial and protracted hiatus in the progress of children's lives.

5.54. The past few years have seen significant government and court funded research into unrepresented litigants, legal need, legal costs and the processing and representation provided in privately funded and legal aid cases.<sup>1317</sup> Such research is to be commended and ought to be ongoing.

## Funding, priorities and legal need

### *Federal funding*

5.55. Prior to 1973, legal aid was considered a matter entirely for the States and Territories. With the establishment of the Australian Legal Aid Office (ALAO) by the Whitlam Government, the federal government entered this field for the first time, and came to dominate funding from then on. Federal expenditure on legal aid increased from virtually nothing in 1972-73, to over \$80 million in 1987-88,<sup>1318</sup> rising until 1997-98, when the total amount spent by the federal government on

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1317. Government, legal aid commissions, courts and tribunals have recently funded research to measure legal need to measure and evaluate the costs, outcomes and processes of private and legal aid family cases: see para 5.81; R Hunter *Family law case profiles* JRC Sydney June 1999; JRC *Research conducted for the Australian Law Reform Commission – Part two: The costs of litigation in the Family Court of Australia* JRC June 1999 and the experience of unrepresented parties: H Gamble and RMohr 'Litigants in person in the Federal Court of Australia and the Administrative Appeals Tribunal: A research note' *Paper 16th AIJA Annual Conference Melbourne 4-6 September 1998*; J Dewar et al *The impact of changes in legal aid on criminal and family law practice in Queensland* Faculty of Law Griffith University 1998. At the same time experimental or pilot initiatives have been set up to consider ways to assist parties with legal disputes and manage difficult cases in cost effective ways – for example, see discussion of clinical education programs and their funding at para 5.203, the Monash-Oakleigh Legal Service's Family Law Assistance Program in Victoria at para 5.205 and the Magellan Project of the Family Court at para 8.55. Such research will provide more accurate measures of legal need, legal costs and effective and appropriate assistance and case management practices.

1318. D Weisbrot *Australian lawyers* Longman Cheshire Melbourne 1990, 239-243.

legal aid and family services was \$171 million.<sup>1319</sup> Though few would disagree that legal aid is less available for federal matters, the government has stated that legal aid funding for Commonwealth family law matters has been maintained at this

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1319. This figure includes the administration expenses of the Legal Aid and Family Services (LAFS) division of the A-G's Dept (now the Family and Legal Assistance division), LACs, CLCs and other organisations: Attorney-General's Dept (Cth) *Annual report 1997-98*, 85. Of this \$171 million, 73% (\$124 million) was given to LACs and CLCs. State governments contributed a further \$93 million to fund LACs and CLCs in 1997-98: Legal Aid NSW *Annual report 1997-98*, 60, 68, 69; Victoria *Legal Aid Annual report 1997-98*; Legal Aid Qld *Annual report 1997-98*, 39; LSC SA *Annual report 1997-98*, 27, 33; Legal Aid Tas *Annual report 1998*, 30, 34; Legal Aid WA *1997-98 Annual report*, 50, 61; Legal Aid ACT *Annual report 1997-98*, 36, 41; NT *Legal Aid Annual report 1997-98*, 44, 60.

level and been quarantined from cuts.<sup>1320</sup> At the heart of the current controversy over levels of legal aid funding is the federal government's view that its responsibilities should be limited to federal matters, with States and Territories responsible for funding legal aid in matters arising under State and Territory law. Under current agreements, \$102.8 million is to be provided by the federal government for legal aid for 1999–2000.<sup>1321</sup> This is to be increased by \$63 million over a four year period under new contracts.<sup>1322</sup> Funding has also been increased for CLCs and the Immigration Advice and Application Assistance Scheme (IAAAS). CLCs receive separate funding from the federal and State governments.<sup>1323</sup> The federal funding allocation for regional CLCs for 1998–99 is \$22.2million<sup>1324</sup> and will increase by \$11.4 million over the next four years. The IAAAS has been allocated \$1.2 million for 1999–2000.<sup>1325</sup>

5.56. LACs generate revenue from costs orders and client contributions and receive funding from legal professional associations. In 1997–98, LACs generated \$53.7 million, comprising \$21.4 million from client contributions and recovered costs, and \$23.8 from law societies.<sup>1326</sup> A significant proportion of such funds derived from client and cost contributions in family law matters, as set down

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1320. D Williams 'Legal aid funding — No impact on unrepresented litigants' *News release* 12 October 1999. Former Attorney-General Michael Lavarch noted

There was no doubt that legal aid required major structural reform. There was also no doubt that State governments in general had been 'freeloading' on the Commonwealth by not increasing their contribution to legal aid when their legislative programmes had increased the demand for legal aid: M Lavarch 'Fighting the fiends from finance' in H Stacey & M Lavarch (eds) *Beyond the adversarial system* Federation Press Sydney 1999, 14.

1321. Under current agreements between the Federal Government and LACs, funding per annum of \$102.8 million comprises \$31.3 million for NSW, \$27.75 million for Victoria, \$18 million for Queensland, \$4.125 million (for 6 months) for Western Australia, \$9 million for South Australia, \$3.72 million for Tasmania, \$3 million for the ACT and \$2 million for the Northern Territory: *Agreement between the Commonwealth of Australia and the Australian Capital Territory in relation to the provision of legal assistance* 3 October 1997; and *New South Wales* 3 September 1997; and *Tasmania* 18 July 1997; and *the Northern Territory* 4 July 1997; and *South Australia* 18 July 1997; and *Western Australia* 26 February 1998; and *Queensland* 30 June 1997; and *Victoria* 7 November 1997.

1322. D Williams 'More money for legal aid' *News release* 15 December 1999. The funds are to be distributed over four years as follows: \$4.5 million in South Australia; \$27.5 million in New South Wales; \$7.454million in Western Australia; 19 million in Queensland; \$1.075 million in the Northern Territory: DWilliams 'Northern Territory to benefit from legal aid reforms'; 'South Australia to receive more money for legal aid'; 'New South Wales to receive more money for legal aid'; 'Western Australia to receive more money for legal aid'; 'Queensland to receive more money for legal aid' *News releases* 23December 1999.

1323. In NSW, for example, \$3 854 805 of funding was provided for CLCs by the federal government and \$2 124 116 by the NSW government: *Legal Aid NSW Annual report 1998–99*, 65.

1324. J Fahey Minister for Finance and Administration *The Commonwealth public account 1998–99* Budget paper No 4 AGPS Canberra 1998, 114.

1325. DIMA *Submission* 385.

1326. *Legal Aid NSW Annual report 1997–98*, 68; *Victoria Legal Aid Annual report 1997–98*; *Legal Aid Qld Annual report 1997–98*, 39, 46; *LSC SA Annual report 1997–98* 27, 32, 33; *Legal Aid Tas Annual report 1998*, 30; *Legal Aid WA Annual report 1997/98*, 61, 62; *Legal Aid ACT Annual report 1997–98*, 41, 46; *NT Legal Aid Annual report 1997–98*, 60. Note that complete 1998–99 figures are not yet available, however, federal government funding is fixed until 30 June 2000.

below for 1997-98 and 1998-99. This revenue provided by clients is a further indication of the need to control legal aid expenditure in particular client cases. The service does not always come free to such clients.

**Table 5.2. Family law legal aid self-generated funding (\$) <sup>1327</sup>**

	Family law cases – client contributions		Family law cases – costs recovery		Total	
	1997-98	1998-99	1997-98	1998-99	1997-98	1998-99
NSW	1 118 628	690 989	749 181	624 571	1 867 809	1 315 560
VIC	2 697 896	2 479 088	4 486	15 233	2 702 382	2 494 321
QLD	568 286	236 967	11 330	74 371	579 616	311 338
ACT	26 365	30 514	1 052	22 300	24 417	52 814
NT	14 736	31 557	8 478	320	22 214	31 887

### *Government priorities and guidelines*

5.57. Priorities and guidelines for the grant of legal aid in Commonwealth matters are set down in agreements between the federal government and individual LACs. The priorities direct funding to certain legal areas within federal jurisdiction. The guidelines detail the specific matter types and the funding limits in each priority area. LACs modify the guidelines from time to time by policy directives.<sup>1328</sup>

5.58. National Legal Aid<sup>1329</sup> submitted that priorities and guidelines are currently set by the federal Attorney-General's Department without any 'real' negotiation with LACs.

Prescriptive Commonwealth guidelines can limit commissions' flexibility, their potential for innovation and their responsiveness to local conditions. They can also be a recipe for the delivery of legal aid services to become moribund due to the slowness and difficulty in obtaining some level of national consensus about changing established guidelines once they are in place. In State matters priorities and guidelines are set by the legal aid commissions themselves. This is valuable in deflecting community concerns about bias.<sup>1330</sup>

5.59. Commonwealth priorities regarding legal aid in family law matters focus on issues relating to children. The highest priority is accorded to 'urgent' matters,

1327. Client contributions include initial contributions and contributions raised from charges over property: Legal Aid NSW *Correspondence* 29 November 1999; Legal Aid Qld *Correspondence* 10 November 1999; Victoria Legal Aid *Correspondence* 1 November 1999; NT Legal Aid *Correspondence* 1 November 1999; Legal Aid ACT *Correspondence* 22 October 1999; WA, SA and Tas LACs did not provide data. On the policy of Victoria Legal Aid, see fn 308.

1328. eg Legal Aid NSW *Policy bulletin No 5/99* May 1999 states that legal aid for Commonwealth administrative law matters is only available 'if exceptional circumstances exist.'

1329. National Legal Aid represents the directors of each of the eight State and Territory LACs in Australia. See <<http://www.nla.aust.net.au>> (6 January 2000).

1330. National Legal Aid *Submission 360*.



where the child's safety or that of the applicant is at risk, or where there is a risk of abduction of the child. Guidelines also direct legal aid funding to child representation,<sup>1331</sup> and restrict grants for property proceedings.<sup>1332</sup> In other federal civil matters, Commonwealth priorities restrict legal aid to pensions disputes (including those of war veterans) discrimination matters, refugee applications and consumer protection matters.<sup>1333</sup> With the exception of family law and veterans' matters, the guidelines provide for grants of legal aid in limited circumstances only.

5.60. The Commonwealth guidelines require the application of a means and a merit test to all legal aid applications. The means test requires analysis of an applicant's income and assets against set benchmarks. The merit test requires a qualitative analysis, to assess whether a particular case has 'reasonable prospects of success', is one where the 'ordinarily prudent self-funding litigant would risk his or her funds in proceedings', and where 'the costs of legal aid are warranted by the likely benefit to the applicant or, in some circumstances, the community'.<sup>1334</sup>

5.61. The Commonwealth guidelines also specify fee ceilings, or 'caps' in family law matters of \$10 000 for party professional costs<sup>1335</sup> and \$15 000 for the costs of children's representation costs.<sup>1336</sup> Such funding is usually provided in stages which relate to key points in the litigation process. Once a stage (for example, up to and including the first directions hearing) has been completed, the LAC then determines whether funding will be granted for the next stage (for example, up to and including the interim hearing).

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1331. Such funding is offset if the child representative's costs are recovered from the parties: 'Commonwealth guidelines – Legal assistance in respect of matters arising under Commonwealth laws' in current *Agreement in relation to provision of legal assistance* between the Commonwealth and each State, Sch 3, Guideline 1. Guideline 3 allows legal aid to be granted for child maintenance and child support departure applications.

1332. This is said to disadvantage women, who are often the party requiring adjustment of property interests under s 79 of the *Family Law Act 1975* (Cth) and may lack the financial resources to pay for legal representation. Family violence and relationship inequalities may cause PDR processes to be ineffective or inappropriate. For a detailed discussion of these issues, see: N Seaman *Fair shares? Barriers to equitable property settlements for women* Womens Legal Services Network Canberra 28 April 1999, rec5, 8.1.

1333. 'Commonwealth Priorities', in current *Agreement in relation to provision of legal assistance* between the Commonwealth and each State, Sch 2, 3.

1334. 'Commonwealth guidelines – Legal assistance in respect of matters arising under Commonwealth laws' in current *Agreement in relation to provision of legal assistance* between the Commonwealth and each State, Sch 3, 1.

1335. Victoria Legal Aid may extend this by \$2000 where appropriate: *Victoria Legal Aid Consultation* Melbourne 26 August 1999.

1336. 'Commonwealth guidelines – Legal assistance in respect of matters arising under Commonwealth laws' in current *Agreement in relation to provision of legal assistance* between the Commonwealth and each State, Sch 3, 9.

5.62. LACs differ in their method of interpreting and applying the merit test criteria.<sup>1337</sup> The Commission was told that inequities and inappropriate refusal of aid may occur in some cases.<sup>1338</sup> The legal aid grants approved in children's matters in the past three years are set out in the table below.

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1337. See para 5.71–5.92.

1338. eg Womens Legal Service (Qld) *Consultation* Brisbane 20 September 1999. See also BClarke et al *Trial by legal aid – a legal aid impact study* Crossroads Family and Domestic Violence Unit Victoria 1999.

**Table 5.3 Legal aid grants approved in family law, children's matters**<sup>1339</sup>

	Residence			Contact			Children's representation		
	1996-97	1997-98	1998-99	1996-97	1997-98	1998-99	1996-97	1997-98	1998-99
NSW	2 795	3 520	2 542	3 067	3 967	2 680	831	945	708
VIC	2 466	2 259	2 333	2 764	2 939	3 059	558	357	508
QLD	2 795	2 614	3 134	4 022	3 970	4 249	516	480	459
SA	923	1 169	1 295	1 081	1 236	1 387	370	445	392
WA	362	545	816	379	646	963	159	143	185
TAS	776	644	856	1 240	1 019	1 238	128	133	136
ACT	243	319	273	297	529	456	92	123	81
NT	151	154	180	129	116	152	25	20	42
Total	10 511	11 224	11 430	12 979	14 422	14 864	2679	2 646	2511

*Measuring legal need*

5.63. There is general consensus among government, the courts and the legal community about the types of cases and litigants which should have priority for publicly funded legal representation. It is not known how many of such litigants do not receive legal aid because they do not apply for legal aid;<sup>1340</sup> apply for, but are wrongly denied legal aid (due to inadequacies in the assessment process); or have qualified and been granted legal aid but such aid has been exhausted before the matter has been resolved.<sup>1341</sup> The consequences in all such cases extend beyond the courts to social security and welfare agencies, CLCs and charities.<sup>1342</sup>

5.64. Collecting and analysing data regarding unrepresented litigants requires careful definition. For example, a party may be unrepresented for the entirety of proceedings, may be fully represented, or represented for part of the proceedings.<sup>1343</sup> The Law Reform Commission of Western Australia's *Review of the*

1339. A-G's Dept – Family and Legal Assistance Division *Correspondence* 18 November 1999. Note that the figures for Queensland include grants of aid for conferencing. Such cases may not receive or require a grant to litigate the matter. See para 5.89.

1340. In its submission to the Commission, National Legal Aid argued there is 'a large area of unmet need for legal aid services that is not expressed as demand for those services': National Legal Aid *Submission* 360.

1341. Anecdotal evidence from CLCs suggests this is happening, but data from LACs does not support this: Victoria Legal Aid *Consultation* Melbourne 26 August 1999.

1342. Family Court judges *Consultation* 28 September 1999; B Clarke et al *Trial by legal aid – a legal aid impact study* Crossroads Family and Domestic Violence Unit Victoria 1999, 22.

1343. The Commission's research into the Family Court noted whether parties were unrepresented at commencement and/or finalisation, and categorised parties as receiving no, full, or partial representation. These categorisations are important. As many parties are conscious of the need to conserve funds, they may utilise lawyers for some but not all case events. The figures on unrepresented parties may be quite misleading if the data does not distinguish those who had no



*criminal and civil justice system in Western Australia – final report* (LRCWA report) stressed that the lack of reliable, quantitative data on unrepresented litigants ‘causes significant difficulties when attempting to assess the magnitude of the phenomenon and develop solutions’.<sup>1344</sup> The report recommended that

[d]ata should be collected by courts to:

- (1) profile litigants;
- (2) categorise their legal disputes;
- (3) determine the cost of resolving matters; and
- (4) record the quality, nature and satisfaction of the results.<sup>1345</sup>

5.65. Some of that data may be difficult and expensive for courts and tribunals to collect on any regular basis. The Commission proposed in DP 62 that courts and tribunals provide data regarding unrepresented litigants on an annual basis.<sup>1346</sup> This proposal received strong support.<sup>1347</sup> National Legal Aid submitted that such data would be ‘a valuable indication of the shortfall between legal aid need and legal aid funding’.<sup>1348</sup> Data collected should include the number of litigants who are unrepresented at commencement of proceedings and/or the resolution of the matter, in cases where the applicant, the respondent or all parties are unrepresented; how and at what stage the cases involving unrepresented litigants were resolved, including numbers of cases heard, defended and decided, withdrawn or dismissed by consent, finalised by consent orders prior to hearing, and finalised by consent orders during hearing.

5.66. DP 62 also proposed that LACs improve their data collection.<sup>1349</sup> The Family Law Refusals Review (FLRR), conducted by Legal Aid Qld, recommended that data collected by LACs inform on ‘outcomes of matters, trends in approvals and refusals of aid, use of alternative services, and the legal needs of the community aware of legal aid and its services’.<sup>1350</sup> National Legal Aid currently publishes statistical information on its website which is provided by all LACs on a monthly basis. This includes statistics on the number of applications and refusals for legal aid by matter type. National Legal Aid also provides a large amount of statistical information to the federal government. In addition, LACs provide data in their annual reports on applications and refusals, although the information published by different LACs varies considerably. National Legal Aid is currently working to develop a consistent standard for statistical information to be included in each LAC annual report.

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1344. LRCWA report, para 18.5.

1345. *id* rec 198.

1346. ALRC DP 62 proposal 7.16.

1347. eg R Sackville *Submission* 388; Law Council *Submission* 375; Victorian Bar *Submission* 367; DIMA *Submission* 385. See also Senate Legal Aid Inquiry, rec 3.

1348. National Legal Aid *Submission* 360.

1349. ALRC DP 62 proposal 7.15.

1350. Legal Aid Qld *Family law refusals – discussion paper* Legal Aid Qld 4 November 1998, 12.

5.67. The following recommendations focus on data that is measurable from within court, tribunal and legal aid files. Such data will disclose necessary information on the profile and needs of persons assessed for and refused legal aid, case outcomes and the efficacy or otherwise of alternative dispute resolution for legal aid cases. From court and tribunal data, some measures of unmet legal need and of the impact of cases with unrepresented litigants on court and tribunal resources will be possible, as well as relative outcomes for such cases. It is costly to collect and categorise case outcomes, and to administer data collection.<sup>1351</sup> It is vital that government, courts, tribunals and LACs identify the type of information sought and the purpose it is to serve. The practice of recording and reporting data becomes discredited if agencies see such work as having little utility.

**Recommendation 39.** Legal aid commissions should standardise data collection nationally and publish this data in their annual reports, with respect to both inhouse and assigned cases, on

- applications and refusals for legal aid, specifying case and applicant type (including data such as gender, non English speaking background, and rural and regional postcode)
- duration (from date of grant to date of finalisation) and outcomes in legal aid cases, by reference to case types (that is criminal, family law, care and protection, administrative law, general civil law cases)
- statistical trends in approvals and refusals of aid
- outcomes in conferencing and/or alternative dispute resolution services within legal aid commissions
- use of legal aid commission services other than under a grant of legal aid.

**Recommendation 40.** Federal courts and tribunals should publish data in their annual reports on the number of unrepresented parties. In gathering such data, courts and tribunals should consult to develop a standard definition of 'unrepresented party' and information on case outcomes and case duration in matters where there is an unrepresented party.

### *Special needs funding*

5.68. Certain matters funded by legal aid in the federal jurisdiction, such as multi-party drug importation cases, are expensive, and use a disproportionate share of legal aid funds.<sup>1352</sup> Certain family law cases, such as intractable, abuse or

1351. National Legal Aid *Submission 360*.

1352. Attorney-General's Dept *Transcript of evidence* Senate Legal and Constitutional Legislation Committee Estimates Hearings 26 February 1998 cited in Senate Legal Aid Inquiry, para 6.19.

sterilisation cases, likewise may be expensive.<sup>1353</sup> Funding these matters diverts funding from other federal civil matters.<sup>1354</sup> To deal with this problem, the Senate

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1353. Family Court judges *Consultation* 9 August 1999.

1354. In *Dietrich v R* Mason CJ and McHugh J acknowledged that if an accused is unrepresented in a serious offence, the matter may be adjourned indefinitely to prevent an unfair trial, and that this could result in reordering legal aid practices and priorities: (1992) 109 ALR 385, 397. The Senate Legal Aid Inquiry noted that there are no comprehensive, readily available, statistics on the number of *Dietrich* applications being made, but that the fragmented and anecdotal information collected by the Committee since the Second Report (twelve months previously) indicated that the number of applications for stays on *Dietrich* grounds was increasing: Senate Legal Aid Inquiry, 9.

Legal Aid Inquiry<sup>1355</sup> and the Law Council<sup>1356</sup> proposed establishing a 'special needs fund' for expensive cases. The Commission supported such a proposal in DP 62.<sup>1357</sup> In reply, National Legal Aid stated

NLA supports the provision of special funding to meet the costs of providing legal aid in expensive matters. Even with cost ceilings and other strategies to limit costs in legally aided matters, there will always be some cases in which justice requires an allocation of funds in excess of the ceiling ... And, of course, the fund should be additional funding and not funding skimmed from existing legal aid budgets.<sup>1358</sup>

5.69. On 21 December 1999, the federal Attorney-General announced the establishment of a separate fund for expensive Commonwealth criminal cases, principally for those cases which might otherwise be stayed due to lack of representation for the defendants, pursuant to the *Dietrich* decision.<sup>1359</sup>

A separate national expensive cases fund will be established to deal with the potential for stays of Commonwealth criminal prosecutions. The fund will receive \$9 million over the next four and a half years, including \$5 million taken from a surplus of funds from Victoria Legal Aid.<sup>1360</sup>

5.70. National Legal Aid submitted that such a fund should be administered by the LACs since administration by the Attorney-General's Department 'simply adds a further layer of bureaucracy to the legal aid process'.<sup>1361</sup> Other submissions supported administration by the Attorney-General's Department.<sup>1362</sup> The arrangements for and efficient operation of such a fund is a matter for agreement between the Attorney-General's Department and LACs.

**Recommendation 41.** The federal government's expensive cases fund should be open to applications on behalf of parties in all complex, expensive cases in the federal jurisdiction, including family law cases.

## Access to legal aid

### *Introduction*

1355. ALRC DP 62 para 6.41.

1356. Law Council 'Law Council welcomes Attorney's consideration of special needs fund for legal aid commissions' *Media release* 22 April 1999; *Law Council Submission* 375.

1357. ALRC DP 62 proposal 7.2.

1358. National Legal Aid *Submission* 360.

1359. See fn 145.

1360. D Williams 'New legal aid fund for expensive cases' *News release* 21 December 1999.

1361. National Legal Aid *Submission* 360.

1362. Victorian Bar *Submission* 367; *Law Council Submission* 375; J Doyle *Correspondence* 16 November 1999; Federal Court *Submission* 393.



Full services for a small subset of needy clients, and no services at all for many others, is simply not an acceptable outcome.<sup>1363</sup>

5.71. Those who apply for a grant of legal aid are screened for eligibility and streamed for appropriate assistance. When assessing an application for legal aid, competing criteria balance the financial circumstances of the applicant, the case type and issues in dispute, urgency of need, the skills of the person, and the merits of the case.<sup>1364</sup>

5.72. Deploying legal aid resources in an effective and cost efficient manner is a more complex task than simply ordering cases according to priorities. It requires analysis of how much priority cases cost LACs and how this cost may be minimised without providing a substandard service. The Ontario Legal Aid Review (OLAR) stressed efficiency and proportionality as crucial to reform.

Regardless of the level of funding, we believe that capped funding demands that resources be directed to the most compelling legal needs and that they be deployed in the most efficient manner possible. Doing so necessarily requires prioritization of legal needs and a detailed analysis of the most cost-effective means of providing specific services.<sup>1365</sup>

5.73. The Commonwealth merits test provides little to assist LACs in this task. Such assessment may require a focus on client needs, rather than on case type.<sup>1366</sup> A needs-based model is commendable in theory but presents practical difficulties in evaluation. LACs termed such needs assessment a 'highly meritorious idea',<sup>1367</sup> justifying 'very careful discussion and detailed analysis',<sup>1368</sup> but resource intensive.<sup>1369</sup> Certainly, a full 'skills audit' of applicants may require detailed analysis beyond the capacity of LACs.<sup>1370</sup>

5.74. Application forms for legal aid could require identification of needs and client skills. To some degree, LACs already assess needs when applying the merit test. Difficulties arise if clients with intellectual disability, psychological or

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1363. Ontario Legal Aid Review *Report of the Ontario Legal Aid Review: a blueprint for publicly funded legal services* Queen's Printer for Ontario 1999, ch 6 <<http://www.attorneygeneral.jus.gov.on.ca/olar>> (19 January 1999) (OLAR report).

1364. See R Dingwall et al *Rationing and cost-containment in legal services* Lord Chancellor's Department Research Series No 1/98 March 1998,5ff. See also, for example, Legal Aid Commission of NSW *Legal aid policies* Legal Aid NSW Policy and Education Branch July 1998.

1365. OLAR report, ch 10.

1366. NT Legal Aid *Consultation* Darwin 6 October 1999; J McCamus 'The reshaping of legal aid' *Paper Access to Affordable and Appropriate Law Related Services in 2020* Conference CBA Communications Ontario January 1999, 46.

1367. Legal Aid ACT *Correspondence* 22 October 1999.

1368. Victoria Legal Aid *Correspondence* 1 November 1999.

1369. NT Legal Aid *Correspondence* 1 November 1999; Legal Aid NSW *Correspondence* 29 November 1999, 4.

1370. Legal Aid NSW *Consultation* 25 November 1999.

psychiatric disorders, or drug induced conditions, are unable to disclose or do not admit such problems. There is a danger that the attempt to assess skills and needs could work against equitable treatment of applicants.<sup>1371</sup> Future research into legal aid service delivery ought to include an analysis of assessment of client needs.

5.75. Needs analysis is important both for the improvement of service delivery in individual cases and to direct funds generally to cases, clients and geographical areas which experience particular disadvantage. A recent forum on access to justice in Canada identified lack of information about client needs as a barrier to improved service delivery.

A fundamental proposition in the design of a system for providing services of any kind to the public would surely be that the system should be designed in the light of an understanding of the existing needs for service. While this may appear to be an uncontroversial proposition, it is not entirely clear that it is one which has informed the design of legal aid services ... [T]o the extent that fixed funding requires the legal aid system to be strategic in its use of resources, information concerning the changing nature of these needs will be of crucial importance.<sup>1372</sup>

5.76. People from rural and remote areas in particular experience difficulties accessing legal and family services and dealing with litigation or review proceedings. The travel involved to access such services can be extensive and costly. The Commission's research showed regional variations in the types of matters lodged in federal courts and tribunals.<sup>1373</sup> Such differences can impact on the duration of cases, settlement rates, the resources needed in the courts and tribunals, and case management strategies.

For someone who is not from Canberra to have to run around town looking for solicitors and Legal Aid and finding somewhere to sit and fill out forms – and for people who don't have much money – photocopying, lunches, parking, all adds up on top of petrol money and sometimes accommodation. Surely something or someone can make life easier at such a traumatic and daunting affair.<sup>1374</sup>

Living in Dalby I was unable to personally talk to anyone with regards to what was expected from me and at no time was any form of mediation attempted by the other party. If you live outside the coastal region no-one wants to know you and there is no services provided.<sup>1375</sup>

5.77. Federal courts and tribunals have circuits to regional locations, offer telephone access services, and use videoconferencing to good effect. Consultations

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1371. Victoria Legal Aid *Correspondence* 1 November 1999.

1372. J McCamus 'The reshaping of legal aid' *Paper Access to Affordable and Appropriate Law Related Services in 2020 Conference CBA Communications Ontario* January 1999, 46.

1373. See T Matruglio & G McAllister, Family Court Empirical Report Part One; T Matruglio & G-McAllister, Federal Court Empirical Report Part One.

1374. Family Court file survey response 867 (unrepresented respondent).

1375. Family Court file survey response 1000 (unrepresented respondent).

and submissions regarding the Family Court were generally supportive of the Court's services to rural and regional clients.<sup>1376</sup>

5.78. The federal government's expansion of CLCs has included a particular focus on improving legal services in rural and regional areas,<sup>1377</sup> with new CLCs established in such areas, determined on the basis of area population, employment and existing access to legal aid and community legal services.<sup>1378</sup> In addition, rural, regional and remote telecommunications legal information services are being established, using toll-free numbers through a national network of rural telephone advice services, the internet, or video conferencing, including a National Family Law Telecommunication Advice and Information Service, for family law and child support matters, and a telephone service for 'men in crisis'.<sup>1379</sup>

5.79. Legal services in rural areas are often described as particularly inaccessible for women. The Women's Legal Resources Centre, contacted by approximately 10 000 women each year, reported that many of their inquiries come from rural areas, where access to face-to-face community legal advice is limited. Family law issues are prominent in rural areas, for example, 65% of inquiries received each week by Dubbo Local Court are from women asking about family law issues.<sup>1380</sup>

5.80. In addition to the availability of legal advice and representation, a major issue for litigants in regional areas is the availability of quality experts to provide advice, reports and evidence in Court.

The problem with [engaging experts] when you are dealing with a town like Mackay is that we don't have those resources so we then have to look at resources and trying to organise people in Brisbane or people in Townsville and that sort of stuff, so it does add extra cost. And secondly, it adds extra time in making all those arrangements ... we [have to] get the stuff organised in Brisbane, got to get the client down to Brisbane, all those sorts of things.<sup>1381</sup>

5.81. The federal Attorney-General's Department recently completed a legal assistance needs study, which showed that people in South Australia, New South

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1376. eg the establishment of Aboriginal liaison officers, and telephone and videoconferencing facilities: Family Court *Consultation* Darwin 7 October 1999; NT Legal Aid *Consultation* Darwin 6 October 1999.

1377. In its 1998-99 budget the federal government committed \$11.9 million to the expansion of CLCs and a further \$3.6 million in the May 1999 budget: D Williams 'Government expands community legal services' *News release* 11 May 1999.

1378. *ibid.*

1379. *ibid.*; D Williams 'National Family Law Telecommunication Advice and Information Service' *News release* 11 May 1999; D Williams 'Free advice lines to assist families' *News release* 14 September 1998; D Williams 'Telephone service for men in crisis' *News release* 11 June 1998.

1380. S Blazey 'Re-thinking family law proceedings' *Paper* 'Children, the Forgotten Players' Conference Blacktown 15 June 1999.

1381. JRC solicitor interview: JRC *Correspondence* 20 December 1999, 4.

Wales, Queensland and Western Australia were more likely to miss out on legal aid than in the other States and Territories, and that

- Almost one in four low income families need legal help for a Commonwealth matter.
- Most want legal help to deal with family law matters, particularly to resolve property disputes, separation and divorce proceedings and child and spouse maintenance.
- Three out of four of these people seek legal help, with one third going to Legal Aid.<sup>1382</sup>

5.82. The Commission supports continuing research in this area. Legal need is not fixed, but requires ongoing evaluation. The JRC's current research project into family law cases for the federal Attorney-General has profiled the 'typical' family law case and litigant and how such cases are resolved.<sup>1383</sup> The second stage of the project will provide comparisons of the legal services provided to self-funding and legally aided family law clients. Again, such research can provide clear guidance for assessment and service delivery of legal aid. The Commission considers that further analysis is required of the methods used by LACs to assess and assign appropriate forms of legal assistance. Such research should be aimed at developing more equitable, efficient and effective means of delivering legal aid services.

***Entry points***

5.83. The first issue for a person requiring legal assistance is whom to approach. There are many entry points to legal aid. For family law matters, legal aid applications may be lodged directly 'off the street', by mail, made at or following clinic advice, through duty solicitors, or by private solicitors for their clients. Applicants are referred to legal aid by LAC telephone information services, CLC telephone and clinic advice services, court assistance programs, local court chamber magistrates, family and local court registries, and counselling services. Such services may provide legal advice and explain the guidelines and priorities for legal aid. If appropriate, persons are assisted to make an application. The Immigration Advice and Rights Centre (IARC) has found its client base to be generated through similarly diverse entry points. A 1995 study reported that 85% of advice was provided via the centre's telephone service, the remainder through drop in centres, referrals from friends, community centres and groups, legal aid, newspapers and private solicitors.<sup>1384</sup>

5.84. Legal Aid Qld uses its telephone information service as a screening process for legal aid applicants. Face to face advice sessions are not provided

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1382. D Williams *News releases* 23 December 1999.

1383. R Hunter *Family law case profiles* JRC Sydney June 1999, para 445.

1384. J Daignan et al *Free and independent immigration advice – an analysis of data collected by the Immigration Advice and Rights Centre July 1990–November 1992* Bureau of Immigration Multicultural and Population Research Canberra 1995, x, table 4.2, 16.

before the telephone information.<sup>1385</sup> In 1998–99, 227 191 calls were received and 48 103 ‘advices’ provided.<sup>1386</sup> In other Australian States, as in overseas jurisdictions, face to face consultations are an important part of the screening process. These are said to assist frank, open disclosure, provide an opportunity to peruse financial, court and other relevant documents and to assist applicants in filling out forms. In the Australian Capital Territory, counter staff and student volunteers are trained to assist the LAC with such interviews and in compiling applications.

5.85. The OLAR recommended the centralisation of the initial screening process, with a single point of first contact to be set up for client intake at Area Offices.<sup>1387</sup>

Upon entering an Area Office, an individual would be interviewed by a trained paralegal, supported by social workers and/or staff lawyers as necessary. The intake worker would interview the applicant in order to conduct a financial-eligibility assessment and prepare a preliminary assessment of the case. Intake workers' decisions on questions of coverage would be supervised by staff lawyers and plan administrators to ensure coverage rules are being applied consistently and accurately.

Applicants who are not financially eligible for legal aid assistance may still be provided with public legal education materials, or referrals to other agencies or to a member of the private bar.

Based upon this initial interview, it may be clear that the person's case does not really involve a legal issue at all. The person could then be diverted to non-legal service providers, such as a shelter or a government agency, depending upon the person's circumstances. Clients who are diverted to other agencies would be told that they could return to legal aid if and when their matters assumed a legal dimension.

5.86. In the United Kingdom the Lord Chancellor's Department has implemented pioneer programs to select strategic test areas, where demand on legal assistance is great, and focus on developing procedures for the efficient selection and delivery of legal services to these areas. These intake programs are established in different regions and seek to achieve a consistent approach.<sup>1388</sup>

### *Processing and determining applications*

5.87. In most States, all applications for legal aid are dealt with by grants officers in the grants or ‘assignments’ division of the LAC. Successful applications

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1385. Legal Aid Qld *Consultation* Brisbane 21 September 1999.

1386. Legal Aid Qld ‘Annual report highlights successful year for Legal Aid Qld’ *Media release* <<http://legalaid.qld.gov.au/corp/media1.htm#annual>> (26 November 1999).

1387. OLAR report, ch 10.

1388. R Smith *Justice: Redressing the balance* London Legal Action Group 1997, 85.

may be referred inhouse if there is capacity, or to private solicitors. Such a centralised system allows applications to be dealt with in a consistent manner.<sup>1389</sup>

5.88. Legal Aid NSW operates a different intake procedure. Their assignments or 'referrals' section determines eligibility for legal aid for those applicants who nominate a private solicitor to act for them. The inhouse practice receives all applications lodged at the front desk, sent in by mail, through duty solicitors or advice clinics. The eligibility of these applicants is determined by inhouse solicitors, who then act for the clients if their applications are successful. This system is said to avoid internal transaction costs and allow merit to be more accurately identified.<sup>1390</sup> Supervision arrangements inhouse ensure that experienced solicitors make the more difficult decisions regarding merit.<sup>1391</sup>

5.89. Like other LACs, Legal Aid Qld has an assignments division which deals with all applications for aid.<sup>1392</sup> However, unlike the other States, the intake procedure for family law applicants is centred on a conferencing program. This program has its supporters and its critics.<sup>1393</sup> Most legal aid applicants are referred to the conferencing program before the merits of the case are decided. Matters not resolved at the conference are the subject of a report by the conference chairperson. This report is used by Legal Aid Qld to determine whether there should be further

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1389. Victoria Legal Aid *Consultation* 26 August 1999, 17 September 1999; NT Legal Aid *Consultation* Darwin 6 October 1999; Legal Aid WA *Consultation* Perth 8 September 1999; Legal Aid ACT *Consultation* Canberra 27 September 1999; Legal Aid Qld *Consultation* Brisbane 21 September 1999. If an application cannot be determined due to lack of information, an 'investigate and report' grant can be made for the client to be interviewed and the information gathered: Legal Aid ACT *Consultation* Canberra 27 September 1999.

1390. Legal Aid NSW *Consultation* 17 September 1999. In NSW, if an inhouse solicitor refuses an application the applicant may appeal this decision to the Legal Aid Review Committee. If an appeal is lodged, the determining solicitor must prepare an appeal document setting out details of the application and grounds for refusal. In other States, the appeals are prepared by the assignments division, before referral to the Review Committee: Legal Aid ACT *Consultation* Canberra 27 September 1999.

1391. Legal Aid NSW *Consultation* 21 December 1999.

1392. Legal Aid Qld *Consultation* Brisbane 21 September 1999.

1393. eg WLS Brisbane *Submission* 218; J Dewar *Consultation* 21 September 1999. See also J Dewar et al *The impact of changes in legal aid on criminal and family law practice in Queensland* Faculty of Law Griffith University 1998.

funding of either or both parties. In 1997–98, 82% of cases fully or partially settled at a conference,<sup>1394</sup> and 83% in 1998–99.<sup>1395</sup> While these figures might imply that conferencing is an efficient process, research suggests that there may be an optimal settlement rate for family law matters. If too many cases are settled quickly, this can indicate that the process is coercive and that some of the settlement agreements made may not be appropriate or durable.<sup>1396</sup>

[T]he discussion paper (DP 62) is correct to flag the concern of parties being forced into conferences and sometimes forced to settle matters because of the availability of only one conference ... High settlement rates do not necessarily mean that agreements will be lasting and future court proceedings avoided.<sup>1397</sup>

5.90. Exclusionary criteria exempting family violence and abuse cases from conferencing are applied,<sup>1398</sup> but it has been suggested that this is not always done carefully enough.<sup>1399</sup> Generally, there was no support for using ADR as a mechanism for screening applications.

5.91. The OLAR dealt extensively with intake processes and prioritisation of legal aid applications. Under their proposed system, in emergency cases, where the safety of a spouse or child is at risk or where abduction is a possibility, intake officers are able to authorise limited aid immediately. Full assessment is postponed until the individual's situation has stabilised. In cases other than emergencies, the applicant is assessed by reference to financial eligibility, legal needs, personal circumstances, whether needs are 'covered' by the legal aid program and whether there may be additional non-legal needs which require assistance from a community agency or government department.<sup>1400</sup>

The claim for an entitlement to legally aided services in family law matters rests on three factors: the complexity of the state-enacted legal regime; the significance of the interests that legal regime has been put in place to protect; and the potential for significant power imbalances between the parties to family law disputes.

The program operates in conjunction with the larger network of family emergency services, such as shelters and crisis centres.

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1394. Legal Aid Qld *Submission 248*.

1395. Legal Aid Qld *Consultation Brisbane 21 September 1999*.

1396. WLS Brisbane *Consultation Brisbane 20 September 1999*; National Legal Aid *Submission 360*; See also JKelly 'A decade of divorce mediation research: some answers and questions' (1996) 34(3) *Family and conciliation courts review* 373, 375. The high proportion of 'repeat' cases in the Commission's sample of Family Court cases confirms the need to secure lasting settlements.

1397. Legal Aid WA *Submission 378*.

1398. Legal Aid Qld *Submission 248*.

1399. N Seaman *Fair shares? Barriers to equitable property settlements for women* Womens Legal Services Network Canberra 28 April 1999; WLS Brisbane *Submission 218*; WLS Brisbane *Consultation Brisbane 20 September 1999*.

1400. OLAR report, ch 10

5.92. An important aspect of an effective intake process is the 'turnaround time' taken to reach a decision about whether an applicant is eligible for a grant of legal aid. LACs have identified turnaround time as an essential performance indicator and have set benchmarks which are closely monitored and substantially adhered to. There are differences in turnaround time between LACs. In 1998-99, figures were as follows.

- In Queensland, 47% were processed on the same day, 87% within 5 days, 94% within 10 days and 97% within 15 days.<sup>1401</sup>
- In Victoria, 76% were processed on the same day, 91% within 5 days, 96% within 10 days and 97% within 15 days.<sup>1402</sup>
- In the Australian Capital Territory, 8% of applications were assessed on the same day, 67% within 5 days, 86% within 10 days, 91% within 15 days and 96% within 30 days.<sup>1403</sup>

5.93. Legal Aid NSW reports that 74% of applications were assessed within 40-days.<sup>1404</sup> This includes determination of legal aid and the provision of written advice about this to the applicant.<sup>1405</sup> Figures from other LACs regarding 'processing' of an application do not specify whether this refers simply to recording of an application and assigning to a grants officer, or to the determination of that application. Difference in the numbers of applications and intake procedures may also explain these figures. Analysis of these differences should be undertaken.

**Recommendation 42.** The federal government should commission research to evaluate the intake procedures used by legal aid commissions to screen and assess applications for legal aid and to determine legal aid services for successful applicants.

## Family law cases

5.94. In family law matters, the issues in dispute are often difficult to identify early on and may change in accordance with the fragmented and changing relationship between the parties. Some issues resolve during the litigation process, while others unexpectedly emerge later.<sup>1406</sup> As a consequence, it is difficult to

1401. Legal Aid Qld *Annual report 1998-99*, 32.

1402. Victoria Legal Aid *Annual report 1998-99*, appendix 9.

1403. Legal Aid ACT *Annual report 1998-99*, 56.

1404. Legal Aid NSW *Annual report 1998-99*, 4.

1405. Legal Aid NSW *Consultation 21 December 1999*.

1406. JRC research has found that, more so than litigants in other federal jurisdictions, Family Court cases are prone to new elements arising. This occurs as circumstances alter in the lives of the



assign resources accurately to family cases and to anticipate what a case may need.<sup>1407</sup> Family law matters require a service delivery model which streams cases to receive the right kind of assistance. Grants of aid for early case preparation, negotiation and evidence gathering can help cases to resolve early and to identify and decipher issues. Funding guidelines which are too prescriptive, or intake procedures which are too attenuated, create difficulties in family law cases.<sup>1408</sup> Legally aided Family Court cases must be managed by LACs and the Family Court together. Cases which receive priority legal aid representation as complex, abuse or client disability cases should not be undermanaged or over-processed within the Family Court.<sup>1409</sup> It is not enough for legal aid to become more focussed and effective. This must be matched by effective court case management.

### *Priority cases and clients*

There is now a growing consensus among commentators on legal aid that defining the right array of service components – varying with type of law, client need, case priorities, type of service being offered ... or the collective characteristics of the needs of certain groups of clients ... is far more useful.<sup>1410</sup>

5.95. Within the group of cases which qualify for legal aid there is a small group of cases which require intensive representation. In family law such cases may involve applicants with psychiatric problems or intellectual or physical disabilities,<sup>1411</sup> or intractable family violence or child abuse issues. These cases may not be so easy to categorise.<sup>1412</sup> The OLAR summarised this problem, stating that

[f]amily law cases vary enormously in their complexity, and the degree of conflict and power differentials between the parties, in ways that defy easy categorization and initial assessment.<sup>1413</sup>

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litigants, or because litigants do not disclose relevant facts to the court or their lawyer until they are raised by the other side. 25% of family law solicitors interviewed stated that new elements arise almost all the time, and 40% stated that new elements arise fairly often: JRC *Correspondence* 20 December 1999, 3. See, on the Family Court originating process and identification of issues, para 8.103–8.110.

1407. Although note that certain factors, such as English language difficulty, allegations of family abuse and intellectual disability are generally reliable indicia of case complexity: see para 5.74, 8.177–8.179.

1408. Victoria Legal Aid *Consultation* 23 November 1999. The Crossroads reports concluded that, 'In one of the worst scenarios, a woman could find herself going to court unrepresented, having to face the perpetrator of violence against herself and possibly their children, and having to cross-examine and be cross-examined by him': B Clarke et al *Trial by legal aid – a legal aid impact study* Crossroads Family And Domestic Violence Unit Victoria 1999, iv.

1409. See para 8.199–8.249.

1410. OLAR report, ch 7.

1411. National Legal Aid *Submission* 360.

1412. Legal Aid NSW Solicitor *Consultation* Sydney 17 September 1999; Family Court *Submission* 348; Legal Aid Qld *Consultation* Brisbane 21 September 1999.

1413. OLAR report, ch 10

5.96. It is the cluster of features in such cases which adds to their complexity. Certainly, parties in such cases are vulnerable. Intellectually disabled parties, for example, may be unable to evaluate whether a proposed settlement is acceptable or how to implement the contact arrangements. They may be unable to keep up with the pace set by the court. Such clients need the time and patient explanation of a representative properly trained to cope with such difficulties.<sup>1414</sup>

5.97. The nub of the problem with legal aid funding under stress is the number of cases requiring such intensive representation. Capped funding presumes a relatively standard case. How does one ensure an appropriate spread of legal aid and still provide representation until the matter is finalised for cases where the

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1414. Legal Aid NSW *Consultation* 25 November 1999; T Brown *Consultation* Melbourne 1 December 1999. See also *In the Marriage of Sajdak* (1992) 16 Fam LR 280: owing to the withdrawal of legal representation, a non-English speaking litigant failed to adduce relevant evidence or seek an adjournment because she did not understand the procedures. The Full Court set aside the trial decision and ordered a new trial.

children and/or the parties are so vulnerable, and the family so dysfunctional that full, careful exposition and resolution of the issues is essential in the public interest?

5.98. In such cases, relevantly experienced solicitors are needed to provide specialised, thorough and ongoing legal advice, evidence gathering and advocacy. Non-legal service support is also often required. The Commission has been told that LACs already have a 'finely honed' process for prioritising cases, which cannot be improved upon with current funding.<sup>1415</sup> National Legal Aid agreed

that there are priority matters which require nothing less than full representation. However, the legal aid commissions are not provided with adequate funding to provide full representation to all applicants who fall within the highest priority. There is certainly insufficient funding to grant aid to all parties in family law matters who have language or emotional difficulties which preclude effective self-representation.<sup>1416</sup>

5.99. The indicia of priority are more common in legally aided than privately funded cases. The JRC analysis of a sample of legal aid family law cases showed

- 60% of CLC and private solicitors' legal aid cases<sup>1417</sup> and 40% of inhouse LAC cases included allegations of domestic violence, compared with 25% of self-funded cases<sup>1418</sup>
- 28% of private solicitors' legal aid cases and 22% of inhouse LAC cases included allegations of child abuse, compared with 12% of self-funded cases<sup>1419</sup>
- 27% of CLC clients, 26% of inhouse LAC clients and 15% of private solicitors' legal aid clients were from non English speaking backgrounds,<sup>1420</sup> compared with 12% of self-funded parties<sup>1421</sup>
- 74% of CLC clients, 67% of inhouse LAC clients and 62% of private solicitors' legal aid clients were women, compared with 52% of self-funded parties.<sup>1422</sup>

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1415. Legal Aid ACT *Consultation* Canberra 27 September 1999; Victoria Legal Aid *Consultation* 26 August 1999; Legal Aid NSW *Consultation* 17 September 1999.

1416. National Legal Aid *Submission* 360.

1417. Funded by LACs.

1418. R Hunter *Family law case profiles* JRC Sydney June 1999, para 393.

1419. *ibid.*

1420. And 3.4% of inhouse clients were of Aboriginal or Torres Strait Islander descent: R Hunter *Family law case profiles* JRC Sydney June 1999, para 40-42. While this figure may appear low, it is high compared to the total Aboriginal and Torres Strait Islander population in Australia of 2.1%: Australian Bureau of Statistics *1999 Year book Australia No 81* No 1301.0 AusInfo Canberra 1999, 102, table S1.1.

1421. R Hunter *Family law case profiles* JRC Sydney June 1999, para 372.

1422. Other research shows that the proportion of women seeking free legal assistance in property matters is particularly high. There are 2.5 times as many women seeking advice at CLCs than men: N Seaman *Fair shares? Barriers to equitable property settlements for women* Women's Legal Services Network April 1999.



5.100. *Fee ceilings.* It has been submitted that the fee ceilings or ‘caps’ which apply to legally aided family law matters are insufficient to cater for priority cases.<sup>1423</sup> Advocates of capping say it encourages efficiency and more appropriately reflects the means of most family law litigants. Where only one party in a matter is funded, the cap is said to reflect more accurately the funds available to the privately represented party.<sup>1424</sup> Research has shown that most self-funding Family Court litigants are in the moderate to low income range – a median of around \$35-000.<sup>1425</sup> While such incomes place litigants outside the legal aid means test, their resources are nonetheless limited and ought not to be pitted against uncapped legal aid funding.<sup>1426</sup> Further, caps limit expenditure which may be recouped by a legal aid charge on the party’s property.<sup>1427</sup>

5.101. However, concerns have been raised about the present system in which capped grants are well publicised and applied uniformly without regard to the circumstances of the individual case. Such practice is said to be associated with

- opposing parties pursuing meritless proceedings or protracting certain stages of litigation with a view to exhausting their opponents’ legal aid funding<sup>1428</sup>
- opposing parties being able to pressure the legally aided party into an inappropriate settlement at the time that the cap is reached<sup>1429</sup>
- other factors such as court delays and practices, beyond the control of the party, exhausting allocated funds<sup>1430</sup>

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1423. Family Court *Submission 348*; Women’s Legal Resource Centre *Submission 350*; Top End Women’s Legal Service *Consultation 7 October 1999*. The Crossroads report stated

Not surprisingly, it is the more complex matters that are the most expensive and the ones in which the cap is most likely to be reached. Yet, these same disputes so often involve serious issues of abuse and other risks that ... require serious examination: B Clarke et al *Trial by legal aid – a legal aid impact study* Crossroads Family and Domestic Violence Unit Victoria 1999, iv.

1424. Victoria Legal Aid *Consultation Melbourne 26 August 1999*. On the property charges exacted by LACs, see para 5.56.

1425. R Hunter *Family law case profiles* JRC Sydney June 1999, para 377.

1426. Victoria Legal Aid *Consultation 3 November 1999*.

1427. See ‘Commonwealth guidelines – Legal assistance in respect of matters arising under Commonwealth laws’ in current *Agreement in relation to provision of legal assistance between the Commonwealth and each State*, Sch 3, Guideline 8.

1428. J Dewar et al *The impact of changes in legal aid on criminal and family law practice in Queensland* Faculty of Law Griffith University 1998, 85; J Disney *Consultation Sydney 23 July 1999*, Springvale Legal Service *Consultation Melbourne 26 August 1999*; Springvale Legal Service *Hitting the ceiling* Springvale Legal Service Victoria August 1998.

1429. J Dewar et al *The impact of changes in legal aid on criminal and family law practice in Queensland* Faculty of Law Griffith University 1998, 85; J Disney *Consultation Sydney 23 July 1999*.

1430. Victoria Legal Aid *Consultation Melbourne 26 August 1999*.

- litigants receiving limited services from their lawyers<sup>1431</sup> or, alternatively, lawyers contributing significant unpaid work to the case to provide an adequate service<sup>1432</sup>
- caps falling short of the work required for complex, intractable cases<sup>1433</sup>
- difficulties for vulnerable clients or those with special needs.<sup>1434</sup>

5.102. Exhaustion of legal aid caps can derail cases at a critical point in proceedings. CLCs told the Commission that many of their clients approach them after the cap has been reached and their legal aid has been withdrawn. This creates problems for CLCs, as they generally do not have the resources or the experience to assist parties on an ongoing basis in difficult family law matters.<sup>1435</sup> The Crossroads report commented that

[i]t must be assumed that women and men for whom aid is denied must either abandon a claim that might be quite legitimate, or remain unrepresented. This presents inordinate difficulties at a time of great distress, and puts additional pressures on both the Court and the lawyers acting for other people in the dispute. It inevitably increases the opportunities for delay and reduces opportunities to settle disputes.<sup>1436</sup>

5.103. Despite the many examples related to the Commission concerning the detrimental effects of capping in particular cases, statistics provided by the LACs below show that only a very small percentage of cases actually reach the cap before resolution. These statistics suggest that the number of cases which cannot be

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1431. Private practitioners in Queensland and Victoria have stated that they are increasingly providing partial service in family law matters because of the restrictions of the legal aid funding caps: See Springvale Legal Service *Hitting the ceiling* Springvale Legal Service Victoria August 1998, 4-5; J-Dewar et al *The impact of changes in legal aid on criminal and family law practice in Queensland* Faculty of Law Griffith University 1998, ch 4. Springvale Legal Service found that the lawyers surveyed assisted their clients to continue unrepresented in 41% of cases that had reached the legal aid cap, although none rated their clients as having better than a fair ability to represent themselves – 92% were rated as having such poor ability that representing themselves was ‘not an option’.

1432. Springvale Legal Service *Hitting the ceiling* Springvale Legal Service Victoria August 1998, 1; J-Dewar et al *The impact of changes in legal aid on criminal and family law practice in Queensland* Faculty of Law Griffith University 1998, iii. The solicitors surveyed by the Commission reported a significant percentage of uncharged legal work in legal aid cases

It is evident that in all cases, the modal amount of time spent on the case without charge was 10–25%. However, a substantial proportion of privately funded cases included no uncharged time, while it was more likely in legal aid cases for more than 25% of time spent on the case to be uncharged: Justice Research Centre Family Court Research Part Two, 6.

1433. Federation of Community Legal Centres (Vic) Inc *Submission 207*.

1434. The inclusion of interpreter costs in the calculation of professional costs for the purposes of legal aid means that cases requiring interpreter services reach the cap more quickly, and may disadvantage people from non English speaking backgrounds.

1435. Springvale Legal Centre *Consultation* Melbourne 26 August 1999; Redfern Legal Centre *Consultation* 12 October 1999.

1436. B Clarke et al *Trial by legal aid – a legal aid impact study* Crossroads Family and Domestic Violence Unit Victoria 1999, iii.

funded under present guidelines is small. Parties who are about to reach the cap may be more disposed to settle the matter with the other side.<sup>1437</sup>

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<sup>1437</sup>. Law Council *Submission 375*; Victorian Bar *Submission 367*.

- In New South Wales, in 1997–98 and again in 1998–99, only two cases reached the cap prior to resolution. In addition in each year, one case had legal aid extended beyond the cap. These cases had serious child protection issues related to the family law matter.<sup>1438</sup>
- In the Australian Capital Territory, no cases reached the cap before resolution in 1997–98 and only one case in 1998–99.<sup>1439</sup>
- In the Northern Territory, 1.3% of cases reached the cap before resolution in 1997–98 and 1.4% in 1998–99.<sup>1440</sup>
- In Victoria, in 1997–98, 32 party cases (0.5%) cost more than \$9000 and 21 (0.3%) in 1998–99. In 1997–98, only one child representation case (0.2%) cost more than \$14 000 and two (0.4%) in 1998–99.<sup>1441</sup>

5.104. Statistics demonstrate most legal aid funds are spent on a relatively small percentage of cases. However, the cases which comprise this 'expensive' group are generally well within the caps and average case costs overall are much lower.

- Victoria Legal Aid advised the Commission that, in the five years to March 1996, the Legal Aid Commission of Victoria (as it was then) spent 71% of its case related payments on 20% of its cases. In 1998–99 the equivalent figure for Victoria Legal Aid was under 59%.<sup>1442</sup> In addition, Victoria Legal Aid analysed family law costs bills prior to the federal legal aid funding guidelines and introduction of costs ceilings. Many bills were greater than \$30000 and in some cases, where both parents and child were legally aided, the costs reached \$100000 or more.<sup>1443</sup>
- Legal Aid NSW advised that in 1998–99 the most expensive 10% of family law cases required 43% of funds. The percentage was 51% in 1994–95. In 1998–99 the most expensive 20% of family law cases required 60% of funds. The percentage was 67% in 1994–95.<sup>1444</sup>
- Legal Aid Qld advised that in 1998–99 the most expensive 10% of family law cases required 52% of funds; it was 54% in 1994–95. The most

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1438. Legal Aid NSW *Correspondence* 29 November 1999.

1439. Legal Aid ACT *Correspondence* 22 October 1999.

1440. NT Legal Aid *Correspondence* 1 November 1999.

1441. Victoria Legal Aid *Correspondence* 21 September 1999, para 6. Note that in Victoria, legal aid has been provided for cases in the Magellan project and some of these cases have exceeded the cap.

1442. Victoria Legal Aid *Correspondence* 21 September 1999.

1443. Victoria Legal Aid *Consultation* Melbourne 26 August 1999.

1444. Legal Aid NSW *Correspondence* 29 November 1999.



expensive 20% of cases in 1998-99 required 68% of funds, dropping steadily from 70% in 1994-95.<sup>1445</sup>

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1445. Legal Aid Qld *Correspondence* 16 November 1999. In Queensland, in 1997-98 there were 12 legally aided children's cases whose costs exceeded \$30 000; in 1998-99 there were four such cases: Legal Aid Qld *Consultation* 12 November 1999.

- NT Legal Aid advised that in 1998–99 the most expensive 10% of referred family law cases required 41% of referred family law funds. The percentage was 42% in 1997–98. In 1998–99 and in 1997–98 the most expensive 20% of cases required 58% of referred family law funds. The average cost of the most expensive 10% of referred cases was \$6827 in 1998–99 and \$6241 in 1997–98. The average cost of the most expensive 20% of referred cases was \$4819 in 1998–99 and \$4165 in 1997–98.<sup>1446</sup>
- Legal Aid ACT has advised that in 1998–99, 7% of family law cases cost more than \$5000 and required 55% family law case funding. In 1997–98, 4% of cases cost more than \$5000 and required 30% of funds.<sup>1447</sup>

**Table 5.4 Average cost per legal aid family law case<sup>1448</sup>**

	Inhouse		Assigned	
	1997–98	1998–99	1997–98	1998–99
NSW	-	-	(parties) \$1 756 (child) \$4 028	(parties) \$1 529 (child) \$4 099
VIC	\$174	\$193	\$1 948	\$1 824
QLD	(parties) \$1 328 (child) \$16 160	(parties) \$635 (child) \$9 842	(parties) \$1 683 (child) \$5 903	(parties) \$1 595 (child) \$6 632
ACT	\$880	\$ 1 000	(parties) \$738 (child) \$1 541	(parties) \$1 267 (child) \$1 730
NT	-	\$2 000	\$1 449	\$1 679

5.105. Agreements brokered between each of the Queensland<sup>1449</sup> and Victoria<sup>1450</sup> LACs and the federal government, specified a suggested number of grants to be made with the federal funds. In Victoria, it was suggested that 6000 of 7562 (79%) federal grants be made for family law matters. The estimated cost of each federal grant was thus \$3399.<sup>1451</sup> In Queensland, it was suggested that 5600 of 6390 (88%)

1446. NT Legal Aid *Correspondence* 1 November 1999. In one Alice Springs case where a child had been raised by various family members, the need for anthropological evidence and interpreters increased the costs of the case to more than \$20000: NT Legal Aid *Consultation* Darwin 6 October 1999.

1447. Legal Aid ACT *Correspondence* 22 October 1999.

1448. Legal Aid NSW *Correspondence* 29 November 1999; Legal Aid Qld *Correspondence* 10 November 1999; Victoria Legal Aid *Correspondence* 1 November 1999; NT Legal Aid *Correspondence* 1 November 1999; Legal Aid ACT *Correspondence* 22 October 1999; Legal aid ACT *Correspondence* 23 December 1999; Note WA, SA and Tas LACs did not provide data. Note that Qld and NT figures for inhouse cases are estimates, including time costed fees. For Victoria the costs are disbursements and do not include a fee estimate. Note also that Qld figures include conferencing cases.

1449. *Agreement between Commonwealth of Australia and Legal Aid Queensland in relation to the provision of legal assistance* made on 30 June 1998.

1450. *Agreement between Commonwealth of Australia and Victoria Legal Aid in relation to the provision of legal assistance* made on 22 January 1999.

1451. id Sch 1.

federal grants be made for family law matters. The estimated cost of each federal grant was thus \$2344.<sup>1452</sup> Of the cases analysed by the Commission, the median costs generally for Family Court cases across all States and Territories, were

**Table 5.5. Median costs by case type and funding source<sup>1453</sup>**

	Case type	Legal aid		Private		Both		Total	
		N	Median	N	Median	N	Median	N	Median
Professional fees	Children only	36	\$1 261	80	\$1 966	6	\$950	122	\$1 655
	Children & property	1	-	51	\$2 840	3	\$1 290	55	\$2 840
	Property only	3	\$5 000	162	\$2 000	1	-	166	\$2 000
Total disbursements	Children only	32	\$144	75	\$290	6	\$72	113	\$240
	Children & property	1	-	47	\$200	3	\$2 097	51	\$235
	Property only	3	\$330	146	\$219	1	-	150	\$226
Total costs	Children only	39	\$1 342	82	\$2 165	6	\$986	127	\$1 731
	Children & property	1	-	52	\$3 047	3	\$3 387	56	\$3 184
	Property only	3	\$5 900	162	\$2 418	1	-	166	\$2 482

5.106. These figures are commensurate with the statistics provided by LACs. They show that less money is being spent on legally aided cases than privately funded cases, but not dramatically less.

5.107. *Effect on legal aid of Family Court case management.* Effective case management can assist to maintain cost effective litigation. Litigants, practitioners, court officers and some judges told the Commission that, under existing, undifferentiated, inflexible Family Court case management, cases in which parties had limited resources were stretched or exhausted by multiple case events, non compliance and inflexible registry procedures.<sup>1454</sup> The Court was said to require

1452. *Agreement between Commonwealth of Australia and Legal Aid Queensland in relation to the provision of legal assistance* made on 30 June 1998, Sch 1.

1453. Justice Research Centre Family Court Research Part Two, table 3.

1454. Law Society of SA *Consultation* 6 August 1999, Victorian Bar *Consultation* Melbourne 26 August 1999; Family Court Judges *Consultation* 9 August 1999; NSW Law Society Family Law Committee *Consultation* Sydney 17 November 1999; see also para 8.137–8.158, 8.225–8.449.

parties to reappear for straightforward procedural issues such as leave to use external mediation services or to obtain orders to inspect each set of subpoenaed documents in a matter.<sup>1455</sup> This was seen as cumbersome and time consuming, and a part of the process which easily could be improved. One practitioner complained that registry practice allowed her to inspect only one folder of subpoenaed documents at a time which necessitated three physical attendances at court over a week to inspect some relatively routine documents. She did this work pro bono so as not to diminish the legal aid capped funds.<sup>1456</sup> Unnecessary, extended and repeated processes have the effect of exhausting legal aid.

5.108. Practitioners have stated that cases with four or more interim applications are likely to use up allocated funding before the matter is heard.<sup>1457</sup> One South Australian case described to the Commission had 27 interim hearings on the father's application. The child representative's funding was used up after only ten days. The child representative stated that the applications were not vexatious but should have been consolidated into one hearing.<sup>1458</sup> In another Victorian case described to the Commission, more than 15 interim hearings exhausted the funding of the legally aided party.<sup>1459</sup> Repeated interim hearings or adjournments are occasionally used by disaffected parties as a means of harassment.<sup>1460</sup> However, JRC research has found that adjournments were usually at the instigation of the Court, rather than the parties.<sup>1461</sup> Of the many hundreds of Family Court case files analysed by the Commission, the median number of case events was higher for legal aid cases than for privately funded cases.<sup>1462</sup>

5.109. One important development in resolving the above issues has been the Family Court's 'Magellan' pilot which provides ongoing judicial management of certain cases alleging child abuse. By agreement with the Attorney-General and with the support of Victoria Legal Aid and the Department of Human Services, all parties in such cases are legally aided and the Department and the Court provide an expert report on the matter. The majority of cases resolved to date have been

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1455. Law Society of SA *Consultation* 6 August 1999.

1456. Law Society of SA *Consultation* 6 August 1999. Also, Victorian Bar *Consultation* 26 August 1999; Law Society of NSW Family Law Committee *Consultation* Sydney 17 November 1999; see also para 8.137–8.158.

1457. NT Legal Aid *Consultation* Darwin 6 October 1999.

1458. Law Society of SA *Consultation* 6 August 1999.

1459. Victoria Legal Aid *Consultation* Melbourne 26 August 1999.

1460. Family Court judges *Consultation* 28 September 1999; see also para 8.246–8.249.

1461. R Hunter *Consultation* Sydney 19 November 1999; JRC *Correspondence* 20 December 1999, 4.

Figures provided by the Family Court dispute this: see para 8.225, 8.234–8.236.

1462. The median number of case events overall (including the large number which settle before or shortly after the first case event) was two for privately funded cases, three for inhouse legal aid cases and four for referred cases: Family Court survey datafile, additional Commission analysis. Legal aid cases also tended to have more difficult issues than privately funded cases.

settled early in proceedings and within legal aid budgets.<sup>1463</sup> However, overall time and cost effectiveness of the pilot will not be calculable until the remaining cases — those that have proven time consuming, difficult and therefore expensive to resolve — have been finalised. Of the cases resolved to date, 55% were resolved at

the first or second directions hearing, compared with 4% of child abuse cases within the sample analysed by the Commission.<sup>1464</sup> Magellan cases took an average of 14 weeks to resolve, compared with 13.2 months for the Commission's similar sample. Magellan cases had an average of two case events compared with six for the Commission's sample. Magellan cases are not subject to legal aid caps but only 10% of those so far costed would have exceeded the cap.<sup>1465</sup> The median case costs of the Magellan project cases to date were relatively low at \$4534, compared with a median of \$7767 for child abuse cases in the Commission's sample.<sup>1466</sup>

5.110. The Commission was told in consultations with the Court that the Magellan pilot is too resource intensive for expanded implementation.<sup>1467</sup> It may nevertheless provide the basis for a solution. The Court has decided to extend the pilot to Parramatta. Such a pilot could experiment, under close judicial management, with different funding and resource options to determine whether a pattern emerges as to the most effective and timely use of party and child representation, family reports and other expert evidence, the use of strategic adjudication of key issues and PDR events. Such a pilot should include not only child abuse cases but also those involving parties with diminished capacity to understand processes due, for example, to mental or intellectual disability.<sup>1468</sup> The Commission's data shows that child abuse cases are among those with the highest number of case events. The current problem generally for such cases, on the Commission's sample research, is undermanagement, or insufficiently focussed management, by the Court.<sup>1469</sup>

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1463. 70% of party legal costs were less than \$8000, 50% less than \$2000: T Brown *Comparison of ALRC child abuse data with family violence and Family Court research data both pre and post Magellan* November 1999.

1464. *ibid.*

1465. T Brown *Consultation* 9 September 1999. These cases cost \$20 882 and \$75 125 in legal fees: T Brown 'Comparison of ALRC child abuse data with family violence and Family Court research data both pre and post Magellan' *Unpublished* ALRC November 1999.

1466. T Brown 'Comparison of ALRC child abuse data with family violence and Family Court research data both pre and post Magellan' *Unpublished* ALRC November 1999.

1467. Family Court *Consultation* 23 September 1999; Family Court *Consultation* Melbourne 9 September 1999. Note, however, that certain Family Court judges are supportive of Magellan as a model: para8.55–8.56.

1468. Victorian Bar *Consultation* 26 August 1999. Also, Legal Aid NSW *Consultation* 23 November 1999; RToohey *Submission* 373. Solicitors have stated that there is no distinction made by the Court between different education levels of clients in directions hearings and when explaining processes to clients: Law Society of SA *Consultation* 6 August 1999.

1469. See para 8.200–8.249.

***Inhouse representation***

5.111. The majority of legally aided matters are assigned to private practitioners. In family law, for example, in New South Wales in 1998–99, 2851 matters (34%)<sup>1470</sup> were handled inhouse and 5638 (66%) assigned to private practitioners. In Victoria

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1470. Including *Legal Aid Commission Act 1979* (NSW) s 33 authorisations. This is a one off expenditure to obtain information (eg medical reports) in order to determine the merit of an application for legal aid: *Legal Aid NSW Annual report 1998–99*, 61.

11 224 (32%) of cases were handled inhouse and 23 517 (68%) assigned. In South Australia, 40% of cases were handled inhouse and 60% assigned.<sup>1471</sup> In Queensland, a much lower 13% were handled inhouse and 87% assigned.<sup>1472</sup>

5.112. The JRC found that there were significant differences between LAC inhouse practices as to the types of issues involved in family law cases. The differences in the percentage of cases involving children was particularly significant. For example, while all Penrith and almost all Adelaide cases involved children's matters, 35% of Melbourne cases did not involve children's matters.<sup>1473</sup> In addition

- Sydney had a low concentration of residence, contact and care/welfare/development cases
- Penrith had a high concentration of residence and contact cases, but no divorce or child support cases
- children's matters at Parramatta included high proportions of care/welfare/development issues and other specific issues, and were most likely to be combined with ongoing contact problems leading to applications for location/recovery orders. Parramatta also had a relatively high proportion of property cases, but no child support matters
- Adelaide had more of a focus on child support and parentage testing, with low proportions of specific issues, location/recovery applications, property and divorce
- There was a greater emphasis on "difficult" divorces in Melbourne (all but two involved a non-English speaking client and in some cases the client's spouse was also unlocatable), with relatively low proportions of residence and specific issues matters, and no child maintenance, child support or parentage testing cases.<sup>1474</sup>

5.113. By common consensus of practitioners, fee reductions have made it less viable for specialist private solicitors to continue to do legal aid work.<sup>1475</sup> Data provided by Legal Aid Qld shows that several preferred supplier firms have

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1471. In South Australia, assignments to private lawyers have increased 4% and to inhouse lawyers 13% since 1997-98.

1472. Information obtained from annual reports of the respective States and Territory LACs. Figures for Tasmania supplied by National Legal Aid. In family law, Legal Aid NSW has a more extensive inhouse practice than the LACs in Victoria and SA. Legal Aid Qld has a limited inhouse family law practice, other than in the area of child representation and group-based child support forums. See R Hunter *Family law case profiles* JRC Sydney June 1999, para 24.

1473. R Hunter *Family law case profiles* JRC Sydney June 1999, para 55.

1474. *id* para 52.

1475. R Hunter and A Genovese 'Qualitative aspects of quality: an Australian experiment' (July 1999) 12*Justice Issues* 5, 26. The federal Attorney-General announced recently that the government is to consult with LACs to attempt to ensure that private practitioners are reasonably remunerated for their services, that funding paid at each stage is more strictly controlled to ensure that work is performed competitively and cost effectively and that there is national consistency regarding these issues: D Williams 'A modern legal aid framework — the Commonwealth government's strategy for reform of legal aid services in Australia' *Keynote address* Legal Aid Forum — Towards 2010 Canberra 21 April 1999, para 109.

pulled out of the scheme.<sup>1476</sup> A change in fee scales in New South Wales to encourage lawyers to take on legal aid matters received an 'underwhelming' response.<sup>1477</sup> Recent JRC research has found inverse proportionality between solicitor experience and the amount of legal aid work undertaken.<sup>1478</sup> National Legal Aid have recently completed a survey of 260 private firms who do legal aid family law work. The results show 'a noticeable exit from legal aid work by private legal practitioners in Australia'. Specifically, the survey showed

- 52% of firms surveyed did less legal aid work in 1998/99 than they had done in 1994/95 and many firms reported that they no longer did any legal aid work at all;
- while the number of partners in the respondent firms had shown almost no decrease, there had been a noticeable decline in the number of partners doing legal aid work and there had been a similar decline in the number of employed solicitors with over ten years experience doing legal aid work.<sup>1479</sup>

5.114. Some of the findings are explicable by reference to additional features, such as differences in caseload, the time taken in New South Wales to assess legal aid for outsourced work and the practice in some LACs of utilising specialist family magistrates in Local Courts rather than the Family Court. It has been suggested legal aid agencies refer out more difficult work and conduct more routine work

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1476. Legal Aid Qld's inhouse practice is proportionally much smaller than other states. Their preferred supplier scheme established in February 1998 is serviced by electronic lodgement of applications, notification of decisions and payment of fees. 397 legal firms were selected for preferred supplier status: *Legal Aid Qld Annual report 1997-98*. There are now 388 preferred suppliers, down 18 since February 1999. Statistics show that 14 of the 18 firms leaving the scheme were based in Brisbane: *Legal Aid Qld Overall results of service agreement with preferred suppliers* provided in *Legal Aid Qld Consultation Brisbane 21 September 1999*. While Legal Aid Qld claim that there has not been the predicted 'stampede' of practitioners from legal aid under the preferred supplier scheme, Brisbane lawyers have dropped away from the scheme due to the higher market rates in the city: *Legal Aid Qld Consultation Brisbane 21 September 1999*. It is claimed that the tendering of duty lawyer services has provided substantial savings without affecting the quality of the services provided to clients: *Legal Aid Qld Annual report 1997-98*, 17. However, in the Commission's consultations, concerns were raised as to the rigid auditing and 'intrusive and paternalistic' accountability structure. The panel is said to comprise mixed suburban firms with less experienced solicitors. Practitioners are being replaced 'quantitatively but not qualitatively': *Queensland Law Society Consultation Brisbane 21 September 1999*; J Dewar Griffith University *Consultation 21 September 1999*.

1477. B Slade 'Not enough lawyers - legal aid civil law service delivery' (1998) 36 (11) *Law Society Journal* 58, 59.

1478. However, JRC research also indicates that years of experience is not a reliable indication of quality of service providers: R Hunter *Consultation Sydney 19 November 1999*.

1479. *National Legal Aid Survey of legal firms doing legal aid family law work* in *National Legal Aid Correspondence* 6 January 1999. Note, the Commission has also been told inexperienced lawyers face significant problems in family law and are often given the most difficult clients ... Some lawyers lack in-house help or advice or are unwilling to seek such advice inhouse because of concerns that their competence might be doubted: *Family Law Council Meeting notes Brisbane 17 August 1999*.



inhouse,<sup>1480</sup> and that inhouse practices take on more cost-effective work, such as children's representation, while the more time consuming and client driven party

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1480. T Goriely *Legal aid delivery systems: Which offer the best value for money in mass casework? A summary of international experience* Lord Chancellor's Department Research series No 10/97 December 1997, 42.

representation is left to private solicitors.<sup>1481</sup> This may also result from strict adherence by some LACs to Commonwealth guidelines regarding caps, which state 'if it appears likely that the costs ceiling will be exceeded, the case should be handled in-house wherever possible'.<sup>1482</sup> Certainly in the context of the declining availability of specialist, private, legal aid lawyers, the Commission's research and consultations<sup>1483</sup> and the preliminary findings of the JRC suggest a number of benefits from inhouse representation.

- Inhouse cases resolve more quickly (median 4 months) than referred cases (median 6 months).<sup>1484</sup>
- Support by inhouse social workers is readily available.<sup>1485</sup>
- Inhouse lawyers have particular experience in family violence and child abuse cases.<sup>1486</sup>
- The inhouse 'community' of lawyers allows workshoping between lawyers of differing levels of experience and supervision where appropriate.<sup>1487</sup>
- The level of payment to private solicitors does not permit the intensive representation demanded by such cases.<sup>1488</sup>

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1481. Law Society of SA *Consultation* 6 August 1999. In Queensland, the vast majority of inhouse legal aid cases (other than counselling cases) are children's representation cases: Queensland Law Society *Consultation* Brisbane 21 September 1999.

1482. 'Commonwealth guidelines – Legal assistance in respect of matters arising under Commonwealth laws' in current *Agreement in relation to provision of legal assistance* between the Commonwealth and each State, Sch 3, 9.

1483. eg Top End Women's Legal Service *Consultation* 7 October 1999; Legal Aid WA *Consultation* Perth 24 September 1999.

1484. R Hunter *Family law case profiles* JRC Sydney June 1999, xvii, para 426. An explanation of the time differences between LAC and private lawyers may be the additional transaction time for private lawyers in corresponding with and awaiting approval from the LAC and inhouse use of local courts for many family matters.

1485. Legal Aid NSW *Consultation* 13 July 1999; Legal Aid WA *Consultation* Perth 24 September 1999.

1486. In addition to child representation cases, legal aid family law solicitors in many states represent respondent parents and children in State care and protection matters brought by family services departments. Most of these cases involve family violence and child abuse allegations and provide experience in dealing with the most serious and difficult issues which come before the Family Court.

1487. R Hunter and A Genovese 'Qualitative aspects of quality: an Australian experiment' (1999) 12-*Justice Issues* 17; National Legal Aid *Submission* 360.

1488. Queensland Law Society *Consultation* Brisbane 21 September 1999. As payments for legal aid work decline in real terms, family lawyers may choose to abandon legal aid work rather than compromise quality. In this (and other) respect(s), salaried legal aid services may have more to offer: R Hunter and A Genovese 'Qualitative aspects of quality: an Australian experiment' (1999) 12-*Justice Issues* 28. See also B Slade 'Not enough lawyers – legal aid civil law service delivery' (1998) 36(11) *Law Society Journal* 58, 59.

- There are economies of scale within inhouse practices. For example, duty solicitors not only assist unrepresented litigants, but may appear in interlocutory hearings for all inhouse matters listed on a particular day. Such economies of scale are similar to those which have prompted corporations to rely more heavily on inhouse counsel in recent years.<sup>1489</sup>

5.115. Comparing the relative costs of inhouse and assigned legal work is not simple, given their differing case loads and practices. Some studies and costs data indicate that salaried services are cheaper on a cost per case basis than legal aid funded services provided by private practitioners.<sup>1490</sup> In its submission to DP 62, National Legal Aid supported the use of inhouse solicitors for complex matters, or panel solicitors where conflict or other preclusions exist.

NLA agrees that in difficult matters involving family violence and child abuse it is more appropriate that in-house legal aid commission solicitors should act. The in-house practices of most Commissions are centres of expertise in acting in these difficult matters with specialised training, supervision and support ensuring a quality service.

NLA supports the idea of panels of appropriately trained and experienced private practitioners to act in these high priority matters if in-house solicitors are unable to act.<sup>1491</sup>

5.116. The difficulties with attracting and retaining a quality pool of private solicitors for legal aid work are not easily solved. As discussed in the following section of this chapter, encouraging lawyers to take on legal aid work may depend upon fee incentives at the early stages of the litigation process.<sup>1492</sup> However, such incentives must not be applied in such a way as to give lawyers an interest in pressing their clients to accept inappropriate early settlements.<sup>1493</sup> The Australian Capital Territory Bar has suggested that lawyers most object to acting where legal

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1489. The Law Society of NSW practicing certificate survey reported 7.8% of practitioners were corporate legal counsel and 8.4% government legal: Keys Young *Practising certificate survey 1998-99 Final report* September 1998, 3. Reports from Canada also describe inhouse services as cost-effective and beneficial.

Based on the Canadian research, it can be concluded that staff lawyer delivery can be less expensive than private bar delivery, with no compromise with respect to quality of service: A Currie 'Legal aid delivery models in Canada: Past experience and future models' in *Legal aid in the new millennium* Conference papers from the International Legal Aid Conference Vancouver BC Canada 16-19 June 1999, 9.

1490. T Goriely *Legal aid delivery systems: Which offer the best value for money in mass casework? A summary of international experience* Lord Chancellor's Department Research Series No 10/97 December 1997, 1. Goriely states that 'the issue at stake is whether the extra time private lawyers spend is worth the money that is paid for it': id 42. Meredith has argued that a private practitioner who takes 8-hours to finalise a divorce matter where an inhouse lawyer takes six, presumably takes longer because their client needed all of those eight hours of service: G Meredith *Legal aid: Cost comparison - salaried and private lawyers* AGPS Canberra 1983, 7.

1491. National Legal Aid *Submission* 360.

1492. R Hunter *Consultation* Sydney 19 November 1999.

1493. Legal Aid NSW *Consultation* 22 December 1999.

aid funding falls well short of market or the Supreme Court scales. It was suggested to the Commission that lawyers would prefer a quid pro quo arrangement where they undertook a set number of deserving cases on a pro bono basis, but were paid at a reasonable rate for the legal aid work they performed.<sup>1494</sup>

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<sup>1494</sup>. ACT Bar *Consultation* Canberra 28 September 1999.

As stated, the federal Attorney-General announced recently that increased funding for legal aid will be directed in part to addressing the issue of legal aid rates for private solicitors.<sup>1495</sup>

**Recommendation 43.** Legal aid commissions should develop effective mechanisms for identifying priority cases and clients in family law matters. Such priority clients should be assigned to inhouse legal aid lawyers wherever possible. Where an inhouse lawyer is unable to act for a priority client, referral should only be made to private practitioners who are experienced in family law work.

**Recommendation 44.** Legal aid commissions, in conjunction with law societies and bar associations, should approve panels of lawyers to act in priority family law cases. Payments should be structured so as to retain the services of specialist family law practitioners. In that regard, legal aid commissions also should consider establishing a pro bono scheme in which participant panel lawyers who provide set, agreed, pro bono services are paid at a commensurably higher rate for performing other legal aid work.

#### *Targeting limited legal aid*

5.117. The capacity to offer limited, targeted services is crucial to the efficiency of LACs. A fast, limited grant of legal aid often can resolve the major issues in a case. Such grants are particularly important to stabilise urgent issues, such as where one parent allegedly abducts or refuses to return a child to the principal carer parent.<sup>1496</sup> JRC research shows that clients perceive outcomes more favourably if achieved early in proceedings

a "same" outcome as what the client originally wanted was most likely to be achieved when the case settled relatively early (at the directions hearing stage), whereas a somewhat different/dissimilar outcome was most likely to occur if the case settled at or after the pre-hearing conference. An outcome "quite different" from what the client originally wanted was most likely to result from a hearing.<sup>1497</sup>

5.118. JRC and Commission research suggests that unrepresented litigants in the Family Court are significantly disadvantaged in negotiating a settlement.<sup>1498</sup>

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1495. D Williams 'More money for legal aid' *News release* 15 December 1999.

1496. OLAR report, ch 10.

1497. JRC *Correspondence* 20 December 1999.

1498. See ALRC DP 62 para 11.41; Justice Research Centre Family Court Research Part One, para 10.5.1, tables 43A, 43B; Redfern Legal Centre *Consultation* 22 October 1999.

[T]he real distinction in family law disputing lies not in litigation versus PDR, but in obtaining legal representation (and arriving at a settlement via solicitor negotiations) versus directly accessing community-based or private dispute resolution services (and arriving at a settlement with the assistance of a neutral third party).<sup>1499</sup>

5.119. The Commission's research indicates that where parties have representation they are more likely to attempt, and to be successful in, negotiations to resolve the matter. The converse is that unrepresented litigants are less likely to resolve their dispute through negotiation and more likely to have the matter dismissed or discontinued, or to withdraw or have a default judgment entered against them.<sup>1500</sup>

5.120. Informally, such assistance is sometimes provided by duty solicitors in family matters, at both the Family Court and in magistrates courts. For example, in the Family Court at Albury, solicitors sometimes act as informal mediators, assisting in any negotiations and advising parties on the range of options and likely outcomes if a matter proceeds to trial.<sup>1501</sup> Some LACs approve limited grants of aid for investigations and evidence gathering, to negotiate consent orders, or for settlement conferencing.<sup>1502</sup>

5.121. It has been suggested that early stage of matter grants are low because funds must be kept in reserve in the event that the matter proceeds to a hearing. However, few cases do proceed to hearing.<sup>1503</sup> In November 1998, Victoria Legal Aid increased its first stage funding from \$1000 to \$1800. This initiative was in response to a perception that time spent by lawyers at the early stages of a matter greatly enhanced the prospects of the matter being resolved without protracted litigation.<sup>1504</sup>

5.122. Legal Aid ACT has introduced an early stage grant for 'negotiations and to file consent orders'. This is the most commonly used grant of aid by this LAC, reflecting the 'settlement culture' of the local profession. Practitioners believe that a fast resolution of a case, whether by adjudication or negotiation, has benefits which

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1499. R Hunter *Family law case profiles* JRC Sydney June 1999, para 168. PDR or Primary dispute resolution services are offered by the Family Court or community based organisations to assist in the resolution of a dispute prior to a court hearing. For further discussion of PDR services see ALRC DP 62 para 11.140–11.159.

1500. Justice Research Centre Family Court Research Part One, 30, table 43A; R Hunter *Consultation* 19–November 1999. See also Court Network *Consultation* Melbourne 8 September 1999. In the JRC sample, in matters conducted by LAC staff, negotiations involving solicitors were attempted in 71% of cases. In cases run by private solicitors, negotiations between solicitors were held in 70% of cases. In CLC cases, solicitor negotiations occurred in 62% of cases in the sample. All other attempted resolution types occurred in less than 50% of cases: R Hunter *Family law case profiles* Justice Research Centre June 1999, para 68, 84, table 3.7, 252.

1501. Albury Law Society *Consultation* 2 December 1998.

1502. B Slade *Submission 278*; Legal Aid ACT *Consultation* Canberra 27 September 1999; National Legal Aid *Submission 360*.

1503. See para 8.58.

1504. Victoria Legal Aid *Consultation* 3 November 1999.

outweigh the potential problems. In family matters in particular, even if the orders agreed are not ideal, it was suggested that the outcome is better for the parties and

the children if it is achieved quickly and in final form.<sup>1505</sup> In its submission to the Commission, National Legal Aid supported an early focus for legal aid funding, stating

NLA supports the adoption of federal guidelines allowing grants of aid for negotiation, primary dispute resolution (PDR) or other preliminary stages of litigation to assist in the early resolution of appropriate matters.<sup>1506</sup>

5.123. As noted above, however, National Legal Aid stresses the need to ensure that the limited level of a grant remains confidential. Opposing parties may manipulate the process and force the legally aided party into inappropriate settlement if they are aware that legal assistance will not continue.<sup>1507</sup>

There may also be a problem if the non-legally aided party is aware that legal aid is limited to ADR. They may then resist resolving the matter at ADR in order to force the matter on to a hearing where their opponent will be unrepresented. For this reason the limited nature of any grant of aid should be kept from the other party. However, this could be difficult if 'ADR only' grants are standard practice in legal aid commissions.<sup>1508</sup>

5.124. Submissions to the Commission support early stage of matter funding, but also have stressed that such stage grants should not be used as a screening process for applicants or to force clients to settle inappropriately under threat of legal aid not being available for more advanced stages of litigation.<sup>1509</sup> A number of submissions,<sup>1510</sup> including that of National Legal Aid, also supported the development of a new, non uniform capping system.<sup>1511</sup> National Legal Aid is already investigating an alternative system.

NLA is currently designing a fee system for legally aided family law matters which is a mixture of event based costing and tailored lump sum fees. It recognises the need for a costing system for those matters which fall outside standard litigation.

NLA supports the proposal that legal aid commissions work together to identify priorities for legal aid funding and is currently doing this.

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1505. Legal Aid ACT *Consultation* Canberra 27 September 1999; JRC *Correspondence* 20 December 1999.

1506. National Legal Aid *Submission* 360.

1507. *ibid.*

1508. *ibid.*

1509. Law Council *Submission* 375; Victorian Bar *Submission* 367; Family Court *Submission* 348; Women's Legal Resource Centre *Submission* 350; National Alternative Dispute Resolution Advisory Council *Submission* 343.

1510. eg R Sackville *Submission* 388; Family Court *Submission* 348; Family Court judges *Consultation* 9-August 1999; Victorian Bar *Submission* 367; Law Council *Submission* 375; Women's Legal Resource Centre *Submission* 350.

1511. As proposed in ALRC DP 62 proposal 7.5.



NLA agrees that where legal aid grants come with limited funding, these limits should be kept confidential to reduce the possibility of an opponent running a matter in a manner designed to exhaust the legally aided party's funding.<sup>1512</sup>

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1512. National Legal Aid *Submission 360*.

**Recommendation 45.** The Family Law and Legal Assistance division of the federal Attorney-General's Department, in consultation with legal aid commissions, should develop new procedures for assessing and imposing funding limits upon legally aided, family law cases. Such new procedures should ensure that

- 'stage of matter' grants focus on early opportunities for case resolution, including negotiations aimed at the resolution of a dispute, the preparation of preliminary stages of litigation or particular PDR processes, and obtaining evidence such as medical reports
- uniform caps are replaced by capping procedures directed at particular stages or events in the individual case
- exceptional additional payments are available in cases approved at director level as requiring funds beyond the cap for a certain stage and provision should be made for such payments to be drawn from the separate fund for expensive, complex cases, as stated in recommendation 41
- stage limits and caps, set for particular legally aided clients remain strictly confidential.

### *Family property disputes*

5.125. As stated, the median income of self-funded parties in the Commission's Family Court case sample was \$35 000.<sup>1513</sup> This does not mean that 'middle-Australia' can afford the Family Court process. Indeed, litigation may dissipate much of the matrimonial property through legal expenses.<sup>1514</sup>

5.126. Federal guidelines limit grants of aid in property matters to cases where the equity in the property, usually the family home, is less than \$100 000;<sup>1515</sup> where the applicant is likely to retain possession of the home, and where the applicant can borrow funds to buy out the other party and pay for legal costs.<sup>1516</sup> LACs are able to levy a charge against the family home, which is realised when the home is sold. In practice, LACs rarely use such charges to fund property cases. They are utilised frequently by Victoria Legal Aid in children's matters,<sup>1517</sup> but not in other

1513. R Hunter *Family law case profiles* JRC Sydney June 1999, para 377.

1514. National Legal Aid *Submission 360*.

1515. Recently increased from \$20 000: Law Society of NSW (1999) 206 *Caveat 1*.

1516. 'Commonwealth guidelines – Legal assistance in respect of matters arising under Commonwealth laws' in current *Agreement in relation to provision of legal assistance between the Commonwealth and each State*, Sch 3, Guideline 8.

1517. Victoria Legal Aid *Consultation 3* November 1999. The majority of funds recovered from Victorian clients are from charges over property: See table 5.3 above.

States.<sup>1518</sup> As stated, a recent legal assistance needs study commissioned by the federal Attorney-General found that most people who miss out on legal aid are applying for assistance with property matters.<sup>1519</sup> The federal magistracy should lower the cost of litigating family law property matters and make grants of legal aid for such matters more viable.

5.127. In its report *Fair shares? Barriers to equitable property settlements for women*, the Women's Legal Services Network (WLSN)<sup>1520</sup> highlighted many of the difficulties faced by women who seek to have limited matrimonial property divided following separation. The report argued that, for such parties, the unavailability of legal aid, the expense of the Family Court and the inappropriateness of mediation does not allow appropriate resolution of their case. This view was echoed in consultations and submissions.<sup>1521</sup> The WLSN report included comments from a range of CLCs, some of which illustrate this problem.

The litigation process of the Family Court is geared for major property settlements where there is plenty of money and people can afford lawyers. The system is simply not set up to solve small disputes. *Top End Women's Legal Service – Darwin*

I have been before Family Court judges for cases with pools of \$50-\$60,000 and have been told that such a case should not be in Court, that the parties should settle themselves and stop wasting their money and the Court's time. And that's all very well in theory but what other option is there but to proceed when one party is intractable?  
*Women's Legal Resource Centre – Sydney.*<sup>1522</sup>

5.128. Few State magistrates courts are experienced in family property work.<sup>1523</sup> The new Federal Magistrates service should make a difference in this regard. In the meantime, and in addition to magistrates, the WLSN favours the establishment of a small claims division of the Family Court, presided over by registrars.

Mediation is supposed to offer that alternative, but in reality cannot. It is based on an assumption that parties are able to sit in a room together and reach an agreement. It does not provide an option for a woman who has suffered a history of domestic violence in the relationship or even for the woman who, having been out of the workforce for several years, simply doesn't have the skills or the confidence to argue the

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1518. Legal Aid NSW solicitor *Consultation Sydney* 17 September 1999; R Hunter *Consultation Sydney* 19 November 1999.

1519. D Williams *News releases* 23 December 1999.

1520. N Seaman *Fair shares? Barriers to equitable property settlements for women* Womens Legal Services Network Canberra 28 April 1999.

1521. eg Top End Women's Legal Centre *Consultation Darwin* 7 October 1999; Women's Legal Service *Consultation Brisbane* 20 September 1999.

1522. N Seaman *Fair shares? Barriers to equitable property settlements for women* Women's Legal Services Network 28 April 1999, 26.

1523. An exception is the Local Court Family Matters in Sydney, which is presided over by specialist family law magistrates and deals exclusively with family law and child support matters.

matter through. A low cost and accessible forum is needed for the resolution of disputed small property matters.<sup>1524</sup>

5.129. Registrar decisions are not determinative and are subject to appeal. The Attorney-General announced recently<sup>1525</sup> that the *Family Law Amendment Bill 1999*, currently before Parliament, will permit family law disputants to use private

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1524. N Seaman *Fair shares? Barriers to equitable property settlements for women* Women's Legal Services Network 28 April 1999, 26. The Family Court supports this proposal and is considering establishing a 'small claims track': Family Court *Submission 348*. Also suggested in Law Society of SA *Adelaide Consultation 6 August 1999*.

1525. D Williams 'Shaping family law for the future' *Speech* National Press Club Canberra 27 October 1999.

arbitration to resolve their property disputes without going to court.<sup>1526</sup> Appeals from both private and court referred arbitrators will be reviewable by a single judge<sup>1527</sup> or federal magistrate<sup>1528</sup> on questions of law only.

5.130. A review conducted by the Attorney-General of British Columbia also recommended an arbitration system set up through legal aid to deal with such disputes.<sup>1529</sup> A graduated fee would be charged to consenting parties, relative to available resources and the equity in the property. There are many benefits to such a scheme.

- The large number of relatively simple property disputes for low income Australians could be determined quickly and cheaply.
- Apart from a modest 'seed' fund, the scheme could pay for itself without drawing upon the general pool of legal aid funding.
- Arbitrators may be sourced from the legal profession through pro bono schemes, as their services would be required for a short, discrete period only.<sup>1530</sup>

5.131. Access to an arbitration scheme of this kind need not be limited according to means or merit in the way of legal aid grants. Rather, parties who opt for the scheme could pay a fee calculated ad valorem as a percentage of the value of the property in dispute. Accordingly, the scheme not only would be self-funding, but potentially could supplement the general pool of legal aid funds for family law. Arbitrations could be held via conference telephone or internet and documents exchanged electronically. Similarly the parties could agree that a decision be made 'on the papers'.

**Recommendation 46.** Legal aid commissions should review their practices to allow for grants of aid to be made for family law property matters, subject to a charge levied on the property in dispute.

1526. Arbitrations under the Bill can be carried out by persons 'who meet the prescribed requirements of an arbitrator', Family Law Amendment Bill 1999 (Cth) s 4(1), rather than only by an 'arbitrator approved under the regulations', *Family Law Act 1975* (Cth) s 4(1). In addition, the introduction of binding financial agreements before during and after a marriage creates the possibility of privately brokered or arbitrated decision regarding Family Law Act property: Family Law Amendment Bill 1999 (Cth) s 90D.

1527. Family Law Amendment Bill 1999 (Cth) s 19EA.

1528. *id* s 19EB.

1529. Family Justice Review Working Group *Breaking up is hard to do: Rethinking the family justice system in British Columbia* Family Justice Review Working Group British Columbia November 1992, 151.

1530. This pro bono work could represent the quid pro quo for specialist lawyers who undertake legal aid work and are paid at closer to court scale rates. See para 5.116 above.

**Recommendation 47.** Legal aid commissions should investigate establishing self-funding arbitration schemes for family law property disputes, with a fee calculated by reference to the value of the property in dispute.

## Administrative law cases

5.132. In federal administrative law cases, legal aid is largely confined to veterans' matters. There is limited assistance for migration, refugee and social security cases. Federal funds are also provided for assistance through the Immigration Advice and Application Assistance Scheme (IAAAS), veterans' advocacy organisations and welfare rights centres.<sup>1531</sup> In administrative law matters, the government pays for the cost of departmental review processes and review tribunals, for government inhouse and agency advocates and for legal aid for certain applicants. Managing these cases therefore necessitates viewing the process as a whole. The Commission urges flexibility throughout the process to allow effective, early case resolution. Funds should be employed at an early stage, for example, where the applicant's medical condition is the only fact in issue and could be resolved by a report. Funds or assistance in refugee matters also should be targeted for application assistance for cases from countries with high success rates for protection visas. Reserving legal assistance in cases for AAT proceedings can diminish the value of internal review or lower level tribunal proceedings. Delays in applicants obtaining legal aid also cause delays and increase costs in subsequent AAT proceedings.<sup>1532</sup>

**Table 5.6 Grants of legal aid in administrative law cases**<sup>1533</sup>

	Immigration and refugee	Veterans' affairs	Social security
1996-97	1 431	2 704	212
1997-98	1 253	1 414	169
1998-99	322	1 262	221

5.133. In DP 62 the Commission proposed that legal aid guidelines for administrative matters be altered and sufficient federal funding made available for the preparation of applications in meritorious migration and refugee cases, negotiations with government departments and necessary disbursements such as medical reports.<sup>1534</sup> Grants of aid for early assistance were widely supported in consultations and submissions to the Commission.<sup>1535</sup> National Legal Aid stated that

[l]egal assistance in the preparation of applications in refugee and immigration matters and veterans' pension matters, as well as social security matters, can make a significant

1531. See for example Attorney General's Dept *Commonwealth Community Legal Services Program* <<http://law.gov.au/fllad/legal%5Faid/dirclc.html>> (16 December 1999).

1532. AAT *Consultation* Brisbane 21 September 1999.

1533. A-G's Dept (Cth) – Family and Legal Assistance Division *Correspondence* 18 November 1999.

1534. ALRC DP 62 proposal 7.11– 7.13.

1535. Law Council *Submission 375*; R Sackville *Submission 388*; Victorian Bar *Submission 367*.

difference to outcomes at comparatively little cost. It also reduces the need for appeals.<sup>1536</sup>

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<sup>1536</sup>. National Legal Aid *Submission 360*. See also *Mbuaby Paulo Muaby v Minister for Immigration & Multicultural Affairs* [1998] FCA 1093 at [2] (Wilcox J).



*Immigration and refugee matters*

5.134. Under guidelines effective from 1 July 1998, legal aid is generally not available for immigration and refugee cases. Grants of legal aid for immigration matters have declined from 229 in 1996–97 to 38 in 1998–99. Grants for refugee status applications declined from 316 in 1996–97 to 58 in 1998–99; grants for refugee status review dropped from 822 in 1996–97 to 157 in 1998–99. Grants for refugee status judicial review remained low at 69 for 1998–99.<sup>1537</sup>

5.135. Advice and assistance in immigration and refugee cases is now provided through the IAAAS operated by the Department of Immigration and Multicultural Affairs (DIMA). DIMA has variously contracted with private law firms and migration agents, Legal Aid NSW, the Refugee Advice and Case Service (RACS) and the Immigration Advice and Rights Centre (IARC), to provide advice<sup>1538</sup> and application assistance<sup>1539</sup> to protection visa applicants and immigration advice to eligible members of the community.<sup>1540</sup> In its submission, DIMA stated that legal aid for the preparation of primary and merits review applications was not necessary.

The Government's position in relation to migration matters is that, at the primary and review stages of migration applications, assistance does not necessarily need to be legal assistance. Any assistance is better provided by a wider range of service providers which may (but does not necessarily have to) include legal advisers. Primary and merits review processes are administrative ones rather than the adversarial judicial review processes in courts.<sup>1541</sup>

5.136. IAAAS does not provide funding for all cases previously covered by legal aid. Assistance extends to primary applications for refugee status and to MRT or RRT review in limited cases, but not to judicial review or for lodging applications to the Minister to seek a visa on humanitarian grounds. Eligibility guidelines for IAAAS assistance focus on the applicant's financial, cultural, geographical, language, physical, psychological and emotional difficulties.<sup>1542</sup> Government policy is that judicial review should be at the applicant's own expense. Legal aid is still available for judicial review in migration and refugee cases where there is an

1537. A-G's Dep (Cth) – Family and Legal Assistance Division *Correspondence* 18 November 1999. Immigration figures include matter types: 'immigration', 'deportation' and 'application for permanent residency'. Note there were also grants for submissions on humanitarian grounds for refugee matters in 64 cases in 1996–97 and 15 cases in 1997–98.

1538. Including advice to visa applicants seeking to prepare and lodge applications, to vary or extend visas, to sponsor applicants, to prepare supporting documentation and as to departmental procedures and administrative provisions.

1539. Including assistance to prepare, lodge and present visa applications.

1540. DIMA *Submission 385*. See also National Legal Aid *Submission to the Senate Legal and Constitutional Affairs References Committee on the Operation of Australia's Refugee and Humanitarian Program* Sydney 25 June 1999, 1; Legal Aid NSW *Consultation* Sydney 1 July 1999.

1541. DIMA *Submission 385*.

1542. *ibid.*

unresolved difference of judicial opinion, or proceedings seek to challenge the lawfulness of detention, but only in limited circumstances.<sup>1543</sup>

5.137. According to some critics, IAAAS does not always provide quality advice and representation.<sup>1544</sup> However, DIMA submitted that it monitors complaints to the Migrations Agents Registration Authority and to legal professional bodies, and has its own comments and complaints process, to advise IAAAS clients of their right of complaint and their entitlements under the scheme.<sup>1545</sup> DIMA also monitors IAAAS contractors and conducted a full review of 1998–99 contractors, inviting submissions from key interest groups

DIMA regularly reviews contractor performance against a range of indicators, including assessments of quality and timeliness. To this end, all IAAAS providers are required to provide monthly expenditure and performance reports.<sup>1546</sup>

5.138. In some registries, assistance to migration and refugee applicants is also provided by barristers through the Federal Court's pro bono scheme. Additional government assistance is offered by AGS, which provides the case documentation, the 'green book', that applicants are required to provide in Federal Court judicial review cases.<sup>1547</sup> Although the numbers requiring early assistance can put a strain on existing advice services,<sup>1548</sup> an assessment of the merits of an application, advice about relevant facts and communication with legal representatives ultimately can save time and money for applicants and tribunals.<sup>1549</sup> Given the specialist knowledge required in this area, inhouse LAC lawyers and lawyers from specialist legal centres such as RACS and IARC<sup>1550</sup> are appropriate to provide advice and assistance in migration, refugee and administrative matters.<sup>1551</sup>

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1543. In NSW, such aid is available only if 'exceptional circumstances exist': *Legal Aid NSW Policy bulletin No 5/99* Sydney May 1999. These issues are being considered by the Senate Legal and Constitutional Affairs References Committee's inquiry into the operation of Australia's Refugee and Humanitarian Program.

1544. *National Legal Aid Submission made to the Senate Legal and Constitutional Affairs References Committee on the Operation of Australia's Refugee and Humanitarian Program* 25 June 1999, 11; *Law Council Submission to the Senate Legal and Constitutional Affairs References Committee on the Operation of Australia's Refugee and Humanitarian Program* June 1998, 6.

1545. *DIMA Submission* 385.

1546. *DIMA Submission* 385. Legal Aid NSW disagreed that DIMA regularly reviews contractor performance: *Legal Aid NSW Correspondence* 21 December 1999.

1547. See para 5.97–5.98.

1548. *Legal Aid NSW Consultation* Sydney 1 July 1999.

1549. Following merits review, a solicitor's correspondence to the Australian Government Solicitor (AGS) setting out any errors with determination has often secured consensual remit to the relevant tribunal for a new determination: *Legal Aid NSW Consultation* Sydney 1 July 1999; *IARC Consultation* 22 July 1999.

1550. IARC provides assistance to approximately 4000 people each year as well as providing education seminars and self-help kits: *IARC Submission to the Senate Legal and Constitutional Legislation Committee: Migration Legislation Amendment (Judicial Review) Bill 1998* Sydney January 1999.

1551. *Legal Aid NSW Consultation* Sydney 1 July 1999. DIMA and the review tribunals have commented on the high quality of non-profit organisations such as IARC and RACS: Joint Standing Committee on Migration *Protecting the vulnerable? The migration agents registration scheme* AGPS Canberra 1996, para 4.53.

**Recommendation 48.** The Department of Immigration and Multicultural Affairs should reconsider IAAAS funding and priorities. Assistance should be available for the preparation of protection visa applications and/or applications to the Refugee Review Tribunal in cases where there is a strong likelihood of the applicant ultimately qualifying for the visa –

*Recommendation 48 cont'd*

for example, where the applicant is from a country with a high success rate for protection visas. Assistance should also be provided for cases before the AAT concerning visa cancellation and deportation. Selection criteria for firms and agencies receiving IAAAS funding should have regard to practitioners' experience in migration, refugee and administrative law matters.

*Veterans' affairs cases*

5.139. Applicants for legal aid in veterans' affairs cases are subject to a merits test,<sup>1552</sup> but they are not subject to a means test,<sup>1553</sup> nor requested to make any contribution. As shown in table 5.6 above, such cases receive legal aid, but in decreasing numbers in recent years.<sup>1554</sup>

5.140. Legal aid in veterans' matters is targeted to representation at a hearing, rather than the reconsideration, primary review or interlocutory AAT stages.<sup>1555</sup> The Commission was frequently told of veterans' cases taken through lengthy review processes when the only issue was a medical one and this could have been clarified by securing an early, independent medical report.<sup>1556</sup> The Commission proposed in DP 62 that departments, tribunals and legal advice agencies should cooperate to develop appropriate and cost effective ways to obtain such reports in these cases, whether by intervention of the departments, the tribunals or legal aid.<sup>1557</sup>

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1552. The federal Attorney-General announced that, following concerns expressed by the veterans' community, a committee including representatives from the Attorney-General's Department and the Department of Veterans' Affairs was established, and has been holding discussions with a view to achieving consistent national practice across LACs: D Williams 'A modern legal aid framework – the Commonwealth government's strategy for reform of legal aid services in Australia' *Keynote address* Legal Aid Forum – Towards 2010 Canberra 21 April 1999, para 61.

1553. A senior member of the AAT observed that  
 guidelines which operate in relation to assistance in the veterans jurisdiction are far more open and far more flexible than those in other jurisdictions and that, as a consequence of that, if a veteran wants to be represented it would be most unusual for them not to gain assistance: BBarbour *AAT Submission to Senate Legal Aid Inquiry*, para 7.39.

1554. See table 5.6 above. In addition to grants of aid, a significant level of expenditure incurred by Legal Aid NSW in veterans' matters is by way of s 33 authorisation: see fn 261. In 1997–98 in NSW 254

s 33 authorisations were made, and 317 in 1998–99: Legal Aid NSW *Annual report 1998–99*, 61.

1555. Legal Aid NSW 'Legal aid policies' *Veterans' pension matters – Commonwealth guidelines* July 1998, para 4.2. Legal Aid NSW reported and increase in advice services of 98% in 1998–99 and an increase in AAT representation of 7%: Legal Aid NSW *Annual report 1998–99*, 17.

1556. eg Legal Aid NSW *Consultation* Sydney 1 July 1999.

1557. ALRC DP 62 proposal 12.12–12.16.

5.141. In addition to legal aid, federal funding is provided directly to the Returned and Services League (RSL), Legacy and Vietnam veterans' associations to assist people making applications for veterans' pensions.<sup>1558</sup> The Veterans' Review Board (VRB) voiced their support for these advocacy services. Many veterans also seek assistance from private advocates who work on a contingency basis.<sup>1559</sup>

5.142. In its submission to the Commission, the Law Council supported the proposal in DP 62 that grants of legal aid be available for the early stages of veterans' matters.<sup>1560</sup> In a submission to the Attorney-General's Department, the Law Council expressed concern at the recent downturn in approval rates for veterans' applications.<sup>1561</sup> It recommended that legal aid funding for veterans' matters be 'divorced' from the general pool of legal aid funds and administered by the Department of Veterans' Affairs (DVA) or the Attorney-General's Department.<sup>1562</sup> However, in consultations and submissions to the Commission, certain LACs and government departments noted that when government departments fund applicants in matters in which the department is the respondent, there are ready claims of departmental bias or conflict of interest.<sup>1563</sup>

**Recommendation 49.** Commonwealth legal aid guidelines should be modified to allow limited grants of aid in veterans' matters to clients who satisfy a merit test, to be available for the purposes of

- paying for necessary early disbursements, such as medical reports
- conducting initial negotiations and drafting correspondence to the Department of Veterans' Affairs in respect of refused applications which have a strong likelihood of success on review.

**Recommendation 50.** The Department of Veterans' Affairs, the Repatriation Commission and legal aid commissions should cooperate to establish panels of agreed medical experts and processes for the early resolution of disputes.

### *Social security matters*

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1558. National Legal Aid *Submission 360*.

1559. Veterans' Review Board *Consultation* Canberra 27 September 1999.

1560. Law Council *Submission 375*; ALRC DP 62 proposal 7.13.

1561. Law Council *Submission to the Attorney-General regarding Civil Law Draft Guideline Number 6 as to War Veterans' matters* 30 July 1999.

1562. Law Council *Submission 375*.

1563. AGS *Consultation* Canberra 29 September 1999; Victoria Legal Aid *Consultation* Melbourne 26-August 1999. See also DVA *Consultation* Canberra 27 September 1999.

5.143. Social security appeals to the AAT receive legal aid funding for preparation, evidence gathering and submissions in very limited circumstances.<sup>1564</sup> LACs are not able to make targeted grants to obtain medical reports.<sup>1565</sup> Government funded medical evidence is limited to reports by general practitioners contracted by

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1564. See 'Commonwealth guidelines – Legal assistance in respect of matters arising under Commonwealth laws' in current *Agreement in relation to provision of legal assistance between the Commonwealth and each State*, Sch 3, Guideline 3; *National Legal Aid Submission 360*.

1565. Other than by s 33 authorisation in NSW: *Legal Aid NSW Consultation Sydney 1 July 1999*. See fn-261.

Centrelink, usually from Health Services Australia. The Commission was told that these reports are often inadequate, with medical conditions, particularly psychiatric conditions, often overlooked.<sup>1566</sup>

5.144. National Legal Aid noted that most disability support pension (DSP) claims were quickly conceded by Centrelink when legal aid was more readily available for assistance and medical evidence. In the two years to December 1999, Legal Aid NSW obtained medical reports, including psychiatric reports for 33 DSP applicants at a total cost of \$23945. In the event, 32 of these cases were conceded by the department before the AAT hearing.

It is true that obtaining medical reports is a service many litigants need in order to be able to represent themselves, as they are often unable to afford these reports, are unsure what information to ask for, and may have difficulty interpreting the reports when they are obtained. In some types of matters, for example, disability support pension (DSP) claims, if a claimant is able to obtain a favourable medical report Centrelink is often prepared to settle the matter.

Being unable to afford the necessary report, the unrepresented claimant must pursue the matter through the Social Security Appeals Tribunal (SSAT) and possibly even the AAT, with little chance of success in the absence of medical evidence. Even if the claimant could afford to pay for a report, it is unlikely he would know the right questions to ask to address the very specific requirements of eligibility for a DSP.<sup>1567</sup>

5.145. The reintroduction of early, limited grants of aid in social security matters was supported by the National Welfare Rights Network<sup>1568</sup> in its submission and in all other submissions which addressed the issue.<sup>1569</sup>

5.146. Regular communication between the Social Security Appeals Tribunal and the Department of Family and Community Services regarding tribunal practices may improve the quality of information before the tribunal at early stages in proceedings and assist in producing timely, appropriate case resolution.

**Recommendation 51.** Commonwealth legal aid guidelines should be modified to allow limited grants of aid in social security matters, to clients who satisfy the means and merits test, to be available for the purposes of

- paying for early necessary disbursements, such as medical reports
- conducting initial negotiations and drafting correspondence to Centrelink in respect of refused applications.

<sup>1566</sup>. National Legal Aid *Submission 360*.

<sup>1567</sup>. *id 14*.

<sup>1568</sup>. National Welfare Rights Network *Submission 380*.

<sup>1569</sup>. Law Council *Submission 375*; R Sackville *Submission 388*; Victorian Bar *Submission 367*.

## Unrepresented litigants

5.147. As stated, litigants are unrepresented for a variety of reasons. Some litigants choose to represent themselves. Many cannot afford representation, do not qualify for legal aid or do not know they are eligible for legal aid, and are litigants in matters which do not admit contingency or speculative fee arrangements.<sup>1570</sup> They may believe they are capable of running the case without a lawyer, may distrust lawyers, or decide to continue unrepresented despite legal advice that they cannot win.<sup>1571</sup>

## Difficulties for litigants

5.148. The Commission's survey of unrepresented litigants in the Family Court and AAT revealed the variety of unrepresented litigants, their differing understandings of the process and reasons for lack of representation. Many of those who were unrepresented wanted or needed some advice and assistance, as the following selection of typical comments indicates

Before me and my wife separate we had many difficulty and we try to work out and find out what was the wrong. Unfortunately, did not work that way. Finally we separate of course. I did not have any idea about all the law system ... then she moved what she done I do not know. Few time she came to me and ask for sign few paper. I did so. Few weeks later I received some paper from Family Court. I didn't understand all that and I didn't know what is going on?... I don't know what to do how to do? So hopefully you will understand that in this case I didn't had any lawyer or solicitor or didn't go to Court.<sup>1572</sup> (Unrepresented family law litigant)

[I] thought it would be a simple procedure (as my ex has no contact) How wrong I was.<sup>1573</sup> (Unrepresented family law litigant)

People don't realise they will get virtually no assistance from the Court with solving their problem. Information sessions cannot solve this: people need advice that is addressed to their specific situation.<sup>1574</sup> (Unrepresented family law litigant)

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1570. Legal costs are detailed in ch 4. Issues concerning unrepresented parties and case and hearing management in the Federal Court, Family Court and federal review tribunals respectively, are discussed in ch 7, 8 and 9.

1571. In consultations by the Commission, a number of people have noted that in the Family Court parties will often pursue residence or access cases knowing that they have no chance of winning, to demonstrate their love and attachment to their children, and to ensure the children do not feel they were abandoned by an uncaring parent: Family Court *Consultation* Sydney 17 September 1999.

1572. Family Court case file survey response (unrepresented applicant).

1573. Family Court case file survey response 522 (unrepresented applicant).

1574. Family law practitioners *Consultation* Sydney 14 September 1998.



I found it very difficult in even finding out which forms to obtain, which direction to follow and what was expected from me. This was from counter staff or duty solicitor. When conducting my own case, the judge was not the slight bit interested in my situation.<sup>1575</sup> (Unrepresented family law litigant)

[Assistance I would like to see provided by the Family Court is] someone to take each case through its process with you when there is an obvious formula followed like property settlement. The people on the desk "are not allowed to advise." There should be someone who is allowed to advise available also at the Family Court.<sup>1576</sup> (Unrepresented family law litigant)

Dealing with Commonwealth officers which always have access to legal assistance more than the applicant is always at a disadvantage. Access to legal assistance could be more equitable and would almost certainly speed the process up.<sup>1577</sup> (Unrepresented applicant in a compensation case)

Very hard for a person with no legal background to help themselves, feels like us against them.<sup>1578</sup> (Unrepresented party in social welfare case)

I did my own representation. I had no choice. The DSS had a lawyer. I felt intimidated by the DSS lawyer.<sup>1579</sup> (Unrepresented party in social welfare case)

If I was represented, I may have succeeded.<sup>1580</sup> (Unrepresented party in social welfare case)

I was ill prepared as I did not understand what was required. Some representation or assistance on case preparation would have helped.<sup>1581</sup> (Unrepresented party in social welfare case)

The AAT or some other body should provide legal advice (or an adviser) if requested ... I could not afford personal legal advice and feel I lost the case because I did not have the necessary legal experience to present my argument properly.<sup>1582</sup> (Unrepresented party in social welfare case)

At all times I felt pressured by both the tribunal and the other party's legal representative to get my own legal representation ... There appeared to be no avenue for true unbiased resolution for a non-represented person.<sup>1583</sup> (Unrepresented party in social welfare case)

5.149. Other unrepresented litigants felt adequately assisted by the court or tribunal, were confident and satisfied with the case outcome they secured for

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1575. Family Court case file survey response 1292 (unrepresented applicant).

1576. Family Court case file survey response 867 (unrepresented respondent).

1577. AAT case file survey response 1094 (unrepresented party).

1578. AAT case file survey response 591 (unrepresented party).

1579. AAT case file survey response 317 (unrepresented party).

1580. AAT case file survey response 729 (unrepresented party).

1581. AAT case file survey response 553 (unrepresented party).

1582. AAT case file survey response 661 (unrepresented party).

1583. AAT case file survey response 987 (unrepresented party).

themselves, and/or felt that a better outcome had been achieved without lawyer assistance.

It was when I had no [representative] that things moved because I stuck to the real issues of abuse and not putting out little insignificant matters ie: photos or school reports.<sup>1584</sup> (Unrepresented family law litigant)

I was given all help required and was made to feel confident in presenting my own case. This was my first experience at anything of this type. I was not confident until I became involved with dealing with the AAT staff and received their help, advice and informative material. Even a video of a typical AAT hearing was made available to me.<sup>1585</sup> (Unrepresented party in Austudy case)

I was assisted in every way with positive advice, co-operation, vital facts regarding my case and this made me aware of the situation at hand. Through the AAT assistance I was able to confidently appear at two hearings for the first time.<sup>1586</sup> (Unrepresented party in employment and retirement case)

5.150. As these last quotes make clear, not all unrepresented litigants need assistance with all aspects of their case.<sup>1587</sup> The problems faced by unrepresented litigants and applicants vary, depending on their individual capabilities, the complexity of the proceedings, whether they are applicants or respondents,<sup>1588</sup> and the extent of assistance available by advisers or court staff.

5.151. As discussed in the next section of this chapter, unrepresented parties increasingly are making use of limited scope or 'unbundled' legal services, to assist them to represent themselves.<sup>1589</sup> Most unbundled services are purchased from

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1584. Family Court case file survey response 577 (unrepresented respondent).

1585. AAT case file survey response 567 (unrepresented party).

1586. AAT case file survey response 630 (unrepresented party).

1587. There is no legal barrier to individuals representing themselves in courts exercising federal jurisdiction: *Judiciary Act 1903* (Cth) s 78; *Collins (aka Hass) v R* (1975) 133 CLR 120, 122: 'In the ordinary course of litigation, criminal or civil, it is considered that a party to proceedings should have the right to present his own case'. A corporation must be represented by a solicitor and cannot act by an officer without leave of the court. There are barriers to litigants being represented otherwise than by a lawyer as non-legal advocates require leave from the court to represent or advocate for a litigant. In all jurisdictions non-lawyers are prohibited from acting as barristers or solicitors in litigious matters and lawyers monopolise court advocacy. These barriers are based on the common law and, in some cases, on legislation — see for example, *Legal Profession Act 1987* (NSW) s 48B-E.

1588. Establishing a defence may be more challenging than presenting a series of facts upon which a claim is based. An American study found that even where litigants took legal advice for small claims, unrepresented defendants did as badly at hearings when facing an unrepresented plaintiff as a represented plaintiff: J Ruhnka & S Weller *Small claims courts* National Center for State Courts 1978 cited in R Cranston *Access to justice: Background report for Lord Woolf's inquiry* Lord Chancellor's Department London 1995, 128.

1589. This evidences the 'client focus' of the litigation processes, a more sophisticated range of assistance and an 'increasing emphasis on "legally competent citizens" who are not wholly and unnecessarily dependant on legal professionals': F Regan 'Legal aid without the state: Assessing the rise of pro bono schemes' *Paper* Legal aid in the new millennium — Third International Legal Aid Conference Vancouver June 1999, 6.

private solicitors or are offered by public or community legal service providers. In addition, such services are offered by court registries or litigant assistance programs adjunctive to courts and tribunals.

### Difficulties for courts

5.152. A court is faced with different challenges in cases where one or both parties are unrepresented. When only one party is unrepresented, a primary difficulty can be maintaining the perception of impartiality.<sup>1590</sup> Judges need to ensure that all relevant evidence is heard, relevant questions asked of witnesses, and that the unrepresented party knows and enforces their procedural rights. The represented party may see such judicial intervention as partisan, and judges must ensure they do not apply different rules to unrepresented parties.<sup>1591</sup> Where both parties are unrepresented, the parties may be difficult to control, the case disorganised and wrongly construed, there may be party quarrels over irrelevant points, or even harassment or violence.<sup>1592</sup>

5.153. The difficulties associated with lack of representation have been set down in several judgments and reports on the justice system.<sup>1593</sup> A report prepared by the United Kingdom Lord Chancellor's Department stated

It is not satisfactory simply to leave it to lay people to prepare their cases in whatever way they think is appropriate and then expect district judges to muddle through as best they can at the hearing ... A fair hearing means more than an impartial adjudicator weighing the evidence from both parties dispassionately: it requires also that the parties know what they are doing.<sup>1594</sup>

5.154. In a 1996 Federal Court case, Justice Sackville discussed the general approach which a court should take to proceedings involving a litigant in person.<sup>1595</sup> The judge referred with approval to the following statement.

[T]he advice and assistance which a litigant in person ought to receive from the court should be limited to that which is necessary to diminish, so far as this is possible, the disadvantage which he or she will ordinarily suffer when faced by a lawyer, and to

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1590. J Goldschmidt et al *Meeting the challenge of pro se litigation – a report and guidebook for judges and court managers* American Judicature Society Chicago 1998, 52. See para 5.10 above.

1591. See *Buljubasic v Buljubasic* (1999) FLC ¶92-865.

1592. J Goldschmidt et al *Meeting the challenge of pro se litigation – a report and guidebook for judges and court managers* American Judicature Society Chicago 1998, 53, 54.

1593. In addition to the following, see *Dietrich v R* (1992) 109 ALR 385. In *Dietrich* the High Court held that lack of representation in a trial for a serious criminal offence is likely to prejudice the right to a fair trial. See fn 145.

1594. Baldwin *Monitoring the rise of the small claims limit* Lord Chancellor's Department Research Series-1/97.

1595. *Re Morton; Ex parte Mitchell Products Pty Ltd* (1996) 21 ACSR 497.

prevent destruction from the traps which our adversary procedure offers to the unwary and untutored.<sup>1596</sup>

5.155. In *Sadjak*<sup>1597</sup> the Full Court of the Family Court held that the lack of legal representation and lack of a reliable interpreter founded a successful appeal and a new trial on the ground that the appellant did not have a fair trial.

It is, we believe, intolerable that a person in the position of the wife in this case should be expected to present reasoned argument to an appellate court without legal representation ... In this regard there is very little that a court can do. Its role is to decide cases as between litigants and it cannot perform that role and retain the confidence of litigants if it is proffering advice to one side or another.<sup>1598</sup>

5.156. A United States survey of judges and court administrators found

a clear lack of uniformity across courts and judges with respect to the handling of pro se litigants, raising questions about the consistency and quality of justice administered to them.<sup>1599</sup>

5.157. In relation to Australian courts, the Australian Institute of Judicial Administration's (AIJA) *Courts and the public* report made the following recommendation.

All courts should have a Litigants in Person Plan that deals with every stage in the process, from filing through to enforcement, or the equivalent in criminal matters. This is recommended so that systematic attention is given to the issues. As part of the Litigants in Person Plan, guidelines should be prepared by the judicial officers so that best practice is identified and shared between them about how to conduct a hearing where one or more of the parties are unrepresented.<sup>1600</sup>

## 'Unbundling' legal assistance

### Introduction

Unbundling is in reality an education and assistance program for legal aid clients. It is a process of providing, in a meaningful, practical way, information and support for those

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1596. *Rajski v Scitec Corporation* (unreported) NSW Court of Appeal 16 June 1986 (Samuels JA).

1597. *In the Marriage of Sadjak* (1992) 16 Fam LR 280.

1598. id 283–284 (Nicholson CJ, Nygh and Purdy J). In *Heard v De Laine* (1996) FLC 92–675 the Full Court of the Family Court held that a party to civil litigation has no right in a legal sense to legal representation and the court has no power to order a legal practitioner to act for or appear on behalf of a party.

1599. J Goldschmidt et al *Meeting the challenge of pro se litigation – a report and guidebook for judges and court managers* American Judicature Society Chicago 1998, 19.

1600. S Parker *Courts and the public* AIJA 1998, 166.

clients who do not fall within the guidelines to receive legal representation but are not in a position to fund ... litigation.<sup>1601</sup>

5.158. In Australia and overseas, public legal advice agencies provide a diverse range of limited or 'unbundled' services in an effort to help a broader class of applicants. Such services have been criticised as 'second rate'.<sup>1602</sup> Certainly, they are not a substitute for legal representation and expanded use of such schemes can carry professional risks, as set down below. Even so, high level usage of the schemes suggests that they serve an important function, providing assistance that otherwise may not be available.

5.159. Unbundled assistance in family matters comprises information about dispute resolution options; referral to mediation or counselling; assessment of settlement recommendations and of the merits of the case; preparation of information or settlement options for negotiations or conciliation;<sup>1603</sup> analysis of available income and help to develop realistic economic plans; or referral to necessary ancillary professionals such as therapists, appraisers, or vocational counsellors.<sup>1604</sup> Advice is provided by telephone or personal attendance, in pamphlets, via the internet, and in information services such as community education seminars. Francis Regan of Flinders University commented that the value of these services is that they 'respond to people's desires to avoid, bypass and threaten litigation'<sup>1605</sup> and provide a valuable service preventing or resolving disputes that might otherwise end up in the court system. Such assistance is generally, but not always, provided by qualified lawyers. The services rely heavily on pro bono services by lawyers.<sup>1606</sup>

5.160. It is often the case that applicants for legal aid are refused on merit grounds because their case lacks a 'genuine and substantial dispute'. The Family Law Refusals Review, conducted by Legal Aid Qld, found that most legal aid applicants wanted 'to formalise arrangements'.<sup>1607</sup> These may be matters where able applicants can adequately self-represent, such as where the parties are close to agreement regarding residence and contact of children. Many of these applicants may need only brief explanations as to procedures, information to assist them with prescribed forms or advice about appearing for themselves in court. Legal Aid

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1601. 'Unbundling services for family law' document provided to ALRC in Legal Aid Qld *Consultation* Brisbane 21 September 1999, 2.

1602. Law Council *Submission 375*; Legal Aid NSW solicitor *Consultation* 17 September 1999.

1603. eg Springvale Legal Service has recommended the use of legal aid funding to assist litigants to prepare for litigation: Springvale Legal Service *Hitting the ceiling* Springvale Legal Service Victoria August 1998, 21.

1604. F Mosten 'Unbundling of legal services and the family lawyer' (1994) 28 *Family Law Quarterly* 421, 429.

1605. F Regan 'Australia's legal aid service in international perspective: how do we compare?' *Paper* State of Legal Aid Conference Melbourne 12 December 1997, 9.

1606. See also para 5.10-5.20.

1607. Legal Aid Qld *Family law refusals – Discussion paper* Legal Aid Qld Brisbane 4 November 1998.

NSW<sup>1608</sup> and Legal Aid Qld<sup>1609</sup> websites provide basic answers to questions, with referral information for further legal assistance. Guides or kits to assist parties with specific, common court procedures are also offered by LACs.<sup>1610</sup> The Commission encourages such programs and considers that a coordinated approach by LACs, CLCs and courts to the development of self-help programs would enhance their efficacy.

5.161. Ontario Legal Aid have developed a pilot unbundled services model to provide legal advice and support for individuals who do not qualify for higher priority legal aid.<sup>1611</sup> Area directors issue special two hour duty counsel authorisations to eligible legal aid clients with low priority matters to get advice or assistance drafting documents at specific stages of negotiations or court process to enable them to represent themselves.<sup>1612</sup> Ontario Legal Aid have also introduced an expanded duty counsel pilot model that allows for a duty counsel to assume carriage of a case and represent a client over several court appearances.<sup>1613</sup> The models are presently under assessment.<sup>1614</sup>

5.162. In England, such services are available for the most part by way of initial legal advice and assistance under the 'Green Form Scheme'. Under this scheme, solicitors may provide general advice about the individual's legal situation, give assistance to try to settle disputes, seek a barrister's opinion, and write letters. Those who qualify are entitled to two hours of free legal assistance. The United Kingdom Legal Aid Board can agree to extend the time limits in some cases.<sup>1615</sup>

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1608. <<http://www.legalaid.nsw.gov.au/lac.nsf/pages/familyfaq>> (4 November 1999).

1609. <<http://elo.legalaid.qld.gov.au/defaultFAQ.htm>> (25 November 1999).

1610. eg Legal Aid NSW has developed a guide on their website for reaching a settlement in property matters, designed to take parties through the settlement process and giving links to different options: <<http://www.legalaid.nsw.gov.au/lac.nsf/pages/property1>> (22 December 1999). Legal Aid Qld has developed a domestic violence 'self-help kit' and is aiming to develop kits in other areas: Legal Aid Qld *Domestic violence – finding a way out self-help kit* <<http://elo.legalaid.qld.gov.au/kits/dvkit/default.htm>> (25 November 1999); *Unbundling services for family law* provided in Legal Aid Qld *Consultation* Brisbane 21 September 1999, 3. Legal Aid WA provides information sheets advising how to defend motor vehicle damage claims and how to identify marital property prior to negotiations: C Slattery 'Legal aid's non-litigation services' *Hearsay* October 1999, 32. The IARC provides education seminars and produces an 'Immigration kit' as a practical guide for immigration advisers: IARC *Submission to the Senate Legal and Constitutional Legislation Committee: Migration Legislation Amendment (Judicial Review) Bill 1998* Sydney January 1999.

1611. Legal Aid Ontario *Pilot project report – unbundled services model* <<http://www.legalaid.on.ca/reports/pilotprojectjune.htm#unbundled>> (23 February 1999).

1612. Legal Aid Ontario *Proposed pilot projects final report* 15 January 1998 <[http://www.legalaid.on.ca/reports/legalaidpiloten.html#family\\_services](http://www.legalaid.on.ca/reports/legalaidpiloten.html#family_services)> (14 December 1999).

1613. Legal Aid Ontario *Pilot project report – expanded duty counsel models* <<http://www.legalaid.on.ca/reports/pilotprojectjune.htm#expdc>> (23 February 1999).

1614. Legal Aid Ontario *Pilot project report* <<http://www.legalaid.on.ca/reports/execsummary.html>> (14 December 1999).

1615. Lord Chancellor's Department *The legal aid system – an overview* <<http://www.open.gov.uk/lcd/laid/legfr.htm>> (14 December 1999).

There have been significant costs incurred in the rapid expansion of the scheme.<sup>1616</sup> The British experience indicates the need to keep funds allocated for such schemes under control.

5.163. Legal Aid Qld has drawn from the Ontario model and is developing 'strategies and procedures to ensure that every person who approached Legal Aid Qld for legal assistance receives some form of support'.<sup>1617</sup> Family law clients can receive conferencing, initial and ongoing family law advice and self-help kits regarding consent orders and self-representation. Legal Aid Qld propose to launch a pilot with the following objectives.

- Develop the profile of the family law client best suited to using unbundled services
- Identify the services to be provided
- Develop procedures and process to enable that appropriate deployment of those services including setting the criteria for identifying suitable files for the services
- Identify an office which has the capacity to implement the services
- Implement a trial of those services
- Evaluate the pilot.<sup>1618</sup>

5.164. CLCs play a major role in providing unbundled services. Many focus on particular areas of law which fall outside the ambit of LACs. Some CLCs, such as welfare rights and immigration rights centres offer specialist advice services. There are clearly benefits in CLCs offering a complementary range of services, rather than overlapping services with LACs.<sup>1619</sup> In respect of family law, the JRC recently confirmed that

[w]e have found that the family law casework services offered by CLCs at the time of the survey were substantially different from those offered by other providers in the field. CLCs were more likely to restrict the range of clients and types of matters dealt with, in particular targeting clients whose cases fell outside legal aid eligibility guidelines, but who were also unable to afford private legal representation. CLCs also often restricted assistance to particular types of dispute resolution processes. Thus, CLCs provided a specialised service aimed at filling gaps rather than 'competing' with other mainstream service providers in family law.<sup>1620</sup>

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1616. The Lord Chancellor's Department 'Legal aid average payments 1990/91 to 1996/97' in *The Legal Aid System – an overview* <<http://www.open.gov.uk/lcd/laid/legfr.htm>> (11 January 1999).

1617. *Unbundling services for family law* document provided to ALRC in *Legal Aid Qld Consultation* Brisbane 21 September 1999, 1.

1618. *ibid.*

1619. In the ACT, for example, practice areas are divided by agreement as between Legal Aid ACT and the CLCs, with social security and tenancy work all done by CLCs: *Legal Aid ACT Consultation* Canberra 27 September 1999.

1620. R Hunter *Family law case profiles* JRC Sydney June 1999, para 446.

## The changing nature of legal assistance

5.165. The internet and other electronic information sources also have enhanced information and assistance services for those who are unable to afford a lawyer. The assistance provided by the internet and other technology is changing from an information source to an interactive medium providing enhanced self-help services. Advice services are changing from specialised advice for individuals to generic advice for groups.<sup>1621</sup> The future provision of legal services is expected to involve

- movement from a fundamentally advisory/consultative legal service to reusable, less specialist legal information and guidance service, where one-to-one consultations no longer dominate but where many citizens benefit from the packaging of legal experience
- a change from a substantially reactive legal service to an increasingly proactive service with the potential for much earlier legal input into the affairs of non-lawyers
- a shift from a legal system centred on time-based billing to one where many legal services are sold in the manner of commodities, in some cases, it is likely, selling in high volumes for mass consumption at low prices
- a change from today's system where access to the law can be difficult or bewildering to one where its greater availability and friendlier delivery empowers and motivates users
- a shift from today's compartmentalisation of legal advice to the delivery of multi-disciplinary service.<sup>1622</sup>

5.166. Unbundled services are already provided by courts, tribunals, legal aid agencies and law firms. Law firms provide new services, with advice and assistance provided without direct lawyer intervention for standard transactions such as wills drafting, property transactions,<sup>1623</sup> divorce and property settlements,<sup>1624</sup> legal compliance,<sup>1625</sup> and other forms of virtual legal advice.<sup>1626</sup>

1621. R Susskind *The future of law – facing the challenges of information technology* Oxford Clarendon Press 1996, 286.

1622. *ibid.* See also Lord Chancellor's Dept *Consultation paper* 'Resolving and avoiding disputes in the information age' Lord Chancellor's Dept September 1998, ch 3 <<http://gate.ccta.gov.uk/lcd/consult/itstrat/civdlc.htm>> (3 February 1999).

1623. *eg* by Law Partners Solicitors: N Reece 'Sultans of cyber take a swing at the suburbs' *Australian Financial Review* 26 November 1999, 33.

1624. *eg* the 'Split-up' system developed by La Trobe University: K Owen 'Computing your divorce' *Herald Sun* 1 June 1999, 21.

1625. *eg* SAFETRAC, an online compliance program developed by Minter Ellison: B Clegg 'Better to be safe than sorry' *Australian Financial Review* 30 July 1999, 30. Blake Dawson Waldron have also developed SOAL, SALT, SILC Super and SILC Insurance, legal compliance products for clients <<http://www.bdw.com.au>> (16 April 1999).

1626. As being developed by Blake Dawson Waldron in conjunction with US technology firm Jnana: K-Nicholas 'Computerised lawyers to give virtual advice' *Sydney Morning Herald* 18 August 1999, 29.



Such systems are expected to provide cheaper services to people needing legal assistance.<sup>1627</sup>

5.167. Certain United States courts have initiated some very sophisticated schemes to assist unrepresented litigants, including the 'Quickcourt' self-service centre. This is a 'self-service court kiosk', dealing with issues such as divorce and tenancy, at which the inquirer can choose the applicable options, enter the relevant information, and ultimately receive a printout of the court documents needed and a set of instructions on how to proceed.<sup>1628</sup> Some self-service centres, such as the Supreme Court of Arizona, Maricopa County (Phoenix) Self-Service Centre have, in addition to a 'Quickcourt' service, a clinic for procedural advice, a website with court forms and instructions, an automated telephone service, a data bank with names of mediators and legal practitioners prepared to provide unbundled services, and individual assistance from pro bono lawyers on site.<sup>1629</sup>

5.168. Decision support systems are also being used within federal government agencies to improve the consistency of departmental decision making.<sup>1630</sup> The Family Decision Support System, developed for trial for Centrelink, asks the client, with the assistance of Centrelink staff, a series of simple questions. A split screen shows the questions and answers on the left, with guidance material such as commentary, legislation, policy, and (to be added) significant court and tribunal decisions on the right. The guidance material shows why a question is being asked and the legislative basis for it. The system presents a report of a person's eligibility for benefits, giving reasons based on the legislation. A person's entitlement under each allowance is calculated. An applicant can change the answers to consider how different circumstances, for example, a change in their level of income, would affect entitlements. Such systems can promote accuracy and consistency in decision making and explanation concerning the decision for clients. The process is quick and provides immediate information on current and potential entitlements. The relationship between such systems and administrative review is yet to be addressed.

5.169. The expanding volume of legal information available on the internet is becoming a significant source of legal assistance for litigants, as well as for those in the legal profession. CLCs, LACs and other such organisations have internet home

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1627. For a discussion of the legal issues in relation to this type of self-help advice, see M Tichtel 'Texas lawyers do battle with do-it-yourself legal software' [November 1999] *California Bar Journal* 1, 7.

1628. See para 5.214 below.

1629. See Superior Court of Arizona Maricopa County *Self-service centre – final report for State Justice Institute* SJI Arizona 17 April 1997.

1630. eg Department of Defence (Defcare library; Multi-Period Incapacity Calculator), Comcare (Compensation Research Library), Department of Finance (Commonwealth Managers' Toolbox), Department of Family and Community Services (FAMnet), Department of Veterans' Affairs (Compensation Claims Processing System). A Family Decisions Support System has also been built for trial by Centrelink: <<http://www.softlaw.com.au>> (30 June 1999). This system was developed for Centrelink by Softlaw, but has not been purchased nor implemented.

pages which provide legal information assistance as well as information on their areas of practice, office locations and contact details.<sup>1631</sup> Law societies, law firms

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1631. eg Lawstuff, a website developed by the National Children's and Youth Law Centre, provides information to young people about laws that most affect them: <<http://www.lawstuff.org.au>> (19 January 1999); K Shea 'Lawstuff drives on' (October 1999) *Rights Now* 4; NWilliamson <http://www.Lawstuff.org.au> – *A review of Lawstuff for the National Children's and Youth Law Centre* Law Foundation of NSW September 1998.

and ADR organisations also provide legal information, usually by publishing papers, journals<sup>1632</sup> or newsletters.<sup>1633</sup> Most Australian law societies and bar associations have internet home pages providing information to members and the public.<sup>1634</sup>

5.170. Governments, courts and tribunals also provide assistance and information through their websites. Some of this is general information about the organisation, but there is also information on accessing services, statistics, speeches, press releases and other information. All Australian legislation and cases are available free either on SCALEplus<sup>1635</sup> or AustLII,<sup>1636</sup> including historical and current material.<sup>1637</sup> Courts and tribunals provide lists of litigant services and other practical information for unrepresented litigants on coming to court.<sup>1638</sup>

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1632. eg Gilbert and Tobin <<http://www.gtlaw.com.au>> (19 January 1999).

1633. eg Freehill Hollingdale and Page <<http://www.fhp.com.au>>. Barristers chambers are also establishing internet web sites: B Watt 'Lawyers launch web chambers' *Northern Territory News* 29 September 1999, 14; <<http://www.johntoohey.com.au>>.

1634. Law Council <<http://www.lawcouncil.asn.au>>; Law Society of NSW <<http://lawsocnsw.asn.au>>; NSW Bar Association <<http://www.nswbar.asn.au>>; Law Society of Tas <<http://www.taslawsociety.asn.au>>; ACT Law Society <<http://www.lawsocact.asn.au>>; Qld Bar Association <<http://www.brassocqld.com.au>>; Law Institute of Victoria <<http://www.liv.asn.au>>; Victorian Bar Association <<http://www.vicvbar.com.au>>; Law Society of SA <<http://www.lssa.asn.au>>; Law Society of WA <<http://www.LawSocietyWA.asn.au>>.

1635. <<http://scaleplus.law.gov.au>>.

1636. Australian Legal Information Institute <<http://www.austlii.edu.au>>. AustLII's National Law Collection now includes the complete legislation of all Australian jurisdictions, the decisions of all federal courts and the decisions of the Supreme Courts of all States and Territories.

1637. Cases from the High Court of Australia are available on AustLII minutes after they are handed down in court. The High Court intends to become the first Australian court to broadcast hearings on the internet: B Lane 'High Court tests case for Net' *Australian* 7 December 1999, 3. In August 1999 the Federal Court broadcast the delivery of a judgment live over the internet: 'First judge on the Internet' *Daily Telegraph* 2 August 1999, 9; Federal Court 'Live judgment on internet' <<http://www.fedcourt.gov.au/media.htm#live.htm>> (3 December 1999); G Malatesta 'Long arm of the law learns digital tricks' *West Australian* 4 August 1999, 26.

1638. See for example High Court of Australia <<http://www.highcourt.gov.au>>, the Federal Court <<http://www.fedcourt.gov.au>>, the Family Court <<http://www.familycourt.gov.au>> (19 January 1999) and the Administrative Appeals Tribunal <<http://www.aat.gov.au>> (19 January 1999).

5.171. The multiplicity of legal websites has ensured that information about courts, tribunals, government agencies and lawyers is more accessible.<sup>1639</sup> For people who cannot or choose not to retain a lawyer there is a significant amount of information available to provide assistance and improve their access to the legal system.<sup>1640</sup> Such information is not always easy to access or utilise. Much of the information is organised by formal legal categories rather than search terms people would use. Search engines lack discretion and may turn up vast quantities of information. It can be difficult to extract a relevant, manageable and coherent core of information.<sup>1641</sup>

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1639. Studies show that the availability of the internet is increasing. In the twelve months to May 1999 40% of adult Australians accessed the internet: Figures provided by the Australian Bureau of Statistics (ABS) cited in R Alston 'Massive growth in internet usage' *Media release* 6 September 1999 <<http://www.dcita.gov.au>> (3 December 1999). See also the ABS at <<http://www.abs.gov.au>> (19 January 1999). However, this is available primarily for households with incomes over \$66 000 a year. Less than 10% of these households had incomes below \$27 000 a year: HZampetakis 'One in three on the net but e-trading still slow' *Australian Financial Review* 2 March 1999, 27. These figures are based on the ABS survey to November 1998, which recorded 4.2 million Australian adults had access to the internet. Access from these sources will be enhanced by the federal government's Online Public Access Initiative (OPAI), providing financial support to the development of systems that enhance public online access, as well as access to special and disadvantaged groups: R Alston '\$2 million for projects providing public online access' *Media release* 13 June 1997 <<http://www.dcita.gov.au>> (30 March 1999). Internet access will also increase when it becomes widely available through television. 'In the long term by far the single most significant driver will be access to the World Wide Web via television': Lord Chancellor's Department 'Resolving and avoiding disputes in the information age' *Consultation paper* Lord Chancellor's Department September 1998, ch 2 <<http://gate.ccta.gov.uk/lcd/consult/itstrat/civdlc.htm>> (3 February 1999). The Attorney-General also recently announced an inquiry into the access by older Australians and people with disabilities to the electronic provision of business and government information and services and ways to promote access for these people to electronic information: D Williams 'Access to new technologies by older Australians and people with disabilities – government reference to the Human Rights and Equal Opportunity Commission' *News release* 13 September 1999. Services are also provided by commercial organisations and the websites of law societies. However, these tend to have a market focus, usually directed to the legal profession, rather than focus on providing information to consumers: for example LawNow, which includes THEMIS, the online service established by the Queensland Law Foundation <<http://www.lawnow.com>> (19 January 1999); excata.com <<http://www.excata.com>> (19 January 1999) and Law of Australia Online <<http://www.lao.com.au>> (19 January 1999).
1640. As an indication of access of legal information available on the internet, in one survey of the top 500 Australian websites most accessed by Australians, for the week ending 26 November 1999, AustLII was positioned at number 145, Foundation Law 191, the Law Society of New South Wales 208, the Family Court 258 and Lawlink NSW 276. The Law Institute of Victoria and the Attorney-General's website *Window on the Law* were at 462 and 470 respectively in the previous week: <<http://usrwww.mpx.com.au/~ianw/monthau500.html>> (3 December 1999).
1641. Lord Chancellor's Department 'Resolving and avoiding disputes in the information age' *Consultation paper* Lord Chancellor's Department September 1998, ch 2 <<http://gate.ccta.gov.uk/lcd/consult/itstrat/civdlc.htm>> (3 February 1999).

5.172. In Victoria the government has been active in building a state-wide series of channels in an electronic service delivery project known as 'Maxi'.<sup>1642</sup> Users identify the service they want. They are not required to have knowledge of the government agency which provides the service. There is a business channel and a

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<sup>1642</sup>. Parliament of Victoria Law Reform Committee *Technology and the law* Government Printer Melbourne May 1999, para 5.27. The NSW government operates a similar scheme called 'Connect NSW'.

land channel<sup>1643</sup> and the Victorian Law Reform Committee has recommended that the Department of Justice establish a legal channel.<sup>1644</sup> The approach has received international praise for identifying how people interact with the government and the life event involved.<sup>1645</sup>

5.173. To improve access to legal information on the internet for those without legal training, the Commission proposed in DP 62 the establishment of a first port of call online civil justice service.<sup>1646</sup> The service would act as a central point of reference for anyone seeking information or advice on a legal problem and guide users to the appropriate information on the internet.<sup>1647</sup> A national coordinating website for legal information could provide: a single, first port of call for people seeking information on legal services; basic factual advice and information; and a gateway to other sources of advice, for example, court websites or the proposed Victorian legal channel. It could take a similar approach to the Victorian site by categorising information with a user focus. While individual court and tribunal home pages provide a significant amount of information, they do so in relation to their own services. The Law Council agreed that such a service should be provided.<sup>1648</sup> National Legal Aid noted that State LACs should coordinate such online legal information service in recognition of their role as a major source of general legal information.<sup>1649</sup>

5.174. The recent establishment of a national Internet Legal Practice by the federal Attorney-General's Department aims to provide some of this assistance. The service will provide information, advice, referral and education services over the internet, telephone and in paper publications.<sup>1650</sup> However, part of the aim of this service is to encourage business and consumer confidence in the internet and to encourage the development of other online information services. It is not expected to organise those services or provide a directory for them. Such a website could be established through the current Window on the Law website<sup>1651</sup> or some similar site with an easily remembered domain name and address.

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1643. Parliament of Victoria Law Reform Committee *Technology and the law* Government Printer Melbourne May 1999, para 5.29.

1644. id para 5.54, rec 18.

1645. B Gates *Speech* Empowerment 2001 Seattle 9 February 1998

(<http://www.microsoft.com/BillGates/speeches/empowerment2001.htm>) (19 January 1999).

1646. ALRC DP 62 proposal 6.4.

1647. A similar need has been recognised in the UK: Lord Chancellor's Department *Consultation paper* 'Resolving and avoiding disputes in the information age' Lord Chancellor's Department September 1998, ch 3 <<http://gate.ccta.gov.uk/lcd/consult/itstrat/civdlc.htm>> (3 February 1999).

1648. Law Council *Submission 375*.

1649. National Legal Aid *Submission 360*.

1650. D Williams 'National internet legal practice' *News release* 1 September 1999.

1651. <<http://www.law.gov.au>> (10 January 2000).

5.175. The dramatic increase in information availability which has resulted from the creation and expansion of the internet may not, however, mirror an increase in accessibility to this information. Such access depends upon an ability to locate and operate an online computer. Many disadvantaged persons may lack the resources, knowledge or skills necessary to obtain information via the internet. It is essential, therefore, that information can be accessed in hardcopy form by such persons and supplemented wherever possible by direct assistance or advice.

5.176. The array of internet and other electronic avenues to legal information are essential to a changing world of legal advice and assistance. They are not set to replace direct contact between lawyers and clients, of course, but it has considerable utility for many clients of legal services and for the many routine cases in courts and tribunals. AIJA provides a regular conference and forum on technology and should add to its agenda consideration of the many electronic legal advice and assistance projects.

**Recommendation 52.** The Attorney-General's Department should establish a 'first port of call' online information service to act as a central point of reference and referral for anyone seeking general information on a civil legal matter.

## Unbundling issues and risks

### *Professional responsibility*

5.177. As discussed above,<sup>1652</sup> legal assistance can be provided in the form of a limited grant of legal aid, such as for case preparation, obtaining evidence or for negotiations. Unbundled services are usually for clients who do not qualify for a grant of legal aid at all and who have sufficient skills to select, comprehend and utilise the limited assistance provided.

Unbundling can really only work for educated, articulate litigants in routine matters where general information can be provided, for example, by information officers on a legal aid commission legal helpline or on legal aid commission websites. This general information can then be supplemented by specific advice and assistance provided by lawyers.<sup>1653</sup>

5.178. In the Commission's consultations, private lawyers described how their clients increasingly see unbundled services as a product in the legal marketplace. Clients often prepare their own documents with the assistance and oversight of lawyers, gather their own evidence and appear for themselves at interlocutory case

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<sup>1652</sup>. para 5.61, 5.120–5.122.

<sup>1653</sup>. National Legal Aid *Submission 360*. Women's Legal Resource Centre *Submission 350*.

events. Such clients are more likely to reserve their limited funds for representation at the hearing if this becomes necessary.<sup>1654</sup>

5.179. Consultations and submissions were supportive of such practices,<sup>1655</sup> but often with reservations. There are risks in the provision of such services. If a practitioner has not acted for a client continuously in a matter, he or she may not be sufficiently informed of all relevant issues and may inadvertently give advice that is incomplete or wrong, or is misunderstood by the client, exposing the practitioner to an action for professional negligence.<sup>1656</sup> The lawyer's limited professional responsibility for the matter may not be understood unless lawyers place themselves on and remove themselves from the court record at the appropriate times. In the United States, where unbundled legal services are an expanding industry for lawyers, it has been suggested that 'the legislature grant civil immunity from liability to lawyers when they provide limited scope discrete task representation'.<sup>1657</sup> The Law Reform Commission of Western Australia has noted that new retainer arrangements may be necessary in providing unbundled services that give lawyers immunity from liability.<sup>1658</sup> Such issues deserve careful consideration by professional associations and governments.

### *Conflict of interest*

5.180. Where one party to a dispute has received prior assistance from an inhouse legal aid lawyer, the rules about conflict of interest may prevent a later arriving party from obtaining 'one off' advice, advice from a different inhouse legal aid solicitor, or assistance in an area of law unrelated to that of the dispute.<sup>1659</sup> In such circumstances the client must look elsewhere or may be denied assistance.<sup>1660</sup>

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1654. Law Society of NSW Family law group *Consultation* Sydney 17 November 1999.

1655. Support for increased use of unbundling was voiced in a number of consultations: eg Top End Women's Legal Service *Consultation* Darwin 7 October 1999.

1656. F Mosten 'Unbundling of legal services and the family lawyer' (1994) *Family Law Quarterly* 421, 430. See also National Legal Aid *Submission* 360. See also M Tichtel 'Texas lawyers do battle with do-it-yourself legal software' (November 1999) *California Bar Journal* 1, 7.

1657. F Mosten 'Unbundling of legal services and the family lawyer' (1994) *Family Law Quarterly* 421, 433.

1658. Law Reform Commission of Western Australia *Review of the civil and criminal justice system: Consultation paper: Litigants in person, unreasonable and vexatious litigants* March 1999, 15, quoting Lord Woolf *Access to justice: Interim report to the Lord Chancellor on the civil justice system in England and Wales* Lord Chancellor's Department London 1995, 129.

1659. See National Legal Aid *Practice standards*, s 6 <<http://www.nla.aust.net.au>> (22 October 1999).

1660. In the sample analysed, 4.4% of inhouse cases were found ineligible for legal aid and 2.8% rejected for an extension of aid, against 11.5% and 12.6% for referred cases: R Hunter *Family law case profiles* JRC Sydney June 1999 table 6.8.



5.181. The incidence of conflict of interest is high in LACs because of the number of employed solicitors within the 'firm' and the diversity of practice areas.<sup>1661</sup> Unbundling increases the risk of conflict as many more clients are assisted. Instances of conflict of interest are now more readily identified because of computer record management in LACs.<sup>1662</sup>

5.182. In family law cases, conflict of interest may be manufactured by disaffected and manipulative litigants who seek advice from a range of different sources in order to 'conflict out' the other party. In one case described to the Commission as 'typical', the father sought advice from Redfern and Marrickville CLCs and Legal Aid NSW. The mother was thus unable to get assistance from any of these sources and eventually found a private solicitor to represent her.<sup>1663</sup> The extent of this problem is not clear.

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1661. In the early days of legal aid, the limitations to equitable service delivery by inhouse practices due to conflict of interest were the source of great controversy. See D Weisbrot *Australian lawyers* Longman Cheshire 1990, 241-242.

1662. Legal Aid NSW Solicitor *Consultation* 17 September 1999.

1663. Redfern Legal Centre *Consultation* 13 October 1999.

5.183. *The test for conflict of interest.* Legal professional rules require that, even where there is no prejudice to the clients involved, they must be fully informed of the nature and implications of a potential conflict and assent to the lawyer's involvement.<sup>1664</sup> The common law rules regarding conflict of interest<sup>1665</sup> assume that clients are entitled to expect from their lawyer unfettered allegiance and service of their interest.<sup>1666</sup> In Australia, the question is whether there is 'a real and sensible possibility of a conflict arising between the opposing interests',<sup>1667</sup> or of 'the misuse of confidential information'.<sup>1668</sup> In the United Kingdom the House of Lords in *Prince Jefri Bolkiah v KPMG* stated recently that 'the court should intervene unless it is satisfied that there is no risk of disclosure'.<sup>1669</sup>

5.184. The Family Court in *Gorman v Gorman*<sup>1670</sup> held that advice given by a solicitor to the mother, about how to conduct her case pending her legal aid application, was not based upon confidential information and did not create a conflict for another solicitor in the same firm representing the father.

5.185. Legal Aid WA submitted

Many clients who can (and should) be helped through non-litigation services of legal aid commissions would be prevented from doing so by a strict application of conflict of interest guidelines ... A flexible approach to conflicts is required.<sup>1671</sup>

5.186. Legal Aid WA has detailed policies about when conflict checks are required. Checks are not mandatory for information, advice, duty lawyer and legal education forums, but are for minor assistance and casework.<sup>1672</sup>

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1664. J Disney et al *Lawyers* LBC Sydney 1986, 788-792.

1665. Generally, legislation does not deal with conflict of interest, other than in NSW, where legislation states: 'a solicitor shall not act for more than one party to the same proceedings if to do so would create a conflict of interest': *Legal Aid Commission Act 1979* (NSW) s 37(2).

1666. F Riley *New South Wales Solicitors Manual* Butterworths Sydney 287.

1667. *Watson v Watson* (Unreported) Supreme Court of NSW No. 4347/96, 25 May 1998, 12 (Santow J).

1668. *Farrow Mortgage Services Pty Ltd (in Liq) v Mendall Properties P/L* [1995] 1 VR 1 (Hayne J); *Watson v Watson* (unreported) Supreme Court of NSW No. 4347/96, 25 May 1998, 12 (Santow J); *Yunghanns v Elfic Ltd* (unreported) Supreme Court of Victoria No. 5970/97, 3 July 1998, 7 (Gillard J).

1669. *Prince Jefri Bolkiah v KPMG* [1999] 1 All ER 517, 528 (Lord Millet). See also A Mitchell 'Chinese Walls in Brunei: Prince Jefri Bolkiah v KPMG' (1999) 22(1) *University of New South Wales Law Journal* 243. For many years the leading case regarding conflict of interest was the English Court of Appeal case of *Rakusen v Ellis Munday & Clarke* [1912] 1 Ch 831, which held that the court should not intervene unless there was a 'reasonable probability of real mischief'. More stringent tests have developed over the years. Rukusen's test has been consistently criticised and is not followed in Australia: *Pradhan v Eastside Day Surgery Pty Ltd* No SCGRG-98-833 Judgment No S256 [1999] SASC 256 (18 June 1999), para 49; *Mallesons Stephen Jaques v KPMG Peat Marwick* (1991) 4 WAR 357; *National Mutual Holdings Ltd v The Sentry Corporation* (1989) 22 FCR 209, 228; *Murray v Macquarie Bank Ltd* (1991) 33 FCR 46; *Wan v McDonald* (1992) 105 ALR 473, 492; *Carindale Country Club Estate Pty Ltd v Astill* (1993) 115 ALR 112.

1670. *Gorman v Gorman* (unreported) FCA Canberra CA 815 of 1999.

1671. Legal Aid WA *Submission* 378.

1672. *ibid.*

5.187. *Chinese walls*. The traditional means of preventing or resolving a conflict is by the use of so-called 'Chinese walls' between the different offices or divisions of a firm.<sup>1673</sup> In *Prince Jefri Bolkiah*, the House of Lords<sup>1674</sup> acknowledged that Chinese walls may eliminate the risks in question, but only if 'effective measures are taken' to ensure that no disclosure of confidential information can occur.

It is one thing, for example, to separate the insolvency, audit, taxation and forensic departments from one another and erect Chinese walls between them. Such departments work from different offices and there may be relatively little movement of personnel between them. But it is quite another to attempt to place an information barrier between members all of whom are drawn from the same department and have been accustomed to work with one another ... in my opinion an effective Chinese wall needs to be an established part of the organisational structure of the firm, not created ad hoc and dependent on the acceptance of evidence sworn for the purpose by members of staff engaged on the relevant work.<sup>1675</sup>

5.188. Their Lordships cited with approval the *Fiduciary Duties and Regulatory rules*<sup>1676</sup> developed by the Financial Services Authority of the United Kingdom. The rules suggest the following organisational arrangements for the construction of Chinese walls.

- the physical separation of the various departments in order to insulate them from each other — this often extends to such matters of detail as dining arrangements;
- an educational programme, normally recurring, to emphasise the importance of not improperly or inadvertently divulging confidential information;
- strict and carefully defined procedures for dealing with a situation where it is felt that the wall should be crossed and the maintaining of proper records where this occurs;
- monitoring by compliance officers of the effectiveness of the wall;
- disciplinary sanctions where there has been a breach of the wall.<sup>1677</sup>

5.189. LACs already follow procedures to separate inhouse and referred client files.<sup>1678</sup> National Legal Aid has developed practice standards which set out when conflict arises for inhouse legal aid solicitors, but these add little to the common law as a practical guide for solicitors in particular cases.<sup>1679</sup> LACs would benefit

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1673. Legal aid group *Consultation* Sydney 28 May 1999.

1674. *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 1 All ER 517, 529 (Lord Millet).

1675. *id* 517, 530.

1676. *Fiduciary Duties and Regulatory rules* Law Com No 124 (1992), *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 1 All ER 517, 529 (Lord Millet).

1677. *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 1 All ER 517, 529 (Lord Millet).

1678. Files on clients referred to private solicitors, which contain confidential and sensitive documentation such as the client's application for aid and supporting documentation are held by the assignments sections. Inhouse solicitors do not have access to such files: National Legal Aid *Practice standards*, section 6 <<http://www.nla.aust.net.au>> (22 October 1999); Legal Aid NSW *Consultation* 22 July 1999.

1679. *ibid*. At Legal Aid NSW memos have been circulated from time to time for support staff regarding conflict. The computer system registers a conflict where the other party has been acted for or advised previously, and prima facie identifies this as a conflict: Legal Aid NSW *Consultation*

from rethinking law and practice regarding conflict of interest. Areas where improvements could be made include

- developing legislation and guidelines which identify those situations in which a conflict of interest occurs and which preclude the conflicted party from assistance or representation by an inhouse legal aid solicitor
- developing administrative arrangements which minimise the occasion for conflict by effectively separating confidential information held by drop in advice, duty and casework administration, and administration between legal aid commission branch offices and different divisions within legal aid commissions
- prioritising the determination of legal aid applications where an applicant for legal aid is referred to a private solicitor for reason of conflict of interest, to minimise the disadvantage caused to such parties.

**Recommendation 53.** Legal aid commissions, legal services commissioners and legal ombudsmen, and law societies should consult to clarify and develop procedures for identifying, dealing with and preventing the occurrence of conflicts of interest in legally aided matters.

5.190. Conflict of interest within LACS should also be clarified in legislation. National Legal Aid supported such a proposal in their submission to the Commission.

NLA supports the investigation of any legislative amendments which would give the legal aid commissions greater flexibility in the provision of legal aid. This is particularly an issue as the legal aid commissions move towards providing more advice services. As more people are provided with advice and other limited services, it is important that the legal aid commissions retain maximum flexibility to provide services in the most effective manner, which may require more use of in-house lawyers.<sup>1680</sup>

**Recommendation 54.** Federal and State governments should legislate to clarify that conflict of interest in legal aid commission cases only occurs where casework is undertaken for both clients. Limited advice or assistance provided to a person by a solicitor employed in a legal aid commission should not create a conflict of interest in circumstances where another solicitor employed by the legal aid commission acts for another party in dispute with the person,

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<sup>22</sup> July 1999. A memo to family law legal assistants noted that previous representation or advice constituted a conflict where that assistance was also in family law or child support, in relation to defended or repeat criminal matters or those involving family violence, or in civil matters where legal aid have acted in house: Legal Aid NSW *Family law legal assistance workshop* Legal Aid NSW Sydney October 1998.

<sup>1680</sup>. National Legal Aid *Submission 360*.

providing no confidential information has been or is at real risk of being disclosed.

*Coordinating legal services*

5.191. The coordination and management of advice, information and assistance is critical for effective legal aid delivery and avoidance of conflict of interest. Just as LACs must stream their own cases, legal advice agencies also need to identify cases, analyse the type of assistance required and provide or ensure effective

referral for such appropriate and necessary assistance. Information on referral agencies and practice is essential. Training in case and dispute resolution analysis would also assist. Technology can facilitate communication between agencies.

5.192. Better national coordination of legal aid was a principal aim of the AJAC report<sup>1681</sup> and has been supported in the consultations with and submissions to the Commission.<sup>1682</sup> The need for improved coordination between legal service providers has been confirmed to the Commission in consultations and submissions. The Womens Legal Service (Qld) suggested that regular meetings be held between the WLS the Family Court, Legal Aid and private practitioners to pool experience.<sup>1683</sup> The AJAC report stated that

[m]any of the planning needs are national ones. These include more effective and coordinated responses to changes in the demands for legal aid services, improved identification of best practices, and better coordination of the common activities of LACs.<sup>1684</sup>

5.193. The importance of developing a coordinated legal aid service has been emphasised overseas, particularly in Ontario<sup>1685</sup> and in the United Kingdom.<sup>1686</sup> In DP 62 the Commission proposed that National Legal Aid, LACs, CLCs and governments work towards solving these problems with a coordinated approach to service delivery and information sharing. National Legal Aid supported this proposal.<sup>1687</sup>

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1681. AJAC report, ch 9.

1682. R Sackville *Submission 388*.

1683. WLS Brisbane *Consultation* Brisbane 20 September 1999.

1684. AJAC report, 249.

1685. In May 1998 the OLAR found limited coordination a fundamental problem between legal aid and ancillary community legal service providers. The Review emphasised early assessment of each case to determine the type and level of legal assistance needed

- The system should provide early, sophisticated assessment of each case and the services it requires. The system must encourage early legal intervention, emphasizing advice, mediation, settlement and resolution where appropriate.
- The system should provide different degrees of legal assistance, based on the prioritization of legal needs, client circumstances, and potential individual and systemic impact.
- The system should have the flexibility to address simple matters efficiently and quickly, and enable emergency or complex cases to be referred to more extensive legal assistance and representation.
- Given the multifaceted nature of many family law needs, the legal aid system should be able to coordinate its services with non-legal community service providers: OLAR, ch 10.

1686. Lord Chancellor 'Annex D: "The information/advice/assistance framework"' in *Modernising justice: A consultation paper* London Community Legal Service, 1999, para 2-4.

1687. National Legal Aid *Submission 360*

This would address the problem of inappropriate repeat referrals of clients ... A formal process for the coordination and exchange of information between service providers would assist in the development of this improved approach to providing legal advice and information.

5.194. National Legal Aid advised that it has made progress towards coordination of legal aid<sup>1688</sup> and such coordination has been identified as a priority by the federal government.<sup>1689</sup> Individual LACs have taken initiatives in this regard, sharing information and education<sup>1690</sup> with other LACs and with CLCs and assisting with resources such as computer systems,<sup>1691</sup> hardware and software and intranet linkage.<sup>1692</sup> National Legal Aid and Legal Aid NSW have developed registers of experts for criminal and family law.<sup>1693</sup> National Legal Aid coordinates annual meetings of staff from all LACs and CLCs working in the areas of community legal education and information services, in case assessment and assignment, financial management, and family and criminal law.<sup>1694</sup> The Commission supports the expansion of current initiatives.

5.195. The Australian Legal Assistance Forum (ALAF) also could play an important role in coordinating and enhancing legal aid services.<sup>1695</sup> This body includes representatives of the directors of all LACs, the Law Council, Aboriginal and Torres Strait Islander Legal Services (ATSILS) and CLCs. Its objects are to promote cooperation and communication between service providers, to enhance service delivery and response to client needs, and to develop and promote policies regarding access to justice issues.<sup>1696</sup> ALAF is already working to ensure better

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1688. National Legal Aid *Submission 275*.

1689. The federal Attorney-General announced recently that the government's strategy for reform of legal aid would focus upon greater national accessibility and uniformity in the provision of legal aid services, and an integrated approach between LACs, community legal services, the private profession, courts and prosecution authorities: D Williams 'A modern legal aid framework – the Commonwealth government's strategy for reform of legal aid services in Australia' *Keynote address Legal Aid Forum – Towards 2010 Canberra 21 April 1999*, para 33, 106. In this context a review of CLCs is being conducted by the federal government: D Williams 'Government expands community legal services' *News release 11 May 1999*. In Victoria, an Implementation Advisory Group for senior government and legal aid officers has been formed to formulate strategies to improve access to CLCs: D Williams and Victorian A-G's Dept 'Enhancing community legal services in Victoria' *Joint press release 25 June 1999*.

1690. A national register of community legal education programs and publications is compiled by National Legal Aid and the National Association of Community Legal Centres: National Legal Aid *Submission 275*.

1691. eg the federal government encourages the use in all LACs of LA Office, a software package developed by Legal Aid Qld: National Legal Aid *Submission 275*.

1692. Victoria Legal Aid *Consultation Melbourne 26 August 1999, 17 September 1999*; NT Legal Aid *Consultation Darwin 6 October 1999*; Redfern Legal Centre *Consultation 13 October 1999*.

1693. National Legal Aid *Submission 360*. At present, National Legal Aid produce a register of expert witnesses for criminal matters. In addition, the National Legal Aid Family Law Section managers confer regarding appropriate experts for family law matters: R Coates *Submission 275*. In its inquiry into children in the legal process the Commission was told of the difficulties in securing children's experts for legal aid cases: Australian Law Reform Commission and Human Rights and Equal Opportunity Commission Report 84 *Seen and heard: priority for children in the legal process Sydney 1997 (ALRC 84)*. Similar coordination could assist in some native title or veterans' cases.

1694. National Legal Aid *Submission 360*.

1695. Australian Legal Assistance Forum *Media release 22 April 1999*.

1696. *ibid*.

coordination between legal aid providers, and initiatives have been taken by some LACs and CLCs in this regard.<sup>1697</sup> The Standing Committee of Attorneys-General (SCAG) should consider its role in this process.

**Recommendation 55.** Legal aid commissions, community legal centres and law societies should develop a process for coordinating and exchanging information among legal (and appropriate non-legal) service providers. This should include the following.

- Provision of one-stop advice where the advice provider is accountable for providing an adequate response to a given inquiry. Such advice provider should be able to contact other organisations, panels of specialist legal aid and private practitioners and refer back to the client with the correct advice.
- Apportionment of work to legal aid commissions, community legal centres and other service providers according to resources and expertise.
- Continued development of registers of experts, including experts relevant to family and civil matters.
- Coordination of community legal education, information, administrative innovation and continuing legal education for staff.
- The exchange of information and education about processes, programs, kits and classes which various service providers use as self-help schemes for unrepresented litigants.

### *The referral 'roundabout'*

At the heart of the Community Legal Service is the concept of the local network of advisers, using active referral systems to pass customers from one to another — so that anyone who approaches an adviser with any type of problem will quickly find the help they need.<sup>1698</sup>

5.196. A further problem associated with unbundling, which can reflect a lack of coordination of services, is that clients seeking assistance from public legal service agencies often experience a legal advice 'roundabout',<sup>1699</sup> as they are referred from

1697. eg NT Legal Aid recently unsuccessfully sought funding to establish a videoconferencing facility to provide a 'one stop shop' for legal advice, in coordination with the Darwin Community Legal Service, the Top End Women's Legal Service and the Northern Territory Aboriginal Legal Services. Legal Aid NSW is currently developing a similar proposal: National Legal Aid Submission 360.

1698. Lord Chancellor 'Chapter 3: Community Legal Service Partnerships' in *Modernising justice: A consultation paper* London 1999 <[www.open.gov.uk/lcd/comlegser/repindex1.htm](http://www.open.gov.uk/lcd/comlegser/repindex1.htm)> (4 June 1999).

1699. Legal aid group *Consultation* Sydney 28 May 1999.



one CLC or legal aid office to another.<sup>1700</sup> Each agency counts the referral as a service, but no substantial assistance is ever provided.<sup>1701</sup> This has been the experience of clients in Australia and overseas.

Even where help is available, it is too difficult for people in need to find out about local services, and to identify which source of help would be best for their problem. As a result, many who could be helped simply struggle on alone, and may end up before a court as unprepared and unassisted defendants, or claimants with an unwinnable case.

The lack of effective referral networks of providers means that even when someone has taken the difficult first step, and sought help, he or she may be sent away. The lack of proper targeting also fails to make proper use of the resources available in the advice sector. For example, a fully trained lawyer who spends his or her time providing straightforward money advice, or checking welfare benefit entitlement, is not only wasting their own expertise, but is also denying that expertise to those customers whose problem really needs it.<sup>1702</sup>

5.197. There is often a lack of knowledge about the services provided by other agencies in the system.<sup>1703</sup> The service provider may not have the expertise to give advice, and service providers may be reluctant to give the 'tough advice'<sup>1704</sup> that the person is ineligible for legal assistance.<sup>1705</sup> Sometimes, where such 'tough advice' is given, the person continues to seek positive advice.

5.198. Although there is some shared information, there is often little coordination of service delivery, sharing of case and practice data, or referral cooperation

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1700. There are over 200 such points of referral for legal or legally related assistance in NSW, under the headings of: Aboriginal, accidents compensation, adoption, children's legal services, communications, complaints against professionals, consumer, credit and debt, crime, disability and guardianship, discrimination, dispute resolution, domestic violence, drugs, employment, family, government and privacy, health, housing, immigration and refugees, insurance, superannuation, interpreters, legal information access, mental health, motor vehicle and traffic, neighbours, sex offences, small business, tenancy, welfare, wills and funeral. In addition to the general State and federal courts, there are 32 specialist courts and tribunals which may or may not be the appropriate venue for a certain action: Legal Aid NSW *Operational support telephone list* September 1998.

1701. National Legal Aid *Submission 360*.

1702. Lord Chancellor's Dept *The Community Legal Service – a consultation paper: Modernising justice*, ch 2 <[www.open.gov.uk/lcd/comlegser/repindex1.htm](http://www.open.gov.uk/lcd/comlegser/repindex1.htm)> (4 June 1999). See also OLAR report. See also National Consumer Council *A community legal service – the first steps* National Consumer Council London April 1998.

1703. Lord Chancellor's Dept *The Community Legal Service – a consultation paper: Modernising justice*, ch 2 <[www.open.gov.uk/lcd/comlegser/repindex1.htm](http://www.open.gov.uk/lcd/comlegser/repindex1.htm)> (4 June 1999).

1704. Victoria Legal Aid *Consultation* Melbourne 26 August 1999.

1705. National Legal Aid *Submission 360*

the person can end up being referred from agency to agency in search of assistance which is not available. There is a natural reluctance on the part of each person from whom assistance is sought to simply say there is no one who can provide the help you need, and so inappropriate referrals are made.

between LACs, CLCs, and ATSILS.<sup>1706</sup> Public legal service providers should ensure

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1706. As to CLCs, most States have secretariats or similar overarching bodies, and there is a National Association of CLCs. In addition, the federal government administers its Commonwealth Community Legal Services (CLS) program through the Legal Aid Branch of the Family Law and Legal Assistance Division of the Attorney-General's Dept. The branch is responsible for the development of consistent national policy and the coordination of program improvement initiatives across the community legal services sector:  
<[http://law.gov.au/aghome/commaff/lafs/legal\\_aid/dirclc.html#program](http://law.gov.au/aghome/commaff/lafs/legal_aid/dirclc.html#program)> (27 July 1999).

that adequate advice is provided by the first provider assisting a person. Otherwise the first provider should verify that any referral has been available and is appropriate.<sup>1707</sup>

5.199. One means of improving referral would be to develop and circulate a directory of relevant legal and non-legal services. The directory could detail the form of assistance, how to access it, its limitations and strengths. It could be funded by federal and State governments, law societies and private legal and ADR practitioners. It could be comprehensively advertised in courts, tribunals, legal aid commissions, community legal centres and public libraries and available on the internet. The Commission suggested in DP 62 that the directory could be monitored and updated to include and delete services where appropriate, and prepared or facilitated by State law societies, in conjunction with National Legal Aid and ALAF.<sup>1708</sup> LACs and CLCs often use their own directories of services and a consolidation of these would provide a sound basis for a comprehensive version.<sup>1709</sup>

5.200. In DP 62 the development of such a directory was proposed by the Commission.<sup>1710</sup> This proposal was supported in a number of the Commission's consultations and submissions, including by National Legal Aid.<sup>1711</sup> National Legal Aid suggested that the ALAF or LACs be funded to provide such service, in conjunction with National Legal Aid.

Because legal aid commissions are such major providers of legal services and already provide telephone legal information services and internet sites with legal information, they already have a community profile as sources of assistance and information. It would therefore be more effective for the legal aid commissions to establish and maintain these directories. Because of the consultative relationship that already exists between the commissions through NLA, it would be possible to achieve a cooperative approach to establishing these state-based services.<sup>1712</sup>

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1707. The federal Attorney-General announced recently that the government is conducting a 'Service standards and performance indicators project' of CLCs, together with a project to formulate and implement a new data collection and reporting system for the Community Legal Services Program which will 'assist planning and evaluation of service delivery': D Williams 'A modern legal aid framework – the Commonwealth government's strategy for reform of legal aid services in Australia' *Keynote address* Legal Aid Forum – Towards 2010 Canberra 21 April 1999, para 85, 89 <<http://law.gov.au/ministers/attorney-general/articles/Legalaidforum.html>> (15 July 1999).

1708. See ALRC DP 62 para 7.17, 7.79–7.82. However, the Law Council submitted that, as a public resource, such a directory ought to be funded by government: Law Council *Submission* 375.

1709. eg Legal Aid WA has a highly developed referral database: Legal Aid WA *Submission* 378.

1710. ALRC DP 62 proposal 7.7.

1711. eg National Legal Aid *Submission* 360; Top End Women's Legal Service *Consultation* 7 October 1999; Victorian Bar *Submission* 367. NADRAC notes that some directories exist already, and questions whether the cost in setting up and maintaining such a directory outweighs its usefulness unless there is a selective process about which legal and non-legal services are included. In addition, NADRAC has reservations about the Law Foundation or law societies preparing a directory on ADR and other non-legal advice and services: NADRAC *Submission* 343.

1712. National Legal Aid *Submission* 360.



**Recommendation 56.** Legal aid commissions should develop a comprehensive referral directory for legal and non-legal advice and services in each State and Territory. Such directories should be made available to advisers and the public, on the internet and in printed forms. Each directory should include

- information as to avenues of legal advice, dispute resolution, and related referrals such as relationship and drug and alcohol counselling, community and emergency housing and refuge, ethnic support and interpretation services, domestic violence, trauma and torture services
- relevant government departments and officers
- specialist and approved lawyers who accept legal aid work, initial free consultations and contingency fee arrangements
- and be designed to complement the law handbooks produced by community legal centres.

### Assistance by paralegals

5.201. The use of non-lawyers, such as law students and paralegals for advice, legal research, simple representation or support in court is common in the United States, Britain and Canada.<sup>1713</sup> Persons not legally qualified often have specialist knowledge in discrete legal areas.<sup>1714</sup> Such specialists routinely assist in migration,<sup>1715</sup> housing and welfare,<sup>1716</sup> and veterans' matters.<sup>1717</sup> The expanded use of non-lawyers in such areas is supported by the National Welfare Rights Network.<sup>1718</sup> While representation by paralegals or lay advocates does not typically occur in family law matters, parties are sometimes assisted or supported by friends or family members as 'McKenzie friends'.<sup>1719</sup>

1713. See OLAR report.

1714. Policy on the reservation of legal work to lawyers is changing. In December 1998 the Law Council issued its policy on the reservation of legal work, defining core areas of business which should be reserved for lawyers. These core areas of work included court appearances, advice regarding contentious matters and litigation, wills and probate and conveyancing. The Queensland Law Society was the only body opposed to the Law Council policy, saying that the claiming of a monopoly is counter productive to solicitors' image and profile.

1715. Legal Aid NSW *Consultation* Sydney 1 July 1999.

1716. Welfare Rights Centre Queensland *Website* <<http://www.dovenetq.net.au/community/wrc>> (8-July 1999).

1717. Queensland Returned and Services League *Pensions, advocacy and welfare* <<http://www.qld.rsl.org.au/welfare/whatwedo.html>> (8 July 1999). Legal Aid NSW employ only non-lawyer advocates (6) in their veteran's affairs division: Legal Aid NSW *Consultation* 21-December 1999.

1718. National Welfare Rights Network *Submission* 380.

1719. The English Court of Appeal in *R v Leicester City Justices; Ex parte Barrow* [1991] 3 All ER 935 confirmed the right of every party to litigation to have a 'friend' present in court to assist by prompting, making notes or quietly giving advice on the conduct of the case. Unlike private law

5.202. Often people seeking legal help also need assistance in relationship and parenting or drug and alcohol counselling, and/or assistance with housing or emergency refuge. Such assistance is available from non-legal specialists such as social workers.<sup>1720</sup> The one-stop service envisaged for legal aid requires a pragmatic, multi disciplinary approach to legal problem solving.<sup>1721</sup> Certain LACs have a social work section providing assistance with refuge accommodation, community housing, relationship and parenting counselling, and enrolment in drug and alcohol or mental health programs.<sup>1722</sup> Legal aid social workers often compile reports on the individual or family for the court or tribunal. National Legal Aid supports this trend,<sup>1723</sup> as does the Commission.

5.203. The use of non-lawyers has been particularly successful in CLCs. In the context of legal aid, there are a number of CLCs (such as Springvale Legal Service in Melbourne and Kingsford Legal Centre in Sydney) which function cooperatively with a university clinical legal education program. The federal government recently increased funding for such programs.<sup>1724</sup> Professor Simmonds of Murdoch University, which operates the Rockingham Legal Centre, told the Commission

I strongly support the development as a matter of urgency of approaches to permit sensible use of law students as representatives to enhance access to courts and tribunals.<sup>1725</sup>

5.204. National Legal Aid encourages the participation of practical legal training (PLT) providers in the delivery of legal services. This already occurs in New South Wales and the Australian Capital Territory. In the Australian Capital Territory, the ANU's Legal Workshop PLT program provides students three days per week to assist, under practitioner supervision, at the LAC's advice clinic. The students assist in providing face to face legal advice and in case preparation. This program

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firms, LACs do not generally use paralegals for tasks such as interlocutory court appearances or to take witness statements.

1720. Legal Aid NSW *Consultation* 13 July 1999.

1721. And an environment which adopts a 'non-lawyer ethos': J Disney *Consultation* Sydney 2 July 1999.

1722. Legal Aid NSW *Consultation* 13 July 1999; Legal Aid Qld *Consultation* 13 July 1999; Legal Aid WA *Consultation* 13 July 1999; Legal Aid SA *Consultation* 13 July 1999; Legal Aid Tas *Consultation* 13 July 1999; Legal Aid Victoria *Consultation* 13 July 1999; NT Legal Aid *Consultation* 13 July 1999; Legal Aid ACT *Consultation* 13 July 1999. Legal Aid NSW has a team of three social workers: Legal Aid NSW Social Work Section *Consultation* 13 July 1999. Other than New South Wales, only Legal Aid Qld has an inhouse social work department. The Legal Services Commission of South Australia has family and financial counsellors who are available to the general public. Legal Aid WA has a domestic violence unit that specialises in providing legal services to women who are victims of family violence.

1723. National Legal Aid *Submission* 360.

1724. D Williams 'Government expands community legal services' *News release* 11 May 1999; D Williams 'Clinical legal education expands initiative' *News release* 29 January 1999; D Williams 'Clinical legal education initiative' *News release* 9 March 1999.

1725. R Simmonds *Submission* 301.

has been very successful and may be expanded.<sup>1726</sup> National Legal Aid state in their submission that

[t]he program's results leave no doubt that the students support and complement LACs civil law practices, and the concept enables more services to be delivered than would otherwise be the case. At the same time the students have a greater opportunity to develop legal skills, such as communication, counselling and negotiation skills, than

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<sup>1726</sup>. Legal Aid ACT *Consultation* Canberra 27 September 1999.

would be possible in training provided in a purely institutional setting. Students also develop an understanding of the legal needs of the socially and economically disadvantaged which they will take with them into legal practice.<sup>1727</sup>

5.205. An interesting initiative is that by the Monash-Oakleigh Legal Service in Victoria, in conjunction with Monash University, which recently launched the 'Family Law Assistance Program'. This program presently holds classes to train litigants to represent themselves in the Family Court, or to resolve their dispute via mediation or conciliation. In addition, each person is helped by a law student and a social work student from Monash University as part of its Clinical Legal Education program.<sup>1728</sup> Two Legal Aid NSW civil litigation solicitors work alongside lawyers employed by the Newcastle University Law School to provide community legal services.<sup>1729</sup> Many LACs, CLCs and universities are expanding these types of services.

5.206. The Family Law Refusals Review (FLRR), conducted by Legal Aid Qld,<sup>1730</sup> saw better utilisation of the conferencing program and self-help and information services as essential. Such services should be targeted at

- those seeking to formalise existing arrangements.
- those who will represent themselves in court on matters such as, Enforcement proceedings, Divorce, Child Support and Spousal Maintenance.
- those who will represent themselves at Final Hearing and at each interlocutory step in the process, such as Directions Hearings, Conciliation Conferences and Pre Hearing Conferences.

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1727. National Legal Aid *Submission 360*.

1728. Court Network *Consultation* Melbourne 8 September 1999; The Family Law Assistance Program *Helping those who want to help themselves* Monash-Oakleigh Legal Service 1999.

1729. National Legal Aid *Submission 360*. The University of Western Australia has established an 'Unrepresented Criminal Appellants Scheme', in conjunction with the Supreme Court. Students from the university assist with compiling appeal books under supervision of a staff solicitor: University of WA *Consultation* Perth 23 September 1999. See also P Moyle 'Establishing an unrepresented criminal appellants scheme before the Court of Criminal Appeal in Western Australia: an outline of the proposed scheme' *Paper ALTA Conference Wellington New Zealand* 4 July 1999. <<http://www.law.ecel.uwa.edu.au/law/UCAS/UCASBackgroundPaper.htm>> (7-January 1999)

A simulated 'firm' of about five students will undertake the following tasks:

- Attend the State's prisons (under guidance of the supervising solicitor) after approval has been granted to assist an unrepresented appellant;
- Interview that prisoner and take instructions;
- Undertake research on the likely grounds of appeal;
- Obtain transcripts of the trial proceedings;
- Prepare draft grounds of appeal and outline of submissions
- Prepare a 'brief' for consideration by the supervising solicitor.
- Prepare appeal books.

1730. Legal Aid Qld *Family law refusals - discussion paper* Legal Aid Qld Brisbane 4 November 1998.



This type of service can be provided not only through direct contact with the client in a Legal Aid Queensland office but through the Statewide telecommunication infrastructure.<sup>1731</sup>

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<sup>1731</sup>. id 11.

5.207. While expansion of the current use of non-lawyers in CLCs and LACs is generally supported,<sup>1732</sup> practitioners observed that work appropriate for non-lawyers should be confined to instructing counsel in court or lower level tribunal advocacy. It should not extend to interlocutory court appearances.<sup>1733</sup> The need for adequate supervision also has been stressed.<sup>1734</sup>

5.208. LACs seldom use paralegals, other than to assess applications for grants of aid.<sup>1735</sup> There is said to be 'no shortage of solicitors wishing to work in the legal aid commissions'.<sup>1736</sup> National Legal Aid stated that paralegal work should be limited to provision of generic information and referrals, for example as telephone information officers.<sup>1737</sup> However, Legal Aid WA argue that strategic use of senior, 'career' paralegals can provide greater long term value for money for LACs than junior lawyers who see paralegal work as merely a stepping stone in their career.<sup>1738</sup> The Commission considers that paralegals and law students could provide valuable assistance to LACs for such tasks as interviewing applicants, explaining basic information and means test requirements, gathering such information, calculating means, and referring applications to appropriate legal officers.

**Recommendation 57.** Legal aid commissions should use employed paralegals and/or law students in internship programs, to assist applicants to complete legal aid applications.

**Recommendation 58.** The federal government should evaluate the Family Law Assistance Program to determine whether it should expand the program nationally.

### Court assistance schemes

5.209. Unrepresented litigants often find the court processes, premises and registry procedures confusing. A recent Family Court study of court users related their comments, including that 'the place is intimidating – too formal. Makes you aggressive'.<sup>1739</sup> Problems highlighted by those interviewed included 'feeling of

1732. eg Springvale Legal Service *Consultation* Melbourne 26 August 1999; Legal Aid ACT *Consultation* Canberra 27 September 1999; Legal Aid Western Australia *Submission* 378.

1733. ACT Bar *Consultation* Canberra 28 September 1999.

1734. Legal Aid ACT *Consultation* Canberra 27 September 1999; ACT Bar *Consultation* Canberra 28-September 1999; Law Council *Submission* 375.

1735. Victoria Legal Aid *Consultation* Melbourne 26 August 1999.

1736. National Legal Aid *Submission* 360.

1737. *ibid.*

1738. Legal Aid WA *Submission* 378.

1739. Family Court *Survey of client perceptions of service quality* Family Court of Australia March 1999, 12.

confrontation when I meet the other party', 'very impersonal. People assume you know what is happening', 'hard to find my way through the legal process', 'frightening and overwhelming', 'afraid of leaving the waiting area for a drink and missing being called into court', 'you feel like you are a sheep. Very impersonal', 'stressful and scary' and 'it's very hard emotionally'.<sup>1740</sup> When asked what was the worst thing about the Family Court, clients most often stated it was the nature of the experience — 'having to be here'. Overall, the worst things said about the court related to services (almost 60%) and emotional factors (almost 30%).<sup>1741</sup>

Unrepresented litigants in the AAT made similar comments in survey responses to the Commission.

I felt somewhat intimidated because ... I felt unprepared and alone ... I was emotionally upset recalling the death of my children's father ... I believe I had a strong case but didn't feel anyone was listening to my side.<sup>1742</sup>

I was basically non-existent and just an appendage to my husband's case because the outcome of my decision depended entirely on the decision which he received. I feel that my basic right as a human being and an individual was totally ignored throughout the whole episode.<sup>1743</sup>

I found the process intimidating. In a matter involving a Social Security matter an unrepresented applicant is going to be in a hopeless position. If he is talked down to he feels more intimidated and inadequate.<sup>1744</sup>

5.210. Many courts offer assistance to unrepresented litigants, such as court orientation and referral services, and, as stated, information on websites. The Federal Court has facilitated, through the bar associations and DIMA, arrangements for pro bono assistance for refugee and migration judicial review cases. In some Family Court registries practitioners or LACs run a duty solicitor scheme giving pro bono legal advice. The AAT conducts an Outreach Program<sup>1745</sup> with the aim of providing unrepresented applicants assistance and information about the practice and procedures of the AAT. Staff of the National Native Title

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1740. id 31, 12.

1741. Family Court *Survey of client perceptions of service quality* Family Court of Australia March 1999, 17. A study by the British Columbia A-G's Dept reported similar experiences of Family Court litigants

Anger is kept alive in the Courts. The emotion of divorce needs to be recognized. This isn't a legal matter or a justice matter. It's the complete upheaval of a family.

The system as a whole is intimidating. It's a power structure. It's so complicated, and information is withheld and rules are used to avoid cooperation: Family Justice Review Working Group *Breaking up is hard to do: Rethinking the family justice system in British*

*Columbia* Family Justice Review Working Group British Columbia November 1992, 44, 48.

1742. AAT case file survey response 1144 (unrepresented party).

1743. AAT case file survey response 977 (unrepresented party).

1744. AAT case file survey response 986 (unrepresented party).

1745. Outreach is conducted over the phone. Where necessary, an AAT officer will arrange for an interpreter to be available to assist before making contact with the unrepresented party: AAT *Unrepresented litigants* <<http://www.aat.gov.au:80/unrep.htm>> (14 December 1999).

Tribunal provide assistance in preparing applications and accompanying material.<sup>1746</sup> The homepages of many courts and tribunals provide procedural information, application forms and, in some instances, details of how to make an application, describing hearing processes, contact details and addresses.<sup>1747</sup> Courts and tribunals also provide brochures, videos and tape recordings, such as the Family Court 'divorce kit', 'parenting plan kit' and 'Family Court Book', all of which provide step-by-step instructions for parties. The Family Court also runs information sessions on court services and processes and the impact of parental separation on children.

5.211. Court assistance schemes provide assistance and orientation in court. Such services are provided to all courts in Victoria, including Family Court registries, by the Court Network.<sup>1748</sup> The Court Network Family Court program has been operating for nine years in the Melbourne and Dandenong registries.<sup>1749</sup> The service is funded by the State government for the State courts and the federal government for the Family Court. Federal funding in 1999–2000 was \$65732. In the year up to March 1999, 2900 people were assisted by the Court Network Family Court Program. The federal Attorney-General has advised the Court Network that federal funding will be withdrawn after June 2000 and suggested that future funding be sought from the Family Court itself.<sup>1750</sup>

5.212. The Court Network may assist either or both of the parties.<sup>1751</sup> Volunteers act as a link between lawyers and clients, the client and the court or between parties; work in conjunction with the Australian Federal Police, sheriffs and court security to assist in protection of the parties; and provide 'hand holding' support which is so often needed. The service employs a proactive 'outreach model'.<sup>1752</sup> Volunteers approach parties in waiting areas who appear 'lost'; provide company or emotional support to those in distress or who are worried about their safety;

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1746. National Native Title Tribunal *Annual report 1998–99*, 13.

1747. eg the RRT homepage <<http://www.rrt.gov.au>> (17 December 1999).

1748. The Court Network is largely staffed by trained volunteers from a range of backgrounds, such as students of psychology, law and social work and retired people. Volunteers undergo a 12 week training course which covers

- 'Support' (for example, listening skills)
- information about the Family Court process and working with unrepresented parties
- referral to emergency accommodation, financial assistance and legal advice.

Court Network *Annual report 1997–98*.

1749. The Family Court is also trialling a 'Family Court support program' at the Dandenong registry, in conjunction with Victoria Legal Aid, the Family Law Assistance Program, the Family Mediation Centre and local CLCs to provide advice, brief court appearances, counselling, mediation and referrals for unrepresented litigants. The program reported success at assisting such litigants with resolving their cases: Family Court *Correspondence* 23 December 1999.

1750. Court Network *Correspondence* 13 October 1999.

1751. Court Network *Consultation* 28 October 1998.

1752. *Court Network – Family Court program*, provided by H Chapman in Court Network *Consultation* 28 October 1998. There are always two volunteers at a registry to prevent one volunteer having to assist both parties. There are 250 volunteers overall in Court Network; 40 of these are in the Family Court program.

provide information on court processes and referrals to legal or community assistance agencies; or arrange child care. In certain circumstances, the Court Network has assisted with the handover of children for contact.<sup>1753</sup> The volunteers do not give legal advice, but can explain basic court procedures and expectations.

5.213. The expansion of the Court Network was supported in a number of consultations and in submissions to the Commission.<sup>1754</sup> Legal Aid Western Australia suggested that the court network role could be integrated with the duty lawyer role.<sup>1755</sup> Comments to the Commission stressed that volunteers need to be adequately trained and should not provide legal advice.<sup>1756</sup> National Legal Aid stated its support of an expanded Court Network.

NLA supports the concept of court support schemes along the lines of Victoria's Court Network. The Family Court, with a high proportion of unrepresented and distressed and confused litigants, would be an appropriate court in which to trial the scheme. Any organisations contracted to provide the service should be conscious that their role is to provide support, information and referrals. There should be appropriate training and supervision in place to ensure that participants in the scheme, whether volunteers or paid workers, understand the distinction between their role and the role of a legal representative.<sup>1757</sup>

5.214. Similar schemes also operate in many courts in the United States<sup>1758</sup> and in Citizens' Advice Bureaux in the United Kingdom. Lord Woolf has recommended permanent advice centres be set up in larger courts in the United Kingdom.<sup>1759</sup> In Australia, a number of LACs provide court support services, including the Domestic Violence Court Assistance Program (DVCAP) in New South Wales, which provides support and arranges legal representation for women for apprehended violence order proceedings.<sup>1760</sup> LACs coordinate such schemes, and fund CLCs and other community groups to provide the services. National Legal Aid submitted that the DVCAP system works well. It may be appropriate for LACs

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1753. Court Network *Consultation* 28 October 1998.

1754. Victorian Bar *Submission* 367; Family Court Judges *Consultation* 9 August 1999; Family Court *Submission* 348; B Healey *Submission* 331; Redfern Legal Centre *Consultation* 22 October 1999; Victorian Legal Services Ombudsman *Consultation* Melbourne 24 August 1999.

1755. Legal Aid WA *Submission* 378.

1756. Legal Aid NSW Solicitor *Consultation* 17 September 1999; National Legal Aid *Submission* 360.

1757. National Legal Aid *Submission* 360.

1758. See also J Goldschmidt et al *Meeting the challenge of pro se litigation – a report and guidebook for judges and court managers* American Judicature Society Chicago 1998, 72–102. This originated in Arizona, and has been taken up in other US States. See D Venables 'Quickcourt of Arizona – just a gimmick or a view of the future?' (1995) 5(6) *Computers and Law* 10. See also ALRC IP 23 *Technology – what it means for federal dispute resolution* ALRC Sydney 1998, para 6.9–6.19 for a discussion of kiosks in use in Australia and overseas.

1759. Lord Woolf *Access to justice: Final report to the Lord Chancellor on the civil justice system in England and Wales* HMSO London 1996, rec 283, 288, 290.

1760. 33 schemes serving 44 local courts in NSW are allocated \$2.3 million by the NSW government: Legal Aid NSW *Correspondence* 29 November 1999, 5.

to be funded to administer an expanded Court Network for assistance to all family law litigants.

**Recommendation 59.** The Family Court should establish and fund Court Network schemes in all registries. The schemes should be integrated with the information desk and the legal aid commission duty lawyer schemes, and coordinated by legal aid commissions, with community legal centres utilised for the sourcing and training of volunteers.

## 6. General issues – practice, procedure and case management

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### Introduction

6.1. The terms of reference of this inquiry specifically direct the Commission to consider court and tribunal procedures, case management schemes and the arrangements for obtaining and evaluating evidence.<sup>1761</sup> This chapter considers general issues relevant to the design and evaluation of case management systems and procedures concerning discovery and expert witnesses. These procedures have occasioned a good deal of concern in litigation practice. The chapter also discusses the types of litigants in federal jurisdiction and particular issues associated with dispute avoidance and dispute resolution by government agencies. The Commission has previously considered these matters in issues papers on Federal Court, Family Court and federal review tribunal processes, technology and alternative dispute resolution (ADR) and in Discussion Paper 62.<sup>1762</sup> The case types, litigants, case management and practice and procedure in federal courts and tribunals are all quite different. Specific issues relating to the Federal Court, the Family Court and review tribunals are dealt with separately in chapters 7, 8 and 9 of this report.

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<sup>1761</sup> See the altered terms of reference at p 5 in this report.

<sup>1762</sup> ALRC Issues Paper 20 *Review of the adversarial system of litigation: Rethinking the federal litigation system* ALRC Sydney 1997 (ALRC IP 20); ALRC Issues Paper 22 *Review of the adversarial system of litigation: Rethinking family law proceedings* ALRC Sydney 1997 (ALRC IP 22); ALRC Issues Paper 23 *Technology – what it means for federal dispute resolution* ALRC Sydney 1998 (ALRC IP 23); ALRC Issues Paper 24 *Review of the adversarial system of litigation: Federal tribunal proceedings* ALRC Sydney 1998 (ALRC IP 24); ALRC Issues Paper 25 *Review of the adversarial system of litigation: ADR – its role in federal dispute resolution* ALRC Sydney 1998 (ALRC IP 25); ALRC Discussion Paper 62 *Review of the federal civil justice system* ALRC Sydney August 1999 (ALRC DP 62).

6.2. As stated in chapter 1, the civil justice system is changing significantly. One aspect of the change concerns government funding for the justice system, which is limited, and conditional upon courts and tribunals delivering demonstrably efficient outcomes in the determination or resolution of cases.<sup>1763</sup> Resources within courts and tribunals are now deployed and managed to deal with cases more efficiently and effectively. Parties are encouraged, sometimes even pressured, to settle their matters. Lawyers are required by practice and court rules to inform their clients of the alternatives to litigation and the costs expended and anticipated in the litigation.<sup>1764</sup> These arrangements seek to mould litigants into reasonable, prudent parties, who calculate the risks of litigation and invest time, costs and emotion in their case proportionate to the value or complexity of the claim. These changes in the federal civil system (and similar trends in common law and civil code systems around the world) form the background to this analysis.

## Case management

### Introduction

6.3. As stated in chapter 1, the adversarial system of litigation traditionally left primary responsibility for the pace of litigation in the hands of the parties and their lawyers.<sup>1765</sup> The court's role was reactive — the judge was the umpire; not a player in the process.<sup>1766</sup> Over the last ten years Australian courts have become more active in monitoring and managing the conduct and progress of cases before them, from the time a matter is lodged to finalisation. Case management involves a deliberate transfer of some of the initiative in case preparation from the parties to the court, with the aim of controlling costs and ensuring the timely resolution of cases, without compromising the quality and fairness of the process.<sup>1767</sup> To support case management objectives, practice and procedure rules have in turn been significantly modified so that pleadings, discovery, evidence presentation and settlement facilitation are subject to court control and supervision.<sup>1768</sup>

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1763. See para 1.63–1.68, 5.4–5.6, 5.8–5.11, 5.52, 5.107–5.110.

1764. See para 8.60, 3.102–3.109 and 4.24–4.37.

1765. See para 1.117.

1766. Judicial case management is now the norm in the superior courts. The judges seek to control the proceedings in their progress towards trial and, increasingly, at trial. The days when the courts were seen as passive tools controlled wholly by the litigants are days that are passed: K Hayne 'Judicial case management and the duties of counsel' *Paper Brisbane Bar practice course February 1999* <<http://www.hcourt.gov.au/bris.htm>> (13 May 1999).

1767. *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146, 154 (Dawson, Gaudron and McHugh J).

1768. It has been noted

[u]ntil very recently one looked in vain in procedural tomes for any recognition of such emerging fields as caseload management, alternative dispute resolution, and the financing of litigation that bulk large in the judicial administration scene ... but things are beginning to change: I Scott 'Procedural law and judicial administration' (1987) 12(1) *The Justice System Journal* 67, 69.



6.4. Justice Michael Kirby described these changes to the judicial role in the following way.

It has become more common for judges to take an active part in the conduct of cases than was hitherto conventional. In part, this change is a response to the growth of litigation and the greater pressure of court lists ... In part, it arises from a growing appreciation that a silent judge may sometimes occasion an injustice by failing to reveal opinions which the party then affected has no opportunity to correct or modify. In part, it is simply a reflection of the heightened willingness of judges to take greater control of proceedings for the avoidance of injustices that can sometimes occur from undue delay or unnecessary prolongation of trials.<sup>1769</sup>

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<sup>1769</sup>. *Galea v Galea* (1990) 19 NSWLR 263, 281–282.

Case management calls for new skills from judges. Justice Bryan Beaumont commented

[w]e should not underestimate the skills required, and the time needed, for ‘managerial judging’ if it is to be fairly carried out. The right balance has to be struck and it is difficult to discuss this in an abstract fashion. In the end, what is, or is not, good judicial practice in this area comes down to a question of degree ... My own experience is that judges in this country are well aware of their duty to provide individualised justice in the case at hand, but are equally conscious of the fact that they are also managing a system.<sup>1770</sup>

6.5. Case management is often presented as a team effort — ‘the whole registry needs to be involved in keeping cases moving’.<sup>1771</sup> Administrative staff maintain and make case files available when required. Increasingly, case management functions are being provided electronically by calendaring and data collection systems which allow electronic filing, arrange and monitor judicial and court calendars and track cases as they move through interlocutory processes.<sup>1772</sup>

6.6. These complex management arrangements vary, depending on court resources, their caseloads, the types of disputes and litigants and the proportion of represented parties. Courts and tribunal staffing arrangements affect the case management model adopted. They are often organised in a stratified fashion with particular types of judicial officers, registrars, members or case officers undertaking interlocutory hearings or facilitations. In addition to judges, the Family Court has judicial registrars, senior executive service and deputy registrars, registrars and counsellors — all with different case functions and delegated authority. The AAT has a president, deputy presidents, senior, full and part time members and registrars who are likewise allocated different case functions and case types.<sup>1773</sup> Case management systems are arranged to fit in with these staffing hierarchies and functions.

6.7. Case management deploys judges and judicial officers for different roles and at different times in the progress of a case. In the Commission’s consultations there was considerable discussion about the need for courts and tribunals to oversight cases, stream them to appropriate hearings and processes and secure compliance with court and tribunal timetables and directions. The questions raised included — how to ensure cases are allocated appropriately to settlement facilities, where and when to deploy judges or settlement facilitation processes, how to engender compliance from parties and lawyers and accountability within the court or tribunal.

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1770. B Beaumont *Submission 17*.

1771. Family Court judge *Consultation 21 December 1999*.

1772. See para 6.41–6.46.

1773. See para 9.27–9.31.

6.8. Case management is not only directed within the court or tribunal. The lawyers and parties are sought to be co-opted as part of the team. Behavioural and procedural norms created by courts, tribunals and legislation which are directed to support case management objectives, are taken up by lawyers who ‘manage’ their clients according to these standards.<sup>1774</sup> A leading case management expert, Dr-Maureen Solomon, described effective case management as follows.

‘Control’ is rejected in favour of ‘supervision’ to avoid any implication that a dictatorial approach by the court is advocated. Court supervision of case progress does not supplant attorney responsibilities. Instead, it should create a system of joint responsibilities wherein the perspectives and judgment of each can be applied in an appropriate manner to decisions concerning the progress of individual cases and the caseload as a whole.<sup>1775</sup>

The tension in case management derives from the competing, sometimes disruptive, self interest of lawyers and parties. Chief Justice Murray Gleeson noted in relation to this interactive arrangement that

‘the justice system’ is ... in some respects ... not a system at all. Litigants, lawyers, court administrators, judges and the executive government all influence the time and expense involved in the process of litigation. Their interests often conflict. In civil litigation, for example, plaintiffs and defendants, and their respective lawyers, do not have common interests ... The process of litigation is not co-operative. This does not mean that it is chaotic, but it is unrealistic to expect that it can be managed with a view to producing an outcome satisfactory to everybody.<sup>1776</sup>

6.9. In the Federal Court, where there are significant numbers of complex matters, a range of case types and sophisticated, repeat litigants and lawyers, the Court places judges at the front of the process, individually managing each case. The law firm Arthur Robinson and Hedderwicks, among others, supported such case management where

each case would be managed by one judge and, where possible, heard throughout (including in interlocutory processes) by that judge. We recognise that heavier cases require more management and that smaller cases may require little or no management. We nevertheless believe that as a general principle each case should be managed, throughout the process of the case and by the same judge.<sup>1777</sup>

The Department of Immigration and Multicultural Affairs (DIMA) also supported this case management model, noting

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1774. R Hunter *Consultation* Sydney 19 November 1999.

1775. M Solomon & D Somerlot *Caseflow management in the trial court – Now and for the future* American Bar Association Chicago 1987, 13.

1776. M Gleeson 'The state of the judiciary' *Address* Australian Legal Convention Canberra 10 October 1999, 5–6.

1777. Arthur Robinson *Submission* 189.

the importance of competent, effective management by judges who will ultimately hear and determine the matters involved. Management throughout a case by the same judge is preferable to management by different judges at different stages of the case.<sup>1778</sup>

6.10. In other courts and tribunals it is more difficult to identify the optimal case management role of the judges or members. Many courts and tribunals have large numbers of cases that are relatively straightforward and likely to settle. It

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<sup>1778</sup>. DIMA *Submission 385*.

may not be a ‘smart’ or ‘effective’ use of judicial or member time or skills<sup>1779</sup> to have them manage such cases from the time of filing. In such courts and tribunals, case management is focussed on arrangements for appropriate, strategic judicial or member oversight of cases, and the identification and streaming of routine and complex matters into different processes. Registrars may manage cases and undertake early evaluation of case issues and the prospects of settlement.<sup>1780</sup> In the Family Court, for example, a high proportion of matters settle and only 5% of cases filed receive a judicial determination.<sup>1781</sup> In family matters case streaming is a diagnostic, social science exercise, evaluating the disposition and relationship of the parties, as well as an evaluation of the legal issues. Significant numbers of litigants in the Family Court are unrepresented and may be unable to accommodate to timetable and formal procedures set by the Court. These issues were extensively discussed with the Commission and are analysed in chapter 8.

6.11. Justice Trevor Olsson noted of case management systems that ‘there is no single perfect model for all jurisdictions’.<sup>1782</sup> There are, however, general principles for effective practices in case management. Generally courts and tribunals need to monitor cases from the start and maintain supervision throughout so that they know if a case is off track and not meeting time standards or complying with directions.<sup>1783</sup> This supervision can be undertaken electronically as well as by judges, members or registrars. Successful case management requires judicial and member commitment, and leadership and consultation with the legal profession. Most courts and tribunals have time standards and goals to measure case progress and utilise ‘short-schedule’ event techniques and procedures to prompt lawyers into, for example, filing documents before the set case event so that the event accomplishes its objectives. Given the cooperative interchange required in effective case management, courts and tribunals have to ensure lawyers do not accommodate one another to the prejudice

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1779. Chief Justice Gleeson commented that

the problem with the total case management approach is that there are a lot of cases which do not need judicial attention suddenly taking up judicial time and requiring the attendance of lawyers: Chief Justice M Gleeson *Consultation* Sydney 13 October 1999.

The NSW Bar (and others) noted

Care should be taken to ensure that judges do not attempt to do too much management and not enough judging. Registrars or masters could often efficiently do case management. In some cases it is better to push down case management and where necessary appoint more registrars: NSW Bar, Federal civil section *Consultation* Sydney 24 September 1999.

1780. A Family Court judge said that ‘individualised discussion about the issues earlier rather than later is good’: Family Court judges *Consultation* 28 September 1999.

1781. A high proportion of cases settle on the day of the hearing. See para 8.58.

1782. T Olsson *Submission 18*.

1783. I Scott ‘Is court control the key to reduction in delays?’ (1983) 57 *Australian Law Journal* 16, 22; M-Solomon & D Somerlot *Caseflow management in the trial court: Now and for the future* American Bar Association Chicago 1987; I Scott ‘Caseflow management in the trial court’ in R Cranston & A Zuckerman (eds) *Reform of civil procedure: Essays on access to justice* Clarendon Press Oxford 1995, 1, 7.

of the parties and the efficiency of the court or tribunal. Listing dates must be credible and adjournments controlled. Courts and tribunals need to create among lawyers and parties an expectation that events will occur when scheduled.

## **‘Second generation’ case management problems**

6.12. Case management was initiated with great promise. It was expected to produce cost effective, timely resolution of cases, and relieve judges of their ‘policeman’ role. Case management was to be supervision not control. It was expected that with early and continuous judicial control, and short and fixed scheduling of case events, there would be fewer ineffective or redundant case events and significant costs savings.

6.13. Case management arrangements in federal jurisdiction are well established working models. The Justice Research Centre is currently evaluating the implementation and operation, including the cost effectiveness, of the Federal Court’s individual docket system (IDS),<sup>1784</sup> but with this exception the claims of case management remain largely untested in federal jurisdiction. The data does not exist to enable comparison of case duration, case outcomes and costs before and after the implementation of particular case management models.<sup>1785</sup> The Commission’s data gives a more comprehensive picture, but without comparative, historical case information to give a context for the analysis.

6.14. The Commission obtained helpful perspectives on the promise and prospects of case management from Professor Ian Scott, who, as previously stated in chapter 1, is an expert in procedural law and case management systems. Professor Scott identified ‘second generation’ problems in established case management systems in the United States. Some of these problems are design faults, able to be remedied. Other observations are, strictly, not problems but involve a reassessment of what case management can deliver. These issues are able to be identified in case management systems in the United States because of their fuller, longstanding evaluation of case processes. Professor Scott identified the following second generation case management issues.<sup>1786</sup>

- Many courts are experiencing case management difficulties because their information systems were not explicitly designed to support case management functions. Courts and tribunals need technology systems for this function. Such systems may be ‘off the shelf’ – there is no requirement for tailor made systems, but it appears to be important to the functioning and evaluation of case management that the electronic system used in the court or tribunal has case management functions and capabilities.

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1784. See para 7.4.

1785. For a discussion of the case management models in the Federal Court, Family Court and federal review tribunals see ch 7, 8, 9.

1786. Professor I Scott *Consultation* 19 January 2000.

- There is some indication that case management systems need, what the Americans term, 'Rambo' style judges to work effectively. This recognition justifies court concerns about where and when to deploy their judges and the style of judging best reserved for the front line. The United States experience does not indicate that tough judging is needed for all cases but for the small percentage of difficult, obstructive or, sometimes complex matters. Some judges are clearly more effective than others in promoting effective and durable settlements and in determining cases. Some judges are also clearly better at handling trials and writing judgments. Their figures generally reflect the faster resolution times of particular judges and styles of judging.
- Case management was often implemented as a scripted system in which varied, local practices were not tolerated. United States courts are revisiting such issues. Where local practices are consistent with good case management, these are encouraged. Local practices can promote innovation. Lawyers frequently practice in only one or two registries of a court or tribunal. The concern for standardisation across all registries may be misplaced in such circumstances.
- There are differences in case management emerging as between single and multi jurisdiction courts. Case management often shows uneven results in single jurisdiction courts. In such courts, some cases are quickly and easily resolved; others take a longer time and have more elaborated processes. These outcomes may reflect the difficulties in such jurisdictions identifying and streaming routine and difficult cases.
- There is no clear evidence that duration statistics are continuing to improve under case management. Courts set time standards for case duration or case events but there are examples of over-ambitious norms which are not adjusted down and working norms are not monitored and reset to encourage shorter, improved resolution timelines.
- Although case management has made some improvement in the numbers of redundant or ineffective case events or hearings, the problem has not been eradicated. Technology has changed practices, such that many more events are undertaken electronically, via fax or email. Practices may still be redundant or ineffective, even if the judge is in chambers at a screen rather than in the court.
- Case management and practice and procedure rules are becoming linked. Case management was brought in to make court procedures more effective. In turn, case management has prompted changes, sometimes draconian, to procedural law. United States courts are seeking to limit trial time, sometimes by changed listing practices which allocate a short



hearing time for a case. If the hearing goes beyond that time, the matter is adjourned out of the list and the lawyer must come back for a continued hearing date at some other time.

6.15. The matters raised by Professor Scott are analysed in detail in chapters 7, 8 and 9. In this general chapter, it is sufficient to elaborate those 'second generation' case management themes with broader relevance.

## The role of the judge in case management

6.16. The Commission's consultations confirmed that judges play a critical role in case management, case resolution and in assisting to engender compliance with court timetables and orders. As practitioners described it, judges have 'clout'.<sup>1787</sup> Their directions generally are followed and their suggestions concerning settlement heeded by parties. Practitioners appearing in the Federal Court were emphatic that the advantage of IDS was the continuing, informed oversight of the judge who was to determine the case. This was seen as a way to 'cut to the issues' and reduce inappropriate tactical play. The following comments were typical of practitioners' views concerning the role of judges in case management.

We believe that judges, by reason of their expertise in litigation, play an important role in case management ... We have experienced early case management experimentation in State Courts in the 1980's by having non-judicial registrars conducting pre-trial settlement conferences. The consensus was that despite the dedication and good intentions of the court staff, they lacked the experience and expertise in litigation to play an effective part.<sup>1788</sup>

It is better to have someone meaningful in charge. If you have matters before people with lesser powers, they are necessarily limited by their jurisdiction to deal only with trivia. Someone more senior can deal with the whole matter.<sup>1789</sup>

Although registrars can perform many tasks they do not have the same authority and power as judges. Individual, early treatment by a judge means that the parties are confronted with the judge who is to hear their case right through. The parties do not want to get the judge off-side and therefore they are less likely to engage in unnecessary steps.<sup>1790</sup>

In some cases judges may be better able to deal with non compliance because they have greater authority.<sup>1791</sup>

Judges on the Federal Court are flexible and are able to cut through the process to get to the real issues.<sup>1792</sup>

The courts have an essential role in setting the rules of the game ... The judiciary has a key role to play in disciplining the profession.<sup>1793</sup>

The secret in family law matters is that the judicial officers have to take control – otherwise parties and practitioners follow their own agendas.<sup>1794</sup>

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1787. Victorian Bar Family Law Group *Consultation* Melbourne 23 August 1999.

1788. *ACLA Submission 70*.

1789. Law Society of NSW Family Law Committee *Consultation* 17 November 1999.

1790. Justice C Branson *Consultation* Sydney 22 October 1999.

1791. NSW Bar Association, Federal Civil Section *Consultation* Sydney 24 September 1999.

1792. *AGS Consultation* Adelaide 5 August 1999.

1793. Corporate counsel *Consultation* Melbourne 14 January 1998.

1794. Legal Aid NSW *Consultation* Sydney 14 September 1998.

6.17. This is not to say that all judges are good managers and are effective at securing compliance or in focussing issues in the case. Their skills in these matters vary. Some few judges resist case management and prefer parties to ‘run the show’. Other judges may be overbearing. They ‘win’ concessions and settlements from parties but at a cost, leaving parties dissatisfied with the process. In family jurisdiction where matters are frequently relitigated,<sup>1795</sup> such an approach can create new cases for the court.<sup>1796</sup> Generally the Commission heard few complaints concerning the management styles of individual judges. There are a number of courses on judicial case management, which may help judges improve their case management practices.

6.18. Judges take different approaches to non compliance.<sup>1797</sup> Some defaults are incidental or inadvertent and easily remedied. It can be counterproductive and costly for the court and the parties if all non compliance is sanctioned. Parties and lawyers place different emphasis on the importance of compliance. Some parties pursue non compliance as a tactic against their opponents. Notwithstanding such qualifications, lawyers observed that judges and tribunal members should be more attentive to the incidence and effects of non compliance. Some judges and members are said to be reluctant to impose sanctions or to call the matter on for hearing when one party is promoting delay. The Family Court was said to have ‘a culture of non compliance’.<sup>1798</sup> There were persistent criticisms concerning non compliance in the AAT.<sup>1799</sup> Complaints were also made of some Federal Court matters,<sup>1800</sup> although IDS is taken to have been an effective arrangement for discouraging and dealing with non compliance.<sup>1801</sup> Again, detailed consideration of these issues is provided in chapters 7, 8 and 9.

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1795. See para 8.68.

1796. See para 1.86.

1797. For further discussion of compliance issues see para 7.8, 7.182, 7.216–7.219, 8.234–8.249, 9.75–9.77, 9.122–9.134, 9.164–9.175.

1798. The Court established a Compliance Committee. The Court is considering the recommendations made by that Committee. See para 8.233, 8.237–8.239.

1799. See para 9.164–9.175.

The tribunal is not able to exercise enforcement procedures and so there is very little we can do for non compliance. The only thing we can really do is dismiss the case and this is rarely used: AAT *Consultation* Melbourne 25 August 1999.

There is a reticence to impose rules and ensure compliance in the AAT – that creates a need for many directions hearings: Law Society of SA Civil Litigation Committee *Consultation* Adelaide 6 August 1999.

1800. Judges should get more involved with lawyer conduct and lawyer led delays in order to sanction inappropriate conduct: Federal Court practitioners *Consultation* Melbourne 7 September 1999.

Many judges are unwilling to impose sanctions of the requisite type or severity, even though such sanctions are provided for by the rules of court and are necessary for efficiency, equity and in order to re-educate the users of the system and the legal profession: Arthur Robinson *Submission* 189.

1801. See para 7.8.

6.19. The Commission's research and consultations certainly support the conclusion that judges should be closely involved in case management. Case management can become inflexible, and compliance with directions and timetables a problem, if, as presently the case in the Family Court, judges are reserved to the back of the process. Similar problems are noted in the AAT where members have a limited role in conferencing processes. This does not mean that judges or tribunal members need to undertake close and continuing management of all cases, as in the Federal Court. For the many cases in family and AAT jurisdictions which need only the 'shadow' of the court or tribunal to resolve by consent, such judicial or member involvement is unnecessary and inappropriate. The Commission's recommendations are directed to secure some more strategic involvement of judges and members. Judges and members can be brought in as required for particular, difficult or intractable cases. This requires more careful case management, effective computer monitoring of individual cases and close communication between judges or members and registrars and other staff.

### **Legal culture, national practice and flexible case management**

6.20. Although federal courts and tribunals operate nationally, their individual registries are often relatively autonomous. There are different legal cultures and practices associated with specialist jurisdictions and with barristers or solicitors in particular cities, States or Territories. In these circumstances, the Commission heard a good deal of commentary concerning the relative merits of consistent, standardised court practices and more flexible, sometimes idiosyncratic or local practice variations. In the context of particular courts and tribunals these issues were expressed as a desire for some greater, but not inhibitory, consistency in the Federal Court,<sup>1802</sup> and greater flexibility and less standardised practices and processes in the Family Court.<sup>1803</sup> Within courts, questions about flexible or standardised practices can also raise court governance issues. These questions concern the court executive and administration, court development of policy, the participation of judges in policy formulation, the distribution of court resources and the protection of judicial independence in dealing with particular cases. Federal courts and tribunals are self administered and independent. The Commission considered these issues only as relevant to case management and practice.<sup>1804</sup>

6.21. The Federal Court is managed 'on a loose rein'. Judges fully participate in policy and rule making initiatives and the Court culture is tolerant of management processes adapted to local cultures. It has close and cooperative working arrangements with the profession and has successfully brokered important reforms to practice and procedure – with accommodation from both sides. IDS is designed

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1802. See para 7.13–7.16.

1803. See para 8.225–8.232.

1804. See para 1.169.

to tailor processes to the particular case. Federal Court Registrar, Mr Warwick Soden, stated

[i]t is important for case management processes to be adapted to a legal culture. Case management processes can not simply be shipped from one part of the country to another and applied. The local legal culture is responsible for the success of case management processes.<sup>1805</sup>

Justice Catherine Branson of the Federal Court said

[a] docket system can not produce identical processes and practices and therefore it is useful for judges to be able to get information about what works to develop best practices.<sup>1806</sup>

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1805. Federal Court registrar *Consultation* Perth 14 May 1997.

1806. Justice C Branson *Consultation* Sydney 22 October 1999.

Generally case management flexibility was supported in consultations and submissions. Government lawyers and practitioners dealing with several different registries of the Court, were sometimes critical of local practice variations.<sup>1807</sup> The Court is evaluating the implementation of its case management system – a process which involves all judges and court staff – and is considering variations in practice between judges and registries.<sup>1808</sup>

6.22. Family Court judges, like those in the Federal Court, debate and direct policy, case management and practice changes. However, the more centralised ‘chain of command’ implementation of standardised case management practices and the Court’s ‘scripted’ case management processes and practices have caused some dissension among judges, court staff and practitioners. The 1996 Coaldrake review of the implementation of the Buckley Report<sup>1809</sup> noted

[t]here is little doubt that a number of Family Court judges remain frustrated by their lack of formal management authority within the Court. They believe that because they are the Judges whose collective decisions provide the legal operating framework of the Court, they should have a close involvement in the Court’s running. It is crucial that the involvement of Judges in the processes of the Court be maintained. Notwithstanding the legislative authority of the Chief Justice, the Act does not preclude a collegial approach involving the Chief Justice and other Judges.<sup>1810</sup>

6.23. The Commission heard similar complaints from some judges about the Court’s centralised case management practices. Professor Scott spoke of the Court’s ‘agitation’ at internal diversity and its keenly felt ‘need for “standardisation” as if differences in approach between registries must necessarily be a bad thing’.<sup>1811</sup> Family jurisdictions are notoriously difficult to manage. The problems experienced by the Court are as much a feature of the jurisdiction as of the Court. Even so, the ‘second generation’ case management evaluations noted by Professor Scott have particular application for the Family Court. The Commission’s recommendations seek to promote more consistent management of cases, to reduce redundant attendances and assist with compliance, as well as allow more flexible, less scripted practices.<sup>1812</sup> Some local registries in the Court work well.<sup>1813</sup> Sometimes

1807. This issue is dealt with at para 7.13–7.16, 7.158–7.162.

1808. See para 7.4.

1809. Family Court *Report of the Working party on the review of the Family Court* Commonwealth of Australia Canberra 1990 (Buckley Report).

1810. P Coaldrake ‘Evaluation of the Implementation of the Recommendations of the Working Party on the Review of the Family Court (Buckley report)’ *Unpublished Family Court* January 1996, 9–10.

1811. Professor I Scott *Correspondence* 23 December 1999.

1812. The Court’s Future Directions Committee is developing a wideranging set of recommendations also directed at addressing these problems.

1813. Legal aid lawyers made the following comment about the Canberra registry (in particular) of the Family Court

There is a good relationship between the profession and the Court. This is very important to the success of the case management system in Canberra. The Court knows that it can rely on practitioners to comply with directions: Legal Aid ACT *Consultation* Canberra 27 September 1999.

the success is attributable to particular engaged and effective judges. Whatever the reason, such effective practices should be encouraged. There is no particular virtue in consistent, national approaches if practitioners' and parties' experiences of the Court are generally local ones.

6.24. The issue of standardised or local practices in the court is likewise associated with the relationships between courts, tribunals and the practitioners who appear before them. Australian legal practice is increasingly specialised. In federal jurisdiction, family practice is probably one of the last remaining areas of generalist practice – although it too has its committed and accredited, specialist practitioners. Some areas of practice comprise a small select circle of practitioners, well known to each other and the Court. Practice in such areas can have the quality of an exclusive club.

6.25. As stated, practitioners' cooperation is essential if case management systems are to work. This is not to say that cooperation should be secured at any cost. Courts and tribunals cannot afford to be 'captured' by the profession. Further, where the practitioners in particular jurisdictions comprise a small group of specialists, there is generally close cooperation with the court or tribunal, but innovations may be checked and those who are not court or tribunal insiders may be disadvantaged. Like all relationships, those between courts, tribunals and practitioners are dynamic. One important constituent of such effective relationships is mutual respect. This was evident in the Federal Court's dealings with the profession<sup>1814</sup> but was a notable omission in Family Court and practitioner comments on their relationship.<sup>1815</sup> Both Courts consult with the profession. One experienced practitioner noted 'the Federal and Family Courts consult – the difference is the Federal Court listens'.<sup>1816</sup> Family practitioners repeatedly described the Family Court as 'not trusting' them, as 'cynical' about practitioners, seeing them as 'self serving and exploitative'.<sup>1817</sup> Some of the difficulties in this relationship derive from the Court's determination to implement a consistent, national practice and their evident frustration with practitioners who resist this. The tension is clear. Practitioners in some of the smaller registries were careful to distinguish 'the Court' attitude and that of the local judges with whom they had good, working rapport. The Commission discusses and makes recommendations concerning Family Court relations with its practitioners in chapter 8.

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1814. Submissions and consultations were most complimentary about the Federal Court's relationship with the profession. The Law Council stated

The Federal Court has been at the forefront of case management and procedural reform in Australia. In addition, it has adopted a particularly consultative approach with the legal profession before implementing reforms, a process in which the Law Council has been pleased to be involved: Law Council *Submission 375*.

Justice Beaumont commented

Some of the discussion of judicial management of litigation fails, I believe, to accord sufficient weight to the valuable assistance competent, experienced advocates provide in the early definition of the real issues: B Beaumont *Submission 17*.

1815. See para 8.296–8.302.

1816. Law Council *Consultation* Sydney 19 November 1998.

1817. Law Institute of Victoria Family Law Group *Consultation* Melbourne 24 August 1999; Law Society of NSW Family Law Committee *Consultation* Sydney 22 September 1999; Law Society of SA Family Law Section *Consultation* Adelaide 6 August 1999.



## Interrelated processes

6.26. Practices and procedures in litigation and review are interrelated. Changes made to particular practices will often impact on other procedures and outcomes. The Commission's inquiry provided several examples of this connection.

6.27. If originating processes do not allow written identification of matters in dispute, parties may need additional case events to identify the issues.<sup>1818</sup> Reforms delaying discovery can also delay settlement.<sup>1819</sup> The Commission was told that Family Court conciliation conferences have changed from being a case event where parties armed with information discussed settlement, to a case event where parties identify documents they need. They try to settle the matter themselves at a later stage.

Cases just bubble along, because you don't know what the other side is on about. So you say to the client 'let's just get the conciliation conference over, then we can have discovery and get on with it properly'.<sup>1820</sup>

6.28. Another example relates to the restrictions on discovery in Federal Court matters.<sup>1821</sup> The Commission heard that such restrictions had resulted in parties making increased use of subpoenas<sup>1822</sup> and seeking documents under the *Freedom of Information Act 1982* (Cth) as alternative forms of discovery.<sup>1823</sup>

6.29. These comments are not intended as criticisms of the particular reforms but as a measure of the difficulty of managing and controlling litigation practice. These outcomes also demonstrate that reforms should not be assumed to work in the manner intended. Federal courts and tribunals seem alert to this phenomenon. They generally pilot and evaluate major reforms. Practitioners should be consulted as part of such evaluation.

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1818. See para 8.100.

1819. A legal aid practitioner told the Commission

Simplification of procedures has made it impossible to know the other side's case until it is too late: Legal Aid NSW *Consultation* Sydney 14 September 1998.

A family law practitioner said procedures should

provide more information up front so parties can settle upon a known basis rather than in the dark: Victorian Law Institute Family Section *Consultation* Melbourne 24 August 1999.

1820. NSW Bar Association Family Law Committee *Consultation* Sydney 16 September 1999.

1821. See para 7.174–7.184.

1822. ACLA *Submission* 70.

1823. The ACCC stated that they had

a number of concerns regarding the use of FOI by a respondent to supplement discovery. These include

- the relative lack of control over the use of information obtained under FOI when compared with the rules developed by the Courts in regulating discovery
- the use of FOI as a tactical measure to oblige the ACCC to divert resources from progressing the litigation
- the use of FOI as a tactic to challenge the sufficiency of the ACCC's discovery: ACCC *Submission* 396.

### **Cost effective case management**

6.30. Case management promotes efficient management of court business. Its processes are also intended to control private litigation costs. However, practitioners and some litigants consulted in the course of the inquiry were concerned with the time and cost effectiveness of case management processes, arguing that case management increases legal costs.<sup>1824</sup> Increased costs are said to result from

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1824. Qld Law Society *Consultation* Brisbane 21 September 1999; NSW Bar Association *Submission* 80; Victorian Bar *Submission* 57. See J Badgery-Parker and J Harrison 'A short way down the track: Differential case management in the Supreme Court' (1995) 33(5) *Law Society Journal* 34.

- requirements for additional documentation
- an emphasis on early case preparation which can require senior lawyer involvement at the beginning of the case – ‘front end loading’ of costs and lawyers repeating or revisiting work at a later date
- an emphasis on written evidence and submissions.<sup>1825</sup>

6.31. The cost effectiveness of case management depends largely on the extent to which it achieves earlier settlement of cases. Early definition of the issues in dispute is crucial to early settlement. Some Australian research has found that the value of earlier settlement of cases obtained by case management outweighs increased costs from case management activities.<sup>1826</sup> There is, as yet, no empirical work in federal jurisdiction to test the impact of case management or modified procedures on party costs. Some limited work commissioned by the Family Court on their simplification procedures was equivocal.<sup>1827</sup> Professor Ted Wright, of the Justice Research Centre, stated that settlement prospects can be related to the stage at which lawyers have taken ‘sufficient value’ out of the case. Where case management has ‘front end loaded’ costs, the increased, early rates of settlement may simply reflect that the lawyers have obtained a greater proportion of their fees at an earlier stage.<sup>1828</sup> Submissions supported the claim that more rigorous case management encourages early settlements by focussing issues in dispute at an early stage and reduces the duration of cases.<sup>1829</sup> In the absence of any useful historical and implementation data on this important issue, the jury is still out on whether, how and to what extent federal case management impacts on case costs.

## Performance indicators and court and tribunal technology

### *Performance indicators*

6.32. As discussed in chapter 1,<sup>1830</sup> good data collection and empirical research are critical to the maintenance and reform of the justice system. It is now common for courts and tribunals to articulate objectives and performance indicators against which their operation may be measured and evaluated. Outcome measures on case duration, case costs and the efficacy of certain settlement processes can enhance judicial effectiveness. Worthwhile measurement

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1825. See T Matruglio & J Baker *An implementation evaluation of differential case management: A report on the DCM program in the Common Law Division of the Supreme Court of New South Wales* Civil Justice Research Centre Sydney 1995, 20.

1826. See C Guest & T Murphy *An Economic Evaluation of Differential Case Management* Civil Justice Research Centre Sydney 1995. This cost/benefit study of differentiated case management in New South Wales Supreme Court personal injury cases looked at the full range of fees and expenses incurred by litigants, including the costs incurred by the court system.

1827. See para 8.89.

1828. T Wright *Consultation* Sydney 12 October 1999.

1829. NRMA *Submission 81*; Arthur Robinson *Submission 189*; NSW Bar Association *Submission 88*.

1830. See para 1.27–1.46.

allows courts and tribunals to become more conscious of case processes and practices.<sup>1831</sup>

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1831. C Baar 'The emergence of the judiciary as an institution' (1999) 8 *Journal of Judicial Administration* 216.

6.33. However, there are difficulties with court or tribunal performance measures. In deciding what to measure, courts and tribunals are prioritising particular types of outcomes or processes and helping to formulate or emphasise particular roles for judges, judicial officers and tribunal members. These difficulties are clearly apparent in measures of case duration. Delay in case resolution is often identified as a significant problem in litigation and review. Some of the attention given to case duration also derives from the fact that it is clearly measurable.

6.34. The Federal Court, Family Court and the AAT all set targets for case duration, in relation to the time from commencement to final disposition, as well as the duration of interlocutory steps. This is entirely appropriate. The Federal Court, for example, has a goal of disposing of 98% of cases within 18 months.<sup>1832</sup> The Family Court and AAT case management guidelines provide comprehensive time standards for case duration and intermediate case events.<sup>1833</sup> Such measures need to be monitored and re-evaluated.

6.35. Where courts or tribunals fail to complete or to schedule events in the time prescribed, this can be taken as a measure of court or tribunal inefficiency. However the delay may be due to factors outside court or tribunal control. The Family Court stated that its delay problems are attributable to government failure to make timely appointments of judges, and lawyer non compliance.<sup>1834</sup> Similarly, AAT time defaults derive in part from the time taken by respondent government agencies to compile and submit relevant documents in the case.<sup>1835</sup>

6.36. Case duration is also influenced by court or tribunal objectives and the opportunities offered to parties to settle. If settlement is valued, it may extend the duration figures, as cases are granted adjournments to attend repeat settlement conferences or mediations, or, in family jurisdiction, to trial contact or residence arrangements for parents and children.<sup>1836</sup> An AAT member said

The policy has been that, wherever possible, resolution without a hearing should be encouraged. Therefore, while the system was designed ideally for one to two conferences, the policy approach to case management had been that it was better to have more case events and eventually get settlement than to push cases through to a hearing.<sup>1837</sup>

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1832. Federal Court *Annual report 1998–99*, 44.

1833. Family Court case management guidelines ch 15; Family Court *Annual report 1998–99*, 34–37. See para 8.31–8.45; *Annual report 1998–99*, 112

1834. See para 8.37–38, 8.236.

1835. See para 9.76, 9.77, 9.122, 9.123.

1836. A Family Court judge said

Settling early may not be a success story – you can see if it really works by seeing how many consent orders are challenged or seek enforcement orders within 12 months: Family Court *Consultation* 14 September 1998.

1837. AAT *Consultation* Sydney 24 September 1999.

A Family Court registrar commented

We try to invest the concept of people making and living with their own decisions and only coming to us to impose a decision as a last resort.<sup>1838</sup>

6.37. If speedy completion is a singular goal, then a court or tribunal may be less disposed to have settlement facilitation. It may also be reluctant to allow hearing adjournments. This may be appropriate but it can reduce the number of settlements and increase the number of trials. A focus on shorter durations may also impact on the durability of settlements. It can penalise the parties least able to meet court or tribunal timetables. Many unrepresented parties cannot easily prepare their documents or find witnesses in the time allowed by court or tribunal case management timetables. In tribunals, time standards can limit the scope of investigation by the tribunal and undercut the quality of decision making. In migration or refugee matters where there are significant pressures to review or litigate, attenuated merits review can translate into a higher volume of judicial review cases. In family jurisdiction, rushed settlements can break down and become freshly contested applications before the Court.

6.38. Party engendered delay can derive from inexperience or lack of skills. It can also be a deliberate tactic. In most litigation and review one party will have an interest in speedy resolution, the other in delaying the case outcome. Migration cases are often cited in this regard. Successive governments have noted that litigation and review of such decisions allows applicants to 'buy time' in Australia, to which they are not entitled. The performance indicators in the Migration Review Tribunal (MRT) and Refugee Review Tribunal (RRT) promote quick turn-around of cases.<sup>1839</sup> To help ensure efficient determination of the cases in the Federal Court, DIMA assists with the preparation of appeal books required to be produced by the applicants.

6.39. In federal jurisdiction, there were many complaints about delay in the Family Court and AAT. The Commission cautions against over-simplifying the causes of delay and overstating the benefits of speedier resolution. There should not be unnecessary delays in litigation and review proceedings but time lines should not exert a tyranny over the process. Performance indicators and measures should be set by the court or tribunal (rather than, as in some tribunals, the executive government) and feature indicators which relate to the quality of processes, as well as efficient time measures.<sup>1840</sup> As stated in chapter 1, the Commission supports performance monitoring systems that are

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1838. Family Court registrars *Consultation* 9 September 1999.

1839. See para 9.16–9.17.

1840. M Neave 'In the eye of the beholder – measuring administrative justice' *Paper* 1999 National Administrative Law Forum Canberra 30 April 1999.

- integral to the operations of the court and tribunal and developed by judicial or tribunal officers, managers and users who understand its purpose and can use it for further organisational development
- relevant to the core values of courts and tribunals, so that it makes available information about the most important of the court's and tribunal's activities
- capable of collecting data relevant to goals and values and which is explicit and unambiguous
- developed in such a way as to avoid detracting from the core operations central goals by siphoning off resources.<sup>1841</sup>

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1841. R Mohr et al 'Performance measures for Australian courts' (1997) 6(3) *Journal of Judicial Administration* 156, 158-9.

6.40. The Steering Committee for the Review of Commonwealth/State Service Provision has developed performance indicators for court administration as one element of an ongoing project to develop and publish objective and comparative data on the performance of Commonwealth and State government services. These indicators seek to provide a basis against which to measure the effectiveness of court services by reference to quality, access (including affordability, timeliness and delay, and geographic accessibility) enforcement and the efficiency of court services (inputs per output unit). Indicators relevant to the federal civil justice system, comprise

- client satisfaction
- availability of ADR services
- average court fees per lodgement
- case completion times
- adjournment rates
- court locations and registries
- cost per case.<sup>1842</sup>

Any comparative evaluation based on these indicators must also feature the resources available to the court or tribunal and the volume and complexity of cases within the court or tribunal. Chief Justice Gleeson suggested the most important measure of the performance of courts and tribunals is 'the extent to which the public have confidence in its independence, integrity and impartiality'.<sup>1843</sup> The Commission agrees with this. In federal jurisdiction where the government is a significant repeat litigant, some measure of that independence and impartiality derives from court and tribunal determinations in cases involving the government.

#### *Court and tribunal technology*

6.41. Performance measurement and evaluation require data. Such data is generally provided via electronic information and case management support systems. The Federal Court and Family Court are implementing new electronic systems to give enhanced support, including retrieval and capacity to

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1842. Steering Committee for the Review of Commonwealth/State Service Provision *Report on government services 1999 Volume 1: Education, health, justice* AusInfo Canberra 1999, 479. The report provides data on a comparable basis only in relation to case completion times, average court fees per lodgement and cost per case.

1843. M Gleeson 'The state of the judiciary' *Paper* Canberra Australian Legal Convention 10 October 1999, 5.



accommodate electronic filing and document management.<sup>1844</sup> The Commission supports these efforts at improvement in the Federal Court and Family Court. The AAT has used AATCAMS for case management tracking since 1986, and has upgraded its systems to accommodate its extensive use of performance indicators. A major review of the AAT system has been put on hold, pending finalisation of the structure of the new Administrative Review Tribunal (ART).<sup>1845</sup>

6.42. Electronic court and tribunal systems now enable registries to receive initiating documents electronically, automatically allocate a file number, receive electronic payments, generate necessary correspondence and allocate the matter to a judge or registrar. Minimal intervention is required to set dates for attendance which can be entered automatically into court or tribunal and judicial or member diaries, with diary reminder services for judges, members and parties.<sup>1846</sup> The

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1844. Family Court of Australia *Draft CMS Functional Analysis Version 3.3*, 8 October 1998, 6. See also para 8.288–8.295.

The Federal Court FEDCAMS system

- allocates cases to judges who operate under IDS
- captures data following the introduction of IDS
- records new matters and updates existing matters
- records and maintains hearing details, including information on ADR events
- records details of judges and update reports
- produces reports of matters and hearing details
- maintains code tables: R Reynolds *FEDCAMS Post implementation review report*

Attorney-General's Department Information Management Branch (Commonwealth) Canberra 1991, 12; ALRC IP 23, para 3.15–3.19.

FEDCAMS is set to be replaced with a new system that will allow electronic filing, electronic case files, simultaneous access to the court file by judges and parties, document imaging, electronic document management and litigation support in a framework of electronic commerce that enables all court fees and other user charges to be electronically transferred to the court's accounts. The system will allow more extensive capture of information and data collection: W Soden *Consultation* 7 April 1999. The Family Court and the Federal Court have both purchased modified versions of case management technology used in Western Australia. For information on the WA GENISYS case management system see Ministry of Justice (WA) *Courtrooms of the future ... Here today* Ministry of Justice Perth 1999.

1845. AAT *Annual report 1998–99*, 116. Initial information is manually recorded from information collected on standardised forms. Hearing Report Forms record information about tribunal processes such as conferences, directions hearings, mediations and hearings. Data relating to duration and result is later entered into the system. The information generated by AATCAMS is used to produce reports by registries on day to day case management and consolidated reports on the operations of the AAT. In 1997–98 the functionality of AATCAMS was extended to record demographic information and to take account of the addition of the Small Taxation Claims Tribunal: AAT *Annual report 1997–98*, 119. While waiting for the implementation of the ART, upgrade of the operating environment, networks and other areas continue: AAT *Annual report 1998–99*, 116.

1846. The Supreme Court of Queensland allows allocation of hearing dates through email, rather than requiring parties to attend callover. Available sittings days are published on the internet and parties email the court in advance of the sittings callover, to nominate agreed hearing dates. The dates are confirmed by email by the listing manager without the need for parties to attend court. The system is particularly useful for filling gaps created by late settlements and adjournments and has reduced the average waiting period for a hearing date to three months. See

system can inform parties and the judge or member by email whenever new documents are lodged in the matter. All documents filed, transcripts, evidence,

case management tracking and notes are on the electronic case file and can be transferred easily between registries. At any time, the electronic file shows the stage of proceedings, the documents filed and the next steps in the process.

6.43. The same system can incorporate support services, such as internet and CD-ROM access for research, as well as intranet based bench books and other internal court practice information. 'Real time' transcripts can be made part of the case file, whether recorded by stenographers or voice recognition software. Documents and transcripts can be electronically marked and searched using commercial web browsers. Documents, photos, animations and simulations can appear on computer screens at the hearing.<sup>1847</sup> Parties or their representatives unable to be at court can access the proceedings and transcript using the internet and contact their representatives in court by email.<sup>1848</sup> Witnesses can give evidence live or via videoconferencing.<sup>1849</sup> Proceedings conducted using email or videolink can become part of the case file. The use of intranets or prioritised access will allow access by litigants and the public to public information on the case file. The judge's orders can be entered immediately on the file, an endorsed hard copy given to the parties at the time, and an electronic copy emailed to them. Federal courts are now built or are to be refurbished to accommodate much of this technology.<sup>1850</sup>

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1847. Virtual reality is also suggested as a possible medium: D O'Flaherty 'Computer generated displays in the courtroom: For better or worse?' (1996) *Web Journal of Current Legal Issues* <<http://webjcli.ncl.ac.uk/1996/issue4/oflah4.html>> (28 January 1998).

1848. G Barker 'Courting the world of cyberspace' *Age* 12 December 1998. The transcript of the Royal Commission is at <<http://www.vgrs.vic.gov.au/public/longford.htm>> (25 January 2000).

1849. There is already widespread use of videoconferencing. The High Court conducts a high proportion of special leave applications through videolink between justices in Canberra and parties in other capital cities: High Court of Australia *Annual report 1997-98*, 9. The Federal Court in 1997-98 used videoconferencing in 330 matters and made its facilities available to other courts and tribunals: Federal Court *Annual report 1997-98*. The Federal Court also purchased a number of portable videoconferencing units in 1998-99 enabling videoconferencing to be used almost anywhere in Australia: Federal Court *Annual report 1998-99*. The Family Court also has videoconferencing facilities in several registries and uses those of the Federal Court and AAT: Family Court *Submission 348*. This usage will increase as the technology becomes more affordable and as court rules and preferences are changed relating to hearing evidence in person. The benefits of technology in a hearing are well documented in complex matters. Details about the technology used in the Wood and Longford Royal Commissions, the Rothwells and the Estate Mortgage cases are discussed in ALRC IP 23, para 5.42-5.47. See also Parliament of Victoria Law Reform Committee *Technology and the law* Government Printer Melbourne May 1999, para 10.11-10.16; T Smith and I Chivers 'The Estate Mortgage court system' *Conference paper AIJA Technology for Justice Conference* 23 March 1998 <<http://www.aija.org.au/conference98/papers/estate/index.htm>> (21 January 2000).

1850. The Federal Court created its first permanent electronic courtroom in Sydney in September 1998: BHowarth 'Digital technology has its day in court' *Australian* 15 September 1998. State Supreme Courts are also establishing courtrooms with this capability: J Sinclair 'Courting the wired system' *Age* 21 September 1999; S Walters 'Digital courtrooms in Perth – the courtroom strikes back' (1999) 26(9) *Brief* 5. In Melbourne, the Commonwealth Law Courts building provides computer access point for every lawyer at the bar table, as well as videoconferencing facilities and the capacity for live television broadcasts: M Brown 'A courthouse for the future – opening of new Commonwealth law courts' (April 1999) *Law Institute Journal* 14, 16. The Federal Court issued the

6.44. Many of these information technology (IT) services are available now or anticipated soon in federal courts and tribunals.<sup>1851</sup> They allow integration of judicial, court and registry functions. Some of the expected benefits are

- improved judge, court staff, and public access to information
- cost savings and efficiencies through increased productivity, and more effective utilization of staff, space, and other resources
- reduced physical handling, maintenance, and copying of file documents
- improved docketing, scheduling, case management, and statistical reporting; and enhanced accuracy and efficiency in record maintenance.<sup>1852</sup>

6.45. The Supreme Courts of New South Wales and Victoria have both recently released similar practice notes encouraging parties to consider using electronic data at the hearing and to exchange and provide the court with electronic versions of all documents.<sup>1853</sup> Parties are to accede to any reasonable request for copies of documents in electronic format, including pleadings, affidavits, statements, lists of documents and interrogatories and must consider the equipment needs of parties and the court at hearing.

6.46. In DP 62, the Commission proposed that federal courts and tribunals should develop similar guidelines for the use of technology in civil litigation.<sup>1854</sup>

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first audio visual transmission of a judgment on the internet in August 1999 and the High Court expects to be the first Australian court to broadcast hearings live on the internet: B Lane 'High Court tests case for net' *Australian* 7 December 1999.

1851. The electronic appeals initiative of the Council of Chief Justices (COCJ) reflects one step in the development of electronic case files. As well as focussing on appeal books, the COCJ also recommended the establishment of judgments databases within courts; electronic storage of transcripts; medium neutral citation and paragraph numbering of judgments; consistent protocols and rules concerning electronic appeals; facilitation of the use of electronic material in appeals and electronic filing; J Sherman and A Stanfield *Electronic appeals project – Final report* Council of Chief Justices of Australia and New Zealand 25 May 1998, sections 1, 8 <<http://www.ccj.org/reports.htm>> (24 March 1999). The High Court, Federal Court and Family Court are all developing electronic filing: <<http://www.highcourt.gov.au>>; Federal Court *Consultation* 7 April 1999; Family Court *Submission* 348. All these developments will contribute to the establishment of electronic case files. Videoconferencing, combined with electronic case files merges the hearing, transcript and file management processes into one event.
1852. Administrative Office of the United States Courts *Electronic case files in the federal courts: A preliminary examination of goals, issues and the road ahead* March 1997, 2 <<http://www.uscourts.gov/casefiles/toc.htm>> (8 April 1999).
1853. Chief Justice of New South Wales 'Practice note 105: Use of technology in civil litigation' 15 March 1999 <<http://www.agd.nsw.gov.au/sc.nsf/pages/scpn105>> (5 May 1999); Chief Justice of Victoria 'Practice note 3 of 1999: Guidelines for the use of technology in litigation in any civil matter' 29 April 1999 <<http://supremecourt.vic.gov.au/pnindex.htm>> (2 June 1999). See S Potter and P Moon 'Guidelines for the use of technology in civil matters' (1999) 73(9) *Law Institute Journal* 72 for a discussion of the differences between the two guidelines.
1854. ALRC DP 62 proposal 9.1.

The profession supported this proposal;<sup>1855</sup> the Federal Court did not oppose it;<sup>1856</sup> and the Family Court did not comment on it.<sup>1857</sup>

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1855. Law Council *Submission 375*; Freehill Hollingdale & Page *Submission 339*; Clayton Utz *Submission 341*. Clayton Utz felt that the Federal Court should reconsider Practice Note 14 – Discovery, 3 December 1999 and provide that documents be identified individually rather than in bundles, as being more consistent with the Supreme Court rules that facilitate the use of technology in litigation.

1856. Federal Court *Submission 393*.

1857. Family Court *Submission 348*.

**Recommendation 60.** The Federal Court, Family Court and federal review tribunals should develop rules or guidelines to facilitate and regulate the use of technology in litigation and review proceedings consistent with those of the Victorian and New South Wales Supreme Court rules.

### *Coordination of technology between courts and tribunals*

6.47. Technology is most effective when there is ready compatibility among different users. Courts and tribunals need to be aware of the compatibility requirements of those who use the courts. Richard Susskind has commented

the underlying database technology should be the same across all courts and the 'front-end' for all judicial users should be similar in design and content. Inevitably different courts and specialist jurisdictions will have some different requirements but there should be a strong common element across all modules of the unified system.<sup>1858</sup>

6.48. Federal and State courts and tribunals currently have varied systems that cannot communicate with one another, apart from sending documents via email.<sup>1859</sup> Courts and tribunals tend to determine and design their own systems and better coordination of systems is needed.<sup>1860</sup> The High Court has found that 'off the shelf' programs can be readily adapted for court needs.<sup>1861</sup> All Western Australian courts now have a generic electronic case management system<sup>1862</sup> which proved less

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1858. R Susskind 'The challenges of the information society: Application of advanced technologies in civil litigation and other procedures – England and Wales' *Report World Congress on Civil Procedure* December 1998 <<http://ruessmann.jura.uni-sb.de/wien1999/Reports/england.htm>> (18 March 1999).

1859. Parliament of Victoria Law Reform Committee *Technology and the law* Government Printer Melbourne May 1999, para 9.2.

1860. The federal Attorney-General has expressed support for greater coordination and cooperation on technology between courts and tribunals 'in order to promote simplification, efficiency and, in so far as it is possible and appropriate, common processes and outputs. This would in turn, also promote opportunities for economies of scale'. D Williams *Letter to the Parliament of Victoria Law Reform Committee* 8 April 1999; Parliament of Victoria Law Reform Committee *Technology and the law* Government Printer Melbourne May 1999, para 5.14. Coordination is also a problem in the United States where the federal government has provided funding for a national case management system that has not been developed due to disparity between the existing IT systems across the country: Parliament of Victoria Law Reform Committee *Technology and the law* Government Printer Melbourne May 1999, para 9.12.

1861. There is also greater use of commercial case management programs by courts in the US, primarily because there is a greater market there that encourages development: Parliament of Victoria Law Reform Committee *Technology and the law* Government Printer Melbourne May 1999, para 9.9–9.15. The Commission is not aware of any Australian courts or tribunals that use United States case management software.

1862. G Nunis 'Case management system is proving a winner' (August 1999) 4 *Justice* 7; S Watters 'Digital courtrooms in Perth – The Courtroom strikes back' (1999) 26(9) *Brief* 5; Ministry of Justice (WA) *Courtrooms of the future ... here today* Ministry of Justice Perth 1999. This approach has

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been suggested for all Victorian courts and tribunals: Parliament of Victoria Law Reform Committee *Technology and the law* Government Printer Melbourne May 1999, rec 27; and has been implemented in Israel for civil, criminal, labour, juvenile, motoring and family cases: 'The paperless court' (1999) *IBM Police & Justice* 31.

expensive than building a unique system and may more easily be made compatible with other courts and tribunals. Electronic coordination is a particular requirement for the management of appeals. The High Court receives all its work from lower courts and with compatible systems could receive all files electronically. The Federal Court receives a significant amount of its work from federal tribunals and it would make sense for them to have joint or compatible systems.

6.49. The coordination and compatibility of electronic case management systems should be extended to other government services involved in dispute resolution. The AAT and the Commonwealth Ombudsman already have administrative arrangements to refer matters between the two organisations.<sup>1863</sup> The new Family Court IT system will include interfaces with relevant agencies, such as the Child Support Agency.<sup>1864</sup>

6.50. There have been calls for a national technology register or clearinghouse to provide information on court and tribunal and legal practice technology.<sup>1865</sup> In this regard, the Commission supports the initiative of the Australian Institute of Judicial Administration (AIJA) which has established and maintains a court technology register to document and evaluate technological innovations used in courts and tribunals, and sponsors bi-annual conferences on technology and courts to disseminate information about current and future court and tribunal technologies.

6.51. In DP 62, the Commission proposed that federal courts and tribunals develop protocols for compatible use and information sharing on technology. This proposal was supported by the profession.<sup>1866</sup>

**Recommendation 61.** The Federal Court, Family Court, review tribunals and the federal magistracy should consult to develop

- arrangements for information sharing on technology
- compatible electronic case management systems which promote better communication and movement of files between jurisdictions.

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1863. AAT *Annual report 1997-98*, 121-2.

1864. Family Court *Submission 348*.

1865. Parliament of Victoria Law Reform Committee *Technology and the law* Government Printer Melbourne May 1999, para 4.38-4.43, rec 10, 11.

1866. Law Council *Submission 375*; Freehill Hollingdale & Page *Submission 339*. The Federal Court did not oppose the proposal : Federal Court *Submission 393*; the Family Court did not comment on it: Family Court *Submission 348*.



## Alternative dispute resolution

6.52. Alternative dispute resolution (ADR) ‘refers to all methods of resolving disputes other than court-based adjudication’.<sup>1867</sup> Other definitions of the term exclude, for example, lawyer assisted negotiation. Even so, the phrase has become a term of art for processes or procedures that are ‘the standard, regular or mandated systems used by disputants’ – no longer ‘alternative’<sup>1868</sup> but assisted or additional dispute resolution.

6.53. Most litigation and review matters are resolved without a hearing through direct negotiations between parties,<sup>1869</sup> conciliation, mediation and other processes. In 1996, then Chief Justice Sir Gerard Brennan said that

the full-scale trial can no longer be regarded as the paradigm method of dispute resolution, even for complex disputes involving subjects of high value ... alternative means of dispute resolution, conducted pursuant to the private agreement of the parties, can be expeditious, flexible and tailored to particular needs.<sup>1870</sup>

6.54. The Access to Justice Advisory Committee report noted that

ADR can make a very positive contribution to access to justice because it offers, in its various forms, an inexpensive, informal and speedy means of resolving disputes ... the outcomes are those which the parties themselves have decided and are not imposed on them.<sup>1871</sup>

6.55. Government and industry ombudsmen,<sup>1872</sup> regulatory commissions,<sup>1873</sup> internal review, and complaints mechanisms<sup>1874</sup> are all additional, effective dispute resolution arrangements for matters in the federal civil justice system. In

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1867. L Boulle ‘Editorial – Introducing the Bulletin’ (1998) 1(1) *ADR Bulletin* 3. For other definitions and descriptions of ADR processes see NADRAC *Alternative dispute resolution definitions* NADRAC Canberra 1997; ALRC IP 25, para 2.3–2.4, 2.15–2.49; Lord Chancellor’s Department *Alternative dispute resolution – a discussion paper* Lord Chancellor’s Department London November 1999, annexure A <<http://www.open.gov.uk/lcd/consult/civ-just/adr/annexa.htm>> (23 November 1999).

1868. L Boulle ‘Editorial – Introducing the Bulletin’ (1998) 1(1) *ADR Bulletin* 3.

1869. Lawyer brokered negotiation has always played a part in resolving disputes and lawyers play a key role in ensuring clients can make informed decisions about the merits of their disputes, in educating clients about avoiding disputes and about alternatives to litigation.

1870. G Brennan ‘Key issues in judicial administration’ (1996) 6 *Journal of Judicial Administration* 138, 139–140.

1871. Access to Justice Advisory Committee *Access to justice – An action plan* AGPS Canberra 1994 (AJAC report), para 11.4.

1872. Such as the Commonwealth Ombudsman, Private Health Insurance Ombudsman, Australian Banking Industry Ombudsman and the Telecommunications Industry Ombudsman.

1873. Such as the Human Rights and Equal Opportunity Commission and the Australian Competition and Consumer Commission.

1874. Of government departments and agencies and within private organisations.

promoting multi-faceted dispute resolution, the federal Attorney-General has stated that

the government firmly believes that mediation and alternative dispute resolution should be the norm rather than the exception.<sup>1875</sup>

6.56. Submissions to the Commission noted a 'cultural' shift to embrace ADR as an integral feature of the civil justice system.

There is already a cultural change afoot in the legal profession. The last few years has seen a growing acceptance by the legal profession of alternative dispute resolution, especially mediation, as an adjunct to the court system.<sup>1876</sup>

The congruent system of ADR in harmony with the court system is to be recommended.<sup>1877</sup>

The increased use of ADR by parties does not necessarily indicate a dissatisfaction with the judicial process. The time and cost factor in preferring an ADR process does not necessarily equate to a dissatisfaction with the judicial process.<sup>1878</sup>

6.57. ADR within litigation and review systems provides 'adjudication-backed' remedies.<sup>1879</sup> For the majority of cases, settlement is 'intimately bound to' and bargained for against the background of a possible trial.<sup>1880</sup> ADR processes can provide better outcomes, more effective settlements, the preservation of ongoing relationships between disputants and allow complex compromises, bargains and trade-offs on matters ancillary to the dispute.<sup>1881</sup>

6.58. Within federal jurisdiction, the use of ADR is well established. Industrial disputes have long been resolved by conciliation and arbitration. Conciliation and counselling are integral parts of family law processes and mediation a core feature of native title dispute resolution. In federal courts and tribunals, judges and members can order parties to attend conciliation, counselling and mediation.<sup>1882</sup>

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1875. D Williams *Press release* 6 April 1998.

1876. *ACLA Submission 70*.

1877. *ibid*.

1878. Law Society of NSW Dispute Resolution Centre *Submission 72*. The NSW Bar Association agreed: *Submission 88*. The Law Society of WA also submitted that increased use of ADR does not relate to a dissatisfaction with the judicial process: *Submission 78*.

1879. M Galanter 'The Federal Rules and the quality of settlements: A comment on Rosenberg's, "The Federal Rules of civil procedure in action"' (1989) 137 *University of Pennsylvania Law Review* 2231, 2233.

1880. *id* 2234.

1881. M Redfern *Submission 90*; A Stitt *Submission 32*.

1882. For example

- *Family Law Act 1975* (Cth)(Family Law Act) s 16A — The Court must, if it considers it is in the best interest of the parties or their children to do so, direct or advise either or both parties to attend counselling.

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- Family Law Act s 62B(2) – The Court must consider whether to advise parties seeking orders relating to children (Part VII orders) about counselling available through the Court or approved counselling organisations.
  - Family Law Act s 79(9) – The Court shall not make orders relating to property disputes unless the parties have attended a conference relating to that dispute, unless the Court is satisfied that it is not practicable to require the parties to attend a conference or it is otherwise satisfied in the circumstances that it is appropriate to make such an order.
  - Federal Court Rules O 10 r 1(2)(i) – Where it considers it appropriate, the Court may direct the parties to attend a case management conference.
  - *Federal Court of Australia Act 1976* (Cth) s 53A – The Court may order a proceeding, or any part of a proceeding, to a mediator for mediation, with or without the consent of the parties to the proceeding.

The processes are credited with high settlement rates,<sup>1883</sup> including where reluctant parties were ordered to participate in such processes. Many of the issues which are hotly debated in State and Territory jurisdictions are already dealt with in federal legislation, rules or practice. Such matters include mandatory or voluntary referral, the timing of a referral to ADR, funding ADR processes, confidentiality of ADR sessions and the enforcement of agreements reached following ADR. In federal jurisdiction, the contentious issues relevant to ADR primarily concern the role and benefits of ADR, and its effective usage within and outside courts and tribunals.

### ADR is no panacea

6.59. The United States and Australia have had long term court experience with ADR. Their evaluations provide a measured assessment of its benefits. ADR is presented as a bonus, an additional facility, supplementing adjudication. However, as Professor Judith Resnik has observed, given the high costs of adjudication and mandatory referrals to ADR, the claim that ADR is a supplement to adjudication may be fanciful.

The assumption of many proponents, that ADR will increase the options available to litigants within the publicly financed system may not be borne out. As the state makes alternative dispute resolution its own, both ADR and adjudication are being reconceptualised. As we proceed into the next century, the commitment to twentieth century style adjudication is waning. In this interaction, we may soon find ourselves with a narrower, not a richer, form or range of forms of dispute resolution.<sup>1884</sup>

Within courts and tribunals, the benefits of ADR are generally accepted, but they are limited.

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1883. The Commission's research data shows that, of cases completed in the Federal Court, the Family Court and the AAT, the majority are resolved by negotiation between the parties, either with or without their engagement in formal ADR procedures. ALRC research indicated that 5% of family law cases require judgment, 35% of Federal Court cases and 34% of AAT cases: T Matruglio & G-McAllister *Part one: Empirical information about the Family Court of Australia* ALRC Sydney February 1999, para 6.1 and 6.5.2 (T Matruglio & GMcAllister, Family Court Empirical Report Part One); ALRC *Part one: Empirical information about the Administrative Appeals Tribunal* ALRC Sydney June 1999, table 5.3 (ALRC, AAT Empirical Report Part One). On conciliation in the Family Court, see para 8.58 and 8.147. On mediation in the Federal Court see para 7.192.

1884. According to Resnik, the ultimate result of this process and ideological movement will be to regard a civil trial as a 'pathological event'. She questions the value of this transformation on a number of grounds and contends that the many virtues of adjudication have been little discussed or acknowledged in the face of this embrace of ADR. Those virtues include its attention to individual instance, its effort to announce, explain, and generate public norms, its slowness, its labour intensive and messy activity of attempting to reconstruct events so as to attach the label 'fact' from whence 'law' and 'judgment' can flow: J Resnik 'Many doors? Closing doors? Alternative dispute resolution and adjudication' (1995) 10(2) *Ohio State Journal on Dispute Resolution* 211, 257-261.

ADR has had too little impact on overcrowded dockets and litigation expenses. Studies show that ADR does not necessarily reduce caseloads. It may be a fairer, more just settlement technique, but generally it replaces ordinary settlement negotiation more than it substitutes for trials.<sup>1885</sup>

The Utah Family Court Task Force noted that mediation should not be taken to be a substitute for trial or lawyers.

Mediation is not a substitute for legal representation. Indeed, representation of each party by independent counsel is preferred. If the mediator represents the interests of either party or offers legal advice to either party, the mediator abandons neutrality. Mediation has the best chance of success when each party is fully informed regarding his or her own legal rights and responsibilities and those of the other party ... Such information is just as important in mediation as in litigation. Representation by counsel can help to provide this information.<sup>1886</sup>

6.60. Sir Gerard Brennan has questioned whether litigants will be satisfied with ADR justice – ‘solutions reached by diversionary procedures may deliver cheaper but also a less satisfying form of justice’.<sup>1887</sup>

6.61. These are important questions which should continue to feature in evaluations of case management and ADR practice. It is essential that ADR processes are evaluated empirically to ensure that, in the drive to speedier, less costly dispute resolution, we have not assumed that all alternatives to litigation are necessarily cheaper and faster. Further, such evaluation can indicate effective use of ADR. The benefits of ADR appear to be clearly related to how and when such procedures are provided.

6.62. In federal jurisdiction, where ADR can be a set procedure which most cases undertake or a process parties are ordered to attend,<sup>1888</sup> the issue is how to ensure that ADR is effective. Some factors may indicate ADR processes are unsuitable in resolving a dispute, for example

- when a definitive or authoritative resolution of the matter is required for precedential value

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1885. L Katz ‘Compulsory alternative dispute resolution and voluntarism: Two-headed or two sides of the coin’ (1993) 1 *Journal of Dispute Resolution* 1, 52.

1886. Utah Family Court Task Force *Final report to the Utah Judicial Council* Administrative Office of the Courts Salt Lake City 1994, 4.

1887. G Brennan ‘Key issues in judicial administration’ (1996) 6 *Journal of Judicial Administration* 138, 141–142. See para 1.97–1.110 in relation to the multiple aims of a civil justice system.

1888. Eg Family Court Act s 14F, 14G, 16A–16C, 17, 19B, 62F, 65G; see also para 8.60–8.61; AAT Conciliation Conference Directions 18 May 1998; see also para 9.143.

- when the matter significantly affects persons or organisations who are not parties to the ADR process<sup>1889</sup>
- when there is a need for public sanctioning of conduct or where repetitive violations of statutes and regulations need to be dealt with collectively and uniformly<sup>1890</sup>

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1889. For other excluding criteria see the 1990 *Administrative Dispute Resolution Act* 5 USC § 582(b) and EPlapinger and M Shaw *Court ADR – Elements of program design* CPR Institute for Dispute Resolution New York 1992, 40–41.

1890. Centre for Dispute Settlement, Institute of Judicial Administration and the State Justice Institute (SJI) *National standards for court-connected mediation programs* SJI Washington DC 1992, cl 4.2. Although the standards are applicable only to mediation, some of the exclusion criteria are applicable generally.

- when parties are unable to negotiate effectively themselves or with the assistance of a lawyer<sup>1891</sup>
- in family law matters, where there is a history of family violence.<sup>1892</sup>

These are not hard and fast rules. The Institute of Arbitrators and Mediators Australia noted

[T]he most that could be hoped for is for active encouragement and investigation of the question by the courts as to whether ADR is appropriate in each matter.<sup>1893</sup>

6.63. A further issue associated with effective use of ADR concerns the timing of such processes. Family Court counselling, mediation, information sessions, community education, and liaison programs are available before parties have filed an application with the Court. There was general support for such arrangements. Certainly the Commission's file data indicated that parties attempted to settle their dispute before filing an application with the Court.<sup>1894</sup>

6.64. Generally, the Commission was told that there is no optimal time for ADR referral which would cover all cases. It is possible for ADR processes to be prescribed too early in the history of a dispute – before the parties are ready to settle<sup>1895</sup> – or too late, when significant litigation costs may have been incurred and there are limited monetary or personal cost savings to make settlement through ADR attractive for parties.

6.65. In the United States, the timing is often left to judges or the parties on a case by case basis. This approach has been endorsed by the National Standards on Court Connected Mediation Programs.<sup>1896</sup> In Australia the Institute of Arbitrators and Mediators stated that

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1891. *ibid.*

1892. The risk of family violence is one factor that must be taken into account when determining whether a dispute is one that may be mediated by the Family Court of Australia: Family Law Rules O 25A r 5. See also para 5.51. Other people have commented that ADR may not be appropriate for family disputes generally, as the mediator and parties may not be able to overcome longstanding unequal bargaining power: A McFadzean *Submission 20*.

1893. Institute of Arbitrators and Mediators *Submission 201*. In the United Kingdom, a recent discussion paper published by the Lord Chancellor's Department is exploring the establishment of a checklist for determining the suitability of matters for ADR, available on the internet and including questions to assist litigants to identify the most suitable form of ADR for a particular case: Lord Chancellor's Department *Alternative dispute resolution – a discussion paper* Lord Chancellor's Dept London November 1999, section 4 <<http://www.open.gov.uk/lcd/consult/civ-just/adr/section4.htm>> (23 November 1999).

1894. See para 8.59.

1895. J Kakalik et al *An evaluation of judicial case management under the Civil Justice Reform Act* RAND Institute for Civil Justice Santa Monica 1996, 74; MZander 'How does judicial case management work?' [7 March 1997] *New Law Journal* 353, 355.

1896. E Plapinger and M Shaw *Court ADR – Elements of program design* CPR Institute for Dispute Resolution New York 1992, 114.

the various ADR processes cannot be, nor should they be compartmentalised into specific stages of the litigious process.<sup>1897</sup>

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<sup>1897</sup>. Institute of Arbitrators and Mediators *Submission 201*.



Many judges and parties stated that they can often ‘get a feel’ for the appropriate time and processes for a case.<sup>1898</sup> Justice Olsson commented

[t]o some extent it is a case of ‘horses for courses’ in relation to individual cases: and some degree of intuitive approach. It is a mistake to fetter the process with artificial, doctrinaire boundaries.<sup>1899</sup>

In a 1994 Federal Court survey on ADR, one judge commented

[o]ur experience is that not every case is suitable for mediation. It is often better to let a case run. Many cases settle without the need for any settlement or mediation conference. One needs to have an appreciation of which cases are likely to be helped by mediation and which are not. If one sends cases indiscriminately for mediation, one will impose on parties the burden of unnecessary and wasted expenditure. This is something of which the judges of this Court are very conscious.<sup>1900</sup>

6.66. The Commission agrees that courts and tribunals need to be flexible in streaming and referring cases to ADR. These issues are explored in detail in the following chapters.

## Discovery

6.67. In almost all studies of litigation, discovery is singled out as the procedure most open to abuse, the most costly and the most in need of court supervision and control. This issue is dealt with in this and subsequent chapters. Discovery is an essential litigation tool. Under the common law *Peruvian Guano* test,<sup>1901</sup> a document relevant to a question in issue is discoverable if it would lead to a train of inquiry which would either advance a party’s own case or damage that of the adversary. The discovery process enables parties to obtain information relevant to their own and the other party’s cases and to request other parties to produce relevant documents.

6.68. Problems with discovery result from party responses to discovery requests. Parties may obstruct or subvert disclosure, refusing to provide or destroy or conceal relevant documentation which might have assisted the other side. In some circumstances the party requesting discovery is ‘fishing’ – seeking disclosure of significant numbers of documents, perhaps with the intention of creating sufficient aggravation or embarrassment to encourage settlement, or

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1898. Justice R Sackville *Consultation* Sydney 26 October 1999.

1899. T Olsson *Submission 18*.

1900. A DeGaris ‘The role of federal court judges in the settlement of disputes’ (1994) 13 *University of Tasmania Law Review* 217, 224. The author of the survey preserved the anonymity of the respondents.

1901. *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55, applied in Australia in *Temmler v Knoll Laboratories (Aust) Pty Ltd* (1969) 43 ALJR 363 and *Mulley v Manifold* (1959) 103 CLR 341.

hoping to uncover material which will remedy a weak case or lead to new causes of action. In other instances, parties volunteer vast numbers of documents, not to be helpful and cooperative but as a mechanism to hide a single incriminating document which might now be lost in the detail. The discovery process is used

strategically by parties. Such tactics can result in significant costs, involve repeated interlocutory hearings and be very time consuming. Blake Dawson Waldron partner, Geoffery Gibson, noted that

[i]n the hands of a litigant with a deep pocket, the weapon of discovery is very ominous. So also it is in the hands of a zealot or crank ... There is no doubt that in some cases discovery is not only useful but determinative, and that people have been able to uncover, and prove, and get compensation for, substantial wrongs that would not have surfaced without discovery. But we have to ask if the price is too high.<sup>1902</sup>

Mr Eric Braun, special litigation counsel for Telstra, commented that '[d]iscovery, and particularly general discovery, is the bane of the large litigation process'.<sup>1903</sup> The law firm Arthur Robinson & Hedderwicks commented that '[i]n large scale commercial litigation, it is our experience that there is no interlocutory process more in need of reform than discovery'.<sup>1904</sup>

6.69. The question is whether there is a clear, effective solution to such problems. Courts and tribunals have responded to these problems by restricting and controlling discovery. The Federal Court's rules have replaced the *Peruvian Guano* test for general discovery of all relevant documents with a requirement that parties disclose documents on which they rely, which adversely affect the party's case, documents that support or adversely affect another party's case or documents that the party is required to disclose by a relevant practice direction.<sup>1905</sup>

6.70. A Federal Court practice note states that general discovery will not be ordered as a matter of course and that the Court will have regard to the issues in the case, the resources and circumstances of the parties and the likely cost and benefit of discovery when making any orders for discovery. The Court usually requires parties to define and disclose categories of documents rather than ordering general discovery. Justice Sackville said 'solicitors and counsel need to devote more time to developing the categories and to the process of discovery itself'.<sup>1906</sup> Practitioners agreed that discovery by categories works well if the parties take the time and expense to define the categories carefully and sort the disclosed documents into the correct categories and if the issues in dispute are sufficiently well defined that the documents are amenable to classification.

6.71. Restricted discovery may allow more careful, proportionate disclosure. It also can change the ethics of discovery. Parties no longer disclose all relevant documents but those subsumed in the categories of documents agreed.

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1902. G Gibson *Submission 141*.

1903. E Braun 'Some suggestions for improving the conduct of major case litigation' *Paper 1998 Corporate Law Conference*.

1904. Arthur Robinson *Submission 189*.

1905. Federal Court Rule O 15 r 2(5). This is similar to CPR (UK) r 31.7.

1906. Justice R Sackville *Consultation Sydney 26 October 1999*.

Practitioners noted that some lawyers seek to hide ‘smoking gun’ documents with self justifications that the documents are technically outside the categories of documents required to be disclosed. The Commission was told this can be a real temptation in litigation. Justice Sackville said

the solution to this problem [of hiding documents outside categories] is not to go back to general discovery but rather to further develop and strengthen ethical rules in the area.<sup>1907</sup>

6.72. A culture of compliance to discovery directions is assisted if the judge or registrar discusses the categories of documents with the parties, and tailors the discovery orders for the particular case. The issue of discovery presents different issues in different jurisdictions. In family jurisdiction there are few cases where discovery involves extensive documentation, although the process is likewise open to abuse, non compliance and strategic play. The Family Court has not restricted the scope of discovery but restricts the time when formal discovery can be sought. The rules delay formal discovery to any time after a date is fixed for the hearing unless the Court or a registrar grants leave because of ‘special circumstances’.<sup>1908</sup> There are few problems with discovery in merits review proceedings.

6.73. The Commission’s deliberations support flexible but effective controls on discovery. The process needs supervision and control but, in setting such controls courts should note that discovery is an essential part of the process. The information obtainable through discovery is required to facilitate settlement as well as to present at trial.<sup>1909</sup>

## Experts

6.74. Another important focus for case and hearing management in federal courts and tribunals relates to the use of expert evidence. This was considered in some detail by the Commission in chapter 13 of DP 62. The material below includes general discussion and recommendations aimed at ensuring decision makers are provided with independent expert evidence, presented or interpreted in the manner that best assists them to make high quality decisions. Other issues relating specifically to the use of expert evidence in the Federal Court, Family Court and AAT are discussed in chapters 7, 8 and 9 of this report.<sup>1910</sup>

6.75. Some of the criticism of the present use of expert evidence is based on claims that the use of expert evidence is a source of unwarranted cost, delay and

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1907. *ibid.*

1908. Family Court Rules O 20 r 2.

1909. See para 8.142–8.145.

1910. See para 7.134–7.157; 8.159–8.198; 9.194–9.220.

inconvenience in court and tribunal proceedings. Other mischiefs frequently associated with expert evidence include that

- the court hears not the most expert opinions, but those most favourable to the respective parties and partisan experts who frequently appear for one side
- experts are paid for their services, and instructed by one party only; some bias is inevitable and corruption a greater possibility
- questioning by lawyers may lead to the presentation of an inaccurate picture, which will mislead the court and frustrate the expert

- where a substantial disagreement concerning a field of expertise arises, it is irrational to ask a judge to resolve it; the judge has no criteria by which to evaluate the opinions
- success may depend on the plausibility or self-confidence of the expert, rather than the expert's professional competence.<sup>1911</sup>

6.76. Any attempt to assess the advantages and disadvantages of the present use of expert evidence and expert witnesses in federal courts and tribunals is made difficult by a lack of empirical information, including on how much time and money is spent on acquiring and adducing expert evidence. However, in relation to judicial attitudes to expert evidence, the Commission was greatly assisted by recent research conducted for the Australian Institute of Judicial Administration (the AIJA empirical study).<sup>1912</sup>

### Controlling expert evidence

6.77. The particular use of experts and expert evidence may become part of the tactical play of adversarial litigation, with parties and their lawyers overwhelming the court or the other party with the volume or complexity of expert evidence or withholding expert opinion evidence or related material damaging to a parties' case, or advantageous to their opponents. Expert evidence can be one of the principal weapons used by litigators to take advantage of the other side's lack of resources or ignorance of relevant facts or opinions.<sup>1913</sup> The extent to which this occurs in proceedings before courts and tribunals exercising federal jurisdiction is difficult to establish.

6.78. However, it is clear that the problems are not new. Federal courts and tribunals have well developed rules and procedures enabling them to control the use of expert evidence by the parties, to maximise the usefulness and timeliness of such evidence and to avoid undesirable tactical play. Sometimes these rules and procedures intersect with broader case management arrangements to manage the

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1911. See J Basten 'The court expert in civil trials – A comparative appraisal' (1977) 40 *Modern Law Review* 174.

1912. I Freckelton et al *Australian judicial perspectives on expert evidence: An empirical study* AIJA Melbourne 1999, 37. Freckelton, Reddy and Selby conducted a survey of 480 Australian judges, to provide data on the difficulties attendant on the reception of expert evidence by Australian courts. The results of this survey and the conclusions drawn by the researchers are discussed in more detail in ALRC DP 62 para 13.21–13.22, 13.72, 13.162, 13.174, 13.186. The researchers have expressed the view that the judges' answers articulated a preparedness on the part of a substantial part of Australia's judiciary to confront in a flexible way the difficulties posed by complex and conflicting evidence by experts.

Many do not feel themselves constrained to an uninvolved, non-interventionist role, but are ready, in principle, to become involved in the litigation to the extent necessary to render the evidence before them susceptible of effective evaluation: id 12–13.

1913. Lord Woolf *Access to justice: Final report to the Lord Chancellor on the civil justice system in England and Wales* (Woolf report) HMSO London 1996, 138.

time and events involved in proceedings. In relation to expert evidence, such rules, procedures and processes allow courts and tribunals to control, among other things

- the timing of the disclosure of expert reports, so that the parties know what expert evidence is being advanced by the other side at an earlier stage and may more readily identify areas of agreement
- the deliberations of expert witnesses; for example, by requiring that parties' experts meet to identify and attempt to narrow the issues in dispute
- the way in which expert evidence is presented; for example, by providing that expert evidence is to be given in written form or in a joint report by experts appointed from both sides and
- the manner in which expert evidence is presented at hearings; for example, by limiting the numbers of expert witnesses and the extent of examination and cross examination of experts.<sup>1914</sup>

6.79. Practitioners and expert witnesses consulted by the Commission generally agreed that federal courts and tribunals have sufficient powers to manage, control and obtain expert evidence. It was also agreed that they did not always use such powers effectively.<sup>1915</sup>

6.80. The Federal Court individual docket system (IDS) was seen as affording the best opportunity for judicial control without detracting from party presentation of the case. Active judicial management gives the judge a clearer sense of the nature of the dispute involving expert evidence, its importance as an issue in the case and allows directions on expert evidence, adapted for the particular case.

6.81. Most criticism relating to the use of expert evidence concerned particular case types where parties routinely use the same expert witnesses who become associated as 'applicant' or 'respondent' experts. These criticisms were most applicable to proceedings in the AAT. The Commission's recommendations relating to expert evidence in the compensation, veterans' and social welfare jurisdictions in the AAT (recommendations 132–138) and to improving case management in the AAT (recommendations 124–127), are designed to deal with these issues.

## Disclosure of expert communications

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1914. The rules and procedures in the Federal Court, Family Court and AAT were set out in detail in ALRC DP 62 ch 13.

1915. One submission suggested that the general discretion of courts to refuse to admit evidence under s135 of the *Evidence Act 1995* (Cth) (Evidence Act) should be amended to make it clear that the court may subsequently exclude evidence previously admitted if it becomes apparent later that there is prejudice or undue waste of time: Freehill Hollingdale & Page *Submission 339*.

6.82. It has been suggested that, to improve the quality and independence of expert witnesses and reinforce their duties to the court, communication between experts and the parties instructing them should be available to the other party and



to the court or tribunal hearing the matter. This reform would change the rules relating to legal professional privilege.<sup>1916</sup>

6.83. Some Australian jurisdictions have modified legal professional privilege for expert evidence. The South Australian Supreme Court Rules require mandatory disclosure to an opponent of expert reports prepared for the purposes of litigation and which would, but for the rules, be protected from inspection by client legal privilege. All expert reports, whether favourable or unfavourable, must be exchanged by the parties.<sup>1917</sup> The Law Reform Commission of Western Australia (LRCWA) recommended that, where a party calls on its expert adviser to give evidence, there should be a waiver of legal professional privilege in respect of all communications with the expert, except communications consisting of statements and other communications from other witnesses.<sup>1918</sup>

6.84. The view is widely held that narrowing the scope of legal professional privilege adds to the documentary burden of litigation without any necessary improvement in the quality of the evidence adduced before the court. The Commission considers that, in most circumstances, it would be unfair to expose experts to cross-examination on the contents of draft reports (which may be no

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1916. Briefly, legal professional privilege (or ‘client legal privilege’ as it is referred to in the Evidence Act) may be claimed for communications between a client or his or her lawyer and an expert (such as instructions, draft reports or reports) if such communications are made for the dominant purpose of the client being provided with legal services relating to anticipated or pending legal proceedings: *Evidence Act 1995* (Cth) s 119. Following the decisions of the High Court in *Esso Australia Resources Limited v The Commissioner of Taxation* [1999] HCA 67 (21 December 1999), and *Mann v Carnell* [1999] HCA 66 (21 December 1999) the dominant purpose test now also applies to situations where the common law privilege is invoked at a pre-trial stage of litigation, before questions of adducing evidence have arisen. At common law, legal privilege does not extend to documents which were brought into existence or were obtained by an expert to assist in the preparation of an expert report. That is, ‘witness document privilege’ does not exist. Drafts of an expert’s written opinion, working papers and other documents on the expert’s file (unless in the form of a communication from the client or his or her lawyer or a confidential document prepared by the client or lawyer) are not subject to client legal privilege. This position also applies under the Evidence Act: *Grosvenor Hill (Qld) Pty Ltd v Interchase Corporation Limited* (1999) 1QdR 141; (1999) 1 QdR 163.

1917. SA Supreme Court Rules O 38.01; *Robinson v Adelaide Raceway* (1993) 61 SASR 279. See also Qld Supreme Court Rules O 35 r 5(2). Proposals have been made in South Australia to extend this obligation even further so as to oblige a party to: provide to the opposing party a list of all documents which that party has provided to that party’s experts and, on demand, a copy; a list of the conferences held with any expert, other persons present at the conference and a copy of any notes made at the conference; to discover to the opposing party the financial arrangements between the party and the proposed expert; to provide to the opposing party all documents in the possession of an expert and all notes and drafts of reports prepared by the expert: Supreme Court of SA *Report on the Supreme Court Rules* Supreme Court of SA Adelaide 1997, 127–128.

1918. Law Reform Commission of Western Australia Project 92 *Review of the criminal and civil justice system in Western Australia – Final report* Perth 1999 (LRCWA report) 190–191, rec 245.

more than the 'preliminary musings' of the expert).<sup>1919</sup> Experts often modify their views as they carry out more work.<sup>1920</sup>

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1919. Forensic Accounting Special Interest Group *Consultation* Sydney 20 April 1999. One barrister notes that he routinely asks experts in cross-examination for drafts of reports that they have prepared and for commissioning letters and has never been refused: I Freckelton *Correspondence* 5 January 1999.

1920. P Meadows *Submission* 266.

6.85. The Commission proposes modification of privilege for expert reports in administrative review proceedings to exclude medical reports (see recommendation 137), but no similar reform is suggested in relation to Federal Court or Family Court proceedings. Administrative review proceedings in the federal review tribunals are not party disputes but inquiries directed to arriving at the correct or preferable decision. The differing context and the public interest in correct decision making justify changes to the normal rules on legal privilege.<sup>1921</sup>

### Conferences of experts

6.86. Federal Court and Family Court judges increasingly direct the parties' experts to confer with one another prior to trial. Conferences of experts are less common in the AAT. One general concern raised in consultations was that this practice generally occurs close to the hearing. Conferences and other communication between experts which may help to identify and narrow issues in dispute and facilitate settlement, are needed at an earlier stage in proceedings.

6.87. Courts and tribunals could more actively manage the deliberations of experts by encouraging or requiring party experts: to communicate, or to communicate at an earlier stage in proceedings; to produce joint reports, statements of facts, agreed chronologies or other evidentiary materials. Contact between experts may be convened, or presided over, by the court or tribunal, either directly or via written questions and responses.

6.88. Submissions suggested that judges and tribunal members should more frequently and earlier order that conferences or other communications take place between experts.<sup>1922</sup> Consultation revealed strong support for such conferences. However, some concerns were expressed that well resourced parties, who are best able to afford eminent experts, may have this advantage accentuated through the influence such experts may be able to exert over a less prominent professional colleague in a conference of experts.<sup>1923</sup>

6.89. Expert witnesses consulted by the Commission supported courts and tribunals drafting guidelines for expert conferences.<sup>1924</sup> In some cases there are

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1921. See ch 9, para 9.213–9.20.

1922. ACCC *Submission 396*.

1923. AGS *Consultation Adelaide* 22 September 1999.

1924. Forensic Accounting Special Interest Group *Consultation Sydney* 20 April 1999; ACCC *Submission-396*. Standard directions on expert evidence, requiring parties to meet together to attempt to reach agreement on matters of expert opinion and to produce a joint report (for an arbitrator or referee) were developed by Sir Laurence Street and first published in 1992: L Street 'Expert evidence in arbitrations and references' (1992) 66 *Australian Law Journal* 861. Lord Woolf considered that orders for experts to meet was the most promising of practices aimed at narrowing the issues between experts: Woolf report.

considerable tension between experts, who are professional rivals. There are also differing expectations about whether the lawyers should attend expert conferences

and, if so, what role they should play.<sup>1925</sup> Some experts indicated that they were unsure of their role in direct negotiation concerning settlements. It is not enough for courts and tribunals to direct experts to confer – they may need to set certain ground rules for the aims, conduct and outcomes of these conferences.

6.90. The LRCWA concluded that one reason opposing parties call different experts is the limited opportunity to interrogate an expert briefed by the other side. The LRCWA recommended that experts should be required to prepare for and answer questions from parties upon payment prior to trial of the reasonable costs of answering questions. The Commission agrees with this proposal.<sup>1926</sup>

**Recommendation 62.** The Commission supports the further development of federal court and tribunal procedures to encourage prehearing conferences and other communication and contact between relevant experts. Consideration should be given to developing guidelines on the conduct of court or tribunal ordered conferences of experts.

**Recommendation 63.** Experts should be required, where requested by a party and with the leave of the court or tribunal, to prepare for and answer questions from parties upon payment prior to trial of the reasonable costs of answering questions.

### The partisan expert

6.91. As seen from the perspective of decision makers, the function of the expert witness is to educate and inform the judge or tribunal member. Parties to a case instruct an expert in order to support their case – they want the expert to help them to win. Lawyers, in a manner consistent with their duty to advance their client’s interests, naturally look for an expert who will support the client’s case.

6.92. Some of the mischief associated with expert evidence (see paragraph 6.75 above) derives from the fact that expert witnesses are selected, instructed and

1925. Lord Woolf noted ‘widespread support’ for his suggestion that experts’ meetings should be encouraged and recommended that meetings should normally be held in private, that is, without the attendance of the parties or their legal advisers: Woolf final report, 147, rec 172. However, when the court directs a meeting, the parties would be able to apply for any special arrangements such as attendance by the parties’ legal advisers. Experienced expert witnesses in Australia have also suggested that meetings of experts work best if the lawyers are not present: Comments, Law Week seminar on expert witnesses, New South Wales Parliament Theatre, 29 May 1997; Forensic Accounting Special Interest Group *Consultation* Sydney 20 April 1999. In *Triden Properties Ltd v Capita Financial Group Ltd* (1993) 30 NSWLR 403, the NSW Court of Appeal upheld orders made in a construction dispute that the parties’ experts meet, under the chairmanship of a referee, in the absence of legal representation.

1926. LRCWA report, 188 rec 240.

remunerated by the parties. However, party selection of experts does not necessarily produce inaccurate or partial expert evidence. Factual and legal arguments on technical or scientific matters may be novel or at the cutting edge of scientific or other knowledge or relate to genuine disputes within an expert discipline.

There are different schools of thought within every profession and every subspecialisation of every profession and it is no surprise, nor any indictment of witnesses on this ground alone, that experts are selected as report writers and witnesses on the basis of their known allegiance to particular schools of thought. The forensic difficulty exists if the school of thought which the expert/s called by one party adheres to is very much a minority one, and if this is not brought home to the trier of the fact.<sup>1927</sup>

6.93. As stated, the problems with partisan selection of expert witnesses are most apparent where there is a sustained relationship between expert and party, and where the party, or their lawyer, has a relationship which pre-dates the commencement of litigation or will continue after the litigation has concluded. A long period of contact with other members of the 'litigation team' may lead expert witnesses, consciously or unconsciously, to share attitudes, assumptions and goals with those retaining them.<sup>1928</sup> Judges in certain jurisdictions report the same expert witnesses appearing regularly in litigation before them for the same side.<sup>1929</sup>

6.94. The adversarial ideology confidently asserts that the truth emerges when each party assiduously, but not necessarily dispassionately, pursues its own case. It is assumed that the truth is best discovered by 'powerful statements on both sides of the question'.<sup>1930</sup> On this view, the written reports, examination and cross-examination of opposing experts will get closer to the truth than would be possible through the evidence of a single 'neutral' expert appointed by the court. However, critics assert that the present use of expert evidence does not always conform with this assumption, does not assist judges and other decision makers to understand, and often clouds the issues.

6.95. The AIJA empirical study found that most judges responding to the survey questionnaire had occasionally encountered 'bias' on the part of

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1927. I Freckelton et al *Australian judicial perspectives on expert evidence: An empirical study* AIJA Melbourne 1999, 81.

1928. *Vernon v Bosley* (No 2) [1997] 1 All ER 614, 647.

1929. 72% of judges responding to the AIJA survey said that they encountered the same witnesses appearing regularly before them: I Freckelton et al *Australian judicial perspectives on expert evidence: An empirical study* AIJA Melbourne 1999, 81.

1930. See para 1.121.

experts.<sup>1931</sup> Nearly nine out of ten judges said that they had encountered 'partisanship' in expert witnesses,<sup>1932</sup> and nearly half considered that such partisanship was a significant problem for the quality of fact-finding in their court.<sup>1933</sup>

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1931. 68.1%, n=158. In addition just over a quarter of the judges (27.6%, n=64) said they had encountered bias 'often': I Freckelton et al *Australian judicial perspectives on expert evidence: An empirical study* AIJA Melbourne 1999, 25.

1932. 87.8% n=208: I Freckelton et al *Australian judicial perspectives on expert evidence: An empirical study* AIJA Melbourne 1999, 81.

1933. 46.7%, n=98: I Freckelton et al *Australian judicial perspectives on expert evidence: An empirical study* AIJA Melbourne 1999, 81.

## Experts' duties and responsibilities

### *Guidelines for expert witnesses*

6.96. In 1998 the Federal Court issued a practice direction, developed cooperatively with the Law Council, providing guidelines for expert witnesses. The Federal Court guidelines for expert witnesses provide that

- an expert witness has an overriding duty to assist the Court on matters relevant to the expert's area of expertise
- an expert witness is not an advocate for a party and
- the expert witness's paramount duty is to the Court and not to the person retaining the expert.<sup>1934</sup>

The guidelines also set down detailed requirements concerning the form and content of expert evidence to improve the clarity and usefulness of expert reports and encourage openness about instructions given to, and factual assumptions used by experts.<sup>1935</sup> Details of such obligations are set down in chapter 7.<sup>1936</sup>

6.97. Aspects of these guidelines were criticised in the Commission's consultations. However they were generally supported as an important development in improving litigation processes.<sup>1937</sup> The Federal Court is reviewing the operation of the guidelines. Subject to the outcome of that review, the Commission recommends that the Family Court and federal review tribunals adopt similar guidelines.

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1934. Federal Court *Guidelines for expert witnesses*. The practice direction incorporates many of the components of an influential statement of the duties and responsibilities of expert witnesses in civil cases given by the Court of Appeal in the English case *The Ikarian Reefer*. See also Lord Woolf *Access to justice draft civil proceedings rules* HMSO London 1996 (Woolf rules) 32.1–32.9; *National Justice Compania Naviera SA v Prudential Assurance Co Ltd, The Ikarian Reefer* [1993] 2 Lloyds Rep 68, 81–82; *National Justice Compania Naviera SA v Prudential Assurance Co Ltd, The Ikarian Reefer* [1995] 1 Lloyds Rep 455, 498.

1935. Another example of rules focussing on improving the clarity of expert reports is the Land and Environment Court (NSW) *Practice direction 3: Expert evidence in class 1 and 2 appeals*. This practice direction requires, among other things, that

- expert reports shall be so presented as to clearly and concisely state the opinions proffered and the basis for those opinions. Expert reports should eliminate unnecessary background material
- where a party relies on a number of experts a brief summary report covering an expert opinion may also be served and filed with the Court prior to the hearing
- unless the Court or the opposing party signifies no later than seven days before the listed hearing date its requirement that the expert witness attend the hearing for the purpose of oral examination, there shall be no need for the expert's attendance and that person's written report may be treated as evidence.

1936. See para 7.137–7.147.

1937. *ibid.*



**Recommendation 64.** At the conclusion of the Federal Court’s review of its expert witness guidelines, the Family Court and the AAT (and the new Administrative Review Tribunal), having regard to the outcome of that review, should develop guidelines for expert witnesses in terms similar to the Federal Court.

*Codes of ethics*

6.98. A related initiative concerns the development of experts’ codes of ethics. Such codes would focus on the duties of experts when they are preparing and providing information to lawyers and evidence to the court. This could be in the form of a general code, or a series of codes relating to specific areas of expertise (eg accountants, doctors, psychologists, engineers). The Federal Court suggested that codes of practice should be drawn up jointly by the appropriate professional bodies representing the relevant groups of experts and the legal profession (the Law Council). Once such codes are in place, an expert would be obliged to state to the Court whether or not his or her report was prepared in accordance with the relevant code of practice.<sup>1938</sup>

6.99. The Commission agrees that the Australian Council of Professions, in cooperation with the Law Council, should develop a code of practice for expert witnesses, drawing upon the Federal Court guidelines. Other professional bodies should be encouraged to supplement this generic code with provisions specific to particular disciplines, such as accountancy, engineering and medicine. The Commission proposed this in DP 62.<sup>1939</sup>

6.100. The Law Council disagreed with this proposal and stated that if the Australian Council of Professions or other professional bodies were to develop their own codes of practice for expert witnesses, the provisions of the codes could conflict with the duty of being a witness and lead to confusion.<sup>1940</sup>

6.101. The Commission considers that professions commonly involved in litigation as expert witnesses have a stake in protecting the integrity of the body of knowledge and understanding from which their expertise is drawn. The involvement of other professions in the discourse about ethical duties, including duties relating to conduct in court or tribunal proceedings, is likely to be beneficial and should be encouraged.

**Recommendation 65.** The Australian Council of Professions should develop a generic template code of practice for expert witnesses, drawing upon the

1938. Federal Court *Correspondence* 20 August 1997; cf Woolf report rec 163.

1939. ALRC DP 62, proposal 13.6.

1940. Law Council *Submission* 375.

Federal Court's guidelines for expert witnesses. The Australian Council of Professions should encourage its constituent professional bodies to supplement this code with discipline specific provisions, where appropriate.

## Agreed and court appointed experts

6.102. Agreed or court appointed experts, retained early in proceedings, can reduce the cost and duration of proceedings if all parties are limited to such evidence.<sup>1941</sup> However, if parties call their own expert witnesses to supplement or refute the agreed expert's opinion, there are few and perhaps no savings.<sup>1942</sup>

### *Agreed experts*

6.103. As a general principle, the Commission agrees that single agreed experts should be used where the case or the issue is concerned with a substantially established area of knowledge. Where this is not the case, parties and judges could still consider whether a single expert could be appointed by agreement in a particular case or to deal with a particular issue.<sup>1943</sup>

6.104. The former Queensland Litigation Reform Commission (QLRC) proposed legislation to permit parties to apply to a court before proceedings were commenced for the appointment of an expert who, if the dispute ended in litigation, would be the court appointed expert.<sup>1944</sup> Such 'pre-action protocols' were to encourage parties to agree on an expert at an early time, with consequences in costs should they fail to do so.<sup>1945</sup>

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1941. In Australia there has been much debate about the desirability of agreed or court appointed experts: See for example G Davies & SSheldon 'Some proposed changes in civil procedure' (1993-1994) 3 *Journal of Judicial Administration* 121; R Scott 'Court-appointed experts' (1995) 25(1) *Queensland Law Society Journal* 87.

1942. Law Society of WA *Submission 78*; Law Society of SA *Submission 94*; NSW Bar Association *Submission 88*; Victorian Bar *Submission 57*; Arthur Robinson *Submission 189*; PMeadows *Submission 266*.

1943. See Woolf final report rec 167-168. Woolf Rules 32.6. See also P Middleton *Report to the Lord Chancellor by Sir Peter Middleton GCB* Lord Chancellor's Dept London 1997 (Middleton report) 28; CPR (UK) r 35.7. The Law Reform Commission of Western Australia proposed that Western Australian courts should encourage agreed experts and made a number of specific proposals to ensure that the court has sufficient powers to achieve this: LRCWA Project No 92 *Consultation draft: Expert evidence in civil proceedings*, LRCWA Perth, December 1998, 28-29, proposal 3. The paper proposes that the use of single experts would be encouraged through the requirement for leave to adduce expert evidence (proposal 2) and, amongst others, through the use of costs supervision powers, directions relating to the instructions to be given to experts and the use of approved lists of experts. The paper also proposes that there should be power to require an expert to answer questions from other parties upon payment of reasonable costs of answering the question (proposal 9).

1944. G Davies 'Justice reform: A personal perspective' (1997) 15 *Australian Bar Review* 109, 112. The Queensland Litigation Reform Commission (QLRC) also proposed rules of court under which parties who claim that an expert's opinion is relevant to an issue would have to refer to the claim and identify the issue in their pleading. After the close of pleadings in cases identifying the need for an expert, the parties would come before the court which could then decide to appoint an expert: QLRC *Draft Supreme Court Rules Amendment Order 1994*.

1945. Lord Woolf's final report recorded that a group of lawyers and insurers had agreed upon a pre-action protocol for personal injury actions which included a protocol for instructing experts. The protocol provided that the claimant's solicitors may in the first instance put forward more

6.105. In DP 62 the Commission proposed that federal court and tribunal rules should provide that parties who propose to rely on an expert's opinion be required to identify the issue in their originating application or in documentation filed before the first directions hearing.<sup>1946</sup> This would provide an early opportunity for the court or tribunal and the parties to consider whether an agreed expert should be appointed.

6.106. The AAT submitted that such proposal would be difficult to implement because applicant representatives are not in a position to make decisions on the types of expert required until they have received all relevant documents lodged by the respondent agency.<sup>1947</sup> The AAT stated that these issues are dealt with appropriately during the prehearing conference process.<sup>1948</sup>

6.107. The Law Council also criticised the terms of the Commission's proposal as it is not known at the commencement of proceedings whether or not expert evidence will be required and if so, what type of expert evidence will be required.<sup>1949</sup>

The Law Council agrees that in many cases it would be useful for litigants to inform the court if, and what type of, expert evidence may be required for the case. However, it does not agree that this "informative" process should be strictly prescribed or undertaken at a specific time during the litigation process. Any such information process must be flexible. Consequently, the Law Council believes that the Commission's proposal, as currently outlined, is impractical.<sup>1950</sup>

The Commission accepts the force of these objections and does not renew the proposal.

### *Court appointed experts*

6.108. Supporters of court appointed experts accept that costs will not necessarily be saved if parties choose to also call their own expert witnesses, whose services will need to be paid for as well as those of the court appointed expert.<sup>1951</sup> In

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than one expert's name. The defendant may indicate that one or more of these are unacceptable. The group considered that this would have advantages for both claimant and defendants. Provided at least two names are acceptable to both parties, the claimant may reject a report by the expert of his or her first choice without letting the defendant know that he has done so. The advantage for defendants is that they can identify at an early stage if the claimant is intending to use an expert whom they regard as partisan and whose report they are unlikely to accept: Woolf final report 109.

1946. ALRC DP 62 proposal 13.8.

1947. *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) s 37.

1948. That is, documents relevant to the review are not lodged with the Tribunal or served on the applicant up to 28 days after the respondent agency has received notice of the application for review: AAT *Submission* 372.

1949. Law Council *Submission* 375.

1950. *ibid.*

1951. The Middleton report noted

addition, due to the special position of court appointed experts, such experts may have to attend prehearing conferences (with all parties) and longer portions of the hearing than an ordinary expert witness.<sup>1952</sup>

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That has to be a matter for the party concerned. It is sufficient to ensure that the party cannot deploy the report of such an expert in evidence nor in any circumstances recover the costs from his opponent: Middleton report 29.

1952. G Nossal 'The Federal Court and the expert: Medical and scientific expertise in the service of justice' *Paper Australian Legal Convention Melbourne 1997*.

6.109. Some commentators criticised the suggestion that court appointed experts are likely to be more independent and accurate.<sup>1953</sup> Most practitioner submissions expressed strong reservations about the use of court appointed experts.<sup>1954</sup> The Law Council, among others, stressed that the parties in the case are in the best position to know which experts are the most appropriate to call and that the court or tribunal is unlikely to be in such a position.<sup>1955</sup> A major problem with court appointed experts relates to the bias or perceived bias the court might have towards its own experts.<sup>1956</sup>

6.110. Court appointed experts are infrequently used in proceedings before the Federal Court and the AAT.<sup>1957</sup> While the Federal Court Rules contain comprehensive provisions relating to the appointment and instruction of court appointed expert witnesses,<sup>1958</sup> in practice, such appointments are rare.<sup>1959</sup> The AAT may inform itself on any matter in such manner as it thinks appropriate, including by obtaining expert and other evidence, independently of the parties, if necessary.<sup>1960</sup> In some cases the AAT arranges for expert reports to be obtained, but again this is rare.<sup>1961</sup> In contrast, court appointed experts are commonly used

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1953. id 93–94. As discussed earlier, at least at federal level, constitutional limitations on the exercise of judicial power constrain the role of experts in determination. A particular problem highlighted in submissions, and in the literature, is said to arise where there are distinct ‘schools’ of experts within a discipline. In this situation, by appointing the expert, the court or tribunal is effectively choosing the opinion the expert is likely to give. Lord Woolf recognised this problem in his final report, conceding that for some cases, including those involving issues on which ‘there are several tenable schools of thought, or where the boundaries of knowledge are being extended’, the oral cross-examination of opposing experts selected by the parties may be the best way of producing a just result: Woolf report 141.

1954. Law Council *Submission 126*; NSW Bar Association *Submission 88*; Arthur Robinson *Submission 189*; PMeadows *Submission 266*; I Stewart *Submission 298*; Freehill Hollingdale & Page *Submission 339*; ACCC *Submission 396*.

1955. Law Council *Submission 126*.

1956. *ibid*. The NSW Bar Association had similar concerns: NSW Bar Association *Submission 88*. The AAT expressed concerns that it would be difficult for the tribunal to choose an expert who would not be perceived to favour one side or the other, affecting perceptions about the fairness of the tribunal's processes: AAT *Submission 210*.

1957. As discussed in ch 8, para 8.165–8.166, experts in the Family Court are used comparatively frequently to prepare family reports under Order 30A of the Family Law Rules.

1958. Federal Court Rules O 34.

1959. Reported cases include *Newark Pty Ltd v Civil & Civic Pty Ltd* (1987) 75 ALR 350 and *Trade Practices Commission v Arnotts* (1989) 89 ALR 131. The High Court (Murphy J) appointed a court expert under O 38 r 2 of the High Court Rules in *Minnesota Mining and Manufacturing Co v Beiersdorf (Australia) Ltd* (1980) 144 CLR 253, a patent case involving ‘breathable’ adhesive surgical tape.

1960. AAT Act s 33(1)(c), s 40(1A). The AAT may order that the fees and allowances of a person summoned to appear as a witness by the AAT are to be paid by the Commonwealth: AAT Act s-67(3).

1961. eg in criminal deportation cases where applicants are frequently unrepresented, the AAT sometimes arranges for the applicant to be examined for the purpose of determining his or her mental state and attitude towards rehabilitation. The AAT may require the Department of Immigration and Multicultural Affairs to provide expert information or services which it is difficult for the applicant to obtain: eg information through the Department of Foreign Affairs about the political or social situation in the country to which the applicant is likely to be deported:

in Family Court proceedings. Such experts, usually arranged by the child representative, are discussed in chapter 8.<sup>1962</sup>

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AAT Submission to Joint Standing Committee on Migration: Inquiry into Criminal Deportation 16 April 1997.

1962. See para 8.165–8.168.

6.111. Many judges who contributed to this inquiry were positively disposed towards the increased use of court appointed experts as enhancing the quality of judicial decision making and decreasing the length and cost of litigation. This impression is consistent with the results of the AIJA empirical study.<sup>1963</sup>

6.112. The Commission recognises that there are barriers to the increased use of agreed and court appointed experts, including those related to the selection process and the terms of engagement of individual experts. Nevertheless the Commission considers that options for reform involving the increased use of agreed experts should be closely examined by federal courts in cooperation with the legal profession and user groups. Case management processes should provide early opportunities for courts, tribunals and parties to identify the need for expert evidence and to consider whether and how an agreed expert should be appointed. The Commission considers that some administrative and family proceedings are particularly suited to the instruction of single experts and further examines the use of experts in the Family Court<sup>1964</sup> and in review tribunals.<sup>1965</sup>

**Recommendation 66.** Federal courts and tribunals should, as a matter of course, encourage parties to agree jointly to instruct expert witnesses.

### Expert evidence at the hearing

6.113. It has been claimed that the manner of presentation of expert evidence, through examination and cross-examination, may be confusing and unhelpful to judges.<sup>1966</sup> The AIJA empirical study indicated that many judges identified deficient advocacy as a significant contributor to the problems posed by expert

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1963. Although only 20% of the respondents were federal judges. While only a few respondents had themselves appointed expert witnesses, assessors or expert referees, there was strong in principle support for such measures — much more so, for instance, than the imposition of limits upon the numbers of expert witnesses permitted to be called by parties: I Freckelton et al *Australian judicial perspectives on expert evidence: An empirical study* AIJA Melbourne 1999, 8. About half of the respondent judges to the AIJA empirical study survey said that they thought that greater use of court appointed experts would be helpful to the fact-finding process, even though less than 5% of the judges said that they had appointed an expert in the last five years: id 101-102.

1964. See para 8.159-8.198.

1965. See para 9.194-9.220.

1966. Justice Peter Heerey has observed

Sometimes, as a witness leaves the box, the judge feels that he is perhaps not really on top of the evidence, but does not know how to express what it is he does not know. But the witness is gone forever. While writing the judgment, the judge cannot ring up the expert and put some new idea to him or her or ask for the explanation of some conundrum: P Heerey 'Expert evidence intellectual property cases' (1998) 9 *Australian Intellectual Property Journal* 92, 94.



evidence.<sup>1967</sup> Present hearing practices do not always allow experts to fully communicate their opinions to the decision maker.<sup>1968</sup> In many cases, experts complain that they are not given a chance to explain their written reports, but are

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1967. I Freckelton et al *Australian judicial perspectives on expert evidence: An empirical study* AIJA Melbourne 1999, 37.

1968. Comments, Law Week seminar on expert witnesses, New South Wales Parliament Theatre, 29-May 1997.

exposed immediately to cross-examination by lawyers who have no interest in assisting the judge to understand the experts' views and may have an active interest in obscuring such views.<sup>1969</sup> Experts express frustration that they cannot put relevant information before the court.<sup>1970</sup>

6.114. The Commission considers that experts should be able, of their own initiative, to correct any misstatement or misunderstanding of the evidence which they have provided to the court or tribunal. The Code of Ethics of the Australian and New Zealand Forensic Science Society provides that the expert witness should appeal to the presiding judicial officer if he or she believes that the manner in which evidence is being elicited is such as to prevent disclosure of a significant relevant matter or circumstance.<sup>1971</sup> Similar guidance could be incorporated in the Federal Court guidelines, consistent with the expert's 'overriding duty to assist the Court on matters relevant to the expert's area of expertise'.<sup>1972</sup>

6.115. Solutions proposed in consultations and submissions focussed on changed procedures, such as allowing the expert to summarise his or her opinion before cross-examination or having experts directly explain their views to the judge, other than by way of examination-in-chief, cross or re-examination.<sup>1973</sup> It was suggested that courts and tribunals should encourage experts to be present when other experts give evidence.<sup>1974</sup>

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1969. The constraints inherent in the conventional procedure of examination-in-chief, cross-examination and examination-in-reply do not always enable the expert to give of his/her best. This is frustrating for the expert as well as being less than satisfactory as an exercise in communicating the expert's opinion to the tribunal: L Street 'Expert evidence in arbitrations and references' (1992) 66*Australian Law Journal* 861, 861.
1970. Australian Council of Professions Ltd *Dealing with risk: Managing expectations* Australian Council of Professions ACT 1996, 24; G Nossal 'The Federal Court and the expert: Medical and scientific expertise in the service of justice' *Paper* Australian Legal Convention 1997.
1971. Australia and New Zealand Forensic Science Society 'Code of ethics of the Australia and New Zealand Forensic Science Society' in I Freckelton and H Selby (eds) *Expert evidence* Law Book Company Looseleaf Service, ch 22 para 6 ('Conduct in court').
1972. Federal Court Practice direction: Guidelines for expert witnesses, 15 September 1998.
1973. Forensic Accounting Special Interest Group *Consultation* Sydney 20 April 1999; ACCC *Submission-396*. In 1998, the Federal Court amended its Rules to provide that the Court may order an expert witness to give an oral exposition of his or her opinion, or of his or her opinion about the opinions given by another expert witness: Federal Court Rules O 34A(f)(g). Judicial understanding of expert opinion could also be assisted were experts to more frequently prepare background reading for the judge: Justice French *Consultation* Perth 22 September 1999.
1974. Judges responding to the AIJA empirical study survey were overwhelmingly of the view that it is helpful to have expert witnesses in court to hear the evidence of other expert witnesses: I-Freckelton et al *Australian judicial perspectives on expert evidence: An empirical study* AIJA Melbourne 1999, 82; ACCC *Submission 396*. While the Commission understands this to be usual practice in the Family Court, in some jurisdictions expert witnesses are excluded from court until they give their evidence. The reasons for this are said to include a desire to reduce collusion among witnesses, to avoid the proliferation of disputes over technical points and to limit the costs of witness attendance at court: I Freckelton 'Judicial attitudes towards scientific evidence: The antipodean experience' (1997) 30(4) *University of California Davis Law Review* 1139, 1218.

6.116. A widely favoured option for the presentation and examination of expert witnesses is the panel presentation of expert evidence used in recent cases in the Federal Court and the AAT.<sup>1975</sup> In this ‘hot-tub’ panel approach

- experts submit written statements to the tribunal, which they may freely modify or supplement orally at the hearing, after having heard all of the other evidence
- all of the experts are sworn in at the same time and each in turn provides an oral exposition of their expert opinion on the issues arising from the evidence
- each expert then expresses his or her view about the opinions expressed by the other experts
- counsel cross-examine the experts one after the other and are at liberty to put questions to all or any of the experts in respect of a particular issue.<sup>1976</sup> Re-examination is conducted on the same basis.<sup>1977</sup>

6.117. The Federal Court stated that

It has been the judges’ experience that having both parties’ experts present their views at the same time is very valuable. In contrast to the conventional approach, where an interval of up to several weeks may separate the experts’ testimony, the panel approach enables the judge to compare and consider the competing opinions on a fair basis. In addition, the Court has found that experts themselves approve of the procedures and they welcome it as a better way of informing the Court. There is also symbolic and practical importance in removing the experts from their position in the camp of the party who called them.<sup>1978</sup>

6.118. There was considerable support in consultations for modification, in appropriate cases, of traditional examination and cross-examination of expert witnesses, and in particular for experimentation with panel approaches such as that used by the Federal Court.<sup>1979</sup> The ACCC supports panel presentation of expert evidence as it

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1975. This panel approach was used in the Australian Competition Tribunal and adapted for use in the Federal Court.

1976. Lockhart J *Memorandum* to Registrar of the Federal Court 21 April 1998.

1977. An outline of the procedure is provided in *Re Queensland Independent Wholesalers Ltd (QIW)* (1995) ATPR 41-438, 40,925 and in other decisions of the Australian Competition Tribunal.

1978. Federal Court *Submission* 393.

1979. eg AGS *Consultation* Brisbane 22 September 1999; ACCC *Consultation* Canberra 28 September 1999; National Native Title Tribunal *Consultation* Perth 22 September 1999; Intellectual property practitioners *Consultation* Melbourne 7 September 1999; Trade practices practitioners *Consultation* Melbourne 7 September 1999; AAT *Consultation* Melbourne 25 August 1999; Federal Court *Submission* 393.

has generated significant efficiencies in the litigation process ... the total time for considering expert evidence is considerably reduced whereas their contribution to the relevant court or tribunal is immediate.<sup>1980</sup>

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<sup>1980</sup>. ACCC *Submission 396*.

6.119. However, submissions emphasised that panel presentation should reserve to parties the right to cross-examine opposing expert witnesses,<sup>1981</sup> and that a panel format approach would not be appropriate in most cases because it would be over-elaborate, too expensive and detract from an orderly and efficient presentation of opposing opinions.<sup>1982</sup>

6.120. The AAT submitted that the panel model could prove to be an effective mechanism in some AAT jurisdictions, but cautioned that the adoption of this approach would require a 'significant cultural shift' by advocates who appear in review tribunals. The AAT is also concerned that the approach could sometimes extend proceedings and might unduly disadvantage unrepresented parties, who may not be able to guide or participate in a panel discussion.<sup>1983</sup>

6.121. The existing rules of the Federal Court, Family Court and AAT do not constrain experimentation with panel approaches.<sup>1984</sup> In 1998, the Federal Court amended its rules to provide for the empanelling of experts in this manner.<sup>1985</sup> The provisions of the Evidence Act also provide for court control over questioning of witnesses and flexibility in the manner and form in which witnesses are questioned.<sup>1986</sup>

6.122. However, it is desirable for courts and tribunals to have rules or practice directions expressly empowering, and therefore encouraging, judges and tribunal members to direct that expert evidence be adduced in a panel format. The Family Court has said that such rules or practice directions would be inappropriate in child welfare matters, although it recognises the potential for panel approaches in complex matters.<sup>1987</sup>

**Recommendation 67.** Procedures to adduce expert evidence in a panel format should be encouraged whenever appropriate. The Commission recommends that the Family Court and the Administrative Appeals Tribunal establish rules or practice directions setting down such procedures, using the Federal Court Rules as a model.

## Expert assistance for decision makers

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1981. NSW Bar Association *Submission 88*; I Stewart *Submission 298*; Clayton Utz *Submission 341*.

1982. Law Council *Submission 375*.

1983. AAT *Submission 210*.

1984. eg see Federal Court Rules O 10 r 1(2)(j).

1985. Federal Court Rules O 34A(e)-(i).

1986. *Evidence Act 1995* (Cth) s 26, 29.

1987. Family Court *Submission 264*.

6.123. Difficulties faced by judges and other decision makers in understanding and evaluating conflicting expert evidence derive from the highly specialised and technical nature of the evidence itself. Even though judges may specialise in

particular categories of case<sup>1988</sup> and develop considerable expertise in certain areas, it is unlikely that they possess sufficient scientific or other background information to be able to assess certain conflicting technical expert evidence without assistance.<sup>1989</sup> One response to this difficulty is for the court to appoint an assessor or other expert adviser to assist the judge or other decision maker.

### Assessors

6.124. Unlike expert witnesses, assessors are not sworn and generally cannot be cross-examined. Their advice may be sought and given to the judge in private and only be disclosed to the parties at the court's discretion and then usually at the end of the case in the judgment.<sup>1990</sup> The assessor is an expert available for the judge to consult if the judge requires assistance in understanding the effect or meaning of expert evidence.<sup>1991</sup>

6.125. The term 'assessor' does not have any standard Australian legal usage. Relevant Commonwealth legislation describes the role of assessors as being to 'assist' or 'help' the court in the exercise of its jurisdiction.<sup>1992</sup> In some contexts,

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1988. Under IDS, Federal Court cases in some areas of law (presently admiralty, intellectual property, taxation, takeovers, Part IV Trade Practices Act, native title and industrial relations) are allocated to a judge who is a member of a specialist panel.

1989. The educational needs of judges, tribunal members and lawyers should also be considered in this context. Some commentators have suggested that legal education will need to ensure that future lawyers and judges are knowledgeable enough to make sound decisions when confronted with scientific questions if they become increasingly involved in distinguishing reliable from unreliable expert evidence: S Odgers and J Richardson 'Keeping bad science out of the courtroom – changes in American and Australian expert evidence law' (1995) 18 *University of New South Wales Law Journal* 108, 122. Freckelton notes

The challenge for tomorrow's litigation lawyer is to come to grips with information from other disciplines well enough to play an effective role in rendering forensic experts' expertise accountable: I Freckelton 'Wizards in the crucible: Making the boffins accountable' in J Nijboer and J Reintjies (eds) *Proceedings of the first world conference on new trends in criminal investigation and evidence* Open University of NL 1997, 79.

1990. See I Freckelton and H Selby *Expert evidence* Law Book Company Looseleaf Service [19.200]; A Dickey 'The province and function of assessors in English Courts' (1970) *Modern Law Review* 494, 501.

1991. *The Queen Mary* (1947) 80 LI L Rep 609, 612 cited in A Dickey 'The province and function of assessors in English Courts' (1970) *Modern Law Review* 494, 501 fn 52. It is common for assessors to sit with the judge for all or part of the proceedings. Assessors may be specifically charged with responsibility for making inquiries and reporting to the court or tribunal on particular issues, eg assessors appointed under s 29 of the *Administrative Decisions Tribunal Act 1997* (NSW). It was intended that the Family Court would refer matters to an assessor for 'examination and report': *Hansard* (H of R) 30 May 1991, 4455. Such inquiry and reporting functions are more akin to those performed by a court appointed expert witness than an assessor.

1992. eg assessors appointed under s 37A of the *Federal Court of Australia Act 1976* (Cth) (Federal Court Act) to assist the Federal Court in the exercise of its jurisdiction under the *Native Title Act 1993* (Cth); assessors appointed under s 217 of the *Patents Act 1990* (Cth); assessors appointed under s-102B of the *Family Law Act*. The NSW Land and Environment Court uses 'assessors' to exercise some parts of the Court's jurisdiction. Land and Environment Court assessors determine disputes.

this assistance may go beyond helping the judge or other decision maker to understand expert evidence and may include taking evidence and preparing reports of



evidence for the court.<sup>1993</sup> Assessors are of most relevance in the context of Federal Court proceedings and this issue is discussed in more detail in chapter 7.<sup>1994</sup>

### *Use of referees for inquiry and report*

6.126. Expert referees, appointed by courts to inquire and report on issues in dispute, have a direct influence on decision making. Referees make determinations or recommendations. This distinguishes the referee from a court appointed expert or an assessor.<sup>1995</sup> Determinations can be binding or non-binding on the parties, depending on the circumstances.

6.127. Australian courts generally have a discretion to appoint referees in civil matters and to refer the whole or part of proceedings for inquiry and report, with or without the consent of the parties. The report and opinions of court appointed referees are not binding on courts. The judge may accept, reject or vary all or part of the referee's report.<sup>1996</sup>

6.128. While the Federal Court may refer proceedings, or part of proceedings, to a mediator or arbitrator,<sup>1997</sup> the Court has no express power to refer issues to a referee for inquiry and report<sup>1998</sup> or to use lay decision makers to help it to decide cases.<sup>1999</sup>

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1993. Federal Court Rules O 78 r 16–17 (native title matters). For further discussion of assessors in native title cases see para 7.78–7.84.

1994. See para 7.148–7.157.

1995. The NSW Land and Environment Court uses 'assessors' to exercise some parts of the Court's jurisdiction. Although these expert officers of the Court are styled 'assessors', they conduct and determine disputes, hearing certain merits appeals involving environmental planning, local government and land tenure issues: *Land and Environment Court Act 1979* (NSW) s 12, s 17–19, s-33(1).

1996. For example, in dealing with building and construction cases, the NSW Supreme Court commonly makes use of expert referees appointed under Part 72 of the Supreme Court Rules. Under Part 72 of the Supreme Court Rules, the NSW Supreme Court may make orders with respect to the conduct of proceedings under the reference, but otherwise the referee may determine the dispute in such manner as the referee thinks fit, having regard to the rules of natural justice. The report furnished by the referee may be accepted, varied or rejected by the Court: NSW Supreme Court Rules Part 72 O 1 r 8(1)(2); O 13; *Xuerub v Viola* (1989) 18 NSWLR 453. See also the discussion of referees in I Freckelton and H Selby *Expert evidence* Law Book Company Looseleaf Service ch 18A.

1997. Federal Court Act s 53A, s 59; Federal Court Rules O 72.

1998. There appears nothing to prevent the Court, with the consent of the parties, from referring the proceedings or a matter arising out of them, to an arbitrator who is an expert: Federal Court Act s-53A(1), s 53A(1A); Federal Court Rules O 72 r 9. However, while the Court may make an order in the terms of the arbitrator's award, it may not vary or reject the award as it may a referee's report.

1999. As part of its reference on compliance with the Trade Practices Act, the Commission considered whether the Federal Court should be able to refer pricing matters or other economic issues to a specialist panel for a recommendation or determination. The Commission concluded that it was not satisfied that such an arrangement was either necessary or appropriate: ALRC Report 68 *Compliance with the Trade Practice Act 1974* Sydney 1994 (ALRC 68) 148–149.

6.129. Constitutional arrangements concerning the exercise of judicial power constrain the role of experts in federal courts.<sup>2000</sup> However, as confirmed by *Harris v Caladine*,<sup>2001</sup> the judicial power of the Commonwealth can be exercised by an officer of the court who is not a judge, such as a registrar, as long as a judge continues to 'bear the major responsibility for the exercise of judicial power at least in relation to the more important aspects of contested matters'<sup>2002</sup> and monitors the officer's power or jurisdiction.<sup>2003</sup> As noted above, judges are generally able to accept, vary or reject a report furnished by a referee.<sup>2004</sup>

6.130. Submissions and consultations did not suggest that referees should be used in federal courts. The Commission therefore makes no recommendations on this issue. The use of expert determination in review tribunals is discussed in chapter 9.

## Litigants in federal jurisdiction

6.131. The variety of litigants in the federal civil system is of more than theoretical interest – it is relevant to an assessment of access to justice issues and to the design and workings of case management. Case management arrangements have to take account of the skills and resources of parties and secure the cooperation or compliance of parties and lawyers. Parties initiate or defend litigation or review with certain expectations of the process. Their views of the process are moulded by their lawyers, derive from their participation and often reveal their expectations as much as their experiences of the process. For example, to litigants who have never been inside a court room, tribunal processes may seem formal and impressive, just like a court. To others, with some experience of litigation, the same processes are

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2000. In *Multicon Engineering Pty Ltd v Federal Airports Corporation* (unreported) Supreme Court of NSW, Court of Appeal 15 October 1997, the Court heard a constitutional challenge to the NSW Supreme Court adopting a referee's report in exercising federal jurisdiction. This aspect of the appeal was rejected on the basis that the appellant was not entitled to rely on the constitutional question for the first time on appeal, having consented to the reference. The court noted, however, that there was 'powerful support' for the argument that reference out to referees, in the manner of Part 72 of the NSW Supreme Court Rules, was compatible with the non-delegation principle in *Harris v Caladine* (1991) 172 CLR 84: Mason P as cited in I Freckelton & H Selby *Expert evidence* Law Book Company Looseleaf Service [18A.51].

2001. (1991) 172 CLR 84.

2002. *Harris v Caladine* (1991) 172 CLR 84, 95.

2003. eg through review de novo: id 95, 122, 126, 151–152. See P Lane *Lane's commentary on the Australian Constitution* 2nd ed Law Book Company Sydney 1997, 460–462.

2004. In relation to the principles regarding the use of a referee's report by the court see: *Cape v Maidment* (1991) 98 ACTR 1, 3–4, as cited and discussed in I Freckelton and H Selby *Expert evidence* Law Book Company Looseleaf Service, ch 18A.

seen as informal.<sup>2005</sup> Research on the expectations and experiences of litigants has found that litigants accord a high value to fair procedural features of courts and tribunals and their ability to participate meaningfully in the process.<sup>2006</sup>

## Repeat and experienced litigants

6.132. In each of the federal courts and tribunals there are repeat players.<sup>2007</sup> Corporations and government are major repeat litigants in the Federal Court. Thirty nine per cent of applicants and 35% of respondents in the Commission's Federal Court case sample were corporations or other business entities<sup>2008</sup> and 47% of respondents were government departments or agencies.<sup>2009</sup> The government is the respondent in all AAT cases and is involved in other tribunal proceedings.<sup>2010</sup>

6.133. Repeat litigants such as government and major corporations are significantly well resourced and experienced and can understand and utilise sophisticated and

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2005. The diversity of experience is shown in responses to a survey conducted by the Family Court, in which litigants were asked whether bringing their matter to the Family Court made the process of settling or resolving the dispute easier or harder

- 43% indicated that settlement or resolution was made easier by bringing the matter to Court as, for example, the processes helped people focus on the issues and provided fair and just procedures
- 33% felt settlement or resolution was made harder because the proceedings increased the stress, anger and conflict of the situation, the Court's processes were too complicated, took too long and could be misused, and the Court 'had no enforcement capability': A Phelan 'Strategic use of client feedback by courts: The experience of the Family Court of Australia' Paper AIJA Court Administrators' Conference 6 August 1999.

Similarly in the Commission's survey of unrepresented AAT applicants, some 48% agreed that the AAT registrar or member helped negotiations or promoted settlement, while 52% of people responding disagreed: ALRC *Part two: Empirical information about the Administrative Appeals Tribunal* ALRC Sydney June 1999, (ALRC, AAT Empirical report Part Two) table 3.6 (n=153).

2006. T Matruggio *Plaintiffs and the process of litigation* Civil Justice Research Centre Sydney 1994. The importance of 'fair processes' to users of the litigation system is also supported by overseas research. See for example, Ontario Law Reform Commission *Rethinking civil justice: Research studies for the civil justice review* vol 1 Toronto 1996, 5; M Winfield Research paper *Far from wanting their day in Court: Civil disputants in England and Wales* Research paper National Consumer Council.
2007. Repeat players in the Family Court usually relate to applications involving children's matters, some of which involve vexatious claims. See further ALRC 69(1) *Equality before the law: justice for women* ALRC Sydney para 9.5; ALRC 73 *For the sake of the kids: complex contact cases and the Family Court* ALRC Sydney 1995 para 5.28-30.
2008. T Matruggio & G McAllister, Federal Court Empirical Report Part One, 13, table 6 n=678- (applicants) n=672 (respondents).
2009. Reflecting the Court's caseload of migration, taxation and judicial review matters, as well as the involvement of regulatory authorities in trade practices, securities and corporations matters: T-Matruggio & G McAllister, Federal Court Empirical Report Part One, 13, table 6 n=678(applicants) n=672 (respondents).
2010. Applicants in the AAT also include large corporations affected by taxation, customs, tariff, diesel fuel rebate or business licensing decisions. Many of the AAT's most complex proceedings involved corporations.

rigorous case management. They choose how to manage and resolve their disputes and utilise various alternatives to litigation effectively and strategically. Certain industries in federal jurisdiction have funded ombudsmen to resolve user complaints and consumer disputes. Corporations and government also have the

bargaining power to secure advantageous cost arrangements.<sup>2011</sup> Professor Marc Galanter has noted, that litigation is best utilised by experienced players.<sup>2012</sup>

[T]here are more and more entities that are supplied with the capacity to play the high-stakes legal game: some are individuals who attract major investments of lawyering because they have wealth or their cause holds the promise of high reward. But most are collectivities (organised ones like corporations, governments, unions, associations) or ad hoc ones like groups of injury victims, stockholders acting through lawyer surrogates etc. The presence of an increasing number of more formidable 'players' means that various individual interests are vicariously 'represented' in the legal arena, even when fewer individuals find themselves able to participate directly in that arena.<sup>2013</sup>

6.134. Repeat litigants generally have a good understanding of the rules and processes of courts and tribunals, can meet case management timetables and evaluate their legal risk. In this context, one submission noted

[m]any large commercial cases occupy inordinate amounts of judicial time and public resources, with corresponding distortion of management time and costs. Effective case preparation and case management are possible because they are the product of practitioners with real case management and decision making skills.<sup>2014</sup>

6.135. Lawyers for such parties argued that courts should be tougher in enforcing compliance with directions.

Too great a tolerance of legal incompetence and too great an adherence to rules and doctrine which allow legal practitioners and litigants to conduct proceedings as they see fit merely serve to undermine the system. Costs and delay are more likely to be controlled with strong direction by the judiciary over the litigation system.<sup>2015</sup>

6.136. In general, business and some government agencies favoured rigorous, or at least highly interventionist, judicial management<sup>2016</sup> including

- control of discovery

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2011. Telstra Corp, which was reported to spend an estimated \$75 million a year on legal advice, recently cut the number of law firms it uses for legal advice from 60 to 12. Companies such as BHP, National Australia Bank and Westpac also plan to cut the number of legal firms they use in order to contain costs and develop closer relationships with their lawyers: A Burrell 'Telstra prunes its legal services' *Aust Fin Rev* 5 January 2000, 3.

2012. M Galanter 'Explaining litigation' 9 *Law and social review* (1975), 247.

2013. M Galanter 'Redesigning the iceberg: reforming a largely unchartered and ever changing civil justice system' in Ontario Law Reform Commission *Study paper on prospects for civil justice* 1995, 214.

2014. Freehill Hollingdale & Page *Submission* 339.

2015. The Allen Consulting Group *Submission* 219.

2016. The ACCC, in considering its experience in litigation before the Federal Court, commented The ACCC believes that the Courts generally need to adopt a more interventionist approach to case management: ACCC *Submission* 396.

- greater use of cost and preclusionary penalties against parties and representatives filing frivolous actions, breaching or abusing litigation rules or failing to comply with directions<sup>2017</sup>
- expanded use of summary judgment.<sup>2018</sup>

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2017. The Allen Consulting Group *Submission 219*.

2018. Arthur Robinson *Submission 189*; The Allen Consulting Group *Submission 219*.

## Inexperienced litigants

6.137. Small business and individual litigants of limited or modest means litigate in trade practices, business regulatory matters, tax, customs, industrial, native title, discrimination and migration matters in the Federal Court and in family matters<sup>2019</sup> and the range of cases in federal review tribunals.<sup>2020</sup>

6.138. Parties who are ‘once only’ participants in the litigation and review system can compensate for their inexperience by briefing lawyers or expert representatives experienced in the particular court or tribunal jurisdiction. In federal jurisdiction examples of this include the many cases where larger trade unions provide legal representatives for their members in matters before the Australian Industrial Relations Commission, Federal Court and AAT. Veterans organisations undertake representation in veterans entitlements cases in the Veterans’ Review Board and the AAT. Legal aid provides specialist advice and advocacy in a variety of courts and tribunal matters. Certain firms of lawyers specialise in particular matters and are often identified as applicant or respondent lawyers, a ‘woman’s’ or ‘man’s’ lawyer in family jurisdiction.

6.139. Inexperienced or unsophisticated litigants often have unrealistic expectations of the court process and fewer skills to cope with court or tribunal practice and procedures.<sup>2021</sup> This is particularly marked with unrepresented

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2019. Family Court cases generally involve individuals of modest means rather than government agencies or businesses. A Justice Research Centre study found that self-funded family law litigants had a median gross annual income of \$35 000 and the median gross annual income of all family litigants was \$25 000 for applicants and \$28 000 for respondents: R Hunter *Family law case profiles* Justice Research Centre Sydney 1999, 73, 144. Most of the property applications concern basic ‘house and garden’ cases. The Commission’s survey data showed the median estimated property value at issue in proceedings to be about \$150000 where there was a female applicant and male respondent: T Matruglio & G McAllister, *Family Court Empirical Report One*, 11, table 5. Divorce and consequent disputes over property and in relation to children’s residence and contact affect all socio-economic groups and this diversity is reflected in the profile of parties to Family Court proceedings.

2020. Applicants in the Social Security Appeals Tribunal (SSAT), Migration Review Tribunal (MRT), Refugee Review Tribunal (RRT) and Veterans’ Review Board (VRB) generally are individuals seeking review of agency decisions, although some MRT applicants are businesses or employers seeking to sponsor overseas employees. 96% of non-government parties in the Commission’s AAT case sample were individuals: ALRC, *AAT Empirical Report Part One*, 12, table 3.1: n=1 665. Applicants in the AAT also include small businesses affected by taxation, customs, tariff, diesel fuel rebate or business licensing decisions and individuals seeking visas, pensions, compensation or benefits – again, most of them are one-off applicants.

2021. Small business attitudes to litigation reform were canvassed by the Review of Small Business Access to the Legal System conducted for the Commonwealth Attorney-General’s Department. The results of the review’s survey of small business people found broad agreement with the view that there should be greater use of informal, unrepresented hearings for single low value disputes and that quicker conduct of cases warranted a major increase in effort and resources for which small business would be prepared to pay: Marsden Jacob Associates, Transformation Management Services Brian Sweeney & Associates *Survey of small business attitudes and experience in disputes and their resolution* Attorney-General’s Dept (Cth) Melbourne 1999, 53–54 and referring

parties in family jurisdiction where litigants spoke of wanting a judge 'who knew the



history and what I had been through',<sup>2022</sup> a judge 'interested in my situation'<sup>2023</sup> and advice and assistance from the Court or counter staff. In this context, a Family Court judge noted to the Commission

[I]litigants have an unreal expectation of the Court. They use it as a crutch and refuse to get on with their lives. The Court is here to resolve disputes, not to provide lifetime therapy.<sup>2024</sup>

Unrepresented litigants frequently require assistance and direction from the court or tribunal. On the Commission's data, there are significant numbers of unrepresented or partially represented litigants in federal jurisdiction (some 18% of Federal Court sample cases,<sup>2025</sup> 41% of Family Court sample cases<sup>2026</sup> and 33% of AAT sample cases<sup>2027</sup>). Issues associated with unrepresented litigants are dealt with in chapter 5.<sup>2028</sup> In its evaluation and recommendations concerning case management in the Federal Court, Family Court and federal review tribunals, the Commission had regard to the skills, expectations and resources of parties in those jurisdictions.

## Federal government dispute management

6.140. As the major repeat litigants in federal jurisdiction are federal agencies and departments, the Commission paid particular attention to their role in litigation and review proceedings.

The need for a coordinated approach to government dispute resolution

6.141. Civil disputes in which the federal government is a party are diverse and often complex. The corporatisation and privatisation of government functions and services has produced more complex contractual arrangements. Many service functions have been decentralised and agencies are developing new relationships with service providers. This diversity necessitates effective and comprehensive planning for government dispute management and resolution. In consultations the Commission was told that with the privatisation of government legal work it has become more difficult to maintain consistent advice and the adoption of a

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2022. Confidential interview *Consultation* Macquarie Legal Centre Sydney 6 July 1998.

2023. Family Court file survey response.

2024. Family Court judges *Consultation* 23 September 1998.

2025. T Matruglio & G McAllister, Federal Court Empirical Report Part One, table 35: n=678 (applicants) n=672 (respondents). Issues involving unrepresented litigants are discussed at para 5.148–5.157.

2026. For Form 7 applications for final orders cases: T Matruglio & G McAllister, Family Court Empirical Report Part One 49, table 40. n=967 (applicants) n=967 (respondents); ALRC DP 62 para 11.40, table 11.9. The Family Court itself reports that either one or both parties is unrepresented in 40% of first instance and appeal matters: Family Court *Annual report 1997–98*, 21.

2027. See ALRC, AAT Empirical Report Part One, table 7.1.

2028. See para 5.7–5.11, 5.147–5.157.

consistent position on legal issues.<sup>2029</sup> This requires improved sharing and coordinating of information where appropriate.

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<sup>2029</sup>. AGS Consultation Canberra 25 August 1999.

6.142. Federal government agencies utilise the full range of dispute resolution options. In recent years they have implemented better counter facilities, communication and grievance handling of client queries and complaints, advice and education services and internal review and case monitoring. These are all mechanisms to avoid disputes, litigation and review proceedings. Chapter 9 provides figures showing the numbers of cases resolved through internal and external review processes – which is some indication of the efficacy of these arrangements. The model litigant rules which require federal agencies and their lawyers to act honestly, fairly and cost effectively in handling claims are also dealt with in chapter 3.<sup>2030</sup>

6.143. One particular focus of initiatives to improve agency dispute prevention and management is on improving communication between agencies and their clients.<sup>2031</sup> For example, Centrelink has introduced a new service delivery model for their clients which seeks to ‘respond to an individual and the complexities of life’ and has a single main contact to enable each client to maintain contact with the same Customer Service Officer.<sup>2032</sup> The service has been fitted to the client. It is not assumed that all clients know which pensions or benefits are available to them or the qualifying criteria. This approach avoids much of the frustration which such clients experience in repeating their story to different administrators. It is a significant example of how dispute management theories impact on the delivery of government services. Other dispute management initiatives taken by federal agencies include the following.

- The ACCC has clear strategies for ensuring compliance with trade practices provisions<sup>2033</sup> by negotiating with parties to undertake remedial action, such as corrective advertising or direct mailing, rather than through litigation and uses intensive education and publicity campaigns within industries to avoid non compliance.<sup>2034</sup>
- The Australian Taxation Office’s (ATO) Problem Resolution Service conducts internal review and investigates complaints about the ATO.<sup>2035</sup> The ATO also has a litigation test case program, in which the legal costs of all parties are funded by government as test cases are likely to clarify the

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2030. See para 3.129-3.168.

2031. For example, Comcare recently implemented a number of initiatives to improve communication and information flows between itself and customer agencies, service providers and injured employees: *Comcare Annual report 1997-98*, 31.

2032. J Browne ‘Disputes in the Commonwealth Government – an opportunity for customer service improvement’ *Paper* The management of disputes involving the Commonwealth. Is litigation always the answer? Conference Canberra 22 April 1999; Centrelink *Balancing the business – One main contact: The art of service: A guide for managers & teams for implementing and sustaining OMC* Centrelink July 1999.

2033. *Trade Practices Act 1974* (Cth) s 87B.

2034. *ACCC Submission 396*.

2035. In 1997-98 the PRS cost \$2.4 million: Australian Taxation Office *Consultation* 7 May 1999.

law for the wider community. Seven such cases were approved for funding in 1997-98.<sup>2036</sup>

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2036. Commissioner of Taxation *Annual report 1997-98*, 9.

6.144. In conjunction with the *Finance Management and Accountability Act 1997* (Cth), the government reviewed its policies regarding settlement of disputes and claims. Arrangements for agency approval of settlements were simplified in Finance Directions such that settlements for amounts not exceeding \$10 000 can be approved by the chief executive of the agency (or authorised officer) on a common sense view that the settlement is in accordance with legal principle and practice. Settlements above this amount require written advice from the legal service provider that the settlement is in accordance with legal principle and practice, and the agreement of the chief executive or authorised officer.

### United States and Canadian approaches

6.145. In advancing effective dispute resolution involving their government agencies, the United States and Canada have initiated government-wide facilities and policies for dispute resolution.

6.146. In the United States, the *Administrative Dispute Resolution Act*<sup>2037</sup> specifies that agencies may use ADR proceedings to resolve issues relating to an administrative program, if the parties agree. In February 1996, President Clinton issued an Executive Order directing agencies to employ ADR techniques as a way to reduce the civil litigation case load. In a presidential memorandum of May 1998, an Interagency Alternative Dispute Resolution Working Group was established to support agencies in their development of ADR schemes.<sup>2038</sup> There are four sub-working groups, each focussing on a particular type of dispute.<sup>2039</sup> All United States federal agencies were expected to implement at least one new administrative dispute resolution program by the end of September 1999.

6.147. In Canada, the Department of Justice also has initiated dispute resolution arrangements, including by working with the Treasury Board to remove disincentives to early settlement, providing ADR training to government employees, and developing ADR pilot schemes in government agencies.<sup>2040</sup> The Department of Justice is now working with the Canadian Treasury to establish a dispute resolution fund to assist agencies to develop ADR programs and training, with the aim of avoiding litigation.<sup>2041</sup> The Canadian scheme appears to be more centralised than the United States arrangement.

### Federal dispute management

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2037. Enacted in 1990 and amended in 1996.

2038. Activities of the Working Group, including minutes of meetings, can be found at <<http://www.financenet.gov/financenet/fed/iadrwg/>> (5 April 1999).

2039. The secretariat of the Working Group is provided by the Department of Justice.

2040. See Department of Justice, Canada 'Policy on dispute resolution' 9 December 1997 at <<http://canada.justice.gc.ca/en/ps/drs/dr/dm/892.html>> (20 January 2000).

2041. See Department of Justice, Canada 'Dispute resolution '98 – the way ahead' 23 March 1998 at <<http://canada.justice.gc.ca/en/ps/drs/dr/dm/att252.html>> (20 January 2000).

6.148. The federal Attorney-General's Department has sought information on how departments and agencies use ADR, but there is, as yet, no government-wide initiative comparable to those in the United States and Canada to encourage government departments to utilise ADR for broader conflict and dispute management. Certainly there is merit in promoting flexible, active dispute management that can avoid expensive litigation and unnecessary procedures. Such preventive and management measures should be carefully developed and evaluated. In any assessment of the cost-effectiveness of such dispute prevention schemes, the direct and indirect costs arising from government disputes should be calculated.

6.149. The Commission considers there is a need for a coordinated approach to dispute management resolution in Australian federal government agencies. In DP-62 the Commission compared the Canadian and United States approaches and indicated a preference for the United States model. The Canadian arrangement is directed by one particular agency which allocates dispute resolution funds. The executive order and working group model developed in the United States exhorts agencies to consider ADR, allows agencies flexibility to develop appropriate internal programs and offers a supportive forum for sharing ideas and experiences. This appears closer to the varied Australian federal departmental practice in dispute management and resolution.

6.150. Under such a dispute management policy, each federal department and agency could be required to develop a plan and evaluate the efficacy and cost effectiveness of particular processes for all the disputes, administrative review and litigation handled by the agency.

6.151. In DP 62 the Commission proposed that the Attorney-General's Department establish a 'best practice' model for dispute resolution within government departments and agencies. This model could draw upon the ACCC publication *Benchmarks for dispute avoidance and resolution – A guide*<sup>2042</sup> and the new Australian Standard for the prevention, handling and resolution of disputes.<sup>2043</sup>

6.152. In developing such a plan, government agencies could consult with private corporations with expertise in handling disputes,<sup>2044</sup> and draw from, for example, the Administrative Review Council's project on reviewing internal review processes. They also should consider their arrangements for purchasing and managing external legal services. The ATO, for example, established a committee

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2042. ACCC *Benchmarks for dispute avoidance and resolution – A guide* AGPS Canberra 1997.

2043. Standards Australia *Guide to the prevention, handling and resolution of disputes* (AS 4608-1999) Standards Australia International Sydney 1999.

2044. P Meadows 'The Commonwealth government as a litigant' *Paper* The management of disputes involving the Commonwealth. Is litigation always the answer? Conference Canberra 22 April 1999.

to examine the agency's litigation function and the procurement of external legal services, including 'identifying and implementing litigation best practice'.<sup>2045</sup>

6.153. The establishment of an 'Interagency Working Group' based on the United States model could assist agencies in developing and implementing dispute avoidance and management plans, provide a forum for sharing experience and knowledge for the development of such plans, and assist in the evaluation of dispute management and resolution techniques. The Law Council suggested that if the federal government agrees with this proposal, the interagency working group should be managed and facilitated by the Office of Legal Services Coordination in the Attorney-General's Department.<sup>2046</sup> The Commission agrees with this view.

6.154. Submissions and consultations in response to DP 62 generally supported these proposals.<sup>2047</sup> Officers of the Australian Government Solicitor suggested that the best practice plans should not be overly prescriptive and should constitute a 'blueprint' for practice rather than detailed practice rules, as agencies have different practices, policies and disputes or review matters.<sup>2048</sup> The Commission agrees with this view. Not all disputed decisions or litigated matters are amenable to settlement. Dispute and review management should not be directed to encourage settlement as an end in itself, but to ensure self conscious dispute and case management by government departments, directed to resolve or obtain a determination through effective, appropriate and proportionate processes.

6.155. Each agency needs to see its broader stake in the litigation or review process. It is a false economy for example, if particular agencies save costs by recruiting junior officers as their representatives in tribunal proceedings but the government pays additional costs for delays or tribunal investigation necessitated by inadequate representation.<sup>2049</sup> Where the government or agency is paying the tribunal, the respondent's costs, and the applicant's costs (via costs orders or legal aid funding), there are real financial incentives to develop appropriate, cooperative work arrangements to resolve matters. Such arrangements may involve joint instruction of expert witnesses chosen from approved panels of experts. These matters are elaborated in chapter 9.<sup>2050</sup> The relevant point is that effective dispute or case management requires strategic analysis of the spectrum of dispute resolution options, the costs and effective practices. Dispute management plans assist to develop this approach.



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2045. Commissioner of Taxation *Annual report 1997-98*, 10-11. Recommendations from this committee will be implemented in 1999-2000: Commissioner of Taxation *Annual report 1998-99*, 54.

2046. Law Council *Submission 375*.

2047. See eg Law Council *Submission 375*.

2048. AGS *Consultation* Canberra 29 September 1999.

2049. See para 9.19.

2050. See para 9.197-9.212, rec 133-135.

**Recommendation 68.** The Attorney-General's Department should develop a 'best practice' blueprint applicable to dispute avoidance, management and resolution for federal government departments and agencies.

**Recommendation 69.** Each federal department and agency should be required to establish a dispute avoidance, management and resolution plan. Such plans should be consistent with the model litigant rules.

**Recommendation 70.** An interagency dispute management working group, comprising relevant agency representatives, should be established and coordinated by the Office of the Legal Services Commissioner, to provide a forum for sharing experience and knowledge on dispute management and resolution, to assist in developing dispute avoidance, management and resolution plans, and to evaluate such arrangements.



## 7. Practice, procedure and case management in the Federal Court of Australia

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### Introduction

7.1. This chapter considers case management in the Federal Court under the individual docket system. Particular issues are addressed in relation to native title, representative proceedings and migration cases. The chapter also considers expert evidence and other procedures. The Commission produced a separate issues paper on federal civil litigation and Federal Court case and hearing management and expert evidence were the subject of chapters in Discussion Paper 62.<sup>2051</sup>

### Case types and workload

7.2. The Federal Court's jurisdiction derives from over 120 federal statutes.<sup>2052</sup> In 1998–99, of the 3940 applications lodged in the Court (excluding appeals and bankruptcy), the main case types were in the following proportions: migration 22%,<sup>2053</sup> native title 21%,<sup>2054</sup> corporations 17%, trade practices 9%,

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2051. ALRC Issues Paper 20 *Review of the adversarial system of litigation – Rethinking the federal civil litigation system* April 1997 (ALRC IP 20); ALRC Discussion Paper 62 *Review of the federal civil justice system* August 1999, ch 10, 13 (ALRC DP 62). Expert evidence was the subject of a background paper: ALRC *Experts* January 1999 (ALRC BP 6).

2052. Federal Court *Annual report 1998–99*, 22–24, appendix 5. See also ALRC DP 62 para 10.3.

2053. For a discussion of the management of the migration caseload see para 7.129–7.133.

2054. The native title caseload is particularly high because 793 cases were transferred to the Federal Court from the National Native Title Tribunal (NNTT) on 30 September 1998 pursuant to the

intellectual property 6%, industrial 5%, *Administrative Decisions (Judicial Review) Act 1977* (Cth) (AD(JR))

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*Native Title Amendment Act 1998* (Cth). See para 7.42–7.86 for discussion of case management of native title cases.

5% and taxation 5%.<sup>2055</sup> The Federal Court also has jurisdiction in bankruptcy.<sup>2056</sup> The Commission has not considered bankruptcy matters in this chapter as the majority of such matters are dealt with by registrars. As at 30 June 1999 there were 50 judges of the Court.<sup>2057</sup>

7.3. The Federal Court is also linked with the Australian Competition Tribunal, Administrative Appeals Tribunal, Copyright Tribunal, Defence Force Discipline Appeal Tribunal and Federal Police Disciplinary Tribunal. Several judges are appointed as Presidents, Deputy Presidents or Presidential members of these tribunals and adjudicate matters before the tribunals to which they are appointed, as well as their Federal Court caseload. Registrars and staff of some of these tribunals are officers employed by the Federal Court.<sup>2058</sup>

## Individual docket system

### Analysis and assessment

7.4. The individual docket system (IDS) was adopted in all Federal Court registries on 1 September 1997.<sup>2059</sup> A comprehensive review of the operation of IDS in the Federal Court is being undertaken by the Justice Research Centre (JRC) and is expected to be completed in 2000.<sup>2060</sup> The evaluation is in two parts. Part one is recording how IDS has been implemented. Judges and registry staff have been extensively interviewed. Part two will evaluate IDS, involve users of the Court and analyse data on the impact of IDS on case duration and costs.

7.5. DP 62 detailed the workings of IDS – its purpose, implementation and operation – and made proposals for its refinement.<sup>2061</sup> Comments to the Commission noted that in light of the JRC evaluation of IDS these proposals were premature and should await the results of the JRC study.<sup>2062</sup> The Federal Court stated that it ‘will need to consider the results of the work it has commissioned by the Justice Research Centre before making any decision about changes to IDS or

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2055. For a discussion of the development and expansion of the Federal Court’s jurisdiction see R French ‘Federal courts created by Parliament’ in B Opeskin and F Wheeler (eds) *The Australian federal judicial system* Melbourne University Press 2000 (forthcoming).

2056. Of the 8045 matters filed in 1998–99, 3522 were creditor’s petitions and related applications: Federal Court *Annual report 1998–99*, appendix 6, table 6.1.

2057. Federal Court *Annual report 1998–99*, 2.

2058. id 3–6.

2059. The South Australian registry of the Court has always assigned a judge to preside over a case from commencement until disposition. The Sydney registry has operated under an informal docket system for a number of years, especially for intellectual property and trade practices cases: Federal Court practitioners *Consultations* Sydney 2 June 1999, 4 June 1999 and 16 June 1999.

2060. Justice Research Centre (JRC) *Consultation* 12 October 1999.

2061. See ALRC DP 62 proposal 10.5–10.10.

2062. The Law Council said it ‘wishes to reserve its position on the Commission’s proposals until the Justice Research Centre’s research has been completed. The Law Council believes that any definitive response to these proposals at this stage is premature’: Law Council *Submission 375*; Federal Court *Submission 393*.

what information or guides should be published'.<sup>2063</sup> The Commission supports the evaluation of IDS by the JRC and the benefits for reform that such research

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<sup>2063</sup>. Federal Court *Submission* 393.

provides. The Commission records observations and recommendations on the operation of IDS from its submissions and extensive consultations, noting that such recommendations may be addressed within the JRC study and by the Court on receipt of the JRC report.

7.6. There was unanimous positive feedback in consultations and submissions about the operation of IDS. This is a significant accolade. The Commission consulted with several hundred practitioners from around Australia, experienced in Federal Court litigation, with expert witnesses, some litigants and judges and administrative staff from the Court.<sup>2064</sup> Submissions and consultations were overwhelmingly supportive and complimentary of IDS,<sup>2065</sup> although practitioners did record some areas of concern.

### **Benefits**

7.7. The benefits identified in IDS are those which derive from the same judge dealing with a case from start to finish. The docket judge knows the case and is able to manage and tailor processes for the particular case. Practitioners strongly supported such judicial management and the individual attention given to

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2064. eg Federal Court practitioners *Consultations* Brisbane 18 August 1997, 3 November 1997, 21-September 1999, Sydney 2 June 1999, 4 June 1999, 16 June 1999, 17 September 1999, Melbourne 14 August 1998, 8 August 1999, 25 August 1999, 7 September 1999; AGS *Consultation* Adelaide 10-September 1997, 5 August 1999, 22 August 1999, Darwin 6 October 1999, 19 August 1997, 22-September 1999, Canberra 9 September 1997, 29 September 1999, Melbourne 14 August 1998, 25-August 1999, 8 September 1999, Sydney 5 September 1996; Law Council *Consultation* Canberra 30-May 1997, 29 September 1999; Law Institute of Victoria *Consultation* Melbourne 18 March 1998, 24 August 1999; Law Society of NSW *Consultation* Sydney 28 May 1997, 3 December 1997; Law Society of SA *Consultation* Adelaide 1 September 1997, 3 September 1997, 6 August 1999; Law Society of WA *Consultation* Perth 14 May 1997; NSW Bar Association *Consultation* 24 August 1999, 24 September 1999, 1 October 1999; SA Bar Association *Consultation* Adelaide 23 September 1997, 10 August 1999; Victorian Bar *Consultation* Melbourne 24 November 1997, 25 November 1997, 19-March 1998, 23 August 1999, 26 August 1999, 27 August 1999; Forensic accounting special interest group *Consultation* Sydney May 1999; Federal Court judges *Consultation* Darwin 22 September 1999, Melbourne 15 August 1997, 7 September 1999, Sydney 2 July 1998, 22 October 1999, 26 October 1999 and 1 November 1999; Federal Court staff *Consultation* Sydney 24 February 1998; Federal Court Registrar W Soden *Consultation* 7 April 1999; Federal Court associates *Consultation* Sydney 13 July 1997; Federal Court Deputy District Registrars *Consultation* Melbourne 1 June 1999, Sydney 10 June 1999; Federal Court Native Title Coordinator *Consultation* 1 June 1999; NNTT *Consultation* Sydney 19 May 1997, NNTT Member *Consultation* Sydney 26 May 1997; NNTT *Consultation* Perth 22 September 1999, Darwin 8 October 1999.

2065. Law Institute of Victoria Admin Law Section *Submission* 55; Australian Competition and Consumer Commission (ACCC) *Submission* 67; Australian Corporate Lawyers Association (ACLA) *Submission* 70; NSW Bar Association *Submission* 88; Law Society of SA Civil Law Committee *Submission* 94; Arthur Robinson *Submission* 189; National Legal Aid *Submission* 360; Law Council *Submission* 375; Law Society of SA *Consultation* Adelaide 1 September 1997; Forensic accounting special interest group *Consultation* Sydney May 1999; Federal Court practitioners *Consultations* Sydney 2 June 1999, 4 June 1999, 16 June 1999, Melbourne 8 August 1999, 7 September 1999, Brisbane 18 August 1997 and 21 September 1999; AGS *Consultations* Brisbane 19 August 1997, Canberra 29 September 1999; Victorian Bar Council Admin Law Committee *Consultation* Melbourne 23 August 1999; NSW Bar Assoc *Consultation* 17 September 1999.

cases.<sup>2066</sup> In some registries, registrars conduct directions hearings for particular docket judges.<sup>2067</sup> This 'team' approach is also said to work well.

7.8. One of the stated aims of IDS is to 'minimise the number of events and maximise the result of each event'.<sup>2068</sup> Unnecessary court appearances are discouraged. Parties frequently fax consent orders to the docket judge for approval before listed directions hearings, and directions hearings are often conducted by telephone. With a judge 'in charge', directions hearings are said to be more formal, more productive, and allow earlier exchange of information and narrowing of the issues.<sup>2069</sup> The IDS is said to have prompted solicitors to brief counsel earlier and counsel to more frequently attend directions hearings.<sup>2070</sup> This adds to costs but is said to ensure that each time the matter is before the Court is an occasion to advance or resolve the case and facilitate settlements.<sup>2071</sup> Practitioners noted that such case management contributes to earlier settlements. Certainly in the 681 Federal Court cases sampled by the Commission, a large number of settlements were secured early in the process (57%)<sup>2072</sup> and only 4% of cases settled 'at the door' of the court.<sup>2073</sup> Practitioners also commented favourably on the increased flexibility associated with IDS. Parties have ongoing discussions about substantive and practical management aspects of the case with the judge and speak directly to the docket judge's associate who facilitates flexible listings and 'trouble shooting' of case problems as they arise.<sup>2074</sup> This cooperation between judge and practitioners in the management of the case and the monitoring by the judge of compliance with orders gives direct incentives for improved practitioner conduct and compliance.<sup>2075</sup>

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2066. AGS *Consultation* Brisbane 19 August 1997; Federal Court practitioners *Consultations* Brisbane, 18-August 1997, 21 September 1999, Sydney 2 June 1999, 4 June 1999 and 16 June 1999; Law Society of SA *Consultation* Adelaide 1 September 1997. See also para 6.9, 6.16-6.19.

2067. Federal Court Deputy District Registrars *Consultations* Melbourne 1 June 1999, Sydney 10 June 1999.

2068. See Federal Court homepage <<http://www.fedcourt.gov.au/individual.htm>> (23 January 2000).

2069. Federal Court practitioners *Consultations* Sydney 2 June 1999, 4 June 1999 and 16 June 1999.

2070. Federal Court associates *Consultations* Sydney 13 July 1998; Federal Court Registrar W Soden *Consultation* Sydney 7 April 1999; Federal Court practitioners *Consultations* Sydney 4 June 1999, 16 June 1999 and Melbourne 7 September 1999. The Commission's survey responses from 111-applicant solicitors and 79 respondent solicitors who used counsel showed that counsel were briefed for directions hearings by applicant solicitors in 37% of cases and by respondent solicitors in 24% of cases: T Matruglio *Part two: The costs of litigation in the Federal Court of Australia* ALRC Sydney 1999, 42 table 5 (T Matruglio, Federal Court Empirical Report Part Two).

2071. Federal Court practitioners *Consultation* Melbourne 7 September 1999.

2072. 'Early in the process' means before, at or after a directions hearing or other pre-hearing event and before ADR, interim judgment or a listing for hearing.

2073. 35% of cases proceeded to a final hearing and judgment: T Matruglio & G McAllister *Part one: Empirical information about the Federal Court of Australia* ALRC Sydney March 1999, 28 table 21 (T-Matruglio & G McAllister, Federal Court Empirical Report Part One).

2074. Federal Court practitioners *Consultations* Sydney 2 June 1999, 4 June 1999 and 16 June 1999. The Law Council supports the development of this relationship to enable the parties to approach the judge on an informal basis at short notice to resolve issues and avoid formal applications and unnecessary costs: *Submission* 126.

2075. Law Society of WA *Submission* 78.

7.9. One of the aims of IDS was to improve the time taken to resolve cases. The Court's annual reports show that there has been a continuing improvement in case duration since the introduction of IDS.<sup>2076</sup> Practitioners confirmed to the Commission that case resolution is now more timely and likewise credit IDS.<sup>2077</sup> Submissions and consultations stressed the importance of their fixed trial date for promoting settlements and the effectiveness of processes.<sup>2078</sup> Additional factors may have contributed to the improvement – the Court's power to order compulsory mediation, a temporary decrease in the number of applications filed in the Court<sup>2079</sup> and the changing nature of the case mix – however, the Court reported that IDS was probably the most significant factor.<sup>2080</sup>

7.10. The Commission's study of the sampled cases showed the median period for cases from commencement to disposition was seven months,<sup>2081</sup> 85% of cases were resolved within 1 year 8 months<sup>2082</sup> and 95% of cases were resolved within 2-years 10.5 months.<sup>2083</sup>

#### *Areas of concern with IDS*

7.11. **IDS guide and practice.** The Federal Court's principal registry produced a general guide to IDS to explain its purpose and operation. The Victorian registry has also produced a guide to the operation of IDS in the Victorian registry. All the other registries are developing their own procedural guides.<sup>2084</sup> The 'key events' and the standard case management track set out in the Court's general guide to IDS, are not prescriptive.<sup>2085</sup> Judges retain their discretion to manage their docket as the circumstances of the individual case require.<sup>2086</sup>

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2076. In conjunction with the commitment to IDS the Court set a goal of finalising 98% cases within 18-months of commencement. Between 1 July 1994 and 30 June 1999, 87.5% of cases were completed within 18 months, 80% were completed within 12 months and 64% were completed within six months. There has been a small but steady increase in the number of matters finalised within 18-months. In 1995–96, 83% of matters were completed within 18 months. This figure rose to 85% in 1996–97, 87% in 1997–98 and 91% in 1998–99: Federal Court *Annual report 1998–99*, appendix 6 figure 6.4a.

2077. Federal Court practitioners *Consultations* Sydney 2 June 1999, 4 June 1999 and 16 June 1999.

2078. Victorian Bar *Consultation* Melbourne 24 November 1997; Federal Court practitioners *Consultations* Melbourne 14 August 1997, Brisbane 18 August 1997, 21 September 1999, Sydney 2 June 1999, 4 June 1999 and 16 June 1999; Victorian Bar Admin Law Committee *Consultation* Melbourne 23 August 1999.

2079. The number of applications filed are as follows: 1994–95, 4155; 1995–96, 4307; 1996–97, 3855; 1997–98, 3497; 1998–99, 4523. These figures exclude bankruptcy matters: Federal Court annual reports 1994–95 to 1998–99. The Court's trade practices and corporations law filings have declined. In the past year this has been offset by a significant increase in native title cases. For a discussion of the management of the native title caseload see para 7.42–7.86.

2080. Federal Court *Annual report 1998–99*, 45.

2081. T Matruglio & G McAllister, Federal Court Empirical Report Part One, 30.

2082. T Matruglio *Correspondence* 25 July 1999.

2083. *ibid.*

2084. The guides are available on the Federal Court homepage and in hard copy at the registries <<http://www.fedcourt.gov.au/individual.htm>> (7 December 1999).

2085. See Federal Court homepage <<http://www.fedcourt.gov.au/individual.htm>> (7 December 1999).

2086. The Federal Court's general guide to the individual docket system states

7.12. There are variations between IDS in practice and the description of IDS set out in the general guide as procedures have been developed in response to the different circumstances in each registry or in particular judge's dockets.<sup>2087</sup> For new or infrequent users of the Federal Court it is important that published guides are an accurate reflection of current practices.

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The Court has identified key case management events and has proposed time standards as to when those events should ordinarily occur, although the requirements of each individual case will of course continue to be the paramount consideration:  
<<http://www.fedcourt.gov.au/individual.htm>> (23 January 2000).

2087. Registrar W Soden observed that

[a]ll of the guides produced have been general. They have not been intended to be prescriptive and, at the very heart of the docket system, is a variation in approach ... The procedure guides will of necessity be general and ... differences are likely to occur in approach between Judges and possibly Registries: Federal Court Registrar W Soden *Correspondence* 20 July 1999.



7.13. **Registry differences.** Practitioners have commented that case management procedures and the operation of IDS should be consistent across the registries to reflect the fact that the Federal Court is a national court.<sup>2088</sup> Differences in procedures between registries were of particular concern to firms who practised frequently in the Federal Court such as the Australian Government Solicitor (AGS).<sup>2089</sup> They stated it was difficult to be familiar with procedures in all the registries.<sup>2090</sup> In DP 62 the Commission proposed that the Federal Court should develop a national procedures guide to IDS.<sup>2091</sup> This proposal was supported in submissions received by the Commission.<sup>2092</sup>

**Recommendation 71.** The Federal Court should develop a national procedures guide to the individual docket system. This guide should be regularly revised to correspond with the current practices of the Court.

7.14. **Chamber differences.** There is an acknowledgement and acceptance by the Court and practitioners that within the framework of IDS, judges manage their docket in different ways.<sup>2093</sup> For example, judges may have different expectations and procedures for first directions hearings, use of mediation, listings and monitoring compliance.<sup>2094</sup> Several judges deal with practical variations in their case management by explaining their approach to the parties at the first directions hearing. Some judges have developed guides for matters in their docket which are distributed to parties on filing.<sup>2095</sup>

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2088. Federal civil working group *Meeting notes* 7 July 1999; Federal Court practitioners *Consultations* Sydney 2 June 1999, Melbourne 7 September 1999; Dept of Immigration and Multicultural Affairs (DIMA) *Consultation* Canberra 2 September 1999; Clayton Utz *Submission* 283.

2089. The Australian Taxation Office (ATO) told the Commission that unlike other Federal Court registries the Western Australian registry required parties to file pleadings as well as a Statement of Facts and Contentions in taxation matters: ATO *Consultation* Canberra 29 September 1999.

2090. AGS *Consultations* Canberra 6 July 1999 and 29 September 1999. ATO also commented that there were some procedural inconsistencies between registries: ATO *Consultation* Canberra 29 September 1999.

2091. ALRC DP 62 proposal 10.6.

2092. Victorian Bar *Submission* 367; Law Council *Submission* 375; ACCC *Submission* 396.

2093. Federal Court associates *Consultation* Sydney 13 July 1998; Federal Court Registrar W Soden *Consultation* Sydney 7 April 1999; Federal Court practitioners *Consultations* Sydney 2 June 1999, 4-6 June 1999 and 16 June 1999; Federal civil working group *Meeting notes* 7 July 1999. The Law Council supports the existence of chamber differences as 'consistency should not be at the expense of flexibility. This is particularly the case at the moment, when IDS is relatively new and judges are trying out new approaches and ideas.': Law Council *Submission* 375.

2094. Federal Court associates *Consultation* Sydney 13 July 1998; Federal Court Registrar W Soden *Consultation* Sydney 7 April 1999.

2095. F McRae (Honours thesis) 'The adoption of the Individual List System in the Victorian Registry of the Federal Court of Australia ensures quality and expeditious case management in civil litigation' *Unpublished* Melbourne November 1998, 23 and Federal Court associates *Consultation* Sydney 13 July 1998.

7.15. In DP 62, the Commission proposed that all judges be encouraged to produce a guide to the management of cases in their docket<sup>2096</sup> and that in the Federal Court's overall assessment of IDS the Court should review judge's

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2096. ALRC DP 62 proposal 10.7.

particular management styles to ensure they are consistent with the aims of IDS.<sup>2097</sup> Consultations and submissions concurred as to the inevitability of chamber differences but elicited a mixed response to the use of practitioner guides for individual judges. Consultations with practitioners indicated that it was helpful to be conversant with the judges' practices and have an understanding of what each judge expects.<sup>2098</sup> Such guides also assist unrepresented parties. Some submissions and practitioners indicated concern at the differentiation in practice as between individual judges.<sup>2099</sup> The Law Council was

supportive of proposals that would reveal differences and different practices between judges with respect to IDS. This will ... encourage the development of 'best practice' methods of IDS. The Law Council does not believe, that at this time IDS should have its inherent flexibility restricted or a 'straightjacket' applied to IDS initiatives or innovations ... [it] does not believe it is desirable to encourage judges to have court practices that are so varied so as to require, in effect, each judge to issue his or her own practice direction.<sup>2100</sup>

7.16. The Commission makes no recommendation on practitioner guides for individual judges. It is comparatively early days in the development of the docket system. The JRC is assessing IDS and individual practices. Consistent with a practical evaluation of the workings of IDS, the JRC review should not discourage judges' from developing particular management styles but rather monitor practice variations and their effect.

7.17. **Database management.**<sup>2101</sup> Analysis of case management data is only as good as the data itself. Most prehearing or case events are simply classified in the Court's 'FEDCAMS' data system as a 'directions hearing'. The general guide describes several 'key events'.<sup>2102</sup> The Commission's empirical survey found that no evaluation conferences or trial management conferences were recorded in FEDCAMS as having taken place.<sup>2103</sup> These particular limitations in data recording may be of no consequence and explained by the fact that it can be difficult to characterise the primary purpose of particular hearings. However, the

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2097. ALRC DP 62 proposal 10.8.

2098. Federal Court practitioners *Consultations* Sydney 2 June 1999 and 4 June 1999, Melbourne 7-September 1999; Federal civil working group *Meeting notes* 7 July 1999; Victorian Bar *Submission*-367. In discussing implementation of case management systems, Justice Moynihan observed [t]hose involved in the processes — judges, court officers, legal advisers and clients — should know what is expected of them, and why, and appreciate the consequences of failed actions: M Moynihan 'Towards a more efficient trial process' (1992) 2 *Journal of Judicial Administration* 39, 45.

2099. Law Council *Submission* 375; Federal Court practitioners *Consultation* Sydney 2 June 1999 and 4-June 1999; The Victorian Bar supports the Commission's proposals and stated that it would be better to have uniform practices between judges: Victorian Bar *Submission* 367; DIMA supports the Commission's proposal and 'notes that greater uniformity in such practices would be advantageous': DIMA *Submission* 385.

2100. Law Council *Submission* 375.

2101. For a discussion of data and technology in courts and tribunals see para 6.41-6.51.

2102. See Federal Court homepage <<http://www.fedcourt.gov.au/individual.htm>> (7 December 1999).

2103. T Matruglio & G McAllister, Federal Court Empirical Report Part One 21 table 15.

characterisation of the hearings may be a quality control issue which has implications for the JRC's evaluation of IDS.<sup>2104</sup>

7.18. A customised computer system is essential for the effective operation of IDS because judges and their associates need to have the resources to enable them effectively to manage the docket. The computer system should be able to record the status of a case, past and future listings, orders made and compliance with orders. A new computer system is expected to be in operation in the Court from July 2000.<sup>2105</sup> In the meantime, associates have developed their own databases and management systems in chambers to enable efficient management of dockets. This may unnecessarily increase differences between judges in management practices and data collection.<sup>2106</sup>

7.19. *Hearing delays.* Practitioners consulted by the Commission cited hearing delays as the main problem associated with IDS.<sup>2107</sup> The Commission was told by practitioners that IDS allows greater flexibility within a docket but less flexibility across the Court.<sup>2108</sup> Practitioners said that while a listing manager can arrange for urgent matters to be heard by a duty judge, problems arose when one or two day matters, not strictly urgent, or interlocutory matters of half a day duration, were unable to be heard by the docket judge for 6 months or more.<sup>2109</sup> Delays occurred when the judge had a full docket and was unable to give a timely hearing date.<sup>2110</sup>

The docket of a particular judge is likely to be full at such a time and not able to accommodate the fixing of trials in all matters. It will therefore be necessary for some matters to float, or for certain matters to be allocated to a new judge if the docket judge becomes involved in a long-running case.<sup>2111</sup>

7.20. Sydney practitioners stated that certain judges were reluctant to transfer cases between dockets in order to facilitate earlier hearing dates.<sup>2112</sup> This problem may be alleviated by more effective listing practices. Certain judges told the Commission that they found IDS works most efficiently and flexibly if one week blocks are left vacant for hearings between long cases or every two to three months

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2104. See also T Matruglio and G McAllister *Part one: The status of data collection and evaluation research in the Federal Court, the Family Court and the Administrative Appeals Tribunal* ALRC Sydney January 1998.

2105. Federal Court Registrar W Soden *Consultation* Sydney 7 April 1999.

2106. Federal Court associates *Consultation* Sydney 13 July 1998.

2107. Federal Court practitioners *Consultations* Sydney 2 June 1999 and 4 June 1999, Melbourne 7-September 1999, Brisbane 21 September 1999; AGS *Consultation* Brisbane 22 September 1999. The Law Council commented that 'it has been the experience of a number of legal practitioners that IDS can create 'log jams' and delays in hearings': Law Council *Submission* 375.

2108. Federal Court practitioners *Consultations* Sydney 2 June 1999, 4 June 1999 and 16 June 1999, Melbourne 7 September 1999, Brisbane 21 September 1999; AGS *Consultation* Brisbane 22 September 1999.

2109. Federal Court practitioners *Consultations* Sydney 2 June 1999 and 4 June 1999, Melbourne 7-September 1999, Brisbane 21 September 1999; AGS *Consultation* Brisbane 22 September 1999.

2110. Federal Court practitioners *Consultations* Sydney 2 June 1999 and 16 June 1999.

2111. Arthur Robinson *Submission* 189.

2112. Federal Court practitioners *Consultation* Sydney 4 June 1999.

to allow for urgent matters and judgment writing.<sup>2113</sup> This prevents a docket becoming jammed.

7.21. The Court has listing managers in the busier registries of Sydney and Melbourne. The Commission's consultations indicated practitioners are not aware of the role of the listing manager or their equivalent in different registries. In DP62 the Commission proposed that the listing manager should be responsible for monitoring hearing date allocations and responding to queries about hearing dates.<sup>2114</sup> Submissions and consultations supported this proposal.<sup>2115</sup> It was agreed that a transparent arrangement is needed to solve the problem of hearing delays. The Law Council while reserving its position in relation to the listing manager until the JRC research is completed, agreed

that a 'circuit-breaker', such as a listing manager, may be required in each registry to assist the judges with listings and to prevent 'log jams' from occurring.'<sup>2116</sup>

**Recommendation 72.** To ensure the continued effective functioning of the individual docket system and avoid any listing problems which may result from busy dockets, the Federal Court should ensure that

- a protocol or practice note is circulated for listing and dealing with cases which are ready for hearing but are not listed for hearing by the docket judge within a reasonable time and
- listing management practices are adequately publicised.

7.22. **Docket management.** Practitioners have commented to the Commission that since the advent of IDS, judges appear to have a heavier workload with increased time in court and ongoing docket management responsibilities.<sup>2117</sup> Each judge's docket contains an average of 80 matters<sup>2118</sup> and the parties' primary contact with the Court from the first directions hearing to disposition is with the

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2113. Federal Court judges *Consultations* Sydney 13 July 1999 and 23 July 1999.

2114. ALRC DP 62 proposal 10.10.

2115. Victorian Bar *Submission 367*; Law Council *Submission 375*; Federal Court practitioners *Consultations* Sydney 2 June 1999, 4 June 1999 and 16 June 1999. A suggestion made by practitioners was that a Practice Note could be developed stating that if a docket judge is unable to list a matter of two days or less within 2 months of it being ready for hearing, the docket judge must ask the parties if they would like to have the matter heard earlier before another judge. If the interlocutory matter is heard by another judge, the case nevertheless remains in the original docket. The practitioners also suggested the establishment of a system that enabled parties to notify a nominated person at the Court (such as the listing manager) of any problems with the allocation of hearing dates, so that the Court was aware of all listing problems and was able to address them in a consistent manner: Federal Court practitioners *Consultation* Melbourne 7 September 1999.

2116. Law Council *Submission 375*.

2117. Federal Court practitioners *Consultations* Sydney 2 June 1999, 4 June 1999 and 16 June 1999.

2118. Federal Court Registrar W Soden *Consultation* Sydney 7 April 1999.

judge's associate outside court time<sup>2119</sup> and with the docket judge for almost all court appearances.<sup>2120</sup> Judges are undertaking new managerial responsibilities. The Court has acknowledged to the Commission that specific training may assist some judges to develop the skills necessary to perform these functions.<sup>2121</sup> A bench book developed by the Court for use by its judges was updated in late 1998 to incorporate IDS changes.<sup>2122</sup>

7.23. **Panels.** Specialist panels of judges operate in the larger registries of Sydney and Melbourne in areas such as intellectual property, taxation, trade practices (Part IV cases), human rights, admiralty and industrial law. Cases within

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2119. Federal Court associates *Consultation* Sydney 13 July 1998.

2120. Return of subpoenas and court appointed mediations are still dealt with by registrars.

2121. Judicial education is discussed in ch 2.

2122. Federal Court Registrar W Soden *Consultation* Sydney 7 April 1999.

these areas are randomly allocated to a judge on the specialist panel in the same way other cases are allocated under IDS. The panels are self selected, that is, judges nominate the panels on which they would like to sit.<sup>2123</sup>

7.24. Various changes to the panel system have been suggested in consultations and submissions including that a representative proceedings panel should be established,<sup>2124</sup> that the industrial panel should be expanded<sup>2125</sup> and that the intellectual property panel should be reduced.<sup>2126</sup> There are differing views within the Court and the profession on the role and composition of judge panels. Essentially this is a debate about whether judges should be generalists or specialists. Whilst expertise in an area should be encouraged, there is a danger that a panel which is too small and specialised may create a 'club' culture, promote a matching mythology of expertise amongst the profession, encourage monopolies and constrain jurisprudence.<sup>2127</sup> There is a desirable balance between expertise and accessibility, between the desire for specialist judges and a restricted club of specialists. The Federal Court is well aware of and appropriately sensitive to the competing needs in the formation of panels.<sup>2128</sup> The Commission is not disposed to make any recommendations on these matters.

## Appeals

7.25. The Full Federal Court has a diverse appellate jurisdiction to hear and determine

- appeals from judgments of the Federal Court constituted by a single judge<sup>2129</sup>
- appeals from judgments of the Supreme Court of a Territory<sup>2130</sup> and

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2123. Federal Court *Consultation* Melbourne 7 September 1999.

2124. Federal Court practitioners *Consultations* Sydney 4 June 1999 and Melbourne 25 August 1999; Law Council *Submission 375*; Clayton Utz *Submission 283*. Other practitioners noted that it may be more important to have the case heard by a judge with expertise in the area of substantive law on which the representative proceeding is based.

2125. Federal Court practitioners *Consultation* Melbourne 8 September 1999; AGS *Consultation* Melbourne 25 August 1999.

2126. The Intellectual Property Advisory Committee rejected submissions in 1991 and 1992 for a specialist court or a specialist division of the Federal Court for intellectual property matters and in 1993 the Hilmer Committee rejected suggestions that there should be a specialist division of the Federal Court for competition matters: R French 'Federal courts created by Parliament' in B Opeskin and FWheeler (eds) *The Australian federal judicial system* Melbourne University Press 2000 (forthcoming).

2127. Federal Court Judge *Consultation* Sydney 26 October 1999.

2128. Federal Court *Consultation* Melbourne 7 September 1999.

2129. Federal Court Act s 24(1)(a).

2130. That is, decisions of the Supreme Court of the ACT and the Supreme Court of Norfolk Island. 'Supreme Court of a Territory' does not include the Supreme Court of the NT: Federal Court Act s24(6).

- in such cases as are provided for by any Act, appeals from judgments of a court of a State (other than a Full Court of a State Supreme Court) exercising federal jurisdiction.<sup>2131</sup>

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<sup>2131</sup>. Federal Court Act s 24(1)(c).



7.26. The Court has a substantial appellate workload. The number of appeals to the Full Court general division over the past seven years has increased from 265 in 1992–93 to 419 in 1998–99.<sup>2132</sup> The management of appellate cases raises important issues. The Federal Court has suggested in consultations that the management of its appellate caseload is a particular concern.<sup>2133</sup> This concern is reflected by the following statement in their latest annual report.

The Court is concerned at the possible effects of the increase in the number of appeals on its ability to continue to hear its appellate workload efficiently, effectively and in a timely manner.<sup>2134</sup>

7.27. The Chief Justice is responsible for the establishment of appeals benches. The Federal Court does not operate an appeal division – all Federal Court judges hear appeals. Full Federal Court sittings are scheduled periodically through the year. The challenge is to reserve periods of time for Full Court sittings and writing appeal judgements, while managing and determining individual docket cases.

7.28. The Court has recently developed a new Full Court rostering system to increase the national Full Court sittings from three to four. These sittings are each of four weeks duration.<sup>2135</sup>

One of the purposes of the new system is to provide greater uninterrupted periods of time for individual docket work for judges allocated to Full Courts, and to enable judges not required for Full Courts to list individual docket cases during the Full Court sittings period.<sup>2136</sup>

7.29. The administration of appeals by the Court, such as the processing of appeal notices, the settling of appeals indexes and the organisation of the initial meeting between the parties is undertaken by the registrars and Court staff. In general, appeals are managed to hearing by Court registrars.<sup>2137</sup> Appeal cases require less intensive case management than matters at first instance. The interlocutory steps in appellate proceedings focus on the preparation of appeal books and other written material.

7.30. The Court's Practice and Procedure Committee has been active in considering the management of appeals. The Committee has identified a range of issues including

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2132. Federal Court *Annual reports* 1996–97 and 1998–99.

2133. Federal Court Registrar W Soden *Consultation* Sydney 7 April 1999.

2134. Federal Court *Annual report* 1998–99, 13.

2135. Federal Court *Annual report* 1997–98, 12.

2136. *ibid.*

2137. Where an interlocutory matter arises before call-over, the judge who is to conduct the call-over will normally deal with it on a notice of motion. Alternatively, the matter may be dealt with by the duty judge or the senior judge of a registry. Where a date for hearing has been set, interlocutory proceedings will be dealt with by one of the judges on the panel to hear the matter.

- limits on the length of appeal hearings
- limits on oral advocacy and evidence in appeals
- more active involvement by appeal court judges in pre-hearing preparation in order to shorten hearings
- the use of staff lawyers to summarise and highlight issues of fact and law in appeals, for judges
- the use of ADR to encourage settlement of appeals, to assist in defining appeal issues and other case management purposes
- the introduction of electronic appeals books
- broadening the categories of decisions requiring leave to appeal
- issuing of short form reasons for judgment in appropriate cases
- the use of two judge courts in particular case categories that presently require at least three judges.<sup>2138</sup>

7.31. There is limited information available on the case management or caseload problems faced by federal appellate courts. The Commission has not conducted a detailed survey of issues and options for reform of appellate processes in the Federal Court. In DP 62, the Commission proposed that the Federal Court should implement short form reasons for judgment and the use of two judge appeal courts.<sup>2139</sup> The discussion below addresses these issues and reports on the response to the Commission's proposals. Given the limited investigation of these matters, the Commission does not make any specific recommendations in relation to them but supports the Federal Court's continuing consideration of these issues.

### **Short form reasons for judgment**

7.32. In the United States, courts in particular case categories issue 'memorandum decisions' instead of full reasons for judgment, where the court determines that full judgments would have no precedential value.<sup>2140</sup> The United States Court of Appeals for the Third Circuit has adopted a policy which provides that full reasons for judgment are appropriate when any one of the following circumstances is present

- in deciding the appeal the court enunciates a new rule of law or modifies an existing rule
- in deciding the appeal the court resolves a conflict or apparent conflict of authority
- the court is not unanimous in its decision
- the decision relates to a matter of public interest.<sup>2141</sup>

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<sup>2138</sup>. Federal Court *Annual report 1998-99*, 13.

<sup>2139</sup>. See ALRC DP 62 proposal 10.11-10.12.

<sup>2140</sup>. D Ipp 'Reforms to the adversarial process in civil litigation - Part II' (1995) 69 *Australian Law Journal* 811, 818-819.

<sup>2141</sup>. *ibid.*

7.33. The policy provides that a memorandum opinion (ordinarily no more than a page in length) will otherwise be employed, especially in cases in which the

- issues involve the application of well settled rules of law
- issue asserted is whether the evidence is sufficient and it clearly is
- disposition of the appeal is clearly controlled by a settled rule of law where no good reason exists for reviewing that rule
- decision of the court or the agency being reviewed identifies and discusses all the issues being presented and the appellate court approves of the conclusions and reasons.<sup>2142</sup>

7.34. Short form judgments may be used in the New South Wales Court of Appeal when dismissing an appeal if the Court is in unanimous agreement that the appeal does not raise any question of general principle.<sup>2143</sup>

7.35. The amendment in the Federal Magistrates Bill, Schedule 12 to section 28 of the Federal Court Act which allowed short form judgments to be used in appropriate cases, is not contained in the *Federal Magistrates (Consequential Amendments) Act 1999* (Cth).<sup>2144</sup>

7.36. Short form judgments are not widely supported by the profession.

The Law Council remains concerned that the concept of 'short form' or 'memorandum reasons' may serve to compromise the common law doctrine of accountability of judges through their obligations to provide fully reasoned decisions.<sup>2145</sup>

The [Victorian] Bar Council opposes any move that would relieve judges from the responsibility of issuing full reasons for judgment. Even where a judgment has no value as a precedent, the parties to litigation are ill-served by reasons for judgment in memorandum or short form.<sup>2146</sup>

## Two judge appeal courts

7.37. Another measure to alleviate caseload pressures on appellate courts involves the use of two judge courts in particular categories of case. Justice Ipp noted that two judge panels are used in many United States jurisdictions and in South Africa.<sup>2147</sup>

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2142. D Meador et al *Appellate courts: Structures, functions, processes and personnel* Michie Co Charlottesville Virginia 1994, 1-5 as cited in D Ipp 'Reforms to the adversarial process in civil litigation – Part II' (1995) 69 *Australian Law Journal* 811, 818-819.

2143. *Supreme Court Act 1976* (NSW) s 45.

2144. The *Federal Magistrates (Consequential Amendments) Act 1999* (Cth) came into operation on 23 December 1999.

2145. Law Council *Submission* 375.

2146. Victorian Bar *Submission* 367.

2147. D Ipp 'Reforms to the adversarial process in civil litigation – Part II' (1995) 69 *Australian Law Journal* 811, 819.

7.38. The Bowman Report recommended that consideration be given to the greater use of two judge courts in the English Court of Appeal, where no fundamental point of principle or practice is involved.<sup>2148</sup> More recently the Lord Chancellor has proposed that legislative provisions prescribing the constitution of courts in appeal hearings<sup>2149</sup> should be removed and replaced with a provision that the Court of Appeal may sit for the purpose of exercising any of its jurisdiction in constitutions of one, two or more judges.

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2148. G Bowman *Review of the Court of Appeal (Civil Division) – Report to the Lord Chancellor* Lord Chancellor's Dept London 1997, rec 36.

2149. *Supreme Court Act 1981* (UK) s 54.

The principle behind this proposal is that of proportionality. Valuable resources should not be devoted to cases which have no real need of them. A move towards allowing judicial discretion to determine the constitution of the court according to the individual nature of the case sits well with the general principle of introducing greater case management, which runs through the whole of the civil justice reforms.<sup>2150</sup>

In DP 62, the Commission proposed that the Federal Court Act be amended to permit the use of two judge courts in appeals at the discretion of the Chief Justice.<sup>2151</sup> The Victorian Bar Council supported this proposal.<sup>2152</sup> The Law Council stated that it has reservations about two judge appeal courts and that the proposal requires further consideration and justification.<sup>2153</sup>

7.39. Two judge appeal courts raise the question of what happens when the two judges do not agree.<sup>2154</sup> Section 16 of the Federal Court Act states that if the judges constituting a Full Court for the purposes of any proceeding are equally divided in opinion, in the case of an appeal from a single judge of the Court or a State or Territory Supreme Court, the judgment appealed from is affirmed and in any other case the opinion of the Chief Justice or, if he or she is not a member of the Full Court, the opinion of the senior judge, shall prevail.

7.40. The Law Council suggested that rather than having two judge appeal courts at the discretion of the Chief Justice, it would be more appropriate for legislation to provide categories of cases where two judge appeal courts may be used, with discretion then afforded to the Chief Justice to constitute them.<sup>2155</sup> The Federal Court is currently considering this issue.<sup>2156</sup>

## **Powers to dismiss proceedings**

7.41. In 1998, in *D'Ortenzio v Telstra*<sup>2157</sup> the question was raised whether a single judge has jurisdiction to dismiss an appeal where the appellant had failed to properly invoke the appellate jurisdiction of the Court because of the fundamental inadequacy of the appeal documents.<sup>2158</sup> Justice O'Loughlin concluded that as the power to stay or strike out an appeal was not included in section 25 of the Federal Court Act,<sup>2159</sup> he was not empowered to dismiss the appeal. His Honour said

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2150. Lord Chancellor's Dept (Consultation paper) *The Court of Appeal (Civil Division): Proposal for change to constitution and jurisdiction* Lord Chancellor's Dept London July 1998, ch 2 para 2-3.

2151. ALRC DP 62 proposal 10.12.

2152. Victorian Bar *Submission* 367.

2153. Law Council *Submission* 375.

2154. This was raised by the Law Council: *Submission* 375.

2155. Law Council *Submission* 375.

2156. Federal Court *Annual report 1998-99*, 13.

2157. (1998) 154 ALR 577.

2158. That is, by exercising the powers of the Court under Federal Court Rules O 20 r 2(1).

2159. Which sets out powers of a single judge in exercising the Federal Court's appellate jurisdiction.

I regard this question as one of practical and increasing importance. The number of self-represented litigants who are approaching the Full Court is increasing and if a single judge is empowered to deal with inadequate documents or deficiencies in documents by using the powers that are contained in Order 20, r 2(1), it would greatly assist the expeditious handling of the Court's business.<sup>2160</sup>

Submissions supported the amendment of the Federal Court Act to permit a single judge to exercise powers of the Federal Court to stay or dismiss appeals where no available ground of appeal is disclosed.<sup>2161</sup>

**Recommendation 73.** Section 25 of the *Federal Court Act 1976* (Cth) should be amended to allow a single judge in an appeal, to exercise powers to stay or dismiss an appeal where no available ground of appeal is disclosed.

## Native title

7.42. Native title is a unique and relatively new area of law with a limited but developing jurisprudence. Native title disputes are potentially complex, with complexity deriving in particular cases, from features including

- the number of parties involved<sup>2162</sup>
- the existence of related disputes<sup>2163</sup> including overlapping boundaries representing areas of shared indigenous responsibility, different responsibilities for country in an area of competing claims, indigenous groups with historical and traditional connection to the same country, and family or other group conflicts, as well as conflicting interests between land users and between different State and Territory agencies<sup>2164</sup>
- the need for historical, genealogical and anthropological evidence and the difficulties parties experience in obtaining expert assistance in such matters
- the evidentiary burden on, and complex factual investigations required of claimants to prove that their group, at the date of sovereignty, held native

2160. *D'Ortenzio v Telstra* (1998) 154 ALR 577, 583.

2161. Victorian Bar *Submission 367*; Law Council *Submission 375*; DIMA *Submission 385*.

2162. National Native Title Tribunal (NNTT) President G Neate said 'It is not uncommon for there to be scores and even hundreds of parties.': G Neate 'Resolving native title issues: The relationship between the Federal Court of Australia and the National Native Title Tribunal' *Paper Federal Court of Australia Native Title Workshop Sydney 15 April 1999*, 37.

2163. G Neate 'Resolving native title issues: The relationship between the Federal Court of Australia and the National Native Title Tribunal' *Paper Federal Court of Australia Native Title Workshop Sydney 15 April 1999*. The registration test (*Native Title Act 1993* (Cth) s 61-62, 190A-C) was developed in response to, amongst other things, the number of overlapping claims between Aboriginal groups and resultant intra-indigenous disputes.

2164. NNTT *Annual report 1996-97*, 31.

title and that their group maintains a connection with their traditional lands based on their traditional laws and customs<sup>2165</sup>

- the cultural understanding required and practical difficulties associated with taking evidence effectively from claimants
- complexity of the legislation, including state and territory legislation
- State divisions and differences

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2165. M Barker *Submission* 395.

- the relative novelty of the processes and practice — many parties lack understanding about native title and the processes of the National Native Title Tribunal (NNTT) and the Court<sup>2166</sup>
- complex determinations of the impact of colonial and State and Territory property law and legislation
- the concept of a communal title
- complex land use issues such as how native title can be used consistently with existing federal, state, territory and local government land use management systems.

These features help to explain why this litigation is so time consuming and costly for the parties and the Court. *Yorta Yorta*<sup>2167</sup> had 114 hearing days, *Ward*<sup>2168</sup> had 83, *Croker Island*<sup>2169</sup> had 23 and *Hayes*<sup>2170</sup> had 35.

An additional, related feature that explains why the litigation is so time consuming, is that at least to this point, respondents such as the State of Western Australia, have not been prepared to concede that native title exists, or have not been prepared to concede any of the material elements that must be proved in order to establish that native title exists.<sup>2171</sup>

7.43. The potential appellate workload is also significant. For example, in the *Ward* appeal to the Full Federal Court there were 19 counsel, approximately 2000-pages of outline submissions, 3 weeks of oral submissions and 350 title extinguishment issues.<sup>2172</sup> Court hearings can be very costly for parties. In the *Ward* hearing at first instance, the costs for the West Australian government were approximately \$8 million — approximately \$3.4 million of the State's costs and \$4.7million of the applicants' costs as a result of a costs order. By comparison the annual pastoral lease fees in Western Australia are approximately \$498 000.<sup>2173</sup>

## Overview of the role of the Federal Court and the National Native Title Tribunal

2166. NNTT President G Neate said:

Much of the effort of Tribunal members and staff is directed to pre-mediation education of parties and local communities about the nature of native title and the processes of mediation, so that once the formal mediation meetings take place all the participants have at least a common basic understanding of the process and the possible outcomes: G Neate 'Resolving native title issues: The relationship between the Federal Court of Australia and the National Native Title Tribunal' *Paper Federal Court of Australia Native Title Workshop Sydney 15 April 1999*, 38.

2167. *The members of the Yorta Yorta Aboriginal Community v Victoria* (unreported) [1998] FCA 1606, 18-December 1998.

2168. *Ward v Western Australia* (1998) 159 ALR 483.

2169. *Yarmirr v Northern Territory* (1998) 156 ALR 370.

2170. *Hayes v Northern Territory* (unreported) [1999] FCA 1248, 9 September 1999.

2171. M Barker *Submission* 395.

2172. Justice Beaumont, Chairman of the Native Title Co-ordination Committee, Federal Court *Consultation Sydney 1 November 1999*.

2173. NNTT *Correspondence* 14 December 1999. For costs decision see *Ward v Western Australia* (1999) 163ALR 149.



7.44. The *Native Title Act 1993* (Cth)<sup>2174</sup> (Native Title Act) provides for recognition and protection of native title (and the way future dealings affecting native title may proceed), compensation for native title holders and validation of past acts which are inconsistent with native title. Negotiation and agreement is encouraged by the Act. The Court's role is to make determinations of native title and compensation. The NNTT has a varied role which includes the power to undertake mediations in native title matters, provide assistance in the making of indigenous land use agreements and agreements about statutory access rights and to make determinations in relation to certain future acts, as the arbitral body under the right to negotiate scheme. The NNTT registrar is responsible for maintaining registers of native title claims, approved native title determinations and indigenous land use agreements.

7.45. All applications for the determination of native title or compensation are filed in the Federal Court. The Federal Court and the NNTT work concurrently to process and determine claims.

7.46. The first stage in the process requires the Court to conduct a preliminary assessment of the application's compliance with procedural requirements. If the application does comply it is referred to the NNTT, where the NNTT registrar is required to notify the State or Territory government and representative bodies for the area covered in the application.

7.47. The second important stage is the application of the registration test by the NNTT registrar.<sup>2175</sup> If the registrar does not accept the claim for registration, the applicant may apply to the Court for a review of the decision.<sup>2176</sup> The registration test confers some procedural rights on applicants before native title is determined. The registration test does not determine claims. Applications which fail the registration test are not precluded from mediation but the applicants do not have a right to negotiate.<sup>2177</sup>

7.48. The third stage, once the registration test has been applied, is the notification concerning the application.<sup>2178</sup> Notification of native title applications can be costly and time consuming. There can be a large number of persons or entities with proprietary interests in the area covered by the claim or who may be affected by a determination of the claim.<sup>2179</sup> When such notifications have been

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2174. As amended by the *Native Title Amendment Act 1998* (Cth).

2175. *Native Title Act* s 61–62, 190A–190C.

2176. *Native Title Act* s 190D.

2177. Passing or failing the registration test does not necessarily reflect the merit of the application – registration confers certain rights such as the right to negotiate in future acts.

2178. *Native Title Act* s 66(3), (6).

2179. *Native Title Act* s 66(3).

finalised, the fourth stage is for the Court to identify and determine the parties to the application.<sup>2180</sup>

7.49. Once the parties are identified the Court exercises its discretion as to whether to refer the application (or part of it) to the NNTT for mediation. The Court will refer the application for mediation unless it considers that mediation is unnecessary or that there is no likelihood of the parties being able to reach agreement.<sup>2181</sup> Mediation in the NNTT may be protracted and during the mediation the NNTT may refer questions of fact or law to the Federal Court for determination.<sup>2182</sup> If the mediation is successful, the mediated agreement is referred to the Court. If the Court considers the agreement appropriate, it may make a determination of native title consistent with the agreement.<sup>2183</sup> If the mediation is not successful, the NNTT provides a mediation report to the Court and the Court proceeds with the determination of native title or refers part or all of the proceeding back to the NNTT for further mediation. In the context of this elaborated process there is a need for close working arrangements between the Federal Court and the NNTT.

### **The Federal Court's native title caseload**

7.50. On 30 September 1998 the Native Title Act, in 'extensive' and 'pervasive',<sup>2184</sup> changes effectively transferred the overall management of native title cases from the NNTT to the Federal Court.<sup>2185</sup> The amendments have significantly broadened the Court's jurisdiction and increased its caseload. In dealing with native title matters in its jurisdiction, the Court has various specific powers including power to

- make determinations of native title in relation to an area for which there is no approved determination of native title<sup>2186</sup>
- revoke or vary an approved determination of native title on specified grounds<sup>2187</sup> and
- make a determination of compensation and orders in relation to the payment of amounts held in trust.<sup>2188</sup>

7.51. As at 30 September 1998, all claimant, non claimant and compensation applications had to be filed at the Court and all 794 existing applications before the

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2180. Native Title Act s 84.

2181. Native Title Act s 86B(3).

2182. Native Title Act s 86D.

2183. Native Title Act s 87(2), (3).

2184. G Neate 'Future directions in native title' *Paper* The Centre for Energy and Resources Law Seminar Melbourne 17 March 1999.

2185. The roles of the Federal Court and the NNTT are discussed below in para 7.58-7.74.

2186. Native Title Act s 4(7)(a), 13(1)(a), 44C, 60A(1)(a), 61, 94A, 225.

2187. Native Title Act s 4(7)(a), 13(1)(b), (4), (5), 60A(1)(a), 61, 68, 94A, 225.

2188. Native Title Act s 4(7)(a), 13(2), 50, 52, 53, 60A(1)(a), 61, 94. On the scheme for determining compensation see s 48-54.

NNTT<sup>2189</sup> were transferred to the Court.<sup>2190</sup> Some 58 matters were already before the Court at that date, having been previously referred by the NNTT under the original provisions of the Native Title Act.<sup>2191</sup> Between 30 September 1998 and 29 September 1999, 80 new applications were filed in the Court.<sup>2192</sup> The Court expects native title applications to peak next year with 20–30 new applications each in Western Australia and Queensland. Overall there are expected to be 90–100 new

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2189. Federal Court *Annual report 1998–99*, 50. They comprised 712 claimant applications, 29 compensation applications and 53 non claimant applications.

2190. For a discussion of the operation of the NNTT prior to the transfer date see ALRC Issues Paper 25 *Review of the adversarial system of litigation: ADR – its role in federal dispute resolution* ALRC Sydney June 1998, ch 4 (ALRC IP 25).

2191. The NNTT had referred them to the Court under s 74 of the original Native Title Act.

2192. NNTT *Correspondence* 14 December 1999.

claims up to June 2001.<sup>2193</sup> Twenty five percent of the new claimant applications are expected to be in response to 'future act' activity and are likely to attract fewer number of parties than the larger, 'country' applications.

7.52. As outlined in DP 62, the Court has established a native title coordination committee, bench book, judicial education programs and a section on the Federal Court homepage for native title matters.<sup>2194</sup> The native title coordination committee works with the NNTT and the Court convenes meetings of user groups in various cities and towns to discuss future options for native title case management.

In general terms the aim of each native title user group is to allow the Court to explain its procedures to the people who use the Court; and to allow the users to explain to the Court their requirements and the extent to which the procedures can be modified to work better.<sup>2195</sup>

7.53. The Commission received favourable comment in consultations and submissions concerning arrangements for native title cases in the Federal Court.<sup>2196</sup> The Law Council, for example, noted that the Federal Court 'is managing its burgeoning native title jurisdiction in a sensible and progressive manner'.<sup>2197</sup>

7.54. Of the native title applications before the Court there are approximately 300 contested claimant applications.<sup>2198</sup> If all these cases went to a full hearing each Federal Court judge would be required to conduct six hearings. On the basis of the four native title hearings already completed by the Federal Court,<sup>2199</sup> each similar case could take 6–8 months for a judge to determine: about two weeks pre-hearing reading, 2–3 months collecting evidence and hearing submissions and 3–4 months for judgment writing. The Law Council stated that 'the impact of the native title work on the judicial and other resources of the Court will be very significant'.<sup>2200</sup> The Registrar of the Federal Court noted

The number of [native title] cases coming through and the size of them is a worry in terms of our capacity to deal with them within the timeframes that we would like to deal with them, having regard to expectations out there. We are starting to hear cases that ... are really extraordinary in the length of time they take ... There might be backlogs

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2193. L Anderson, National native title coordinator, Federal Court *Consultation* Melbourne 1 June 1999.

2194. ALRC DP 62 para 10.36–10.37.

2195. Federal Court *Annual report 1998–99*, 51.

2196. NNTT *Consultations* Perth 22 September 1999 and Darwin 8 October 1999; Law Council *Submission* 375.

2197. Law Council *Submission* 375.

2198. Justice Beaumont, Chairman of the Native Title Co-ordination Committee, Federal Court *Consultation* Sydney 1 November 1999.

2199. *Hayes v Northern Territory* (unreported) [1999] FCA 1248, 9 September 1999; *Yarmirr v Northern Territory* (1998) 156 ALR 370; *Ward v Western Australia* (1998) 159 ALR 483; *The members of the Yorta Yorta Aboriginal Community v Victoria* (unreported) [1998] FCA 1606, 18 December 1998.

2200. Law Council *Submission* 375.

and there will just be no capacity for us to have any sort of spare resources in the foreseeable future.

I think we will still be dealing with a lot of native title work in five years time ... I have had a look at what we could list by way of trials that are getting ready for listing in the next two years. If we just went ahead and listed all of these, it would follow that nearly all of our judges across Australia would be dealing with long native title trials at the one time. It is impossible to allow that to happen because there is a whole lot of other work that has to be done. We are going to have to somehow find other solutions.<sup>2201</sup>

7.55. Practitioners have told the Commission that the future native title workload for the Court is not as onerous as these figures suggest<sup>2202</sup> and 'the view should not be taken...that there is a crisis facing the administration of justice in this area'.<sup>2203</sup> Determinations by the High Court in the three cases which have already been heard by the Full Federal Court — *Ward, Yorta Yorta* and *Croker Island*<sup>2204</sup> — will resolve many of the issues relating to the extinguishment and content of native title. The resolution of these issues should reduce the number and length of cases to be heard by the Court as many more cases should reach mediated agreements. In cases where agreement cannot be reached, practitioners indicated the length of the trial should be reduced as relevant principles governing proof and extinguishment of native title will not be contested.<sup>2205</sup>

Thus, in my view, within a relatively short time period, say 2–5 years, the number of applications that will need to go to a full trial on native title (or on all of the current issues that go to proof of native title) or extinguishment issues, should be considerably reduced.<sup>2206</sup>

7.56. Although there are differing opinions and predictions about the future workload and resolution time for native title cases, there is little real difference in the expectations of the Court and parties. The Commission's discussion of the Court's future native title workload is not set down to engender or support a sense of crisis concerning this litigation. It does indicate the need for consultation, appropriate prediction and planning. It is important that the parties, the Court and the NNTT discuss matters relevant to the fair and efficient resolution of native title cases to develop some consensus about management options and a common understanding about the management of native title litigation. As one practitioner

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2201. Evidence given by Registrar Soden, Federal Court of Australia to the Senate Legal and Constitutional Committee on the Federal Magistrates Bill 1999 and the Federal Magistrates (Consequential Amendments) Bill 1999 Reference Committee *Hansard* 18 August 1999.

2202. Law Society of WA *Submission* 389; M Barker *Submission* 395; Native title practitioner *Consultation* Perth 1 December 1999.

2203. M Barker *Submission* 395.

2204. *Ward v Western Australia* (1998) 159 ALR 483; *The members of the Yorta Yorta Aboriginal Community v Victoria* (unreported) [1998] FCA 1606, 18 December 1998, *Yarnirr v Northern Territory* (1998) 156 ALR 370.

2205. The Law Society of WA *Submission* 389; Native title practitioner *Consultation* Perth 1 December 1999; M Barker *Submission* 395.

2206. M Barker *Submission* 395.

commented 'all those currently engaged in native title litigation are gaining valuable experience quickly as to the most efficient way to deal with such litigation'.<sup>2207</sup>

7.57. The Federal Court reported that it aims to ensure 'that the native title cases will be managed, heard and determined in a timely and appropriate manner'.<sup>2208</sup> The Federal Court told the Commission that following consultations with participants at user group meetings it has set a goal of three years to dispose

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<sup>2207</sup>. *ibid.*

<sup>2208</sup>. Federal Court *Annual report 1998-99*, 51.

of all the native title cases currently before the Court.<sup>2209</sup> This is a goal. It is not intended to be prescriptive. Not all participants agree with it. There are concerns that such a goal could limit opportunities for effective mediation in the NNTT. The experience of all those involved has been, and should continue to be, shared in meetings between representatives from the Aboriginal representative bodies, Federal government, State and Territory governments, the Federal Court and the NNTT. Such meetings should give ongoing consideration to the time frame within which native title cases should reasonably be determined (whether by a mediated agreement between the parties, a determination by the Court or a combination of both processes) and ways to achieve this. The recommendations below will operate more effectively if there is agreement and understanding between representative bodies, governments, the Court and the NNTT as to the management and arrangements for such litigation.

**Recommendation 74.** The Federal Court should continue to facilitate meetings between representatives from the Aboriginal representative bodies, Federal government, State and Territory governments, Federal Court and National Native Title Tribunal to discuss the expected time frame for resolution of native title claims and ways to manage the cases so as to meet the agreed timetable.

## **The Federal Court and the NNTT**

7.58. Under the Native Title Act as originally enacted, the NNTT had complete control over the native title proceedings up until agreement had been reached, whereupon the matter was sent to the Court for consent orders to be made. If there was no agreement, the NNTT sent the matter to the Court for determination. Native title matters are now lodged in the Court at the beginning of the process.<sup>2210</sup> There has been a fundamental shift in workload and more importantly a shift in the nature of the relationship, statutory functions and responsibilities between the NNTT and the Court. The two bodies have complementary functions. The challenge is to develop a practice which optimises the expertise, processes and resources available to each body for the effective resolution of native title claims.

7.59. The President of the NNTT said that 'overall the scheme is vastly improved on the old scheme'.<sup>2211</sup> The flexibility afforded by the fact that the NNTT can refer a question of fact or law to the Court for determination<sup>2212</sup> and the Court can refer part matters to the NNTT for mediation<sup>2213</sup> creates potential

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2209. Federal Court *Consultation* Sydney 22 December 1999.

2210. Native Title Act s 13, 61.

2211. NNTT *Consultation* Perth 22 September 1999.

2212. Native Title Act s 136D.

2213. Native Title Act s 86B.

efficiencies. The NNTT had argued for these changes since June 1994.<sup>2214</sup> Issues can now be resolved by the most appropriate means without delaying the whole matter. Under the original provisions of the Native Title Act, the NNTT had to make a critical decision about referring a matter to the Court.<sup>2215</sup> A matter would often be given further time in mediation in the hope that it would be resolved rather than refer the matter to the Court. Now a particular issue can be referred to the Court while the mediation continues. The resolution of an issue by the Court may advance the mediation. Whether by that process, or as a result of partial agreements between the parties in mediation, the number of issues and the number of parties before the Court at a hearing may be significantly reduced.

7.60. For more than a year since the amendments to the Native Title Act commenced, the NNTT's resources have been focussed on applying the registration test introduced by the amended Native Title Act and notification of claims.<sup>2216</sup> The necessary preoccupation of key parties or players (including the NNTT, representative bodies, and State and Territory governments) with the registration test has meant that the NNTT's mediation activity is not at its peak.<sup>2217</sup> The backlog of registration decisions is expected to be dealt with by June 2000 when the NNTT will be able to focus more fully on mediations and mediation reports.<sup>2218</sup> The rate at which registration test decisions are finalised will be influenced by judgments of the Federal Court reviewing such decisions.<sup>2219</sup>

7.61. Practitioners informed the Commission that referring questions of fact or law to the Court for determination or part matters to the NNTT for mediation is useful for a well resourced, coherent matter. However, when a matter is in its early stages and mediations are still ongoing, splitting the matter up may cause

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2214. NNTT *Native title: A five year retrospective 1994-1998* NNTT Perth February 1999, 43.

2215. Native Title Act s 74.

2216. For a review of the operation of the new registration test see Human Rights and Equal Opportunity Commission, Submission to the United Nations Committee on the Elimination of Racial Discrimination in relation to Decision 2(54), Australia: CERD/C/54/Misc.40/Rev.2 <[www.hreoc.gov.au](http://www.hreoc.gov.au)> (18 March 1999); D Young and A Denholder 'Threshold standard and requirements for making a native title claim and registration — past and future claims' (1998) 17-*Australian Mining and Petroleum Law Journal* 273 and NNTT *Annual report 1998-1999*, 9-10, 39-41, 47, 52-55, 62-79.

2217. G Neate 'Resolving native title issues: The relationship between the Federal Court of Australia and the National Native Title Tribunal' *Paper* Federal Court of Australia Native Title Workshop Sydney 15 April 1999, 17; P Lane 'Mediation under the Native Title Act' (1998) 17 *Australian Mining and Petroleum Law Journal* 322, 327.

2218. NNTT *Consultation* Perth 22 September 1999.

2219. Such review may be under s 190D of the Native Title Act or the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and the *Judiciary Act 1903* (Cth). See, for example, *Powder Family on behalf of the Jetimarala People v Registrar, National Native Title Tribunal* (unreported) [1999] FCA 913, 5 July 1999; *Strickland & Nudding on behalf of the Maduwongga People v Native Title Registrar* (unreported) [1999] FCA 1089, 11 August 1999; *Strickland v Native Title Registrar* (unreported) [1999] FCA 1530, 4 November 1999; *Western Australia v Native Title Registrar* (unreported) [1999] FCA 1591-1594, 16 November 1999; *Moran v Minister for Land & Water Conservation for the State of New South Wales* (unreported) [1999] FCA 1637, 25 November 1999.



problems.<sup>2220</sup> Practitioners also said that the concurrent operation of the NNTT and the Court adds to the complexity and creates a risk of simultaneous processes producing incompatible outcomes.<sup>2221</sup> The Court and the NNTT have drafted and agreed to an administrative protocol that provides the basis for the Court and the NNTT's administrative relationship.<sup>2222</sup> For example, it contains an in-principle

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<sup>2220</sup>. Native title practitioners *Consultation* Sydney 19 October 1999.

<sup>2221</sup>. *ibid.*

<sup>2222</sup>. L Anderson *Consultation* Melbourne 1 June 1999.

agreement that a new application or a copy of any court order relevant to a native title proceeding is to be given to the NNTT within two working days of it being made. In a recent paper presented at a native title workshop for Federal Court judges, the President of the NNTT, Graeme Neate, referred to the 'benefit in an appropriate level of liaison between the Court and the Tribunal' and indicated ways in which the Court and the NNTT could develop their working relationship.

In relation to general issues about the management of the caseload such liaison could be, for example, by way of:

- presentations at meetings of the Court's user groups;
- communication with the Native Title Coordination Committee of the Court; and
- contact with staff of the Court.<sup>2223</sup>

### *Provisional docket judge*

7.62. The Court manages native title cases differently to other case types in the Court. The Court has a provisional docket judge for native title cases in each registry. To streamline the management of the native title caseload, and promote consistency and efficiency a provisional docket judge manages the native title cases up to and including the first directions hearing.<sup>2224</sup> Provisional docket judges in the Court manage their lists in different ways. Practitioners and the NNTT have told the Commission that it would be helpful if there was a more consistent approach.<sup>2225</sup> Practices are evolving. There has been correspondence between the NNTT and the Court about the role of the provisional docket judge and meetings of the native title coordination committee on this issue.

### *Directions hearings/reviews*

7.63. The Court conducts a review hearing for each case transferred from the NNTT. At directions hearings some provisional docket judges use only mediation reports. The NNTT told the Commission that at the request of some judges, administrative officers from the NNTT<sup>2226</sup> are present in the courtroom to assist the Court.<sup>2227</sup> Native title practitioners agreed that it is beneficial to have an NNTT presence in Federal Court directions hearings.<sup>2228</sup> The NNTT indicated that there needs to be clarification of their role at directions hearings, for example as a court

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2223. G Neate 'Resolving native title issues: The relationship between the Federal Court of Australia and the National Native Title Tribunal' *Paper* Federal Court of Australia Native Title Workshop Sydney 15 April 1999, 49.

2224. L Anderson 'The Native Title Act 1993 as amended by the Native Title Amendment Act 1998: An overview of the role of the Federal Court of Australia' (1998) 3(11) *Native Title News* 166.

2225. Native Title practitioners *Consultations* Sydney 17 September 1999 and 19 October 1999, NNTT *Consultation* Perth 22 September 1999.

2226. This is often the Litigation Services Manager from the NNTT.

2227. NNTT *Consultation* Perth 22 September 1999; Federal Court judge *Consultation* Sydney 1 November 1999.

2228. Native title practitioners *Consultation* Sydney 19 October 1999.

assistant or amicus curiae.<sup>2229</sup> The NNTT has a direct interest in orders made by the Court which can directly impact on the operation, workload and resource allocation of the NNTT.<sup>2230</sup>

### **Mediation reports**

7.64. The Court monitors mediation undertaken by the NNTT. Status reports on mediations in the NNTT are provided to the provisional docket judge at review hearings. These detail the current interests involved, whether mediation has occurred, the number of meetings, the number of parties and when the case was assessed for registration.

7.65. The Court may request a mediation report from the NNTT at any time<sup>2231</sup> and the NNTT must provide a mediation report to the Court after the conclusion of a successful mediation.<sup>2232</sup> The NNTT may also provide a mediation report to the Court at any time if the presiding member considers that it would assist the Court in progressing the proceeding.<sup>2233</sup> A reporting form is being developed by the Court in consultation with the NNTT.

7.66. In mediation reports there is no discretion for the NNTT to provide any details of the substantive content of the mediation without the consent of the parties.<sup>2234</sup> In most instances the NNTT informs the parties that they are preparing a mediation report and sometimes the NNTT will provide them with a draft for their comments.<sup>2235</sup> Barrister and part-time member of the NNTT, Patricia Lane discussed the use of mediation reports and said that they raised

some interesting questions about the extent to which matters raised between the parties in negotiations ought to be revealed to the Court, and whether the mediator preparing

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2229. NNTT *Consultation* Perth 22 September 1999.

2230. NNTT *Consultations* Perth 22 September 1999 and Darwin 8 October 1999. Mr Neate observed Orders made by the Court in relation to every native title matter will have some impact on the Tribunal. There will be a cumulative effect on the staff and members of the Tribunal from a series of orders to conduct mediation conferences or take other action and report to the Court by specified dates: G Neate 'Resolving native title issues: The relationship between the Federal Court of Australia and the National Native Title Tribunal' *Paper* Federal Court of Australia Native Title Workshop Sydney 15 April 1999, 49.

2231. Native Title Act s 86E.

2232. Native Title Act s 136G.

2233. *ibid.*

2234. Native Title Act s136A(4), 136E, 136F, 179, 181.

2235. NNTT *Consultation* Perth 22 September 1999. When discussing mediation reports, Mr Neate observed

For Tribunal members there are issues such as ... a general practice, should a draft of each report be circulated to the relevant parties for comment before it is sent to the Court?: G Neate 'Resolving native title issues: The relationship between the Federal Court of Australia and the National Native Title Tribunal' *Paper* Federal Court of Australia Native Title Workshop Sydney 15 April 1999, 45.

such a report is to accord the parties the opportunity either to know the substance of the report, or to comment upon it.<sup>2236</sup>

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<sup>2236</sup> P Lane 'Mediation under the Native Title Act' (1998) 17 *Australian Mining and Petroleum Law Journal* 322, 329.

7.67. The role of the mediation report has been the subject of discussion between the NNTT and the Court. The Commission has been told that the Court does not want the report to disclose confidential matters but to give an assessment of the progress of mediation and enough information for the judge to be able to decide whether mediation should continue, particular issues should be resolved or mediation should cease and the matter be set down for hearing.<sup>2237</sup> The provisional docket judge may choose to consult and discuss the mediation report with parties at directions hearings.

7.68. Most practitioners consulted by the Commission stressed the importance of confidentiality in mediations and stated that mediation reports should not be made available to the judge hearing the matter because 'unwittingly, comments may be made in such reports that have the potential to reflect adversely on one or other of the parties involved in mediation'.<sup>2238</sup>

**Recommendation 75.** To promote the development of consistent and efficient practices and procedures for the management of native title cases, protocols and practice notes should be developed by the Federal Court, in consultation with the National Native Title Tribunal, in relation to

- the role of the National Native Title Tribunal representative in Federal Court review and directions hearings
- the sharing of information, expertise and efficient use of resources and
- the form, content and availability of mediation reports from the National Native Title Tribunal.

### *Mediation*

7.69. Some practitioners expressed concerns that as the Federal Court now has overall management of native title cases, the role of mediation in the NNTT will be reduced.<sup>2239</sup> The Commission heard from practitioners that management of cases by the Court and the imposition of tight timetables may be counter-productive as it may unnecessarily drain applicants' resources and direct attention away from productive negotiation and mediation inside and outside the NNTT.<sup>2240</sup> Patricia Lane, for example, stated

[o]ne of the often-expressed benefits of mediation is that the parties themselves control the process. The huge variety of native title claims obviously means that a rigid or

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<sup>2237.</sup> Federal Court judge *Consultation* Sydney 1 November 1999; NNTT *Consultations* Perth 22-September 1999 and Darwin 8 October 1999.

<sup>2238.</sup> M Barker *Submission* 395.

<sup>2239.</sup> Native title practitioners *Consultation* Sydney 17 September 1999.

<sup>2240.</sup> *ibid.*

highly programmed approach is not going to be readily adaptable to the parties' requirements.<sup>2241</sup>

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<sup>2241</sup>. P Lane 'Mediation under the Native Title Act' (1998) 17 *Australian Mining and Petroleum Law Journal* 322, 325.

7.70. As the new regime has been in operation for a little over a year it is difficult to evaluate these concerns. The continued central role of mediation in the resolution of native title disputes is legislated by the Native Title Act, and is recognised by the Court, the NNTT, some governments and by many native title claimants and their representatives. The preamble to the Native Title Act states that

[a] special procedure needs to be available for the just and proper ascertainment of native title rights and interests which will ensure that, if possible, this is done by conciliation and, if not, in a manner that has due regard to their unique character.

7.71. The Native Title Act emphasises mediated outcomes,<sup>2242</sup> sets out the purpose of mediation<sup>2243</sup> and gives the NNTT more clearly defined procedures for conducting mediation.<sup>2244</sup> Under the new regime mediations by the NNTT and Court registrars are conducted in the shadow of the Court.<sup>2245</sup> Agreements, unlike Court imposed judgments, can resolve practical issues between the parties in relation to the existence of native title.<sup>2246</sup> Under the Rules, before the Court makes the final determination it may direct the parties 'to confer, with the aim of reaching agreement about the practical management of any aspect of the rights and interests to be subject to the final determination.'<sup>2247</sup> In the *Ward* case, after determining the existence of native title, Justice Lee commented that

[h]ow concurrent rights are to be exercised in a practical way in respect of the determination area must be resolved by negotiation between the parties concerned. It may be desirable that the parties be assisted in that endeavour by mediation<sup>2248</sup>

7.72. The Court must refer every native title application<sup>2249</sup> to the NNTT unless the Court makes an order that there be no mediation. The Native Title Act sets out matters which the Court must take into account before it can make an order that there be no mediation. The Court can order mediation in the NNTT to

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2242. Mr Neate has observed that '[t]he Native Title Act, as amended in 1998, contains numerous references to mediation as the preferred process for resolving such issues.': G Neate 'Resolving native title issues: The relationship between the Federal Court of Australia and the National Native Title Tribunal' *Paper* Federal Court of Australia Native Title Workshop Sydney 15 April 1999.

2243. Native Title Act s 86A.

2244. Native Title Act Part 6 Division 4.

2245. Mediation time frames fall under the supervision of the Court. Delays in mediation may prompt an application by a party for directions which would be binding on all parties, or a determination that native title does or does not exist, or a strike out of the native title application: NNTT *Native title: A five year retrospective 1994–1998* NNTT Perth February 1999, 44.

2246. P Lane 'Mediation under the Native Title Act' (1998) 17 *Australian Mining and Petroleum Law Journal* 322, 326.

2247. Federal Court Rules O 78 r 47.

2248. *Ward v State of Western Australia* (1998) 159 ALR 483, 639.

2249. Every application under s 61 of the Native Title Act.

cease but must not do this without first considering a mediation report from the NNTT.<sup>2250</sup> Patricia Lane noted that

[a]lthough the issue of whether mediation should commence or continue will now be a matter for the Court, in the majority of applications now mediated by the tribunal, there has not been any concerted push for referral.<sup>2251</sup>

7.73. Louise Anderson, Native Title Coordinator in the Court, explaining the processes before the provisional docket judge, stated that '[f]or the most part the Court will refer applications to the Tribunal for assessment for registration, the giving of notice and mediation.'<sup>2252</sup> At this stage the Court has referred most cases or at least issues of fact or points of law in those cases to the NNTT for mediation.<sup>2253</sup> Graeme Neate said that

[i]t is clear that mediated or negotiated agreements will continue to be desirable before, or necessary after, determination of native title.<sup>2254</sup>

Justice French, former President of the NNTT said that

[r]egardless of changes in the law and the advent of equivalent bodies, the Tribunal's central objective for nearly five years — the promotion of agreements through mediation and negotiation — will remain at the heart of successful management of native title in the future.<sup>2255</sup>

7.74. State and Territory governments have their own approaches to their role in mediation and consent determination.<sup>2256</sup> Some State governments, such as Queensland, have negotiated protocols for consent determination of native title at mediation. The Queensland Native Title Services Unit in the Department of Premier and Cabinet has published a book, *Guide to compiling a connection report*, which sets out the information it requires from the applicant to enter into a consent

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2250. Federal Court Rules O 78 r 21. There has not yet been an application to cease mediation, NNTT *Consultation* Perth 22 September 1999.

2251. P Lane 'Mediation under the Native Title Act' (1998) 17 *Australian Mining and Petroleum Law Journal* 322, 328.

2252. L Anderson 'The Native Title Act 1993 as amended by the Native Title Amendment Act 1998: An overview of the role of the Federal Court of Australia' (1998) 3(11) *Native Title News* 166. NNTT President G Neate also said that

[a]s a general rule, the Federal Court refers native title determination applications...and compensation applications to the tribunal for mediation, including the ascertaining of agreed facts: G Neate 'Resolving native title issues: The relationship between the Federal Court of Australia and the National Native Title Tribunal' *Paper* Federal Court of Australia Native Title Workshop Sydney 15 April 1999.

2253. NNTT *Consultation* Perth 22 September 1999.

2254. G Neate 'Resolving native title issues: The relationship between the Federal Court of Australia and the National Native Title Tribunal' *Paper* Federal Court of Australia Native Title Workshop Sydney 15 April 1999.

2255. NNTT *Native title: a five year retrospective 1994–1998* NNTT Perth February 1999, 2.

2256. For a discussion of the different approaches taken by the State and Territory governments in the NNTT see NNTT *Native title: a five year retrospective 1994–1998* NNTT Perth February 1999, 20–28.



determination.<sup>2257</sup> The Queensland government has anthropologists and historians on its staff to assess material for the purposes of negotiation and consent determinations.

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2257. Queensland Native Title Services Unit, Department of Premier and Cabinet *Guide to compiling a connection report* Queensland Government Brisbane July 1999. See Queensland government homepage <<http://www.premiers.qld.gov.au/about/nativetitle/dwpages/crdoc.pdf>> (24 January 2000).

## Case management options

7.75. Some cases will not be suitable for mediation or parties may not be prepared to mediate. In particular, the Commission heard that some State and Territory governments are not prepared to mediate. Some parties may be reluctant to mediate when there are disputes between or within groups of indigenous people.

Such disputes can be fatal to the prospects of mediated outcomes. Other parties will commonly take the stance that intra-indigenous disputes are for the disputants, or the Federal Court, to resolve. Those parties consider that they are neither qualified nor inclined to decide which of the disputing parties is right. They are not willing to engage in serious discussions with indigenous parties when there is a real risk that they may be dealing with the wrong people and that any agreed outcome may be successfully challenged.<sup>2258</sup>

If mediation is not appropriate or is not successful, the Federal Court will, after consultation with the NNTT, allocate the case to a docket judge.

### *Test cases*

7.76. One option for managing the native title caseload would be to have test cases or test issues within cases.<sup>2259</sup> Practitioners commented that the three cases which have already been heard by the Full Federal Court<sup>2260</sup> could be considered test cases in themselves and that there may not be a need for many more test cases once those three cases have been determined by the High Court.<sup>2261</sup> In any event, one practitioner commented 'each native title application will have its own special features and it may be an inefficient use of resources to spend too much time trying to identify "test cases"'.<sup>2262</sup>

7.77. Some practitioners and the Court have indicated that test issues could be better identified within native title cases.<sup>2263</sup> The *Ward*<sup>2264</sup> appeal is an example of a case which might have proceeded as 10 test extinguishment issues rather than the

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2258. G Neate 'Resolving native title issues: The relationship between the Federal Court of Australia and the National Native Title Tribunal' *Paper* Federal Court of Australia Native Title Workshop Sydney 15 April 1999, 36.

2259. Federal Court judge *Consultation* Sydney 1 November 1999.

2260. *Ward v Western Australia* (1998) 159 ALR 483; *The members of the Yorta Yorta Aboriginal Community v Victoria* (unreported) [1998] FCA 1606, 18 December 1998; *Yarnirr v Northern Territory* (1998) 156-ALR 370.

2261. Law Society of WA *Submission* 389; Native title practitioner *Consultation* Perth 1 December 1999; MBarker *Submission* 395.

2262. M Barker *Submission* 395.

2263. Federal Court judge *Consultation* Sydney 1 November 1999; Native title practitioner *Consultation* Perth 1 December 1999.

2264. *Ward v Western Australia* (1998) 159 ALR 483.

350 extinguishment issues which the Court determined.<sup>2265</sup> The power of the Federal Court to deal with test cases or make single issue determinations is

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<sup>2265</sup> The Commission was told that in *Ward* the respondents raised the possibility of test issues being argued and determined with the Judge at first instance but this suggestion was rejected: Native title practitioner *Consultation* Perth 1 December 1999.

constrained by the High Court's decision in *Bass v Permanent Trustee Co Ltd*.<sup>2266</sup> In that case the High Court held that it was 'contrary to the judicial process and no part of judicial power' to give advisory judgments or respond to hypothetical situations and that the

one crucial difference between an advisory opinion and a declaratory judgment is the fact that an advisory opinion is not based on a concrete situation and does not amount to a binding decision.<sup>2267</sup>

Test issues need to be framed carefully to ensure the judgments in test cases are effective to resolve matters. Courts are reluctant to determine issues which will not advance or resolve a case, but which may simply duplicate work.

### *Taking evidence*

7.78. Oral evidence from applicants can be critical to determine genealogical and cultural connection issues in native title cases. Historical and documentary evidence concerning indigenous families and their connection to the land is fragmented and often inaccurate.<sup>2268</sup> There can be difficulties in eliciting the evidence from parties and witnesses. The hearing of evidence can take time and in many instances will require extended site visits. The following points should be considered by the Court taking evidence in native title cases

- evidence is most comprehensive and reliable if taken by someone skilled in communicating with indigenous people and trusted by the community
- there needs to be sensitivity to the transition from Aboriginal private 'story telling' to the public process of giving evidence to a court
- there is a growing awareness of the different cultural assumptions which indigenous and non-indigenous people make about appropriate and effective ways of seeking and disclosing information — such differences are relevant to questioning and responding to indigenous witnesses
- there can be benefits if people speak as groups or in the company of others rather than as individuals in isolation from each other<sup>2269</sup>
- some matters are exclusively or primarily for men to speak about and others for women
- where there are elderly or frail witnesses whose evidence may be critical, such evidence may need to be taken early in the proceedings to ensure it is not lost.<sup>2270</sup>

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2266. For a further discussion of *Bass v Permanent Trustee Co Ltd* (1999) 161 ALR 399 and single issue determinations, see para 7.199–7.202.

2267. *Bass v Permanent Trustee Co Ltd* (1999) 161 ALR 399 at [48].

2268. Native title practitioners *Consultation* Sydney 19 October 1999.

2269. Federal Court Rules O 78 r 34.

2270. Native title practitioners *Consultations* Sydney 19 October 1999, Perth 1 December 1999; Federal Court Rules O 78 r 35 states

7.79. There are various options for how evidence is taken in native title cases in the Court. Currently parties collect and present their own evidence and evidence is formally taken by the judge at the hearing. The extended hearing times in native title cases means that other options for the collection of evidence are being explored to ensure efficient use of judicial time and the timely progress of the case. There are considerable costs involved if judges spend months on site taking evidence. Alternative means of taking and organising evidence focus on areas where the evidence is more likely to be uncontentious, for example, genealogical evidence. This does not obviate the judge's role in hearing and assessing evidence but does ensure that an evidence base is established in cases – much of which will be uncontroversial and uncontested – in a timely and cost efficient manner. In *Ward*,<sup>2271</sup> for example, genealogical evidence was collected and presented by the applicant. The respondents did not tender any evidence to contradict it.<sup>2272</sup> The evidence taken could be transcribed and made available to all parties who can then agree on the evidence to be made available to the judge. The judge could directly hear evidence that is contentious. Options include assessors<sup>2273</sup> or examiners<sup>2274</sup> taking the evidence and registrars writing preliminary reports on the status of a case for the judge, following a field visit. These options are not intended to replace the important role of representative bodies obtaining and presenting evidence, nor that of solicitors and counsel examining and cross examining witnesses.

7.80. The Federal Court has the power to appoint assessors to assist in native title proceedings,<sup>2275</sup> take evidence<sup>2276</sup> and hold conferences.<sup>2277</sup> Under the Federal Court Act, assessors are appointed by the Governor-General<sup>2278</sup> and as far as practicable are to be selected from Aboriginal people or Torres Strait Islanders.<sup>2279</sup> To be appointed as an assessor a person must have, in the opinion of the Governor-General, special knowledge in relation to Aboriginal or Torres Strait Islander societies, land management, dispute resolution or any other matters considered by the Governor-General to have substantial relevance to the duties of an assessor.<sup>2280</sup> It has been suggested that the Court should make use of assessors for taking evidence.<sup>2281</sup>

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If the Court considers that a person's evidence should be given at a time other than when such evidence would normally be given, the Court may give directions as to how, when and in what form the evidence is to be given.

2271. *Ward v Western Australia* (1998) 159 ALR 483.

2272. (1998) 159 ALR 483, 532.

2273. Native Title Act s 83 and Federal Court of Australia Act Part VA.

2274. Federal Court Rules O 24.

2275. Native Title Act s 83 and Federal Court of Australia Act Part VA.

2276. Native Title Act s 93 and Federal Court Rules O 78 r 39.

2277. Native Title Act s 88.

2278. Federal Court Act s 37A(2).

2279. Federal Court Act s 37A(4).

2280. Federal Court Act s 37B.

2281. Federal Court judge *Consultation* 1 November 1999; Native title practitioners *Consultation* Sydney 17 September 1999.

7.81. Such assistance in collecting evidence may best be provided from a panel of assessors to which the Court can refer. To establish the impartiality of such persons chosen from the panel, the Attorney-General's Department in consultation with the Australian Anthropological Society and any other relevant bodies could call for expressions of interest from suitably qualified people to be appointed to the panel. Assessors could be experienced native title practitioners or anthropologists. The assessors would be selected and appointed under the Federal Court Act<sup>2282</sup> and directed under s 83 of the Native Title Act to assist the Court in relation to a proceeding.

7.82. The Commission heard arguments against the use of assessors to collect evidence in native title cases.<sup>2283</sup> It was suggested that the use of assessors can simply create more work and delays as the judge may have to hear a large proportion of the evidence again.<sup>2284</sup>

One doubts that such a procedure would materially assist the timely progression of the case. It may mean that, in a statistical analysis of the case, the trial judge can be shown to have spent less time than he or she might otherwise have in the hearing of the case, but one doubts whether the collecting of evidence by an assessor in relation to traditional physical connection with land or waters would be at all helpful to the trial judge. In native title cases, the trial judge must make the fundamental, factual assessment whether the claimant group has maintained its traditional connections with land or waters under its traditionally based laws and customs. The effective delegation of this fact finding task to an assessor, and its removal from the trial judge, is likely adversely to bear on the undertaking of that fundamental function of the trial judge, or result in its repetition by the trial judge ...

In short, any steps taken towards the regular engagement of assessors and experts by the court in native title cases, will merely bureaucratise the process, make it more expensive so far as the public purse is concerned, and in all likelihood add delays to the hearing process.<sup>2285</sup>

In *Ward*, Justice Lee made the following comments in relation to taking evidence from Aboriginal witnesses.

The difficulties courts face in receiving and dealing with evidence of Aboriginal witnesses is well known, particularly when English is at best a second, or lesser, language and the grasp of it is limited. A transcript cannot convey nuances of gesture, movement or expression that bear upon an understanding of the evidence received in such circumstances. Similarly, a transcript which presents as a seamless continuum of questions and answers may suggest more comprehension of the process by a witness than the court observes.<sup>2286</sup>

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2282. See para 7.80 above.

2283. Law Society of WA *Submission 389*; Native title practitioner *Consultation* Perth 1 December 1999; MBarker *Submission 395*.

2284. Native title practitioner *Consultation* Perth 1 December 1999.

2285. M Barker *Submission 395*.

2286. *Ward v Western Australia* (1998) 159 ALR 483, 497.

7.83. A witness before the assessor may be examined but may only be cross-examined or re-examined with the leave of the assessor.<sup>2287</sup> In the event that examination and cross examination of witnesses occurs before the assessor, all the main players will be at the site hearing and testing the evidence – the parties and their legal teams – except for the judge. Practitioners have questioned the utility of this process for taking evidence.<sup>2288</sup>

7.84. In response to the above criticism of the use of assessors, it was not suggested to the Commission that assessors should be used in all native title cases for all evidence. One suggestion was for genealogical evidence to be taken in

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2287. Native Title Act s 93(4) and (5).

2288. Law Society of WA *Submission 389*; Native title practitioner *Consultation* Perth 1 December 1999.

appropriate cases by assessors.<sup>2289</sup> The appointment of an assessor may be able to be agreed between the parties. Any evidence which is contentious or critical to the case would still be heard by the judge. The type of evidence appropriate for an assessor to collect will vary from case to case and could be decided by the judge in consultation with the parties.

7.85. Federal Court registrars conduct some mediations in native title cases. It has been suggested that they might also prepare preliminary reports on the status of a case following field visits. Registrars would not collect evidence but their reports could comment on the evidence that should be taken and any special requirements for, or difficulties associated with the collection of that evidence. Their reports could be made available to and commented on by the parties. Such functions may be important for getting some momentum in a case.

7.86. This suggested role for registrars was not supported by some practitioners.<sup>2290</sup> Practitioners expressed doubt about whether registrars have the appropriate level of expertise to undertake mediation and assess evidentiary requirements. The parties' representatives were said to be more appropriately placed and have the expertise to 'seriously and helpfully address such issues and assist the court in the setting of proper directions for the preparation and hearing of a native title case'.<sup>2291</sup> These are matters for discussion between the Court, parties and native title user groups.

**Recommendation 76.** The Federal Court, in consultation with its user groups, should review the arrangements for taking evidence in native title cases relevant to the claimants' association and traditional physical connection with an area including, how best, if at all, to use assessors for taking such evidence.

**Recommendation 77.** The Attorney-General's Department, in consultation with the relevant parties, including the Australian Anthropological Society and the various State and Territory law societies and bar associations, should establish a panel of appropriately qualified assessors and experts which the Federal Court can draw upon for use in native title cases. Expressions of interest should be sought and appointments made to the panel.

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2289. Federal Court judge *Consultation* Sydney 1 November 1999; Native title practitioner *Consultation* Perth 1 December 1999.

2290. Law Society of WA *Submission* 389; M Barker *Submission* 395.

2291. M Barker *Submission* 395.



## Representative proceedings

### Introduction

7.87. Representative proceedings in the Federal Court are governed by the provisions of Part IVA of the Federal Court Act which aims to promote access to justice and the efficient use of court resources for the resolution of claims. The second reading speech stated that the legislation was introduced to give

the Federal Court an efficient and effective procedure to deal with multiple claims ... [to] give access to the courts to those in the community who have been effectively denied justice because of the high cost of taking action ... [and] to deal efficiently with the situation where damages sought by each claimant are large enough to justify individual actions and a large number of persons wish to sue the respondent.<sup>2292</sup>

7.88. For causes of action arising after 5 March 1992,<sup>2293</sup> representative proceedings may be commenced in the Federal Court where seven or more claimants have claims against the same person,<sup>2294</sup> arising out of the same, similar or related circumstances,<sup>2295</sup> and giving rise to a substantial common issue of law or fact.<sup>2296</sup> A representative proceeding may be commenced even if the individual claims for damages would require individual assessment.<sup>2297</sup> The Federal Court representative proceedings scheme is an opt-out scheme. This means that all those persons who fall within the definition of the group are automatically part of the proceedings and bound by the result unless they opt-out of the proceeding by notifying the Court before the publicised opt-out date. Representative actions have been used in consumer and small business matters under the *Trade Practices Act 1974 (Cth)* (Trade Practices Act), and in judicial review applications under the *Migration Act 1958 (Cth)*.

7.89. Representative proceedings legislation was received with trepidation by some potential respondents, concerned at 'legal entrepreneurialism', 'US style litigation' and 'sensational' claims.<sup>2298</sup> Some lawyers and companies continue to

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2292. Second reading speech Federal Court of Australia Amendment Bill 1991 (Cth) *Hansard* (H of R) 14 November 1991, 3174–3175.

2293. Federal Court Act s 33B. The commencement date of the *Federal Court of Australia Amendment Act 1991* (Cth) which introduced Part IVA of the Federal Court Act was 5 March 1992.

2294. But where it seems there may be less than seven applicants, the Court has discretion to decide whether or not the case may proceed: Federal Court Act s 33L.

2295. Federal Court Act s 33C(1)(b).

2296. Federal Court Act s 33C(1)(c).

2297. Federal Court Act s 33C(2).

2298. C Phillips 'Class actions – Quo vadis? The case for restriction of expansion' *Paper Corporate Law Conference Melbourne* 24 September 1998; Allen Consulting Group *Submission* 219.

express these concerns,<sup>2299</sup> although in consultations with the Commission, some lawyers agreed that there is no present evidence of unmeritorious claims or any litigation explosion as a result of the representative proceedings.<sup>2300</sup>

Contrary to the concerns surrounding the introduction of the procedure in the Federal Court, none of the dire consequences predicted have actually materialised in the past five years. There has been no flood of class action litigation. Instead there has been a gradual adoption of the procedure in many appropriate cases with more than adequate restraint and control being exercised by the Court as Judges and the profession seek to come to grips with a procedure which undoubtedly has the potential to contribute significantly to the administration of justice.<sup>2301</sup>

7.90. Law firms which mainly act for applicants in representative proceedings told the Commission that almost all representative proceedings are undertaken on a speculative basis. This means applicant lawyers screen cases to establish whether they are meritorious. Applicant law firms indicated to the Commission that they cannot run the risk of funding unsuccessful claims.<sup>2302</sup> It has been argued that speculative fee arrangements lead to a conflict of interest for lawyers because the lawyer may have a vested interest in advising their client to settle in order to secure his or her fee. In its submission the Law Council referred to the arguments about these potential conflicts of interest for lawyers and said

Australia has had a long history of acceptability of, and accessibility to, speculative litigation. Furthermore, the Law Council understands from anecdotal reports that the potential conflict of interest does not appear to be the source of regular client complaint.<sup>2303</sup>

Speculative fee arrangements in representative proceedings were recommended in the Commission's report, *Grouped proceedings in the Federal Court* 'as a means of financing grouped proceedings and of overcoming the costs disincentives involved'.<sup>2304</sup>

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2299. C Phillips 'Class actions – Quo vadis? The case for restriction of expansion' *Paper Corporate Law Conference Melbourne* 24 September 1998; Allen Consulting Group *Submission 219*; Public Interest Advocacy Centre for Coalition for Class Actions (NSW) 'Representative proceedings in NSW: A review of the law and a proposal for reform' PIAC Sydney October 1995, 25; A Burrell and N Reece 'Law firms' duel for supremacy a class act' *Australian Financial Review* 16 July 1999, 26; L Schmidt 'The writ stuff' *Business Review Weekly* 23 July 1999, 64; Clayton Utz *Correspondence* 14 January 2000.

2300. Federal Court practitioners *Consultations* Sydney 2 June 1999 and Melbourne 25 August 1999. See also C Merritt 'A class act that's really just coincidence' *Australian Financial Review* 1 October 1999, 27. Clayton Utz

disagree[d] with the suggestion that we in Australia have somehow avoided the commencement of 'unmeritorious' claims. One obvious example of such a claim was the personal injuries representative proceedings commenced against the Sydney Water Corporation following the 'water quality alerts' in 1998 ... The proceedings were ultimately dismissed: Clayton Utz *Correspondence* 14 January 2000.

2301. N Francey 'Class Action' *Paper NSW Bar Association CLE Program* Sydney 9 February 1998, 20.

2302. Federal Court practitioners *Consultation* Melbourne 25 August 1999.

2303. Law Council *Submission 375*.

2304. ALRC *Grouped proceedings in the Federal Court* AGPS Canberra 1988, para 286 (ALRC 46).



7.91. Initially representative actions constituted only a small percentage of actions brought before the Federal Court, with approximately 30 cases commenced between 1992 and 1997.<sup>2305</sup> The number of representative actions is gradually increasing.<sup>2306</sup> Practitioners and claimants are becoming more familiar with the procedures. Currently there are approximately 20 representative actions before the Federal Court with potential claims of over \$3 billion.<sup>2307</sup>

7.92. Procedures for representative proceedings generally appear to be working well and in accordance with the legislative intentions.<sup>2308</sup> The Federal Court does not view such cases as more problematic than other complex cases.<sup>2309</sup> The Court treats representative proceedings like any other case, in the sense that they have to comply with the same rules as other cases and are subject to the same, if not more, judicial management from the first directions hearing. Justice Wilcox commented

[r]epresentative proceedings, especially those involving more than one respondent, need close judicial supervision ... The procedure has the potential to handle cases more efficiently than otherwise and to resolve cases that might otherwise remain unresolved. Its use will often require innovative answers to practical problems. Imaginative case management, and sensible attitudes by both bar and bench, will ultimately demonstrate that the representative proceeding provides a valuable addition to traditional procedures.<sup>2310</sup>

7.93. The RAND Institute for Civil Justice (ICJ) has recently released an executive summary of its forthcoming report on class actions in United States jurisdiction, *Class action dilemmas: Pursuing public goals for private gain*.<sup>2311</sup> The ICJ study supports increased judicial regulation of class actions saying that '[j]udges

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2305. A Cornwall *Representative proceedings: Supplement* Public Interest Advocacy Centre for Coalition for Class Actions Sydney 1997, 12. The small number of representative actions commenced is partly due to the prospective nature of the legislation which only applied to causes of action arising after 5 March 1992; the day the legislation commenced: Federal Court Act s 33B.

2306. Cases utilising the procedures must have a cause of action arising after 5 March 1992. Clayton Utz said 'there is no doubt that the incident of representative actions is increasing': *Correspondence* 14-January 2000.

2307. A Burrell and N Reece 'Law firms' duel for supremacy a class act' *Australian Financial Review* 16 July 1999, 26; C Merritt 'A class act that's really just coincidence' *Australian Financial Review* 1 October 1999, 27.

2308. J Kellam and P Long 'Product liability and class actions: a review' (1998) 9(5) *Australian Product Liability Reporter* 61; Federal Court practitioners *Consultations* Sydney 2 June 1999 and Melbourne 25 August 1999; Federal Court Judge *Consultation* 10 January 2000.

2309. Federal Court Registrar W Soden *Consultation* Sydney 7 April 1999.

2310. M Wilcox 'Representative proceedings in the Federal Court of Australia: A progress report' (1996-97) 15 *Australian Bar Review* 91, 97-98.

2311. D Hensler et al *Class action dilemmas: Pursuing public goals for private gain – Executive summary* RAND ICJ Santa Monica CA 1 November 1999 (ICJ Executive Summary) <<http://www.rand.org/publications/MR/MR969.1.pdf>> (6 December 1999). This is the result of a three year study involving empirical research, case studies and consultations with lawyers, corporations and public interest groups. The full report will be published in early 2000: <<http://www.rand.org/hot/Press/classaction.11.1.html>> (6 December 1999).

hold the key to improving the balance of good and ill consequences of damage class actions'.<sup>2312</sup>

7.94. Representative actions raise a number of threshold legal issues such as

- whether a proceeding is properly constituted as a representative proceeding
- the definition of the group
- whether there are substantial common issues
- notice provisions for group members
- sufficient particularity of pleadings.

Justice Wilcox observed that in representative proceedings '[p]leadings have tended to be complex. Interlocutory applications are common. Costs accrue rapidly and in large increments'.<sup>2313</sup>

7.95. This section does not analyse substantive issues relating to representative proceedings, for example, opt-in or opt-out models, the definition of the class and substantial common issues.<sup>2314</sup> Such issues and a challenge to the constitutional validity of Part IVA of the Federal Court Act are currently the subject of litigation or interlocutory claims.<sup>2315</sup> This section considers procedural and ethical issues which arise in representative proceedings.

## Competing representation

7.96. In recent representative proceedings more than one firm of lawyers has each filed an action in the Federal Court within a relatively short period of time on

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2312. ICJ Executive Summary 31.

2313. M Wilcox 'Representative proceedings in the Federal Court of Australia: A progress report' (1996-97) 15 *Australian Bar Review* 91, 94.

2314. These issues were considered in ALRC 46.

2315. The respondents in *Bright v Femcare* (1999) 166 ALR 743 claimed that Part IVA is beyond the legislative competency of Parliament because it empowered the Court to determine proceedings relating to subject matters other than 'matters'. They argued that some group members may never be aware of the proceeding, would not have an opportunity to consent to the proceedings or opt-out and as between those group members and the respondent there was no controversy and therefore no 'matter' for the Court to determine. The respondent further argued that Part IVA required or permitted the Court to determine representative proceedings in a manner incompatible with proper judicial process. At first instance Justice Lehane held that Part IVA was constitutionally valid as the existence of a justiciable 'matter' does not require that 'there is an actual and conscious dispute or disagreement between each person whose right is asserted and each other person interested in denying that right'. He held that the finding of facts, the determination of the law and the application of the law in relation to the claims by the representative party for himself or herself and on behalf of the group members against the respondents 'clearly involves the exercise of judicial power in relation to matters' and results in a judgment which binds all parties. The appeal of this decision to the Full Federal Court was heard on 26 November 1999. Judgment was reserved.

behalf of identical groups, or groups which substantially overlap.<sup>2316</sup> Each firm has been instructed by a separate representative party. It is obviously unsatisfactory to have multiple representative proceedings in relation to the same dispute. In the

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2316. *Johnson Tiles Pty Ltd v Esso Australia Pty* [1999] FCA 56 and *Nixon v Phillip Morris (Australia) Ltd* N326 of 1999.

absence of an agreement between the parties as to representation<sup>2317</sup> the Court will have to decide which representative action should proceed and therefore which law firm has carriage of the representative proceedings.<sup>2318</sup>

7.97. Representation on the record is an important matter. The law firm which acts for the representative party has control over the conduct of the proceedings and is named in the advertisements which give notice of the commencement of the representative proceeding. The Court has to approve the form and content of those notices. The notices usually state that group members may wish to seek their own legal advice. What the notices do not usually state is that in such circumstances, a group member's private legal adviser will not have standing before the Court. Group members who are not satisfied that a representative party is adequately representing the interests of the group members may apply to the Court to have the representative party replaced.<sup>2319</sup> If the Court allows the application and replaces the representative party with another group member this may also involve replacing the representative party's lawyers.<sup>2320</sup>

7.98. The Federal Court Act and Rules do not directly address this issue of competing representation. In recent cases and in an extra-curial capacity, the following principles have been stated by judges.<sup>2321</sup>

- No advantage is gained by being the law firm with the application filed first in time. The Court does not wish to promote a race between applicant law firms to commence proceedings as quickly as possible.

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2317. In *Johnson Tiles Pty Ltd v Esso Australia Pty* [1999] FCA 56 at [6] Merkel J stated that Slater & Gordon and Maurice Blackburn & Co, recognising the difficulties inherent in two representative proceedings against the same defendant on behalf of the same represented parties for the same loss, entered into an agreement dated 6 November 1998 to enable them to jointly conduct only one representative action under Pt IVA.

Even if there is an agreement between the parties the Court would still have to be involved and effectively approve the agreement as the parties would either have to apply to the Court under s-33N for an order that one of the proceedings not continue as a representative proceeding or apply for the Court's approval of a discontinuance of one of the representative actions under s33V.

2318. In *Johnson Tiles v Esso Australia Ltd* [1999] FCA 56 at [14] Merkel J stated that

If ... there are several representative proceedings it will be incumbent upon the Court to determine which of those proceedings should be permitted to proceed as representative proceedings under Part IVA.

This situation has been discussed in Federal Court practitioners *Consultation* Melbourne 25 August 1999, P Over 'Representative proceedings from the plaintiff's perspective' *Paper* NSW Young Lawyers CLE Seminar Sydney 17 November 1999; L Schmidt 'The writ stuff' *Business Review Weekly* 23 July 1999, 64.

2319. Federal Court Act s 33T.

2320. This will depend on the nature of the complaint and the new representative party's choice of lawyer.

2321. *Johnson Tiles Pty Ltd v Esso Australia Pty* [1999] FCA 56; comments made by Wilcox J in court in *Nixon v Philip Morris (Australia) Ltd* NG 326 of 1999 as related to the ALRC in Federal Court practitioners *Consultation* Melbourne 25 August 1999; Wilcox J 'Class actions – Challenges for applicant representatives' 22 October 1999 as referred to in P Over 'Representative proceedings from the plaintiff's perspective' *Paper* NSW Young Lawyers CLE Seminar Sydney 17 November 1999 and L Schmidt 'The writ stuff' *Business Review Weekly* 23 July 1999, 64.





- It would be unfair to select which representative action should proceed solely on the basis of the size or experience of the law firms conducting such actions. This may promote monopoly. Preference should be given to firms with proven experience and competence, an ability to resource the proceeding and accessibility to group members in an effort to serve the best interests of group members, identified and unidentified.

7.99. Certain practitioners informed the Commission that there should be clear criteria for selecting which representative action should proceed, including specific criteria in relation to competing law firms. They said that the Court may be assisted by guidelines on this issue or specific criteria to be taken into account listed in the Rules.<sup>2322</sup> One Judge noted that this issue is best dealt with on a case by case basis.<sup>2323</sup> Further, it may be difficult to draft rules or guidelines to meet all case contingencies. To date, the firms themselves have cooperated with the Court to resolve these issues. On the basis of the concerns raised by practitioners about competing representation, the importance of the representative party's lawyer and the lack of legislative guidance, this issue should be considered in the context of a review of Part IVA of the Federal Court Act.<sup>2324</sup>

## Pleadings

7.100. Pleadings in representative proceedings are subject to the normal rules of pleading as well as the requirements set out in section 33H of the Federal Court Act to describe the group members, specify the nature of the claims and the relief claimed on behalf of the group members and the questions of law or fact common to the claims of the group members. As noted above, Justice Wilcox has observed that 'pleadings tend to be complex' in representative proceedings. When drafting the pleadings the representative party's lawyers should consider the requirement of section 33H and the following factors

- the definition of the group must be precisely and clearly expressed as it will be used in any notices to the public<sup>2325</sup>
- the nature of the claims and the relief sought must be drafted to cover all claims by group members (identified and unidentified) yet with sufficient particularity that respondents know the case they have to answer
- the parties may wish to consider how the case could best be divided up for hearing. Justice Wilcox referred to 'the wisdom of lawyers drafting the statements of claim in complex proceedings with an eye to a later division

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2322. Federal Court practitioners *Consultation* Melbourne 25 August 1999.

2323. Federal Court Judge *Consultation* 10 January 2000.

2324. An assessment of the future direction of procedures in representative proceedings is advocated by Justice Beaumont 'Managing litigation in the Federal Court' in B Opeskin and F Wheeler (eds) *The Australian federal judicial system* Melbourne University Press 2000 (forthcoming).

2325. M Wilcox 'Representative proceedings in the Federal Court of Australia: A progress report' (1996-97) 15 *Australian Bar Review* 91, 96.

of the issues into related sub-groups, for determination at sequential hearings'.<sup>2326</sup>

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<sup>2326</sup> *ibid.*

7.101. A lawyer for applicants in representative proceedings commented that 'pleadings have the potential to undermine Part IVA — they are the new battleground'.<sup>2327</sup> The representative party's lawyer will not have particulars in relation to all the group members as some group members may be unidentified or may not have retained the lawyer. The issue concerns the level of particularity to be pleaded by the applicant and at what stage in the proceedings. Respondents have brought strike out applications on the basis that the applicant's pleadings are too broad and do not apply to any particular group members or that the pleadings only relate to the representative party and are not representative of the group.<sup>2328</sup> In the *Esso* case, in the context of dealing with an application to strike out the statement of claim and a complaint about 'the width of the pleading', Justice Merkel commented

In my view the Court's case management and individual docket system is such that it is well placed to ensure that there is no embarrassment or prejudice about the pleadings and proper particulars can be required to be provided at an appropriate time.<sup>2329</sup>

## Depositions

7.102. Some practitioners have argued for the introduction of a system of depositions in representative proceedings. Under the United States Federal Rules of Civil Procedure, depositions are available before as well as after the commencement of proceedings.<sup>2330</sup> Anyone can be compelled to give a deposition, however, leave of the court is required if a party intends to take more than 10 depositions.<sup>2331</sup> Subject to the rules of evidence, any part or all of a deposition may be used at any interlocutory proceedings or at trial.<sup>2332</sup> The Commission heard that depositions potentially could add significantly to costs and delay.<sup>2333</sup> The Commission notes that the judge may order depositions to be taken if it is considered necessary in a particular case, pursuant to the general discretion in s-33ZF of the Federal Court Act to 'make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding' or the provisions dealing with the examination of witnesses in Order 24 of the Federal Court Rules. The Commission is not disposed to make any recommendation in relation to the introduction of depositions at this stage. However, it is a subject which also could be considered in a review of Part IVA of the Federal Court Act.

## Notice requirements

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2327. This was a comment made by P Over 'Representative proceedings from the plaintiff's perspective' *Paper* NSW Young Lawyers CLE Seminar Sydney 17 November 1999.

2328. L Cook 'Class actions' *Paper* NSW Young Lawyers Seminar Sydney 17 November 1999, 11.

2329. *Johnson Tiles Pty Ltd v Esso Australia Ltd* [1999] FCA 56 at [8].

2330. Federal Rules of Civil Procedure (1999) r 27.

2331. The parties may also by written agreement waive this limit: Federal Rules of Civil Procedure (1999) r 30.

2332. Federal Rules of Civil Procedure (1999) r 32.

2333. Federal Court practitioners *Consultation* Sydney 2 June 1999.

7.103. Under an opt-out system, notice requirements have considerable importance. Unidentified group members need to be notified of the existence of the action so that they are able to make a decision about whether to opt-out or remain

and be bound by the decision. The Court must order that notice be given to group members of the proceeding itself, the right to opt-out, the opt-out date and any application by the respondent for dismissal of the proceedings for want of prosecution.<sup>2334</sup> The Court may require that group members are given notice of any proposed settlement<sup>2335</sup> and of any other matter.<sup>2336</sup>

7.104. The cost of complying with orders relating to notice can be considerable. It may involve advertising in major national and local newspapers over a period of time or contacting specified people from a database. The Court must approve and specify the content and form of the notice and may make orders relating to the costs of notice. Some practitioners have told the Commission that although there needs to be flexibility in orders made in relation to notice, it would assist if the Court published guidelines concerning the form and content of notices.<sup>2337</sup> Again, this is an issue which may also be left to be determined on a case by case basis.<sup>2338</sup>

### **Difficulties with settlement**

7.105. Representative proceedings can be difficult to settle.<sup>2339</sup> A representative party's lawyer owes a duty to all the members of the group. The group can be sizeable and include unidentified members. As a consequence

a respondent cannot know the extent of potential liability which it faces and the applicant's solicitors are in the unenviable position of potentially owing a duty to persons who are unidentified. This can present significant difficulties, particularly as regards settlement and discontinuance.<sup>2340</sup>

In addition there may be a variety of claims within a group and differing quantum of damages. There is a lack of confidentiality surrounding a settlement which can likewise inhibit settlement and the Court must approve any settlement.<sup>2341</sup> The Federal Court Rules do not address these issues and practitioners have commented that some guidance from the Court would be helpful.<sup>2342</sup>

7.106. One of the primary recommendations for reform in the ICJ study relates to settlement practices.

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2334. Federal Court Act s 33X(1).

2335. Federal Court Act s 33X(4).

2336. Federal Court Act s 33X(5).

2337. Federal Court practitioners *Consultation* Melbourne 25 August 1999.

2338. Federal Court Judge *Consultation* 10 January 2000.

2339. For a discussion of the procedural and ethical issues surrounding settlement processes in representative proceedings and the interests of individual group members versus the interests of the group see J Resnik 'Litigating and settling class actions: The prerequisites of entry and exit' (1997) *University of California, Davis Law Review* 835 and J Resnik et al 'Individuals within the aggregate: Relationships, representation, and fees' (1996) 71 *New York University Law Review* 296.

2340. L Cook 'Class actions' *Paper* NSW Young Lawyers Seminar, Sydney 17 November 1999, 22.

2341. Federal Court Act s 33V.

2342. J Basten 'Representative proceedings in New South Wales: Some practical problems' (1996) 34(2) *Law Society Journal* 45, 46.



The powerful financial incentives that drive plaintiff attorneys to assume the risk of litigation intersect with powerful interests on the defense side in settling litigation as early and as cheaply as possible, with the least publicity. These incentives can produce settlements that are arrived at without adequate investigation of facts and law and that create little value for class members or society.<sup>2343</sup>

7.107. As with s 33V of the Federal Court Act, r 23 of the United States Federal Rules of Civil Procedure, requires judges to approve settlements of class actions but does not specify the criteria judges should use to grant such approval. The ICJ study noted

[c]ase law requires that class action settlements be fair, adequate, and reasonable, but these elastic concepts do not offer much guidance as to which settlements judges should approve and which they should reject.<sup>2344</sup>

The report states that judges need to scrutinize proposed settlements more closely and outlines the factors judges should consider when deciding whether to approve a settlement including the amount of the estimated losses and how they were calculated, the mechanics of disbursement of settlement monies, the actual payout by the defendants and whether the amount of fees has been negotiated separately between the applicant lawyer and the respondent prior to settlement.

7.108. Discussing class actions in the United States, Professor Judith Resnik stated that procedural rules should ensure that specified criteria should be addressed by the judge at the time a settlement is proposed to promote an open and fair process. She suggested

- the extent of the information provided to participants in a settlement about the proposed remedy
- whether group members are treated equally or distinguished according to appropriate criteria
- the relationship between damages or compensation to group members and fees paid to lawyers
- the cost of administering and financing the remedy
- the degree to which opting out of the settlement is legally or practically feasible and
- the processes for notifying the group members.<sup>2345</sup>

The Commission supports the drafting of specified criteria for judges to take into account in approving a settlement. This could be considered in the context of a review of Part IVA of the Federal Court Act.

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2343. ICJ Executive Summary 10.

2344. ICJ Executive Summary 32. It should be noted that there are not the same 'powerful financial incentives for plaintiff lawyers' in Australia because percentage contingency fees are not allowed.

2345. J Resnik 'Litigating and settling class actions: the prerequisites of entry and exit' (1997) *University of California, Davis Law Review* 835.

## Damages

7.109. Representative actions will often split issues of liability and quantum of damages. In some cases each group member's claim has to be separately assessed. In *McMullin v ICI Australia Operations Pty Ltd* (the *Helix* case)<sup>2346</sup> seven test cases were heard before Justice Wilcox in the hope that the resulting judgments would assist other members of the class to settle their claims individually without the need for a hearing. Claims of less than \$100 000 were referred to judicial registrars. In other cases individual claims were referred to panels of barristers for assessment or an assessment process incorporated in the deed of settlement. In such cases an assessment process is agreed as opposed to a monetary figure.<sup>2347</sup> This was said to have worked well.<sup>2348</sup> The Federal Magistracy may be able to assess and determine damages for large groups in representative proceedings in the future.

## Costs orders and recovery of costs

7.110. In representative proceedings, costs orders can only be made against the respondent or the representative party, or in limited circumstances, particular group members.<sup>2349</sup> These provisions underline the public interest benefits in representative proceedings. The question whether these proceedings attract costs immunity or costs exposure, and the persons exposed to costs are public policy issues relevant to the competing rights and interests of the representative and group parties, the respondents and lawyers. These issues were considered on designing the scheme but remain topical and vexed ones.

7.111. Respondents complain that as a result of this provision they are unlikely to recover their costs if successful.

The application of Part IVA of the Federal Court Act which prevents a respondent from recovering other than against the named applicant, coupled with the tendency and the part of applicant's solicitors to invariably select a man or woman of straw as the representative applicant ensure that there is often no prospect of a respondent recovering their costs.<sup>2350</sup>

Respondents sometimes have sought security for costs from the representative party. To date such orders have not been made. The Court has held that it would be contrary to the 'spirit if not the letter of s 43(1A)' and the intention of Part IVA if an order for security for costs forced group members to contribute to a pool of

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2346. (1997) 72 FCR 1.

2347. J Kellam and P Long 'Product liability and class actions: a review' (1998) 9(5) *Australian Product Liability Reporter* 61.

2348. Federal Court practitioners *Consultation* Sydney 2 June 1999.

2349. Federal Court Act s 33Q(3), 33R(2) and 43(1A).

2350. Clayton Utz *Correspondence* 14 January 2000.



funds, abandon their claims or continue them as separate proceedings.<sup>2351</sup> This is not to say that security for costs will never be ordered in a representative

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2351. *Grant Ryan v Great Lakes Council* (1998) 154 ALR 584, Wilcox J and (1998) 155 ALR 447 (on appeal) Lindgren J.

proceeding. Justice Lindgren, when referring to the decision of Justice Merkel in *Woodlands v McPhee*<sup>2352</sup> and Justice Wilcox at first instance in *Ryan v Great Lakes Council* stated that

[i]f the group members or some of them were impecunious companies or persons ordinarily resident outside Australia and a 'person of straw' had been deliberately chosen to be the representative party, it might be appropriate to order that the representative party provide security and that the proceeding be stayed until that security was provided.<sup>2353</sup>

7.112. Some respondent lawyers suggested that the firms who 'promote' the litigation should bear some of the costs if the representative proceeding is unsuccessful.<sup>2354</sup> Not surprisingly this proposal was criticised by applicant lawyers. They point out that representative proceedings should not be treated differently to any other litigation where the applicant is at a costs risk, not the applicant's lawyer. They commented that if this proposal was in place, representative proceedings would cease to exist, as applicant firms would not be prepared to take on the work.<sup>2355</sup> Certainly if applicant solicitors were to be exposed to costs, they would be likely to seek and require a higher premium from damage awards. This costs issue, likewise, should be reviewed and, if necessary, attended by legislative change.

### **Ethical concerns with representative proceedings**

7.113. The opt-out nature of representative proceedings creates many ethical issues in relation to the treatment of group members by applicant and respondent lawyers.<sup>2356</sup>

7.114. The Commission was told of situations where respondent lawyers tried to contact group members directly to encourage them to settle or opt-out of the proceedings.<sup>2357</sup> Applicant lawyers told the Commission that although there may be situations where respondents need to contact group members,<sup>2358</sup> this contact should only be made with court approval and supervision.<sup>2359</sup>

Allowing unapproved or unsupervised contact by a respondent could increase the likelihood of group members receiving partial and misleading information about their

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2352. (1997) 80 FCR 529.

2353. *Grant Ryan v Great Lakes Council* (1998) 155 ALR 447, 457.

2354. C Phillips 'Class actions — Quo vadis? The case for restriction of expansion' *Paper Corporate Law Conference Melbourne* 24 September 1998; Federal Court practitioners *Consultation Melbourne* 25-August 1999.

2355. Federal Court practitioners *Consultation Melbourne* 25 August 1999.

2356. Discussed in ALRC DP 62 para 10.11-10.16. See also Law Council *Submission* 375.

2357. Federal Court practitioners *Consultation Melbourne* 25 August 1999.

2358. For example to assist with the notification of group members.

2359. Slater & Gordon *Correspondence* 23 December 1999.

legal rights. This could lead to group members resolving their individual claims without the benefit of legal advice or taking steps that are not in their best interest.<sup>2360</sup>

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<sup>2360</sup>. *ibid.*

7.115. For applicant lawyers, the difficulties concern their representation of a disparate class. There can be competing interests within a group when the group members do not have identical or similar interests or circumstances.<sup>2361</sup> The numbers of persons within a class can create a situation where the practitioner has considerable authority over the conduct of the litigation, including framing the issues, proceeding with or abandoning particular claims, and making settlement decisions.<sup>2362</sup>

Largely because of the novelty of the legal technology, representative proceedings have unusual ethical dilemmas for applicant solicitors. For instance, in every group there will be stronger and weaker claims and striking a balance between the rights and remedies for each of those respective categories of claimant (and everyone in between) requires significant attention and forethought.<sup>2363</sup>

7.116. Another dilemma for practitioners arises from the practitioner's duty to unidentified members of a group. While the Federal Court provisions for representative actions feature an opt-out provision designed to protect potential group members, in practice, certain judges seek to 'close the class' at some stage of the proceedings in order to provide certainty to unsuccessful respondents liable for damages.<sup>2364</sup> The Federal Court Rules do not directly address this situation. Recent litigation appears to have made this issue a critical one to resolve.<sup>2365</sup> Legislation may be needed to require the Court to close the class at a specified time before judgment.<sup>2366</sup> Such a provision would retain the benefits of the opt-out procedure while providing, before judgment, an opt-in arrangement, naming those who receive the benefit in the event of an adverse judgment for the respondents. This will also assist the Court to make an award of damages for the entire class, where that is appropriate. This issue may require immediate legislative amendment to ensure the continuing viability of the Part IVA arrangements.

7.117. While there is general agreement that the practitioner representing the applicants has a duty to the entire class rather than individual group members, the limits of that duty are unclear. A number of practitioners advised the Commission

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2361. P Shelton 'Class actions – Quo vadis?' *Paper* Corporate Law Conference Melbourne 24 September 1998; J Weinstein 'An introduction to who's who in mass toxic torts' (1995) 80 *Cornell Law Review* 845, 847.

2362. R Cramton 'Individualized justice, mass torts, and "settlement class action": An introduction' (1995) 80 *Cornell Law Review* 811, 822.

2363. P Over 'Representative proceedings from the plaintiff's perspective' *Paper* NSW Young Lawyers CLE Seminar Sydney 17 November 1999.

2364. In *McMullin v ICI Australia Operations Pty Ltd* (1998) 84 FCR 1 Justice Wilcox closed the class pursuant to the general power under s 33ZF to make orders 'to ensure justice is done in the proceeding' in response to the respondent's concerns that they would 'never know whether they have resolved all claims' because the claims of unidentified group members would never be statute barred as the limitation period is suspended pursuant to s 33ZE(1) of the Federal Court Act. The class was closed by the Court ordering notice to be given to group members of a date by which they had to identify themselves in order to become part of the class.

2365. *Bright v Femcare* (1999) 166 ALR 743.

2366. Federal Court Judge *Consultation* 10 January 2000.

that, in practice, the duty is generally taken to be fulfilled if appropriate promotion of the action is undertaken to advise potential claimants of their rights. However, there is no guidance in either professional practice or court rules as to how such a duty is or may be fulfilled.

7.118. Further consideration should be given to defining appropriate practitioner conduct with respect to representative actions. Professor Judith Resnik recognised the importance of ethical considerations in representative actions when she stated that

one should endeavour to make class action and other large-scale litigation governed by an amalgam of procedural and ethical constraints and obligations imposed on both judges and lawyers ... [i]n an effort to control not only processes but also professional behaviour.<sup>2367</sup>

### *Costs agreements and supervision by the Court*

7.119. In ALRC 46, the Commission recommended particular costs and fees structures aimed at discouraging abuse of representative proceedings by lawyers, including enabling the Court to approve an agreement concerning remuneration to be paid to the solicitor after being satisfied that the agreement is fair and reasonable to all concerned.<sup>2368</sup>

7.120. The ICJ study discusses the role of the judge in supervising fees awarded to the applicant's lawyer. Unlike in Australia, applicant lawyers in successful representative actions in the United States may receive as their fee payment, a percentage of the total amount paid by defendants. This changes the ethical dimensions of fees as applicant lawyers in the United States are seen to have a direct financial interest in the amount of the settlement reached. The ICJ report recommends that judges should 'reward class action attorneys only for law suits that actually accomplish something of value to class members and society'.<sup>2369</sup> The report provides some guidance for how judges can do this in practice.

7.121. The Commission has been told that in some cases judges ask to examine cost agreements on a confidential basis. In the *Esso* case,<sup>2370</sup> Justice Merkel recently handed down a decision which discussed the nature of the Court's role in approving or supervising the applicant solicitor's fee arrangements with group members. In that case the applicant solicitors entered into a 'no win no fee' costs agreement with some group members. The agreement included a 25% uplift fee if the proceedings were successful. It also provided that group members would be personally liable for individual costs incurred in working on the individual

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2367. J Resnik 'Litigating and settling class actions: the prerequisites of entry and exit' (1997) *University of California, Davis Law Review* 835, 846-7.

2368. The Commission's recommendations in relation to costs and fee structures in ALRC 46, chapter 8 were not adopted when Part IVA of the Federal Court Act relating to representative proceedings commenced operation in 1992.

2369. ICJ Executive Summary 33.

2370. *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) 166 ALR 731.

member's claim as well as a proportion of the overall costs of the representative proceeding. The Court was not informed of the nature of these cost agreements and thus the details of the costs agreements were not included in the opt-out notice. Usually, group members are not liable for costs in representative proceedings pursuant to s 43(1A) of the Federal Court Act. Justice Merkel held that the 'court has a responsibility to be satisfied that the group members are not being unfairly or unreasonably exposed to costs'.<sup>2371</sup> As the group members were not informed about their potential costs liability in the opt-out notice the 'no win no fee' costs agreements were held not fair and reasonable and the Court exercised its supervisory jurisdiction under s 23 and s 33ZF of the Federal Court Act to prevent the lawyers enforcing the agreements.

7.122. There was support in submissions for court supervision of costs agreements in representative proceedings.<sup>2372</sup> The applicant law firm, Slater & Gordon, made the following comments in relation to such agreements and their supervision.<sup>2373</sup>

- Court approval of such agreements should not be required until the end of the proceedings or until such an agreement is sought to be enforced.
- Applicant solicitors should be able to seek contributions from group members during the conduct of representative proceedings providing the group member has means and is willing to contribute.
- Applicant solicitors should be able to require group members to contribute to the cost of the proceedings where all the members of the class are identified.
- Applicant solicitors should be able to charge group members for costs which are specific to their claim, for example the cost of obtaining medical reports and financial statements.
- The Court should supervise costs agreements between group members and the applicant solicitor or any other solicitor.

These comments need to be evaluated in terms of the purpose of Part IVA. If a group member was forced to opt-out of the proceedings because of potential obligations under a costs agreement with the applicant solicitors, the purpose of Part IVA could be thwarted. The Commission supports Court approval of any costs agreement before the opt-out date to enable group members to make an informed choice about whether to remain in the group. If the costs agreement is not approved until the end of the proceeding or until such an agreement is enforced, some group members may already have opted-out because of concerns

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2371. id 739.

2372. National Legal Aid *Submission 360*; Law Council *Submission 375*; Slater & Gordon *Correspondence 23 December 1999*.

2373. Slater & Gordon *Correspondence 23 December 1999*.

about the terms of the costs agreement. Such members are disadvantaged if the cost agreement subsequently is set aside by the Court.

7.123. While most comment in Australia has focussed on personal injury and product liability cases, some of the potential problems with representative proceedings are evidenced in a number of migration cases before the Federal Court. Justice Merkel, in such a case involving 11 persons arriving by boat from Vietnam in 1994, noted

the present matter involves a class action by a group of persons having little command of the English language and, I assume, even less knowledge and understanding of the Australian legal system ... That fact, together with the additional fact that the action is a

class action under Pt IVA, can give rise to a greater responsibility on the part of the Court in relation to the conduct of the hearing. Under Pt IVA, the group members are not strictly parties in the proceedings able to give instructions as such. Yet, group members are bound by the result.<sup>2374</sup>

7.124. Class members for representative actions in migration and refugee cases are often solicited through advertisements in the press, including the ethnic press, with applicants invited to pay a fee in return for joining a representative action. One New South Wales firm representing migration applicants in representative actions consulted the Law Society of New South Wales to seek a ruling on the appropriateness of its costs agreements for its clients.<sup>2375</sup> The Minister for Immigration has referred a number of advertisements by legal firms and migration agents to the industry watchdog, the Migration Institute of Australia.<sup>2376</sup>

7.125. Vince Morabito,<sup>2377</sup> senior lecturer in law, recently discussed the *Esso* judgment and fee arrangements in representative proceedings and called on the federal parliament to address the difficult issues which they raise.<sup>2378</sup> He said

the central issue is whether the supervisory function to be discharged by the judge presiding over the class suit, in relation to fee arrangements, is to be regulated by a statutory scheme or whether the status quo should be maintained, leaving it up to judges to develop a body of relevant principles and guidelines.

...

More importantly, whether the lawyers in charge of a class suit should be able to enter into contingency fee arrangements not only with the representative plaintiff but also with class members, and if so, subject to what restrictions and controls, are questions which raise fundamental policy issues and as such should be tackled by the legislature.<sup>2379</sup>

7.126. The Commission continues to recommend that specific provisions should be enacted enabling the Court to approve fee agreements between the representative party and/or group members with the representative party's lawyer.<sup>2380</sup> This is an issue which could be addressed in a review of Part IVA of the Federal Court Act.

7.127. In DP 62, the Commission proposed that professional conduct rules should address the practice of representative proceedings to ensure such cases work fairly and effectively for the representative party and all group members and to provide guidance to lawyers.<sup>2381</sup> The Law Council submitted that such guidance should be

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2374. *Nguyen Thanh Trong v Minister for Immigration, Local Government & Ethnic Affairs* (1996) 42 ALD 255, 260.

2375. Federal Court practitioners *Consultation* Sydney 23 June 1999.

2376. F Carruthers and B Lane 'Judges in the dock over migrants' *The Australian* 30 November 1998, 5.

2377. Senior lecturer in the Department of Business Law and Taxation at Monash University.

2378. V Morabito 'Contingency fees in federal class actions' (1999) 73(12) *Law Institute Journal* 86.

2379. *id* 89.

2380. ALRC 46, para 293.

2381. See ALRC DP 62 proposal 10.1.



provided in the form of a practice direction, rather than in professional conduct rules.<sup>2382</sup> It further stated that

[o]bviously, with representative proceedings there are special circumstances relating to costs and settlement arrangements. For this reason, the Law Council supports the explicit statement and definition of these matters.<sup>2383</sup>

The Commission sees merit in the Court issuing guidelines to deal with certain of the issues raised in this discussion. A practice direction may be too prescriptive for the range of cases involved. In the past, the Court guidelines drafted in close consultation with the profession have secured effective professional practices. It is more difficult to draft general rules or directions to fit the variety of representative proceeding cases. IDS allows judges to have continuing and close oversight of these cases and the Federal Court Act provides judges with broad discretions to deal with representative proceedings. Legislative amendment is required for issues relating to class closure and costs liability. On other matters, the preferable course may be for the law to be developed on a case by case basis.<sup>2384</sup>

7.128. Where issues concern lawyers' responsibility to and relationship with clients, such matters are ones which lawyers themselves should debate and help define. The Commission continues to recommend that, in addition to Court guidelines to elucidate professional working practices in representative proceedings, the profession should include rules governing lawyer's responsibilities to multiple claimants and in representative proceedings in professional practice rules.

**Recommendation 78.** The Federal Court should consider drafting guidelines or a practice note, relating to the practices of lawyers and parties in representative proceedings, addressing in particular

- the choice of the representative party, who should not be chosen primarily as a 'person of straw'
- the procedures to be followed to ensure fair cost agreements between group members, the representative party and lawyers
- the obligations of lawyers to the representative party and each group member with respect to competing interests of group members and the group, class closure and settlement arrangements
- the arrangements for communication between respondent lawyers and group members.

**Recommendation 79.** The Federal Court should promulgate additional rules for representative proceedings in relation to issues such as

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2382. Law Council *Submission 375*.

2383. *ibid.*

2384. Federal Court Judge *Consultation* 10 January 2000.

- criteria for selecting the appropriate representative action and representative party amongst competing applications
- notification procedures
- proposed settlements, including global settlements.

**Recommendation 80.** The provisions of Part IVA of the *Federal Court Act 1976* (Cth) should be amended to

- require class closure at a specified time before judgment and
- enable the Court to approve fee agreements between the representative party and/or group members with the representative party's lawyer.

**Recommendation 81.** The Attorney-General should commission a review of the operation of Part IVA of the *Federal Court Act 1976* (Cth).

**Recommendation 82.** The profession should include rules governing lawyers' responsibilities to multiple claimants and in representative proceedings in professional practice rules.

## Migration

7.129. The number of migration matters filed in the Federal Court over the past six years has steadily increased. Migration cases are a significant proportion of the Court's total administrative law caseload; from just 28% 10 years ago to 67% in 1997-98. Although the numbers of such judicial review applications are increasing, they represent a fairly small percentage of Immigration Review Tribunal (IRT) and Refugee Review Tribunal (RRT) decisions. DIMA's figures show that an average of 7% of applicants who were unsuccessful in the IRT between 1990 and 1998 sought judicial review of their decisions in the Federal Court and an average of 8.5% of applicants who were unsuccessful in the RRT between 1993 and 1998 sought judicial review of their decisions in the Federal Court.<sup>2385</sup>

### Management of the migration case load

7.130. The Federal Court has experimented with various case management arrangements for the migration caseload in different registries. The migration caseload was seen to require special attention because of its increasing size and the numbers of unrepresented applicants in such cases. Some judges arrange for registrars to take the first directions hearings of such cases in their docket. Judges in New South Wales often list two to three migration hearings in one day. The hearings are often quite short.

7.131. The Commission's survey of Federal Court cases found that 31% of sampled migration cases involved an unrepresented litigant. The other party, the Minister for Immigration and Multicultural Affairs, is a repeat player represented by practitioners experienced in the area. Some judges have commented that many

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<sup>2385</sup> DIMA Fact Sheet 86 'Litigation involving migration decisions' 28 August 1998  
<<http://www.immi.gov.au/facts.htm>> (24 January 2000).

unrepresented applicants have little understanding of the nature of judicial review. Justice Wilcox commented on an applicant who was unrepresented, in detention, unable to read English and who could not read the Refugee Review Tribunal's decision (in English and not translated).

The number of applications filed in the New South Wales District Registry for judicial review of decisions of the Refugee Review Tribunal is running this year at a rate more than twice that of last year. It is the experience of my colleagues, as well as myself, that a large proportion of these matters are commenced by a stereotyped form of application that is uninformative and bears little relationship to what the applicant says at the hearing. It seems the filing of an application for review has become an almost routine reaction to the receipt of an adverse decision from the Tribunal.

He went on to say

The solution is not to deny a right of judicial review. Experience shows a small proportion of cases have merit, in the sense the Court is satisfied the Tribunal fell into an error of law or failed to observe proper procedures or the like. In my view, the better course is to establish a system whereby people whose applications are refused have assured access to proper interpretation services and independent legal advice. If that were done, the number of applications for judicial review would substantially decrease. Those that proceeded would be better focussed and the grounds of review more helpfully stated. If applicants cannot afford legal advice, as is ordinarily the case, it ought to be provided out of public funds. The cost of doing this would be considerably less than the costs incurred by the Minister under the present system, in instructing a solicitor (and usually briefing counsel) to resist all applications, a substantial number of which have no merit and are ill-prepared. That is to say nothing about the desirability of relieving the Court from the burden of finding hearing dates for cases that should not be in the list at all.<sup>2386</sup>

7.132. The Court has initiated discussions to secure advice and representation for such unrepresented parties.<sup>2387</sup> Pro bono schemes, organised with the Bar in New South Wales, Victoria and Queensland have been established. It is hoped that this scheme will provide appropriate and effective assistance to such applicants. However, DIMA noted that

Justice Wilcox's view that legal representation early on would reduce the number of applications for judicial review, is with respect, premised on the assumption that applicants in migration matters act in the same way as other administrative law applicants who seek speedy resolution of their cases. This is not necessarily the case as there is some evidence to suggest that a number of applicants in migration cases seek to delay their removal from Australia through litigation and may therefore not heed advice that their case has little prospects for success.<sup>2388</sup>

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2386. *Mbuaby Paulo Muaby v MIMA* [1998] 1093 FCA 20 August 1998.

2387. Federal Court Registrar W Soden *Consultation* Sydney 7 April 1999. For a discussion of unrepresented parties generally see para 5.7-5.11, 5.147-5.157.

2388. DIMA *Submission* 385.

7.133. In the New South Wales and Victorian District Registries, the AGS, on behalf of the Minister prepares, files and serves a bundle of documents (the 'green book') before the first directions hearing.<sup>2389</sup> Such documentation is ordinarily the responsibility of an applicant. In New South Wales the green book must contain photocopies of documents in the possession or power of the Minister which appear to be relevant to the review, including a copy of the decision under review but not including the transcript of the tribunal proceedings. In Victoria a notice to practitioners, distributed in November 1999, reflects a new practice whereby the AGS will make the DIMA and tribunal files available to the applicant's solicitor or unrepresented applicants, subject to any claim to privilege. If documents arise which are not in the green book, the notice to practitioners goes on to state that directions will be given to enable additional documents to be filed. DIMA and practitioners have said that the green book system is working well, and in combination with IDS, has reduced the duration of migration cases.<sup>2390</sup> DIMA is currently finalising a review of the green book system. DIMA told the Commission that it would like to see the green book system introduced in all Federal Court registries.<sup>2391</sup> The Commission supports such arrangements in all Federal Court registries.

**Recommendation 83.** The practice in the New South Wales and Victorian registries of the Federal Court, whereby the solicitor acting on behalf of the Minister for Immigration and Multicultural Affairs, prepares, files and serves a bundle of relevant documents in the matter before the first directions hearing in migration matters, should be extended to all the other Federal Court registries.

## Expert evidence

7.134. General issues related to the use of experts and expert evidence in court and tribunal proceedings are examined in chapter 6.<sup>2392</sup> These issues are not repeated here. The recommendations in this chapter do reflect the earlier discussions.

7.135. Expert witnesses are involved in many cases in the Federal Court, including cases involving breaches of consumer protection or restrictive trade practices

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2389. In NSW this applies to all migration matters filed from 1 July 1998: Federal Court of Australia NSW Registry Notice to Practitioners 25 June 1998. The practice commenced in November 1999 in the Victorian registry.

2390. Duration figures are also attributable to DIMA's practice of facilitating agreed remittal of cases for a re-hearing at an early stage in proceedings where appropriate: DIMA *Consultation* Canberra 26 May 1999 and 2 September 1999; Federal Court practitioners *Consultation* Sydney 23 June 1999; National Legal Aid *Submission* 360.

2391. DIMA *Consultation* Canberra 2 September 1999.

2392. See para 6.74–6.130.

provisions of the Trade Practices Act; copyright, designs and other intellectual property cases; and income tax, sales tax and custom duties cases.

7.136. In recent years, the Federal Court, in consultation with the Law Council and other professional bodies, has actively considered and implemented reforms on the use of experts and issued a practice direction providing guidelines for expert witnesses.<sup>2393</sup> The Federal Court guidelines are discussed below. Their wider implications for other federal courts and tribunals are examined in chapter 6.<sup>2394</sup> In December 1998, the Federal Court also issued new rules of court dealing with the evidence of expert witnesses.<sup>2395</sup>

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2393. Federal Court *Practice Direction: Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia* 15 September 1998 (Federal Court *Guidelines for expert witnesses*).

2394. See para 6.96–101.

2395. Federal Court Rules O 34A.

## Experts' duties and responsibilities

7.137. An appropriate area of reform, which has been pursued by the Federal Court, lies in creating new understandings of lawyers' and experts' ethical obligations and the imposition on experts of a primary obligation to the court. The Federal Court guidelines for expert witnesses provide that

- an expert witness has an overriding duty to assist the Court on matters relevant to the expert's area of expertise
- an expert witness is not an advocate for a party and
- the expert witness's paramount duty is to the Court and not to the person retaining the expert.<sup>2396</sup>

7.138. The practice direction provides guidelines for written expert evidence to make expert evidence more explicable and transparent and emphasises the ethical obligations of the expert to the Court. For example, the guidelines state that

- expert reports should end with a declaration that the expert has made all the inquiries which the expert believes are desirable and appropriate and that no matters of significance which the expert regards as relevant have, to the expert's knowledge, been withheld from the Court<sup>2397</sup> and
- if experts retained by the parties meet at the direction of the Court, it would be improper conduct for an expert to be given or to accept instructions not to reach agreement.<sup>2398</sup>

7.139. The Federal Court guidelines clarify the general duty of expert witnesses to the Court. It was hoped that such guidelines would change the relationship between experts and the parties who retain them with experts more confident to resist any suggestions to tailor reports to secure a particular legal outcome and parties less likely to suggest 'tactical play' to their experts.

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2396. Federal Court *Guidelines for expert witnesses*. The practice direction incorporates many of the components of an influential statement of the duties and responsibilities of expert witnesses in civil cases given in the English case *The Ikarian Reefer; National Justice Compania Naviera SA v Prudential Assurance Co Ltd, The Ikarian Reefer* [1993] 2 Lloyd's Rep 68, 81–82 and *National Justice Compania Naviera SA v Prudential Assurance Co Ltd, The Ikarian Reefer* [1995] 1 Lloyd's Rep 455, 498. See also Lord Woolf *Access to justice draft civil proceedings rules* HMSO London 1996 (Woolf rules) 32.1–32.9.

2397. Federal Court *Guidelines for expert witnesses*; cf Woolf final report rec 161, Woolf rules 32.9.

2398. Federal Court *Guidelines for expert witnesses*; cf Woolf final report rec 162. In addition, an earlier proposal of the Federal Court suggested that any report or draft report prepared for the purpose of giving evidence to the court and delivered to a client should be addressed to the Court: Federal Court *Correspondence* 20 August 1997 cf Woolf final report rec 160. In the context of the last mentioned element of the practice directions, the Law Council has emphasised that any agreement between experts should be confined to matters of expert opinion rather than matters of fact: Law Council *Submission to Federal Court of Australia on the use of experts in technical cases* April 1997. Such concerns highlight the need for guidelines on expert conferences (see rec 62).

7.140. The guidelines also provide detailed requirements concerning the form and content of expert evidence which may improve the clarity and usefulness of expert reports and encourage openness about instructions given to and factual



assumptions used by experts.<sup>2399</sup> The express requirement for experts to articulate reasons for their opinions is also important, given that, at least in the view of some legal practitioners, some expert reports tend to be 'short-form and somewhat cryptic'.<sup>2400</sup>

7.141. Aspects of the Federal Court guidelines were criticised in Commission consultations. Some practitioners and experts were concerned at the requirement to disclose instructions. The Commission was told that parties may choose to retain advisers, or 'silent' experts and other experts to give evidence in court.

7.142. The terms of the expert witness declaration<sup>2401</sup> were also criticised as not making clear the limit of the expert's declaration as to inquiries made. Others suggested the declaration may form the basis for cross-examination to discredit expert opinions.<sup>2402</sup> One way to address these concerns may be to incorporate a similar provision restricting cross-examination in the manner of the United Kingdom Civil Procedure Rules.<sup>2403</sup> Under those Rules instructions are not privileged against disclosure but the court will not, in relation to those instructions, order disclosure of any specific document or permit any questioning in court other than by the party who instructed the expert, unless it is satisfied that there are reasonable grounds to consider the statement of instructions to be inaccurate or incomplete.<sup>2404</sup>

7.143. The Federal Court guidelines also provide that all instructions, whether in writing or oral, should be attached to the expert report, or summarised in it.<sup>2405</sup> The United Kingdom Civil Procedure Rules provide that the expert's report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written.<sup>2406</sup>

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2399. Another example of rules focussing on improving the clarity of expert reports is the Land and Environment Court (NSW) *Practice direction 3: Expert evidence in class 1 and 2 appeals*. This practice direction requires, among other things, that (a) expert reports shall be so presented as to clearly and concisely state the opinions proffered and the basis for those opinions. Expert reports should eliminate unnecessary background material (b) Where a party relies on a number of experts a brief summary report covering an expert opinion may also be served and filed with the Court prior to the hearing (c) unless the Court or the opposing party signifies no later than seven days before the listed hearing date its requirement that the expert witness attend the hearing for the purpose of oral examination there shall be no need for the expert's attendance and that person's written report may be treated as evidence.

2400. I Freckelton *Correspondence* 5 January 1999.

2401. That the expert has 'made all the inquiries which the expert believes are desirable and appropriate and that no matters of significance which the expert regards as relevant have, to the expert's knowledge, been withheld from the Court': Federal Court *Guidelines for expert witnesses*.

2402. Arthur Andersen *Dispute analysis* October 1998; Forensic accounting special interest group *Consultation* Sydney 20 April 1999.

2403. Civil Procedure Rules 1999 (UK) (CPR (UK)). The new Rules which came into force on 26 April 1999 followed review of Lord Woolf's draft civil proceedings rules by a Civil Procedure Rules Committee established by the *Civil Procedure Act 1997* (UK).

2404. CPR (UK) 35.10(4).

2405. Federal Court *Guidelines for expert witnesses*.

2406. CPR (UK) 35.10(3).

7.144. Practitioners were concerned about how the Federal Court will deal with breaches of the expert guidelines. It was suggested that in this, as with other areas of procedure, courts should use preclusionary sanctions so that, for example, where there has been a breach of the guidelines only limited supplementation of experts reports should be allowed at trial.<sup>2407</sup> Others suggested that 'only in the most extreme cases would costs or preclusionary sanctions be appropriate' in relation to the enforcing guidelines such as those issued by the Federal Court.<sup>2408</sup>

7.145. One way in which the guidelines might be further developed is in more explicitly distinguishing between experts who are say, the treating doctor, or retained experts for the party and experts retained only to give or prepare evidence for the purpose of court or tribunal proceedings.

7.146. The Law Reform Commission of Western Australia has recommended that the practice and procedure of civil courts should maintain a clear distinction between expert advisers and expert witnesses and that this distinction should be established by requiring expert witnesses to disclose, prior to trial, the nature of their relationship with the parties.<sup>2409</sup> A draft Code of Guidance for Experts under the United Kingdom Civil Procedure Rules takes the distinction between expert advisers and expert witnesses as its starting point.

Experts who are instructed by solicitors on behalf of their client to provide advice owe a duty to the client; in the event that the matter proceeds to litigation the expert's overriding duty is to the court.<sup>2410</sup>

7.147. The Federal Court guidelines have been in operation only a short time. It is too early to evaluate the effects of the guidelines on the conduct of parties and expert witnesses in Federal Court proceedings. The Commission understands that the operation of the guidelines, and other aspects of the use of expert evidence are to be reviewed by the Federal Court. During the course of the reference the Commission convened several groups of legal professionals and experts, who

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2407. P Meadows 'Civil litigation reform' *Paper* 1998 Corporate Law Conference Melbourne 24-September 1998.

2408. ACT Bar Association *Submission* 249.

2409. Law Reform Commission of Western Australia (Project No 92) *Review of the criminal and civil justice system in Western Australia – Final report* LRCWA Perth 1999, 189-190, rec 243. The LRCWA also suggests that an expert who claims to be 'independent', that is, not to have acted as an adviser would not be entitled to claim that any communication with the parties and/or lawyers was privileged.

2410. Lord Chancellor's Dept *Draft code of guidance for experts under the Civil Procedure Rules (CPR)* Lord Chancellor's Dept <[http://www.open.gov.uk/lcd/civil/procrules\\_fin/expwitfr.htm](http://www.open.gov.uk/lcd/civil/procrules_fin/expwitfr.htm)> (25-October 1999). Comments on the draft code were requested by 11 October 1999. The code contains comprehensive provisions designed to facilitate better communication and dealings between both the expert and the instructing party and between the parties. For example, the code provides that as and when an experts advice becomes a report (to a court) an opportunity must be afforded to the experts to amend their advice.

provided valuable feedback on the operation of the guidelines. Similar consultation should form one focus of the review of the guidelines.

**Recommendation 84.** In its review of the operation of the guidelines for expert witnesses, the Federal Court, in consultation with relevant professional bodies should give particular attention to

- whether parties increasingly are choosing to retain ‘silent’ expert advisors and the implications of any such trend
- the incidence and effectiveness of conferences and other prehearing contact between experts and whether guidelines on the conduct of court ordered conferences of experts should be developed (see recommendation 62)
- whether the guidelines should explicitly remind experts that they can take the initiative before or at the hearing to correct any misstatement or apparent misunderstanding of the evidence they have provided to the Court
- whether there should be provision for the Court to give leave for parties to submit questions to the expert prior to the hearing, upon payment of the experts’ reasonable costs of answering such questions (see recommendation 63)
- the incidence and effectiveness of the use of panel presentation of expert evidence.

### Assessors in the Federal Court

7.148. As noted in chapter 6, the use of assessors is relevant in Federal Court proceedings, due to the novel and technical issues frequently raised. A Federal Court judge might determine, for example, trade practices cases involving economic evidence as to market definition, copyright cases involving plans, admiralty collision cases on seamanship and navigation, patent cases involving molecular biology and native title cases turning on historical and anthropological evidence.<sup>2411</sup>

7.149. The Federal Court may appoint assessors to assist it in the hearing and trial or determination of any proceedings under s 217 of the *Patents Act 1990* (Cth) and in native title cases under the Native Title Act.<sup>2412</sup> The appointment of assessors is rare. Power to appoint assessors has been included in Commonwealth patents legislation since 1903 but had only been used once<sup>2413</sup> before September 1997, when Justice Heerey made an order for the appointment of an assessor in the *Genetics Institute* case (discussed below).<sup>2414</sup>

2411. P Heerey ‘Expert evidence intellectual property cases’ (1998) 9 *Australian Intellectual Property Journal* 92, 94.

2412. See para 7.79–7.84 for further discussion on the use of assessors in native title cases.

2413. An assessor was appointed, by consent, in *Adhesives Pty Ltd v Aktieselskabet Dansk Gaerings-Industri* (1936) 55 CLR 523; referred to in *Genetics Institute Inc v Kirin-Amgen Inc* (1997) 149 ALR 247, 249.

2414. *Genetics Institute Inc v Kirin-Amgen Inc* (1997) 149 ALR 247.



7.150. As previously discussed, an assessor is an expert available for the judge to consult if the judge requires assistance in understanding the effect or meaning of expert evidence.<sup>2415</sup> The form of communication between the expert and the judge or other decision maker may differ. An assessor could be limited to written communications with the judge, (and such also made available to the parties), or the judge may have unrestricted and private access to the expert.<sup>2416</sup>

7.151. In the *Genetics Institute* case<sup>2417</sup> communication between expert and judge was relatively unrestricted. Justice Heerey has commented that, while it may be appropriate for the expert to present a written report to the judge towards the end of the trial which would be made available to the parties and subject to counsel's comments in final submissions, he would not favour cross-examination of the expert.<sup>2418</sup>

7.152. While communication between an assessor and judge may be more or less private, an assessor or expert assistant may also contribute to deliberations in open court.<sup>2419</sup> For example, in *Beecham Group Ltd v Bristol-Myers Company (No 2)*<sup>2420</sup> Justice Barker of the High Court of New Zealand appointed a scientific adviser to assist him in a patent infringement case. The adviser in course of the hearing, commented in open court on matters raised by counsel's submissions. Any major question which occurred to the adviser which was not simply a technical instruction to the judge in the scientific area was referred to counsel for their comment.<sup>2421</sup>

7.153. Concerns have been expressed that an assessor may have too much influence over the judge. Counsel in the *Beecham Group* case,<sup>2422</sup> in opposing the appointment of the scientific adviser, expressed concerns that 'the adviser could readily transgress the limits of his proper role and express views to the Judge which parties may wish to challenge but would have no opportunity of doing'. The

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2415. *The Queen Mary* (1947) 80 L.L.Rep. 609, 612 cited in A Dickey 'The province and function of assessors in English Courts' (1970) *Modern Law Review* 494, 501 fn 52. It is common for assessors to sit with the judge for all or part of the proceedings. See para 6.123–6.125.

2416. P Heerey 'Expert evidence intellectual property cases' (1998) 9 *Australian Intellectual Property Journal* 92, 97.

2417. *Genetics Institute Inc v Kirin-Amgen Inc* (1997) 149 ALR 247. This was a patent infringement case which involved complex and highly contested scientific issues concerning biochemical technology. Between them, the parties intended to call 14 scientific experts from various disciplines. The judge considered that in a case such as this he would be likely to be assisted by expert assistance such as that provided by an assessor. Given that the cost of such an appointment would not be disproportionate in the case and appropriate terms of appointment could be devised, Heerey J held that an assessor should be appointed.

2418. P Heerey 'Expert evidence intellectual property cases' (1998) 9 *Australian Intellectual Property Journal* 92, 98.

2419. This is closer to the role of the assessor in UK Admiralty cases. See ALRC DP 62 para 13.144.

2420. [1980] 1 NZLR 185.

2421. *Beecham Group Ltd v Bristol-Myers Company (No 2)* [1980] 1 NZLR 185, 195.

2422. *ibid.*

judge responded that, while this concern was valid, it could be addressed by carefully defining the role of the adviser.<sup>2423</sup>

7.154. Some Federal Court judges and practitioners expressed concern about the procedural fairness of contact between judges and experts in chambers.<sup>2424</sup> It was suggested that it may be more appropriate, and just as effective to assist the judge, if there were informal discussions between the assessor and the judge, in the presence of the parties' representatives.<sup>2425</sup> If judges were able to confer with the parties' expert witnesses in similar circumstances, in order to ask questions, this might obviate the need for an assessor.<sup>2426</sup>

7.155. In *Genetics Institute* Justice Heerey rejected the respondent's arguments that High Court authorities concerning chapter III of the Constitution stood in the way of appointing an assessor,<sup>2427</sup> stating that there was no question of an assessor giving a judgment or making an order or otherwise exercising any judicial functions.<sup>2428</sup> The decision was appealed on the basis that, by having 'lengthy discussions' with the court assessor after the close of submissions, Justice Heerey had acted either improperly or in breach of principles of natural justice. This contention was rejected by the Full Federal Court.<sup>2429</sup>

7.156. Federal Court judges have commented favourably on the usefulness of assessors, particularly in restrictive trade practices and intellectual property cases.<sup>2430</sup> Some practitioners have also submitted that the power to appoint assessors should be used more widely.<sup>2431</sup> Others have stated that they should be rarely used and the consent of the parties should be a pre-condition to the

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2423. id 190. In the event, Barker J found it appropriate to confer with the adviser after judgement had been reserved, to ensure that the judgement was correct in its statements of scientific fact or principle: id 195.

2424. eg Law Society of WA *Consultation* Perth 21 September 1999. In particular practitioners expressed concerns that the judge not get a 'private education' on the issues where the adviser cannot be cross-examined.

2425. Federal Court judge *Consultation* Perth 22 September 1999; I Stewart *Submission* 298.

2426. I Stewart *Submission* 298.

2427. *Harris v Caladine* (1991) 172 CLR 84; *Re JRL: Ex parte CJL* (1986) 161 CLR 342.

2428. *Genetics Institute Inc v Kirin-Amgen Inc* (1997) 149 ALR 247, 250.

2429. The Full Court noted that the trial judge had considered and addressed questions, before the commencement of the trial, about the role of the assessor and the potential impact of that role on the parties' rights of natural justice and the judge's obligations to perform his judicial functions fairly and independently. Against that background the Full Court was not persuaded that any aspect of the judge's conduct with respect to the assessor provided a basis for leave to appeal: *Genetics Institute Inc v Kirin-Amgen Inc* (1999) 163 ALR 761.

2430. Comments, Law Week seminar on expert witnesses, New South Wales Parliament Theatre, 29-May 1997. If assessors were to be used in Part IV cases, members of the Australian Competition Tribunal would be well qualified to perform this role. Assessors could have a role in helping to define the ambit of necessary evidence in cases involving market definition. This has proven to be a problem in restrictive trade practices cases, eg *Arnotts Ltd v Trade Practices Commission* (1990) 24-FCR 313, 316 in which investigation of the practical question of fact relating to Arnotts' position in the market for biscuits involved a trial occupying 110 hearing days generating 6500 pages of transcript and 292 exhibits.

2431. Arthur Robinson *Submission* 189; Victorian Bar *Submission* 367.

appointment of an assessor.<sup>2432</sup> There are practical problems in the selection and appointment of assessors, including in situations where expert evidence is not confined to one discipline or where there are few available experts, the best of whom may already have been retained by the parties.<sup>2433</sup>

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2432. Freehill Hollingdale & Page *Submission* 339.

2433. Clayton Utz *Submission* 341.



7.157. The Federal Court has recently promulgated new rules to provide for the appointment, with the consent of the parties, of an 'expert assistant' to assist the Court in relation to the determination of any issue or issues.<sup>2434</sup> The Law Council supported the new Federal Court rule in part because the order for appointment is contingent upon the consent of both parties and any assistance from an expert assistant must be reduced to writing and communicated to the parties.<sup>2435</sup> This model of assistance is different from that used by Justice Heerey in the *Genetics Institute* case. The Federal Court observed that since the less restrictive approach adopted in the *Genetics Institute* case survived challenge there are now two regimes for expert assessors with different procedures.

**Recommendation 85.** The Federal Court should continue to develop appropriate procedures and arrangements, in consultation with legal professional and user groups, to allow judges to benefit from expert assistance in understanding the effect or meaning of expert evidence.

## Practice and procedure

### Harmonisation of civil procedure

7.158. Harmonisation of procedural rules should promote a more efficient and less costly process for parties. Parties and practitioners would no longer have to spend time and resources familiarising themselves concerning the variety of procedural rules in different jurisdictions. The call for harmonised procedures is not new. Reform and professional bodies have made numerous recommendations for uniformity and the harmonisation of procedural rules.<sup>2436</sup>

7.159. The Federal Court and State Supreme Courts have worked together to develop harmonised procedures for Corporations Law matters. Justices Santow and Austin reported the following developments.

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2434. Federal Court Rules O 34B which came into effect on 3 December 1999. It was also anticipated that, leaving aside the option of appointing an expert assistant, judges will more often direct that the parties in scientific or technical cases provide a technical 'primer' for the use of the Court: B-Beaumont *Submission* 256.

2435. Law Council *Submission* 375. The proposed Federal Court Rule provides among other things that a court appointed expert assistant may assist the Court by providing a written report on issues identified by the Court or a judge, and not otherwise; and the Court must afford the parties a reasonable opportunity to comment on the report, but a party is not entitled or permitted to cross-examine the Court appointed expert assistant: Federal Court *Correspondence* 28 July 1999.

2436. eg In 1992, the Law Society of NSW recommended uniform procedures: Law Society of NSW *Access to justice report* Sydney 1992; AJAC recommended the harmonisation of civil procedures: AJAC report action 22.1; Lord Woolf recommended the introduction of a single claim form: Woolf final report rec 144. The Uniform Civil Procedure Rules (Qld) commenced on 1 July 1999, applying to civil proceedings in the Supreme Court, District Court and Magistrates Courts in Queensland.

Through the Council of Chief Justices, a committee comprising State, Territory and Federal Court judges has recently finalised recommendations for harmonised rules of court for proceedings under the Corporations Law. The harmonised rules will simplify

litigation, especially where legal practitioners conduct litigation in a court outside their State of residence. This will mean, say, that a lawyer in Perth will be able to conduct winding-up or takeover litigation in Brisbane using standard documentation.<sup>2437</sup>

7.160. The harmonised Corporations Rules will come into effect nationally in early 2000.<sup>2438</sup> The Commission sees considerable merit in harmonised or uniform rules and originating processes and commends the recent initiatives in relation to Corporations Law matters.<sup>2439</sup> Electronic filing and legal publishing can facilitate such changes.<sup>2440</sup> The Commission supports the introduction of the Queensland Uniform Civil Procedure Rules and the United Kingdom Civil Procedures Rules to the extent they promote harmonisation of procedural rules in litigation, with the qualification that the Commission advocates horizontal harmonisation of rules as between courts of similar jurisdiction. A danger with harmonising rules as between Supreme, District and Magistrates courts is that the lower courts may acquire more formal and elaborate rules than existed previously.

7.161. Harmonisation of procedures should not create inflexible procedures. The Federal Court submitted that

[a]lthough harmonisation in [Corporations Law], where there is a national scheme, has obvious benefits, this does not mean that harmonisation of *all* rules is a good thing. Harmonisation should proceed on a case by case basis consequent upon demonstrated benefits. A general harmonisation of all rules is not supported; it is likely to have the effect of impeding innovation and change.<sup>2441</sup> (original emphasis).

The Law Council stated that

uniformity is not valuable for its own sake, but only if unnecessary variations are eliminated. The themes of case management and judicial involvement in litigation necessarily require that there will be various specific procedures for particular kinds of cases. The uniformity that the Law Council argues for has to do with rules and standard forms, rather than flexible case management ... It could be dangerous to impose too much uniformity, because ... variations in approach which may reveal a better way of doing things may be eliminated.<sup>2442</sup>

7.162. In DP 62, the Commission proposed that the Council of Chief Justices should further develop harmonised rules and originating process, where appropriate, for Federal Court and State and Territory Supreme Courts civil matters.<sup>2443</sup>

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2437. G Santow and R Austin 'No doubts in Wakim wake' 26 July 1999 *Australian Financial Review* 20.

2438. Federal Court *Submission* 393.

2439. The Law Council 'supports completely [such] initiative[s] of the Council of Chief Justices': Law Council *Submission* 375.

2440. See J Sherman and A Stanfield *Electronic appeals project – Final report* Council of Chief Justices of Australia and New Zealand 25 May 1998 <<http://www.cj.org/reports.htm>> (29 July 1999).

2441. Federal Court *Submission* 393.

2442. Law Council *Submission* 126.

2443. See ALRC DP 62 proposal 10.14.

Submissions and consultations received by the Commission supported this proposal.<sup>2444</sup>

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<sup>2444</sup>. National Legal Aid *Submission 360*; Victorian Bar *Submission 367*; Law Council *Submission 375*.

**Recommendation 86.** The Council of Chief Justices should continue its efforts in further developing harmonised rules and originating process, where appropriate, for Federal Court and State and Territory Supreme Courts civil matters.

## Pleadings

7.163. Pleadings are formal written statements of the claim and defence<sup>2445</sup> which aim

- to enable the parties to prepare for trial knowing what is admitted and by defining what has been placed in issue
- to inform the court of the matters at issue
- to form a permanent record of the nature and parameters of the case.<sup>2446</sup>

7.164. The general rule is that a pleading must contain a statement in summary form of the material facts on which the party relies but not the evidence by which the facts are to be proved.<sup>2447</sup> Matters of law, or legal conclusions or inferences are not normally pleaded.

7.165. It is rare for there to be a discussion of civil litigation without criticisms of the rules and practices of pleadings and discovery. In DP 62 general criticisms of pleadings were outlined, as well as solutions which have been suggested in submissions, consultations and articles.<sup>2448</sup> The solutions for pleadings and other practices in litigation focus on three general issues<sup>2449</sup>

- legislation and court rules governing the practice
- legal culture surrounding the practice and lawyers' conduct
- enforcement of the rules and appropriate lawyer conduct by the Court.

7.166. A significant problem identified with pleadings is they are often too general in scope and inadequately particularised<sup>2450</sup> so that there is no narrowing of issues.<sup>2451</sup> This is said to be part of a culture in which parties commence

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2445. A 'pleading' under the Federal Court Rules is defined as including a statement of claim and a cross-claim and subsequent pleadings, but does not include an application, notice of motion or affidavit: Federal Court Rules O 1 r 4.

2446. M Aronson and J Hunter *Litigation: Evidence and procedure* 6th ed Butterworths Sydney 1998, 104.

2447. Federal Court Rules O 11 r 2.

2448. ALRC DP 62 para 10.91–10.92.

2449. C Beaton-Wells 'Solving the problems of pleadings: Are there lessons to be learnt for civil justice reform in general?' (1998) 8(1) *Journal of Judicial Administration* 36, 38.

2450. Arthur Robinson *Submission 189*; Clayton Utz *Submission 341*.

2451. Arthur Robinson *Submission 189*; B Lander 'Pleadings' *Paper Queensland Litigation Reform Commission Conference Brisbane 6–8 March 1996*; G Davies 'A blueprint for reform: Some



proceedings too early, without sufficient preparation or attempts at negotiation.<sup>2452</sup> Lawyers frequently use pleadings tactically and, for example, fail to admit matters pleaded that they know to be true or make allegations that they know they cannot prove at a hearing.<sup>2453</sup> The Commission has heard that inexact pleading is rarely the subject of sanction and frequent amendment of pleadings is allowed by courts.<sup>2454</sup>

7.167. It was suggested to the Commission that it is rare for there to be intentional abuse of the pleadings process by lawyers and the problems described are inevitable in an adversarial system.

The notions of narrowing issues and not taking one's opponent by surprise are said to be anathema to the adversarial culture.<sup>2455</sup>

With the move towards increasing judicial case management, impediments to the proper use of pleadings posed by adversarial culture are being challenged in the Federal Court.

[A]s everyone knows a competent pleader will cast his or her case in the broadest possible way to allow the client the maximum manoeuvrability during the trial. In my view, those days are past.<sup>2456</sup>

A number of submissions expressed support for the current use of pleadings in the Federal Court and did not see any need for a change in practice.<sup>2457</sup> The Federal Court Rules allow parties to plead points of law<sup>2458</sup> and pleadings may be supplanted or supplemented by statements of facts, issues and contentions.<sup>2459</sup> In *Beech Petroleum NL v Johnson*, Justice von Doussa commented that '[t]echnical

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2452. P Meadows 'Civil litigation reform' *Paper* 1998 Corporate Law Conference Melbourne 24-September 1998, 46; Clayton Utz *Submission* 341.

2453. M Aronson and J Hunter *Litigation: Evidence and procedure* 5th ed Butterworths Sydney 1995, 102; MWilson 'Pleadings' *Paper* Queensland Litigation Reform Commission Conference Brisbane 6-8-March 1996; Arthur Robinson *Submission* 189.

2454. Arthur Robinson *Submission* 189. Trial judges often allow amendments of pleadings due to the influence of appeal court rulings such as *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146.

2455. C Beaton-Wells 'Solving the problems of pleadings: Are there lessons to be learnt for civil justice reform in general?' (1998) 8(1) *Journal of Judicial Administration* 36, 44.

2456. J Lockhart 'Case management of complex commercial litigation' as cited by C Hodgekiss in 'The conduct of trade practices litigation' *Paper* Continuing Legal Education, Committee for Postgraduate Studies Faculty of Law University of Sydney 16 March 1997, 7.

2457. Law Society of NSW *Submission* 48; ACLA *Submission* 70; Law Council *Submission* 126; Victorian Bar *Submission* 367; SA Bar Association *Consultation* Adelaide 1September 1997; Federal Court practitioners *Consultation* Sydney 16 June 1999;

2458. Federal Court Rules O 11 r 9.

2459. B Beaumont 'Managing litigation in the Federal Court' in B Opeskin and F Wheeler (eds) *The Australian federal judicial system* Melbourne University Press 2000 (forthcoming). P Heerey *Submission* 49. However, practitioners in trade practices cases said that in practice there is no real difference between issues of fact/notices of contention and pleadings: Federal Court practitioners *Consultation* Sydney 4 June 1999.

objections raised to pleadings on the ground of alleged want of form will be received with less enthusiasm today than in times past'.<sup>2460</sup>

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<sup>2460</sup>. (1991) 105 ALR 456.



7.168. In DP 62 various improvements to the rules and practices surrounding pleadings were discussed and the Commission proposed that the Federal Court Rules should permit conclusions of law to be pleaded<sup>2461</sup> and require the respondent to indicate precisely how its case on any issue differs from the case of the applicant.<sup>2462</sup> This proposal was supported in a number of submissions.<sup>2463</sup> DIMA opposed the proposal and said it did

not accept that it would be workable or fair for it to be required, as a respondent, to state precisely how its case differs from that of the applicant on any particular issue. This proposal assumes that the applicant has clearly stated his/her grounds and particularised them. This is rarely the case with unrepresented applicants and regrettably infrequent with represented applicants.<sup>2464</sup>

The Commission's proposal was made on the assumption that the Court would interpret the practical effect of the rule according to what is reasonable in the circumstances, taking into account the quality of the applicant's pleadings. As stated, the Court itself has noted the large proportion of stereotyped and uninformative pleadings in migration cases.<sup>2465</sup>

7.169. In DP 62 the Commission also referred to the suggestion that lawyers certify that they have made all reasonable enquiries to ensure the facts asserted are true, or that they know of evidence supporting the facts, and do not know of evidence disproving them.<sup>2466</sup> Federal Court judges have approved in principle a rule for the verification of pleadings by parties and, where applicable, certification of the pleadings by their lawyers. The Law Council indicated that it had 'considerable reservations about the utility of the procedure proposed'. While it supported the introduction of greater responsibility being imposed on legal practitioners, it was concerned at the form and content of the proposed certificate.<sup>2467</sup> The Court and the Law Council are consulting further on this issue.

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2461. ALRC DP 62 proposal 10.15. The Uniform Civil Procedure Rules 1999 (Qld) allow parties to plead conclusions of law: s 149(2).

2462. It is common for a docket judge to impose such a requirement by direction, although the rules do not require it: A Kwong 'A year in Santos: Litigation under Part IV of the Trade Practices Act' *Unpublished* Federal Court of Australia Melbourne 1994, 12. See SCR (Vic) O 13 r 12(3) which requires a party to plead the facts the party intends to prove that are different from those pleaded by the opponent.

2463. I Stewart *Submission 298*; Freehill Hollingdale & Page *Submission 339*; National Legal Aid *Submission 360*; Victorian Bar *Submission 367*; Law Council *Submission 375*.

2464. DIMA *Submission 385*.

2465. *Mbuaby Paulo Muaby v MIMA* [1998] 1093 FCA 20 August 1998.

2466. See ALRC DP 62 para 5.56–5.77. Verification of pleadings is already required in the Supreme Court of NSW. The Law Council stated that this 'has had some limited success in limiting abuse of pleadings as a litigation tactic': Law Council *Submission 126*. On the ethics of pleadings see para 3.85–3.96.

2467. Law Council *Submission 375*.

7.170. Another suggested solution to restrict the range of issues raised in pleadings is to make greater use of notices to admit.<sup>2468</sup> Notices to admit are dealt with under O 18 r 2 of the Federal Court Rules. It was suggested that there should be an amendment to the existing rules to give parties an incentive to admit facts and documents that they can expect to be proved without difficulty at trial.<sup>2469</sup> Under the rules, unless the Court orders otherwise, if a party disputes a fact or document pursuant to a notice to admit which is later proved in the proceeding, that party must pay the cost of proof.

7.171. There has been support for the requirement that parties plead with greater specificity, for the abolition of bare denials and the requirement that parties admit facts they know to be true.<sup>2470</sup> The Law Council supported the abolition of all bare denials and commented that 'this is a practical step which is unlikely to increase costs to any appreciable degree, but it will help pleading refine issues'.<sup>2471</sup> The recently enacted Civil Procedure Rules (UK) and the Uniform Civil Procedure Rules (Qld) do not allow bare denials in defences. Rule 166(4) of the Queensland Rules states that a party's denial or non admission of an allegation of fact must be accompanied by a direct explanation and rule 67 states that the Court may order costs against a party who unreasonably makes denials or non-admissions. Under Part 16.5 of the Civil Procedure Rules (UK) a defendant must state his or her reason for denying any matter and must state his or her own version of events if they differ from the version of the claimant. Order 11 Rule 18 of the Federal Court Rules states that, when a party is denying an allegation of fact he or she must not do so evasively or generally but must answer the point of substance.

7.172. In DP 62 the Commission posed the question whether, to discourage technical arguments on pleadings, the Federal Court should adopt a stricter test for strike out applications, so that it is more difficult to succeed.<sup>2472</sup> This proposal received a mixed response in submissions.<sup>2473</sup> In the light of such diverse opinion and without additional information to support or refute such proposal, the Commission makes no recommendation on this matter.

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2468. Arthur Robinson *Submission 189*; Clayton Utz *Submission 341*; C Hodgekiss 'The conduct of trade practices litigation' *Paper* Continuing Legal Education, Committee for Postgraduate Studies Faculty of Law University of Sydney 16 March 1997, 7.

2469. Clayton Utz *Submission 341*.

2470. Arthur Robinson *Submission 189*; Law Council *Submission 126*; P Meadows 'Civil litigation reform' *Paper* 1998 Corporate Law Conference Melbourne 24 September 1998, 46; A Kwong 'A year in Santos: Litigation under Part IV of the Trade Practices Act' *Unpublished* Federal Court of Australia Melbourne 1994, 12.

2471. Law Council *Submission 126*.

2472. See ALRC DP 62 question 10.1.

2473. The following submissions supported a stricter test to make strike out applications more difficult: ACCC *Submission 67*; Law Society of WA *Submission 78*. The following submissions did not support a stricter test. Certain submissions stated that the test should be more liberal so that it was easier to succeed on a strike out application: Law Council *Submission 341* opposes any change; DIMA *Submission 385* and Clayton Utz *Submission 341* state that the test should be more liberal.

**Recommendation 87.** Federal Court Rules should

- require the respondent to indicate precisely how its case on any issue differs from the case of the applicant and
- permit conclusions of law to be pleaded.

## Ex parte applications

7.173. The Commission heard from practitioners that the Court should issue guidelines or a practice note for the conduct of ex parte applications, particularly in relation to industrial matters.<sup>2474</sup> This practice note could be in a similar form and address similar issues to Practice Note 10 for *Anton Piller* orders. When making an *Anton Piller* order, the Court will ordinarily require or impose undertakings or conditions to the order. Practice Note 10 sets out the matters to which these undertakings or conditions relate, such as the manner of service and execution of the order.

**Recommendation 88.** The Federal Court should review its practices in, and arrangements for, ex parte applications. If considered appropriate, a practice note should be drafted in relation to conduct required and the duty of candour expected of parties and their representatives bringing ex parte applications.

## Discovery

7.174. The Federal Court recently amended O 15 and Practice Note 14 to reflect the Court's adoption of the 'direct relevance' test for the discovery of documents.<sup>2475</sup> The 'direct relevance' test replaces the *Peruvian Guano* test<sup>2476</sup> and entails the discovery of documents of which the party is, after a reasonable search, aware in the following categories

- documents on which the party relies
- documents that adversely affect the party's case
- documents that adversely affect another party's case
- documents that support another party's case and
- documents that the party is required to disclose by a relevant practice direction.

Factors relevant to the reasonableness of a search include

- the nature and complexity of the proceedings
- the number of documents involved

<sup>2474</sup> Federal Court practitioners *Consultation* Melbourne 8 September 1999.

<sup>2475</sup> The amendments to Order 15 and Practice Note 14 commenced on 3 December 1999. The Federal Court has undertaken to review the new procedures in 12 months' time: Federal Court *Submission* 393. The Uniform Civil Procedures Rules (Qld) impose an ongoing duty on parties to disclose documents that are 'directly relevant to an allegation in issue in the pleadings' and the direct relevance test is used as the form of standard disclosure in the Civil Procedure Rules 1998 (UK) r 31.6.

<sup>2476</sup> *Companie Financiere et Commerciale du Pacifique v The Peruvian Guano Co* (1882) 11 QBD 55.

- the ease and cost of retrieving documents and
- the significance of any document which is likely to be found.<sup>2477</sup>

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<sup>2477</sup>. Federal Court Rule O 15 r 2(5). This is similar to CPR (UK) r 31.7.

7.175. The amendments to Practice Note 14 include the following paragraph

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.

7.176. The Practice Note on discovery states that the Court will not, as a matter of course order general discovery and it will mould discovery to suit the facts of the particular case. The Practice Note contains questions the practitioners should ask themselves with the aim of narrowing the scope of discovery. Practitioners have stated that parties generally are requested to define and disclose categories of documents.

7.177. The Federal Court Rules on discovery address most of the issues relating to discovery which were raised in submissions and consultations with the Commission.<sup>2478</sup>

7.178. Badly managed discovery is widely regarded as a cause of significant cost, delay and unfairness to parties. Critics point to the abuse of discovery by litigants and their legal representatives, particularly in complex cases where discovery may be used as a delaying tactic, a 'fishing expedition' or as a process to add to the other side's litigation costs.<sup>2479</sup> In the majority of cases where there are few documents, the rules and practices work well and discovery is not a problem.<sup>2480</sup> The concerns relate to large cases where there are significant documents and costs, and to the few cases where discovery is used tactically.<sup>2481</sup>

7.179. The move away from the *Peruvian Guano* test to the test of 'direct relevance' and discovery of categories of documents are attempts to streamline the process of discovery so that discovered documents are directly relevant to the issues in a case and the costs of discovery proportionate to the value of the claim. These approaches change the practice and, practitioners have stated, the ethics of discovery.<sup>2482</sup> Ethically the onus is on a party to make discovery of the party's documents. Practitioners commented on 'the real temptation' when documents adverse to the case are found, to seek to rationalise that the documents are outside the discoverable categories and therefore not required to be disclosed to the other

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2478. See ALRC DP 62 para 10.99.

2479. Federal Court practitioners *Consultation* Sydney 4 June 1999; ACCC *Submission* 396.

2480. Law Council *Submission 126* noted that 'the English, American and Australian Institute of Judicial Administration studies have found that discovery is not a problem in the vast majority of cases'.

2481. D Abernethy 'Discovery (disclosure) and interrogatories' *Paper Queensland Litigation Reform Commission Conference Brisbane 6-8 March 1996*; G Davies 'A blueprint for reform: Some proposals of the Litigation Reform Commission and their Rationale' (1996) 5 *Journal of Judicial Administration* 201.

2482. Federal Court practitioners *Consultations* Melbourne 7 September 1999; Federal civil working group *Meeting notes* 24 September 1999.

side.<sup>2483</sup> Practitioners have told the Commission the new arrangements place greater ethical strain on lawyers.<sup>2484</sup>

7.180. For these changes to the rules of discovery to work effectively, lawyers and parties have to spend time determining which documents are to be disclosed and the Court provide close judicial supervision of discovery. Practitioners have commented to the Commission that streamlined discovery with categories of documents works well if parties give time to the formulation of categories.<sup>2485</sup> In support of increased attention being given to discovery the ACCC suggested an amendment to the rules

requiring parties to complex litigation to convene a pre-discovery directions hearing to argue the scope of discovery and for the court to clearly articulate its discovery orders.<sup>2486</sup>

The Commission notes that the calling of such a directions hearing is within the Court's powers and occurs in many cases. The Commission supports the parties and the Court continuing to give attention to issues of discovery in directions hearings.

7.181. The Victorian Bar Council stated that

the current problem with discovery is that the party providing discovery does not usually take enough care in reading the documents which they provide. A system of discovery by categories, or a system of 'rolling' discovery, would be unlikely to alleviate the current cost of general discovery.<sup>2487</sup>

In relation to the use of categories of documents the law firm Clayton Utz said

[t]here is a risk that parties will abuse the 'bundling' procedure, so as to discover large quantities of irrelevant material. For the purpose of managing documents and information during the course of proceedings, it is infinitely preferable for documents to be identified individually ... Technology is now available that should make it unnecessary for parties to adopt the 'bundling' procedure, which was more appropriate when the technology to create documents and databases was more primitive than it is today.<sup>2488</sup>

The varied submissions and comments on this issue provided no consensus for a general rule for discovery to suit all cases or even all cases of a particular type. The advantage of IDS for discovery is that directions are made by the judge who is

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2483. Federal Court practitioners *Consultations* Melbourne 8 September 1999, Sydney 24 September 1999.

2484. There is a greater scope for arbitrariness if selective discovery only is required: I Stewart *Submission* 298.

2485. AGS *Consultation* Melbourne 25 August 1999; Victorian Bar *Submission* 367.

2486. ACCC *Submission* 396.

2487. Victorian Bar *Submission* 367.

2488. Clayton Utz *Submission* 341.

familiar with the case and tailored for the particular case.<sup>2489</sup> As Justice Heerey said in his submission

[t]he docket system will promote (and already has, in my experience) a more interventionist and practical approach to discovery, tailored to the individual case and the real issues in dispute.<sup>2490</sup>

7.182. Compliance with orders for discovery and sanctions for non compliance cannot be dealt with by a blanket rule. Judges need to exercise discretion in this area. Submissions and consultations observed that parties often fail to comply with directions relating to discovery, sometimes without explanation of the failure.<sup>2491</sup> Part of the solution to discovery problems may be for timetables, including those agreed to by the parties, to be more strictly enforced.<sup>2492</sup> Courts rarely preclude reliance on documents not properly discovered.<sup>2493</sup>

Monetary sanctions are inadequate in deterring this behaviour ['discovery abuse'] where the stakes involved are infinitely greater than any monetary sanction handed out. Thus in complex cases 'preclusionary' sanctions offer the most potent remedy against the abuse.<sup>2494</sup>

7.183. Sydney practitioners consulted by the Commission referred to emerging problems associated with discovering electronic documents.<sup>2495</sup> Under the Federal Court Rules electronic documents are discoverable. Parties and their lawyers indicated there were emerging difficulties associated with how to retrieve, discover and inspect such documents in accordance with their obligations. The main problems identified were the need to fix the documents in time so they could not be altered, to secure disclosure of search terms and control the numbers of electronic documents which are discoverable. Practitioners suggested that discovery orders may need to extend disclosure to a party's back-up systems to enable a search of changes or deletions to documents, to direct parties to provide appropriate search terms for documents and indicate the steps a party is required to take to restore and retrieve data. A common example referred to by practitioners was discovery of email. Email is now commonly used in corporations for work and non-work related purposes and is not stored in any particular order. This makes

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2489. I Stewart *Submission 298*.

2490. P Heerey *Submission 49*.

2491. Federal Court practitioners *Consultations* Sydney 4 June 1999 and 16 June 1999. Arthur Robinson submitted:

The views of many of the corporations with whom we have spoken is that parties seeking indulgences are favoured, and that such treatment is inequitable and penalises a party which makes the sacrifice to comply with directions imposed: Arthur Robinson *Submission 189*.

2492. D Ipp 'Reforms to the adversarial process in civil litigation – Part II' (1995) 69 *Australian Law Journal* 790, 796. See also Arthur Robinson *Submission 189* and A Jack 'Radical surgery for civil procedure' (1993) 143(6605) *New Law Journal* 891.

2493. Arthur Robinson *Submission 189*.

2494. Allen Consulting Group *Submission 219*. The ACCC agreed: *Submission 396*.

2495. Federal Court practitioners *Consultations* Sydney 2 June 1999, 4 June 1999 and 16 June 1999.



the task of discovering and inspecting an email system potentially difficult and costly. The law firm Clayton Utz suggested that a practice note should deal with the difficulties parties may encounter in restoring and retrieving such data. As a general rule parties should only be required to take reasonable steps to restore and retrieve such data and the reasonableness of the steps assessed by reference to the size of the claim, the resources of the party, difficulty of restoration and retrieval, likely relevance of data and likelihood of duplication of data.<sup>2496</sup>

7.184. The Supreme Court of New South Wales and the Supreme Court of Victoria have recently released practice notes, framed in similar terms, concerning the use of technology in civil litigation.<sup>2497</sup> In relation to discovery these practice notes encourage parties to use databases to create lists of their discoverable documents, give discovery by exchanging databases and where possible electronic versions of documents. It is recommended that the parties agree on a protocol for exchanging details of the documents before they make discovery. In DP 62 the Commission proposed that the Federal Court draft a practice note for the discovery of electronic documents.<sup>2498</sup> It was envisaged that this practice note would deal with issues surrounding the discovery of electronic documents as described in para 7.183 as well as electronic discovery generally, that is, the exchange of databases and electronic versions of discovered documents. This was supported in submissions and consultations.<sup>2499</sup> Some of the matters suggested may be more appropriate to guidelines than a practice note. The Federal Court indicated to the Commission that a consultant had been engaged by the Court to assist with the drafting of a practice note for the processes involved in electronic discovery between parties.<sup>2500</sup>

**Recommendation 89.** The Federal Court should draft a practice note and/or guidelines for electronic discovery and discovery of electronic documents dealing with general procedures and problems encountered by parties, including

- requirements for parties to disclose search terms and mechanisms
- arrangements for authenticating documents and
- 'fixing' documents in time
- the restoration and retrieval of electronic data by parties.

<sup>2496</sup> Clayton Utz *Submission 341*.

<sup>2497</sup> Chief Justice of New South Wales 'Practice note 105: Use of technology in civil litigation' 15 March 1999 <<http://www.agd.nsw.gov.au/sc.nsf/pages/scpn105>> (5 May 1999); Chief Justice of Victoria 'Practice note 3 of 1999: Guidelines for the use of technology in litigation in any civil matter' 29 April 1999 <<http://supremecourt.vic.gov.au/pnindex.htm>> (2 June 1999). See S Potter and P Moon 'Guidelines for the use of technology in civil matters' (1999) 73(9) *Law Institute Journal* 72 for a discussion of the differences between the two guidelines.

<sup>2498</sup> ALRC DP 62 proposal 10.16.

<sup>2499</sup> Clayton Utz *Submission 341*; National Legal Aid *Submission 360*; Law Council *Submission 375*; Federal Court *Submission 393*; ACCC *Submission 396*.

<sup>2500</sup> Federal Court *Submission 393*.

Any such practice note should be consistent with the New South Wales and Victorian Supreme Court Practice Notes on discovery of electronic documents.

### **Interlocutory costs**

7.185. Orders in relation to costs of interlocutory proceedings are made pursuant to Order 62 rule 3(3) of the Federal Court Rules. Under this rule an order for the costs of an interlocutory proceeding are not payable until the end of the proceedings, unless the Court otherwise orders. The Court only orders interlocutory costs to be made payable immediately if the demands of justice require departure from the general practice,<sup>2501</sup> for example, where the interlocutory proceedings have been dismissed and have involved the resolution of a discrete issue and the main proceedings are expected to continue for a substantial period of time.<sup>2502</sup>

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2501. *Thunderdome Racetimeing and Scoring Pty Ltd v Dorian Industries Pty Ltd* (1992) 36 FCR 297, 312.

2502. *Allstate Life Insurance Co v ANZ Banking Group Ltd (No 13)* (unreported) Full Federal Court of Australia 17 August 1995.

7.186. In a number of consultations and submissions the Commission was told that parties were frustrated that interlocutory costs orders made by the Court were rarely made payable immediately.<sup>2503</sup> Clayton Utz stated in its submission that

[i]n interlocutory proceedings, the prospect of an adverse costs order will only act as a powerful disincentive for a party if the party against whom the costs order is made is required to pay those costs immediately. Generally, the Federal Court appears to be reluctant to make orders that costs of an interlocutory proceeding be taxable and payable immediately.<sup>2504</sup>

7.187. There is some judicial support for the greater use of interlocutory costs orders payable forthwith.<sup>2505</sup> In the recent case of *McKellar v Container Terminal Management Services Ltd*, Justice Weinberg commented

I agree entirely with the observation of Lindgren J in *Allstate* (to which reference was made by Branson J in *Life Airbag*) that the power to order that costs be paid forthwith should perhaps be used less sparingly than it has been in the past. That is particularly so in lengthy and complex cases where substantial costs have been thrown away as a result of ill-considered pleadings being drawn. Such costs should be capable of being recovered without the innocent party having to wait, possibly for years, for that to occur.<sup>2506</sup>

**Recommendation 90.** In order to support orders, in appropriate cases that costs of an interlocutory proceeding should be payable and taxable forthwith, the Federal Court Rules should be amended to remove any presumption against this course.

## Subpoenas

7.188. The costs of filing subpoenas are usually comparatively low (\$40 in the Federal Court). However, the costs of complying with a subpoena may be substantial. To some extent, the cost is determined by the dispute and the type and extent of the material required in the subpoena. The Federal Court has provision for conduct money to be paid to the recipient of the subpoena to 'meet his reasonable expenses of complying with the subpoena'.<sup>2507</sup> Order 27 r 4A of the Federal Court Rules gives the Court the discretion to order the party who requests

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2503. Industrial law practitioners *Consultation* Melbourne 8 September 1999; Federal Court practitioners *Consultation* Melbourne 7 September 1999; AGS *Consultation* Melbourne 25 August 1999; Arthur Robinson *Submission 189*; Clayton Utz *Submission 341*.

2504. Clayton Utz *Submission 341*.

2505. *Allstate Life Insurance Co v Australia & New Zealand Banking Group Limited (No 14)* (unreported) Federal Court of Australia 18 August 1995 (Lindgren J); *McKellar v Container Terminal Management Services Ltd* [1999] FCA 1639.

2506. *McKellar v Container Terminal Management Services Ltd* [1999] FCA 1639 at [41].

2507. Federal Court Rules O 27 r 3.

the issue of the subpoena, to pay the recipient of the subpoena compensation for expenses or loss reasonably incurred or lost in complying with the subpoena. In some circumstances the use of subpoenas and notices to produce may result in undue cost, delay or unfairness in litigation.<sup>2508</sup> The cost may be attributed to the time spent in responding to the subpoena or in interlocutory applications contesting the validity of the subpoena. Order 27 r 6 of the Federal Court Rules states that

on request of a party, the Registrar shall, unless the Court otherwise orders, issue a subpoena ... [and] if the Registrar is of the opinion that the issue of a subpoena may be an abuse of the process of the Court or be frivolous or vexatious, he or she may then refer the request to a Judge for direction.

7.189. There is widespread support for increased court supervision of subpoenas. Some practitioners noted that subpoenas were being used to circumvent restrictions on, or as a form of alternative discovery.<sup>2509</sup> The most common suggestion was that parties require leave to issue a subpoena.<sup>2510</sup> This is already under review by the Federal Court. Some judges do impose restrictions on the issue of subpoenas, particularly subpoenas for the return of documents. Some practitioners have opposed the proposal that leave be required to issue a subpoena, saying that it would increase costs and unduly restrict the use of an important tool in litigation.<sup>2511</sup> It was also suggested that the Court issue a practice note that puts practitioners on notice that the Court will be more willing to exercise its powers to supervise oppressive and unreasonable subpoenas and notices to produce.<sup>2512</sup>

7.190. A leave requirement for subpoenas accords with the trend of reform in civil litigation for the judge to have greater supervision and control over the use of procedures from discovery to written submissions. Subpoenas are no exception and it is appropriate that the Court supervise orders which are potentially onerous and expensive for third parties.

In complex litigation the procedure [of obtaining leave to issue a subpoena] may also enable consideration by the judge or Master of the relationship between the production sought by the subpoena, the scope of discovery already made and the extent to which the production of some classes of documents may be rendered unnecessary by agreements as to matters of fact not really in dispute.<sup>2513</sup>

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2508. AGS *Consultations* Melbourne 14 August 1997 and Brisbane 19 August 1997.

2509. ACLA *Submission 70*; ACCC *Submission 396*.

2510. ACCC *Submission 67*; ACLA *Submission 70*; AGS *Consultation* Melbourne 14 August 1997; Federal Court practitioners *Consultation* Melbourne 8 September 1999; AGS *Consultation* Melbourne 25-August 1999; Justice French *Consultation* Perth September 1999; R French 'Subpoenas duces tecum: Return before trial and procedure at trial' in A Zariski (ed) *Evidence and procedure in a federation* Law Book Company Sydney 1993.

2511. Federal Court practitioners *Consultations* Sydney 4 June 1999 and 16 June 1999.

2512. Clayton Utz *Submission 341*.

2513. R French 'Subpoenas duces tecum: Return before trial and procedure at trial' in A Zariski (ed) *Evidence and procedure in a federation* Law Book Company Sydney 1993, 160.

**Recommendation 91.** Federal Court Rules should be amended so that subpoenas are issued only with leave, unless a judge otherwise directs.

## Mediation

7.191. Since 17 April 1997, judges have had the power to order parties to mediate under s 53A of the Federal Court Act. In practice judges generally order mediation where both parties consent. At times, practitioners noted, such consent was given so as not to appear obstructionist before the judge.<sup>2514</sup> The Court stated that since the introduction of IDS, a greater emphasis has been placed on identifying cases suitable for mediation at an early stage. Also, under IDS cases do not lose their position in a hearing list when referred to mediation so long as the fixed hearing date falls after the mediation date.

7.192. Mediations are conducted by registrars of the Court – who are trained mediators – in the court-annexed mediation program or by private mediators. Between 1994–95 and 1998–99 an average of 220 matters were referred to mediation<sup>2515</sup> each year, with 347 matters referred to mediation in 1998–99.<sup>2516</sup> The Court reports that the settlement rate has averaged 55% for the duration of the court-annexed program. The number of cases privately mediated is unclear. The parties are not required to inform the Court of a private mediation.<sup>2517</sup>

7.193. Most practitioners consulted by the Commission regarded mediation as a valuable resolution process for appropriate cases although they opposed the concept of compulsory mediation.<sup>2518</sup> There was some suggestion that inappropriate cases were sometimes sent to mediation.<sup>2519</sup> In DP 62 the Commission proposed that the Court should continue to monitor the use and outcomes of mediation, private and court-annexed, to help ensure that mediation is used only when appropriate and appears to offer a prospect of full or partial resolution of the case.<sup>2520</sup> This proposal was supported in submissions.<sup>2521</sup> The Court stated that

settlement rates at mediation should not ... be the sole criteria by which the program is evaluated. Many matters which do not settle proceed to trial with issues better defined, or on the basis of agreed facts, the facts being settled in cooperation with the mediator. In some

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2514. Federal Court practitioners *Consultations* Sydney 2 June 1999; 4 June 1999 and 10 June 1999.

2515. This includes court-annexed mediations and external mediations recorded by the Court.

2516. Federal Court *Annual report 1998–99*, 52.

2517. Federal Court associates *Consultation* Sydney 13 July 1998; Federal Court Deputy District Registrars *Consultation* Melbourne 1 June 1999; Sydney 10 June 1999; Federal Court practitioners *Consultations* Sydney 2 June 1999 and 4 June 1999.

2518. Federal Court practitioners *Consultation* Brisbane 18 August 1997, Sydney 2 June 1999 and 4 June 1999; Law Society of SA *Consultation* Adelaide 1 September 1997.

2519. The ACCC said that enforcement agencies should not be subject to compulsory mediation. The ACCC said that many of its cases may have precedential value and are instituted under the direction of the Minister for that purpose. In these circumstances the ACCC said it considers compulsory mediation may not always be consistent with its statutory objectives and priorities: ACCC *Submission* 396.

2520. See ALRC DP 62 proposal 10.17.

2521. NADRAC *Submission* 343; National Legal Aid *Submission* 360; Victorian Bar *Submission* 367; Law Council *Submission* 375; Federal Court *Submission* 393; ACCC *Submission* 396.

instances the parties also agree that the Court should only be asked to determine liability or quantum.<sup>2522</sup>

7.194. It was noted that the Court would require practitioner support in order to carry out this function in relation to private mediations. Practitioner cooperation could be secured by the use of a practice note issued by the Court. Some submissions expressed concern that this proposal would infringe on the confidentiality of mediations and

require mediators to form some judgment as to the reasons for the parties in mediation failing to reach agreement and, in breach of the mediator's obligations as to confidentiality, conveying that judgment to an outsider.<sup>2523</sup>

The Commission's proposal would not require mediators to form any judgment as to why the mediation failed or succeeded, in fact the mediator's involvement is not required. It is the parties who would inform the Court about whether mediation was used and its outcome. This would be done at the conclusion of the matter so as not to prejudice any judicial determination. It would not involve the parties disclosing any detail of the mediation, simply whether it was successful in resolving the whole or part of the dispute.

**Recommendation 92.** The Federal Court should continue to monitor the use and outcomes of court annexed mediation. The Federal Court should develop a practice note requiring parties to inform the Court, at the conclusion of a matter, about their use of private mediation services and the outcome – that is, whether the mediation assisted to resolve all or a significant part of the dispute.

### **Witness statements**

7.195. Orders for the exchange of witness statements are frequently made in the Federal Court in trade practices cases and intellectual property cases. The most common criticism of early disclosure and exchange of witness statements is their cost. The 'front end loading' of such costs may have an adverse effect on settlement opportunities. Consultations with Sydney trade practices practitioners suggest that these criticisms are unfounded.<sup>2524</sup> These practitioners commented that, overall, witness statements provided a saving in costs and did not inhibit settlement options.

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2522. Federal Court *Annual report 1998–99*, 52.

2523. CAMA *Submission 312*.

2524. Federal Court practitioners *Consultation* Sydney 4 June 1999.

7.196. The Commission's data showed that trade practices and intellectual property sample cases either settled early in proceedings or went through to a hearing.<sup>2525</sup> The early exchange of information, and witness statements, in these cases appears to contribute to this high, early settlement rate.<sup>2526</sup>

7.197. The following proposals in relation to the use of witness statements have been made in submissions, consultations and papers.

- Courts should reduce the level of formality required in witness statements to encourage their earlier exchange. However such change might impact on the utility of the witness statements as a replacement for evidence in chief.
- Supplementary witness statements and additional oral evidence given at the hearing should only be permitted by leave to reduce costs and delays and ensure parties adequately prepare witness statements before the hearing.
- Courts should restrict cross examination on the contents of witness statements.<sup>2527</sup> This was strongly opposed in submissions.<sup>2528</sup>

7.198. The provision of witness statements in Federal Court matters was seen to be cost effective by many practitioners.<sup>2529</sup> In DP 62 the Commission proposed that supplementary witness statements and additional oral evidence given at the hearing should be permitted only by leave.<sup>2530</sup> This proposal was supported by submissions.<sup>2531</sup>

**Recommendation 93.** Supplementary witness statements and additional oral evidence given at the hearing should be permitted only by leave.

### Single issue determination

7.199. The Federal Court has the power to determine discrete issues pursuant to Order 29 of the Rules. This power is often used to separate the determination of

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2525. T Matruglio & G McAllister, *Federal Court Empirical Report Part One*, 41 table 30.

2526. NSW Bar Assoc *Submission 88*; Arthur Robinson *Submission 180*. There are of course other factors which contribute to the high early settlement rate. Such cases often resolve after interlocutory hearings seeking injunctions.

2527. Woolf final report, 312 recs 144-146, 151.

2528. Clayton Utz *Submission 341*; Victorian Bar *Submission 367*; Law Council *Submission 375*.

2529. Federal Court practitioners *Consultations* Sydney 2 and 16 June 1999.

2530. See ALRC DP 62 proposal 10.18.

2531. Law Council *Submission 375*; Victorian Bar *Submission 367*; National Legal Aid *Submission 360*.



liability from quantum, particularly in trade practices and intellectual property cases.

7.200. There is judicial support for the use of single issue determination in complex, multi-party and representative cases where the determination of discrete issues can aid in the resolution of the case as a whole or in the narrowing of issues for trial.<sup>2532</sup> Submissions and consultations generally supported the use of single issue determination but it was suggested that it does not necessarily shorten the duration of a case. As the Law Council said in its submission, 'preliminary points are notoriously dubious – it is problematical as to whether the early determination of discrete issues can lead to savings in time or money'.<sup>2533</sup>

7.201. It was also suggested that the judge should have the power to make a summary determination of facts in dispute without the consent of the parties.<sup>2534</sup> Justice Beaumont suggested that, in complex civil cases, the judge should deal with and determine the facts of the case first and then allow the parties to address the court on the legal issues. This provides an incentive for settlement, for the case to be dealt with in manageable proportions, for legal argument to be reduced as facts have already been determined and for consequential reductions in cost.<sup>2535</sup>

7.202. Order 29 of the Federal Court Rules provides judges with a broad discretion to determine single issues in cases where they consider it is appropriate. The Commission is not disposed on present evidence to make any proposals for change relating to single issue determination.

## Summary judgment

7.203. The Federal Court may dispose of a matter by summary judgment pursuant to O 20 of the Rules. An application for summary judgment can only be brought by the applicant. The various formulations of the test for summary judgment were summarised in *General Steel Industries Inc v Commissioner for Railways (NSW)*.<sup>2536</sup>

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2532. See G Davies 'A blueprint for reform: Some proposals of the Litigation Reform Commission and their rationale' (1996) 5 *Journal of Judicial Administration* 201; P Heerey *Submission 49*; *Ryan v Great Lakes Council & Ors* [1999] FCA 177 at [9–10] (Wilcox J); cf *Bass v Permanent Trustee Co Ltd* (1999) 161ALR 399.

2533. Law Council *Submission 126*.

2534. LRCWA (Project No 92) *Review of the civil and criminal justice system – Consultation Paper: Summary judgment, preliminary issues and written and oral submissions* LRCWA Perth February 1999; B Beaumont 'The conduct of complex civil litigation' *Paper* Australian Bar Association Conference Darwin July 1990.

2535. B Beaumont 'The conduct of complex civil litigation' *Paper* Australian Bar Association Conference Darwin July 1990.

2536. (1964) 112 CLR 125, 129 Barwick CJ stated that [t]he test to be applied has been variously expressed; 'so obviously untenable that it cannot possibly succeed'; 'manifestly groundless'; 'so manifestly faulty that it does not admit of argument'; 'discloses a case which the court is satisfied cannot succeed'; 'under no possibility can there be a good cause of action'; 'be manifest that to allow them [the pleadings] to stand would involve useless expense'.

7.204. Order 20 has been interpreted to mean that the Court must be satisfied that 'it is clear that there is no arguable defence to the claim' before summary judgment can be entered.<sup>2537</sup> In *Caterpillar Inc v Sun Forward Pty Ltd*, Justice Drummond held that the function of Order 20 was 'limited to providing an expeditious means of resolving litigation where the applicant can clearly demonstrate that there is no real defence to the particular claims made by it'.<sup>2538</sup>

7.205. Suggestions have been made that the grounds on which summary judgment may be entered are too restrictive and that summary judgment or dismissal should be able to be used more frequently to dispose of weak cases.<sup>2539</sup> Chief Justice Gleeson said

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2537. *CLC Corporation v Cambridge Gulf Holdings NL* [1997] FCA 236 Carr J quoting from *Express Newspapers Plc v News (UK) Ltd* [1990] 3 All ER 376, 379.

2538. (1996) 36 IPR 411.

2539. P Meadows 'Civil litigation reform' *Paper* 1998 Corporate Law Conference Melbourne 24-September 1998, para 59; Federal Court practitioners *Consultations* Sydney 4 June 1999 and 10 June 1999; Federal Court practitioners *Consultations* Melbourne 7 September 1999 and 8 September 1999; Federal Court judge *Consultation* Perth 22 September 1999; Federal Court judge *Consultation* Sydney 26 October 1999; Freehill Hollingdale & Page *Submission* 339; DIMA *Submission* 385.

[t]here should be an increased emphasis on summary disposal of proceedings which are amenable to such treatment. I suggest that one of the major differences between litigation in continental European countries and litigation in common law jurisdictions may be that in continental countries many more cases are disposed of in what we would regard as a summary fashion. I agree with some judges of [the Supreme Court of New South Wales], (Rolfe J, for one) who have expressed the view that our current rules about summary disposal of proceedings are unduly inflexible and restrictive.<sup>2540</sup>

7.206. In DP 62 the Commission proposed that the Federal Court Rules should be amended to allow summary judgment to be used more flexibly for a broader range of cases.<sup>2541</sup> A number of submissions and consultations supported this proposal.<sup>2542</sup> In their submission, the law firm Freehill Hollingdale & Page stated that

[t]he ability to test at an early stage whether litigation has been properly brought, and to test it in a manner less restrictive than the *General Steel* test, would be an important reform. What it would do is cause lawyers to resist the urgings of their clients to bring proceedings based upon unanalysed and untested assumptions, purely because they represent the client's instructions ... Judicial case management must permit an ability to make early enquiry into the integrity of the claim before permitting the claimant to have the privileges of the court processes in order to prosecute that claim. ... If the primary focus was cast first upon the plaintiff's case, it would send a very clear message to the legal profession and its clients which ought to operate to deter speculative or inadequately analysed or prepared cases to be launched.<sup>2543</sup>

7.207. The Law Council did not support the liberalisation of the summary judgment rule and submitted that

it would be unjustified to seek to make more liberal the test for striking out or summarily dismissing a case or entering summary judgment against a defendant. This is because the current test is couched in terms which ask the question whether the case is fit to go to a full trial. Any test which is more liberal than that, poses the real danger that courts will be abdicating their proper role of adjudicating disputes by hearing both sides ... It is very difficult for that test to be relaxed, without the system overtly embracing the possibility of some meritorious cases or defences being ignored, in the interests of supposed systemic efficiency. That is the antithesis of individual justice.<sup>2544</sup>

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2540. M Gleeson 'Commentary on paper by Lord Browne-Wilkinson' *Paper* Supreme Court of NSW Judges' Conference Sydney 11 September 1998.

2541. See ALRC DP 62 proposal 10.19.

2542. Freehill Hollingdale & Page *Submission* 339; National Legal Aid *Submission* 360; DIMA *Submission* 385; Federal Court judge *Consultation* Perth 22 September 1999; Federal Court practitioners *Consultation* Melbourne 7 September 1999 and 8 September 1999. The Victorian Bar Council generally agreed with the Law Council that it is very difficult for the current test to be relaxed 'without the system overtly embracing the possibility of some meritorious cases or defences being ignored' however they agree that the rules should be amended to allow a more robust approach to summary judgment although 'any amendment in this area must proceed with great caution': Victorian Bar *Submission* 367.

2543. Freehill Hollingdale & Page *Submission* 339.

2544. Law Council *Submission* 126.

In a later submission the Law Council confirmed their opposition to and concern about any changes to the summary judgment rule but stated that it was 'supportive of changes to enable decisions regarding summary judgment to occur earlier in the litigation pathway'.<sup>2545</sup>

7.208. The Federal Court did not support the amendment to the summary judgment rule given proposed in DP 62 which simply suggested a more flexible rule.<sup>2546</sup> The Court said the proposal was 'too general and does not give sufficient recognition to the gravity and difficulty of giving judgment against someone without a trial'.<sup>2547</sup> The Court also said that there was an issue as to whether the Court's rule making power extended far enough to amend the test for summary judgment.

7.209. The summary judgment rules in the United Kingdom and the United States are worthy of consideration. Rule 24.2 of the Civil Procedure Rules (UK) states

The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –

- (a) it considers that –
  - (i) that claimant has no real prospect of succeeding on the claim or issue; or
  - (ii) that defendant has no real prospect of successfully defending the claim or issue;
 and
- (b) there is no other reason why the case or issue should be disposed of at trial.

Under this test the focus is on the prospect of successfully defending the claim rather than, as in *O 20*, whether the defence to the claim is arguable. The British rule allows the court to give summary judgment against a broader range of cases, to have regard to the likely outcome not simply the respondent's case and for summary judgment to be obtained by the respondent against the applicant.

7.210. Rule 56 of the United States Federal Rules of Civil Procedure deals with summary judgment and it also applies to applicants and respondents. Under Rule-56 it must be shown that there is 'no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law'.

7.211. The Law Reform Commission of Western Australia recently recommended that the test for summary judgment be relaxed so that it could be used against a party unless that party can show that his or her case has a 'reasonable prospect of success'.<sup>2548</sup>

7.212. There are competing claims with respect to summary judgment procedures. The power to award summary judgment will always be one that courts will use

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<sup>2545</sup>. Law Council *Submission 375*.

<sup>2546</sup>. ALRC DP 62 proposal 10.19.

<sup>2547</sup>. Federal Court *Submission 393*.

<sup>2548</sup>. Law Reform Commission of Western Australia *Review of the criminal and civil justice system in Western Australia* Project 92 Law Reform Commission of Western Australia Perth September 1999, 111.

sparingly. That is appropriate. The Commission does consider however, that judges should have more flexible and less restrictive powers to deal summarily with appropriate cases. This is not simply a question of administrative efficiency, but is required to enhance the proper administration of justice. The Commission prefers the test for summary judgment in the Civil Procedure Rules (UK) as it focuses on the likely outcome of the litigation rather than solely on the cogency or arguability of a defence. The test is more liberal than the current test for summary judgment under O 20, but, not so broad that it would allow meritorious cases to be struck out.

**Recommendation 94.** The *Federal Court Act 1976* (Cth) or the Rules should be amended to allow the test for entering summary judgment against a party to be applied more flexibly and in respect of either party. In particular, a rule should be promulgated, in terms similar to Rule 24.2 of the Civil Procedure Rules (UK), whereby the Court may give summary judgment against an applicant or respondent on the whole of a claim or on a particular issue if

- it considers that
  - that applicant has no real prospect of succeeding on the claim or issue;
  - or
  - that respondent has no real prospect of successfully defending the claim or issue; and
- there is no other reason why the case or issue should be disposed of at trial.

## Default judgment

7.213. Default judgment may be obtained by the applicant against a respondent under O 10 r 7(b) of the Federal Court Rules if the respondent fails to comply with an order of the Court directing the respondent to take a step in the proceeding. To obtain default judgment the applicant must present the Court with 'all the facts necessary to prove its entitlement to the relief claimed under the judgment applied for ... all facts must be proved by direct, as opposed to hearsay evidence'.<sup>2549</sup> The Commission was told that this rule is unduly restrictive and causes unnecessary expense. It was argued that it should be relaxed so that default judgment can be obtained on the pleadings alone without the need to adduce any evidence.<sup>2550</sup>

7.214. The Queensland Uniform Civil Procedure Rules allow for default judgment to be ordered on the pleadings alone for a debt or liquidated demand.<sup>2551</sup> A default judgment for an unliquidated demand is conditional on evidence being led to quantify the loss.<sup>2552</sup> The Supreme Court Rules (NSW) allow the Court, on

2549. *ASC v Macleod* (1994) 130 ALR 717.

2550. Confidential *Submission 288*.

2551. Uniform Civil Procedure Rules (Qld) r 280, 283.

2552. *id* r 280, 284.

application by the plaintiff where a defendant has failed to enter an appearance or file a defence, to give such judgment against the defendant as the plaintiff appears to be entitled to on the statement of claim.<sup>2553</sup>

7.215. The Commission supports the existing arrangements for claims for unliquidated demands, which require evidence to quantify the loss. Further, claims for a discretionary remedy such as an injunction or a declaration require affidavit evidence. However, there is good reason to relax the rules to allow default judgment for a liquidated claim to be entered on the pleadings.

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<sup>2553</sup>. SCR (NSW) Part 17 r 9.

**Recommendation 95.** The Federal Court should consider amending its Rules expressly to allow default judgment for a liquidated claim to be obtained by the applicant solely on the pleadings; that is, without adducing any evidence, where the respondent has not filed a defence.

## Sanctions

7.216. The Federal Court has the power to sanction non compliance with orders and directions by costs orders, preclusionary sanctions, striking out or refusing to allow amendments.<sup>2554</sup> Some practitioners indicated to the Commission that judges should use these sanctions more rigorously.<sup>2555</sup> Commentators stressed that for case management to be effective, orders and directions need to be complied with.<sup>2556</sup> Arthur Robinson and Hedderwicks stated in its submission

[n]othing is more important to the implementation of successful case management principles than the ability and willingness of courts to support processes and timetables with appropriate sanctions.<sup>2557</sup>

In a similar vein the law firm Clayton Utz, in its submission, stated

there does seem to be some reluctance on the part of some Judges to ensure the implementation of successful case management with sanctions when the circumstances warrant.<sup>2558</sup>

The ACCC commented that it has

continued to experience delay in the preparation and hearing of matters due to a lack of use of appropriate sanctions.<sup>2559</sup>

7.217. In DP 62, the Commission proposed that the Federal Court should monitor compliance with directions and the manner in which non compliance is dealt with by judges.<sup>2560</sup> Submissions supported this proposal.<sup>2561</sup>

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2554. eg Federal Court Rules O 62 r 9; O 62 r 36A; O 20 r 2; O 11 r 16.

2555. P Meadows 'Civil litigation reform' *Paper* 1998 Corporate Law Conference Melbourne 24-September 1998, para 25-26, 31; Federal Court practitioners *Consultation* Sydney 2 June 1999 and 4 June 1999; Federal civil working group *Meeting notes* 7 July 1999; Clayton Utz *Submission* 283; ACCC *Submission* 396.

2556. P Meadows 'Civil litigation reform' *Paper* 1998 Corporate Law Conference Melbourne 24-September 1998, para 34; ACCC *Submission* 396.

2557. Arthur Robinson *Submission* 189.

2558. Clayton Utz *Submission* 341.

2559. ACCC *Submission* 396.

2560. See ALRC DP 62 proposal 10.2.

2561. National Legal Aid *Submission* 360; Victorian Bar *Submission* 367; Law Council *Submission* 375; ACCC *Submission* 396.

The Law Council understands that currently, monitoring of compliance with directions is undertaken inconsistently across the Court. Whilst the Law Council has argued for maintenance of flexibility of IDS, this is one area where a consistency in approach would be beneficial.<sup>2562</sup>

In response to this proposal the Federal Court stated that it 'strongly favours the collection of statistical material' but raised concern if the proposal envisaged 'some supervision over the way in which individual judges exercise their judicial discretion'.<sup>2563</sup> The Commission's proposal is not intended to fetter judicial discretion. It is intended to be a data collection exercise so that the Court's practices can be evaluated.

**Recommendation 96.** The Federal Court should monitor compliance with directions and the manner in which non compliance is dealt with by judges to ensure sanctions are being used effectively and consistently.

7.218. Submissions and consultations suggested that costs orders should be used by judges to sanction a wider variety of inappropriate practices.<sup>2564</sup> A number of submissions also warned against sanctions against lawyers and the use of preclusionary sanctions which risk prejudicing a lawyer when the party is at fault, or a party when the non compliance is the fault of the lawyer.<sup>2565</sup> The Court could correspond directly with the parties in some circumstances to ensure that they are aware of the effect of non compliance with specified orders or to inform them of non compliance by their lawyer. Others suggested the use of self-executing costs orders.<sup>2566</sup> The United Kingdom Civil Procedure Rules have self-executing sanctions so that the onus is on the party in default to seek relief from a sanction rather than the innocent party to move the court to enforce the sanction.<sup>2567</sup> The Civil Procedure Rules set out the following relevant factors for the court to consider if a party applies for relief from a sanction

- a. the interests of the administration of justice
- b. whether the application for relief has been made promptly
- c. whether the failure to comply was intentional
- d. whether there is a good explanation for the failure
- e. the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol

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<sup>2562</sup>. Law Council *Submission 375*.

<sup>2563</sup>. Federal Court *Submission 393*.

<sup>2564</sup>. ACLA *Submission 70*; Arthur Robinson *Submission 189*; Clayton Utz *Submission 341*; P Meadows 'Civil litigation reform' *Paper* 1998 Corporate Law Conference Melbourne 24 September 1998, para 42; Federal Court practitioners *Consultations* Sydney 2 and 4 June 1999.

<sup>2565</sup>. Law Council *Submission 126*; ACLA *Submission 70*; Victorian Bar *Submission 57*. See also Federal Court Rules O 62 r 9.

<sup>2566</sup>. A Jack 'Radical surgery for civil procedure' (1993) 143(6605) *New Law Journal* 891; ACCC *Submission 67*.

<sup>2567</sup>. CPR (UK) r 3.8-3.9.



- f. whether the failure to comply was caused by the party or his or her legal representative
- g. whether the trial date or the likely trial date can still be met if relief is granted
- h. the effect which the failure to comply had on each party and
- i. the effect which the granting of relief would have on each party.<sup>2568</sup>

7.219. Self-executing orders are not used in the Federal Court. In DP 62 the Commission proposed that the Federal Court Rules be amended to include self-executing costs sanctions.<sup>2569</sup> The prevailing view in submissions and consultations was in favour of this proposal.<sup>2570</sup> The Commission continues to recommend the amendment of the rules to include self-executing costs orders.

**Recommendation 97.** The Federal Court Rules should be amended to include self-executing costs sanctions in terms similar to the Civil Procedure Rules (UK).

## Hearing management

7.220. The requirement that all hearings be fair and impartial is ‘deeply rooted in our system of law’.<sup>2571</sup> Judges possess ‘all the necessary powers’ to ensure that a trial is fair.<sup>2572</sup> The *Evidence Act 1995* (Cth) provides that the court has, in respect of trial practice, general wide-ranging powers to grant leave, permission or direction ‘on such terms as the court thinks fit’.<sup>2573</sup> The legislation lists five matters the Court may take into account in exercising such powers – the length of hearing, fairness to a party or a witness, importance of the evidence, nature of the proceeding and alternative orders or directions available to it. The Federal Court has express powers, at any time before or during a hearing, to limit the length of the hearing, the number of witnesses and the time for examination and cross-examination of witnesses, oral submissions and presentation of the case.<sup>2574</sup> There is some support from practitioners for judges setting timetables for the order of witnesses and the structure of the trial but vigorous resistance to the Court restricting the length of examination or cross-examination and oral submissions,

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2568. CPR (UK) r 3.9.

2569. See ALRC DP 62 proposal 10.21.

2570. The following submissions and consultations agreed with the proposal: National Legal Aid *Submission 360*; Victorian Bar *Submission 367*; DIMA *Submission 385*; ACCC *Submissions 67 & 396*; AGS *Consultation Melbourne 25 August 1999*. The following submissions and consultations disagreed with the proposal: Law Council *Submission 375*; Freehill Hollingdale & Page *Submission 339* noting that ‘such a proposal assumes fault lying in a particular direction. A better course would be to require non-compliance with orders to be explained to the Court by the party concerned. What arises from that must be a discretionary matter for the Court’.

2571. *Dietrich v R* (1992) 177 CLR 29 (Deane J).

2572. *Barton v R* (1980) 147 CLR 75, 96 (Gibbs ACJ and Mason J).

2573. *Evidence Act 1995* (Cth) s 192.

2574. Federal Court Rules O 32 r 4A inserted by No. 224 of 1998. See also SCR (WA) O 34 r 5A(1).

except in exceptional circumstances.<sup>2575</sup> The Commission does not advocate change to the Federal Court Rules relating to hearing management. There was no empirical evidence suggesting inappropriate hearing management within the Court.

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2575. Clayton Utz *Submission 283*. The Victorian Bar Council opposes arbitrary mechanism such as the imposition of arbitrary time limits as a method to solving question of efficiency and cost: Victorian Bar *Submission 57*.

## 8. Practice, procedure and case management in the Family Court of Australia

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### **Introduction**

#### **Consultation and research**

8.1. This chapter is concerned with practice and procedure and case and trial management in the Family Court of Australia.<sup>2576</sup> The terms of reference for this inquiry expressly directed the Commission to focus its attention on case management, pleadings and other court processes, expert evidence and ADR. Each of these matters was addressed in Issues Paper 22,<sup>2577</sup> and ADR issues were also considered in Issues Paper 25.<sup>2578</sup> The Commission's Discussion Paper (DP 62) also examined and made proposals in respect of these issues.<sup>2579</sup>

8.2. The Commission's major proposals in DP 62 relating to case management in the Family Court were that the Court should

- revise certain forms used in the Court, in particular the initiating process

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2576. The chapter does not deal with the Family Court of Western Australia, although that Court uses similar rules and procedures to those operating in the Family Court of Australia. The Commission did not study practice and procedures in the Family Court of Western Australia, but consulted members of the Court.

2577. ALRC Issues Paper 22 *Review of the adversarial system of litigation: Rethinking family law proceedings* Sydney 1997 (ALRC IP 22).

2578. ALRC Issues Paper 25 *ADR – its role in dispute resolution* Sydney 1998 (ALRC IP 25).

2579. ALRC Discussion Paper 62 *Review of the federal civil justice system* ALRC Sydney 1999, ch 9 (ALRC DP62).

- revisit the restrictions on discovery and subpoenas
- review the stage at which family reports can be ordered
- allow the conciliation counsellor to prepare a family report in the same matter, provided both parties agree
- ensure parties are not required to attend repeated primary dispute resolution (PDR) events unless there is sufficient information to enable effective negotiation and the parties appear disposed to settle
- modify the case management system so that cases are allocated to particular registrars, who have continuing oversight of and responsibility for the allocated cases and can refer matters as required to particular judges. The 'team' of registrars, judicial officers and judges to have responsibility for a particular docket of cases, from filing to resolution of the matter.
- investigate listing problems in particular registries.

8.3. The Commission's findings and proposals concerning Family Court case management in DP 62 received broad, often enthusiastic support, except in the formal submission of the Family Court. Submissions from National Legal Aid, the Victorian and ACT Bar and the Law Council of Australia (Law Council), opposed the proposal regarding counselling, but supported fully or with some reservation all other proposals. The then president of the Law Council, and experienced family law practitioner, Mr Fabian Dixon, said that

the findings of the ALRC in respect of the Family Court cannot be ignored or dismissed summarily ... Significant changes to the management of, and case management in, the Family Court are imperative, and they must be addressed and not side-stepped.<sup>2580</sup>

Other comments in support of the Commission's approach in DP 62 are cited throughout this chapter.

8.4. In the course of this inquiry, before and after publication of the DP, the Commission consulted several hundred lawyers in all mainland states of Australia, in the cities, suburbs and country districts. The Law Council and solicitors' and barristers' representative bodies in each mainland State arranged meetings for the Commission with groups of family law practitioners. The Commission consulted legal aid family law solicitors in each State as well as legal aid commission directors and officers; lawyers from community legal centres; advisers in other organisations assisting family litigants, and expert witnesses involved in family litigation. The practitioners consulted were specialists and generalists, from suburban, city and regional firms, large and small. The Commission also spoke with staff, counsellors, registrars, deputy registrars, judicial registrars and judges in the Family Court, in registries across Australia. The Commission was advised and assisted by a working group of family specialists and court administrators.

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<sup>2580</sup>. F Dixon 'Message from the president' October 1999 *Australian Lawyer*.

8.5. In addition to the many litigants whom the Commission surveyed on issues relevant to their cases,<sup>2581</sup> and those who made submissions to the inquiry,<sup>2582</sup> the Commission also interviewed or spoke with focus groups of family litigants in meetings arranged for us by community legal centres (CLCs).

8.6. These meetings were extended discussions with frank and often self-critical exchanges. Practitioners' views were strikingly consistent on major issues concerning case management and case procedure in the Court. The simplification process, problems of non compliance with directions, and case management issues were of particular concern. Contrary to stereotyped views of lawyers, practitioners often argued against their self-interest; for example they often favoured revision of practices that could reduce lawyers' income or argued that poor practice by lawyers should be penalised. Many of their observations on case processes were later supported by empirical findings from the Commission's analysis of Family Court files.

8.7. For the purposes of this review, the Commission also conducted the most comprehensive survey to date of Family Court files, analysing data from 1288 of the 4345 cases recorded as finalised during May and June 1998.<sup>2583</sup> The Commission also sent 2780 questionnaires to lawyers and unrepresented parties involved in the sampled cases, seeking information on costs, case processing, and their use of experts and PDR. Some 25% of unrepresented applicants, 32% of lawyers representing applicants, 14% of unrepresented respondents and 28% of lawyers representing respondents replied to the surveys.<sup>2584</sup> Detailed empirical information was published in DP 62. Some of this is reproduced here for convenience.

8.8. Following publication of DP 62, the Commission conducted additional analysis of the data to test the relationship between case costs and case events and

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2581. The Commission sent questionnaires to 452 unrepresented or partially represented litigants in the Family Court matters sampled (see para 8.7), and received 102 responses: T Matruglio *Part two: The costs of litigation in the Family Court of Australia* ALRC Sydney June 1999, 91 (T Matruglio, Family Court Empirical Report Part Two).

2582. The Commission received 49 submissions from litigants and 16 from organisations lobbying for and assisting particular groups of litigants in the Family Court. See Appendix A.

2583. The Court's computer system does not currently identify finalised cases. In order to determine the cases finalised, staff in each registry of the Family Court recorded on a list all cases removed from the Active Pending Cases List during this period. The files were randomly selected, proportional to the number finalised within each registry. The coded files were weighted towards applications for final orders, to obtain full information on Court processes. In total, 981 applications for final orders and 307 applications for consent orders were analysed. See T Matruglio and G McAllister *Part one: Empirical Information about the Family Court of Australia* ALRC Sydney February 1999 (T Matruglio & G McAllister, Family Court Empirical Report Part One).

2584. T Matruglio, Family Court Empirical Report Part Two, 2.

to further analyse those cases which had repeat case events or were cases which took a longer time to be concluded.<sup>2585</sup>

8.9. The Commission's research serves as a snapshot of the caseflow profile at a particular time, an indicator of case management problems and a point against which improved performance can be measured.

8.10. The Commission's sampled cases were completed in May and June 1998. Since that time senior registrars have been appointed to conduct interim hearings in parenting matters, and the 'Magellan' pilot project has been commenced in the Melbourne registry to manage certain cases alleging child abuse. There have been changes to Court forms and procedures, and the Court's Future Directions Committee has been reviewing case management and procedures. A number of Court committees are currently addressing issues raised by the Commission in DP 62 and in this report. The Future Directions Committee is considering

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2585. Additional analysis of the data conducted by the Commission is cited as: Family Court datafile, additional Commission analysis. The Commission also commissioned further analysis of the data on costs: T Fry *Costs of litigation in the Family Court of Australia and in the Federal Court of Australia* ALRC Sydney November 1999 (T Fry, Family and Federal Courts Costs Report).

- major case management issues
- proposals for shortening trials
- earlier and more targeted family reports
- giving comprehensive priority to certain matters
- more effective use of judge time
- a greater reliance on chamber magistrates in some registries
- the attribution of costs to recalcitrant parties, and
- the use of expert evidence.<sup>2586</sup>

The Committee's proposals, which are in an advanced stage of development and scheduled to be placed before the judges in April 2000 for consideration,<sup>2587</sup> also take into account recent reports from the Court's Trial Management and Compliance Committees.<sup>2588</sup> Other committees or sub-committees whose work contributes to the Future Directions Committee's proposals are examining judgment writing; standard orders for use on the new Casetrack system; and calendaring of judicial time.

## **The Family Court response to Discussion Paper 62**

8.11. The Court was stridently critical of the research, conclusions and reform proposals in DP 62, styling them as 'facile, insensitive, ill thought out, misguided, poorly researched and impractical', 'largely based ... on the remarks of persons who have no expertise in case management' and as 'failing to appreciate the Court's true workload and the constraints on resources available to it'.<sup>2589</sup> Chief Justice Alistair Nicholson characterised the Commission as 'wandering the countryside talking to Uncle Tom Cobley' instead of 'the people in charge of case management in the court',<sup>2590</sup> and stated 'the contradictions, and at times facile observations, contained in the paper give little credit to the challenges that face separating families and those in the Court that support them'.<sup>2591</sup> In a media release the Chief Justice implied the Commission had not acted in good faith

There is a troublesome uncritical acceptance of Government assertions in [the area of legal aid funding] ... I am also troubled by the Commission's failure to recognise or adequately acknowledge the thrust of the Court's many strategic initiatives ... This suggests that the Commission either had pre-conceived ideas, or developed them early

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2586. Family Court *Annual report 1998-99*, 18.

2587. Family Court judge *Consultation* 21 December 1999 and material supplied at that meeting.

2588. These reports are published on the Court's website as appendices to the Court's submission on ALRC DP62 at <<http://www.familycourt.gov.au/court/html/alrc.html>> (18 January 2000).

2589. Family Court *Submission* 348.

2590. Interview with the Chief Justice of the Family Court Alistair Nicholson and Professor David Weisbrot, President of the Australian Law Reform Commission *Morning with Jon Faine* 3LO *Transcript* 26 October 1999, 2.

2591. A Nicholson 'The case for the defence' *Australian Financial Review* 3 September 1999.

in its work on the reference, and subsequently ignored anything that ran contrary to them.<sup>2592</sup>

Somewhat incongruously, the Court also claimed that the Commission had adopted some of the Court's ideas.

At times the Discussion Paper merely states, as if the ALRC invented them, initiatives and improvements that the Court itself suggested to it which are either in place already or in the course of implementation.<sup>2593</sup>

8.12. In discussions with the Commission, certain Family Court judges 'thoroughly commended' the discussion paper, agreed very strongly with case management proposals, which they suggested 'could have been stronger', and stated that they were 'happy for the ALRC to say things that judges have felt constrained from saying'. Others indicated that they were 'mystified at the fuss' with which the Court had greeted the paper.

8.13. Much of the Court's criticism stems from its premise that the Court is under-resourced for the tasks that it performs, that this shortfall is exacerbated by legal aid cuts and shortages and that problems in case management and resolution identified in the Court derive from, and are attributable to poor lawyers' practices, lawyer and party non compliance and an insufficient numbers of judges in particular registries. These are long-standing complaints of the Court. The Law Council supports the Court's claim that it is under-resourced.<sup>2594</sup>

8.14. Following the Court's response and its repeated suggestions that the Commission's primary recommendations should be to increase Court and legal aid funding, the Commission sought, but was not provided with, details of a number of matters including the Court's resourcing. In response to the request the Chief Justice stated that

issues as to the number of judges and registrars needed are dependent upon imponderables such as the fate of the Federal Magistrates Bill and there would be little present purpose in making such a calculation until that is clarified. I can however say with certainty that the case management system proposed in the Discussion Paper would of itself require additional judges, plus a substantial increase in the administrative staff of the Court.<sup>2595</sup>

8.15. In its consultations the Commission heard concerns frequently expressed about the way the Court allocates its resources; at the level of administrative

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2592. Family Court *Media release* 19 October 1999.

2593. Family Court *Submission* 348.

2594. The Law Council has supported the argument that more judges are needed in the Family Court in comments to the Commission and publicly: Law Council *Submission* 197; *Submission* 375 and *Submission to the Attorney-General: Delay in the Family Court of Australia* September 1998.

2595. A Nicholson *Correspondence* 7 October 1999.



staffing (there are 774 staff at the Court other than judges, registrars and counsellors)<sup>2596</sup> and, in particular, at the level of staff and resources located within

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<sup>2596</sup>. At 30 June 1999 the total number of paid staff and judicial officers was 1011, with 666 administrative staff at level ASO 1-6: *Family Court Annual report 1998-99*, 97.

the Office of the Chief Executive of the Court (89 staff),<sup>2597</sup> – an entity which is not replicated in any other Australian court. These observations were made by persons in and outside the Court. In consultations there were also frequent comments that the Court was ‘overloaded with bureaucrats’,<sup>2598</sup> as opposed to staff actively dealing with litigants and case processing.

8.16. As stated, the Court’s concerns with its financing and resources are long-standing and were likewise highlighted in the 1992 Joint Select Committee report which commented that

during the course of this inquiry and particularly during the Committee’s deliberations on the detailed report, it became increasingly obvious that there was insufficient data available to the Committee on the funding levels of the Family Court and the administrative efficiency with which those funds are expended. The Committee decided that a further inquiry into the administration of the Family Court, with particular reference to its funding levels and its internal allocation of funds was essential.<sup>2599</sup>

The Committee further commented that

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2597. The position of Chief Executive Officer (CEO) was created in 1990 to assist the Chief Justice in the management of the Court. The CEO has powers equivalent to a Secretary of a Department in respect of staff employed under the *Public Service Act 1922* (Cth). Many of the Court’s senior administrative positions report to the CEO as does the Principal Registrar. The Office of the Chief Executive (OCE) has a total of 89 staff including one judge, the CEO, eight Senior Executive Service staff, 32 Senior Officers and above, and 45 lower level administrative officers (ASO 1–6): id98, table 5.10.

A 1997 report described the reporting arrangement to the OCE as onerous and complex and suggested

- an acknowledgment of the strategic and monitoring role of the OCE, and the need for proper delegations
- reporting relationships to be as simple and direct as possible
- the Court should recognise that its legal and social science-based operations are becoming fused, both for staffing and service delivery
- the structure should be based much less on traditional functional lines and much more on a client service perspective
- resolution of the role of the Court’s regional structure which was weakened by the degree of ‘micro-control’ by the OCE: P Coaldrake ‘Review of the Top Structure of the Family Court of Australia’ *Unpublished Family Court June 1997*.

2598. Law Institute of Victoria Family Law Section *Consultation Melbourne* 24 August 1999; NSW Bar Association *Consultation Sydney* 16 September 1999; Law Council *Consultation Canberra* 29 September 1999; Legal Aid practitioners *Consultation Sydney* 14 September 1998.

2599. Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act *The Family Law Act 1975: Aspects of its operation and interpretation – Report of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act* AGPS Canberra 1992, para 1.16.

despite the Family Court's emphatic requests for additional funding, the Committee is not convinced that the Family Court has substantiated a case for additional funding.<sup>2600</sup>

8.17. The extent of any shortfall in the Court's resources remains unclear. In the circumstances, the Commission is in no position to comment or make recommendations on this issue. In this context, it is useful to attend to the advice of Professor Scott, cited in chapter 1

Politicians do not believe that the way to reduce delays is to provide more resources. The road back to adequate funding starts with judges, lawyers and administrators putting their own house in order so that they can demonstrate to those who control the strings of the public purse that they have done all within their power to see that the court system is being run as efficiently and effectively as possible on the resources available and so that they can show that any further resources that are made available will be used productively.<sup>2601</sup>

It is this path that the Commission seeks to illuminate in the course of this chapter.

8.18. The Commission had several meetings with judges following the publication of DP 62, including with Justice Buckley, Judge Administrator of the Court. Justice Buckley provided the Commission with details of the research and draft proposals of the Court's Future Directions Committee, as requested by the Commission. The Commission's research, conclusions, recommendations, and references to the Court's independent analysis and Future Directions proposals, are set down in detail below.

8.19. There may still be significant disagreement between the Court and the Commission concerning our identification of case management 'problems' in the Court, the scope and cause of such problems, and the Court's approach to reform and consultation with the profession. These matters are dealt with in this chapter. However, the information provided by Justice Buckley on the independent research conducted for the Court and the deliberations of the Court's Future Directions Committee, indicates that the Court and the Commission generally agree about the way cases should be managed and processed by the Court in the

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2600. *id* para 2.45. The Joint Select Committee was particularly concerned that the Family Court had consistently and publicly commented that, so far as funding was concerned, it had not been adequately resourced to perform all its functions. The Joint Select Committee wrote to the then Attorney-General and sought immediate referral of this matter to it. The Attorney-General referred the matter to the Committee on 16 September 1992 to examine the administration of the Family Court to assess

- the base level of funding required to enable the Court to undertake its statutory functions at a level that will meet the reasonable expectations of Parliament
- the effectiveness of present expenditure by the Court towards undertaking those functions and meeting those expectations.

2601. I Scott 'Is court control the key to reduction in delays?' (1983) 57 *Australian Law Journal* 16, 18.

future. As noted, these matters are yet to be deliberated on by the judges. The Commission's analysis is set to assist that deliberation.

## **The nature of family jurisdiction**

### *Difficulties associated with family jurisdictions*

8.20. In DP 62, the Commission noted the well recognised and common difficulties associated with family jurisdictions here and abroad.<sup>2602</sup> Such problems derive from a number of factors, set out below.

8.21. *The nature of the matters themselves.* There is no simple and easy way to deal with all family disputes. Such disputes can be exacerbated by immature or short-lived relationships, lack of trust between the parties, controlling or violent behaviour, psychiatric or substance abuse problems or partisan involvement of relatives or friends.<sup>2603</sup> Some small number of cases may 'require therapeutic intervention' rather than court attention.<sup>2604</sup> Family courts deal with the social and emotional problems of poor and dysfunctional families – problems which cannot be solved by the judicial system alone. As one judge described the most difficult cases

The families are frequently dysfunctional, the matters are virtually beyond satisfactory solution and are questions of where the least harm is likely to be done.<sup>2605</sup>

Relevant facts in family disputes frequently span many years, are easily placed in issue, easily disputed and often incapable of external ratification. The legal and emotional facets of the dispute may be difficult to separate. The disputes change in the course of, and following, litigation, as parties find new partners, change residence and the children assert their views.<sup>2606</sup> There is none of the finality associated with litigation in other jurisdictions.<sup>2607</sup>

8.22. *The disposition of parties and their circumstances.* Family litigants generally have limited experience with legal processes and some have unreal expectations of litigation, seeking vindication of their side of the debate at the expense of the other party.<sup>2608</sup> Frequently, one party will benefit from delay in

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2602. ALRC DP 62 para 11.5–11.14.

2603. L Nicholls *Submission* 244.

2604. P Boshier et al *A review of the Family Court: A report for the principal Family Court Judge New Zealand Family Court Auckland NZ* April 1993, 68 (Boshier Committee). Similar issues were canvassed in P Parkinson *Submission* 149.

2605. B Warnick *Submission* 147.

2606. Legal Aid NSW *Consultation* 28 May 1999; R Hunter *Correspondence* December 1999.

2607. Family Court judges *Consultation* 23 September 1998. Similar points were made by R Hunter *Correspondence* 20 December 1999; Legal Aid NSW *Consultation* 28 May 1999.

2608. The Law Council noted that the expectations of family litigants, and what they want from the Court, frequently changes during the litigation process; they are often motivated by non-legal considerations such as desire for reconciliation or revenge; and their hopes and expectations from the process are often not realistically achievable: Law Council *Submission* 197.

resolution of the case, as delay will prolong the time they have control over property or sole responsibility for children.

8.23. *The variable skills and experience of practitioners.* Family practice is one of the 'bread and butter' areas of legal practice. Family work is therefore undertaken by a wide range of generalists as well as by specialist family

practitioners. The skills, experience, and competence of lawyers, and their cooperation with court timetables, management directives and processes, varies. In some registries, 'a small but not insignificant' group of under-skilled, uncooperative lawyers are said to present considerable case management problems for the Court.<sup>2609</sup>

8.24. *The disparate dispute resolution arrangements.* It follows from the nature of family disputes that dispute resolution calls for varied diagnostic, counselling, conciliation and adjudication skills, and cooperative case management by varied specialists. This can be difficult to coordinate and allocate appropriately in all cases. As Professor Ian Scott wrote

some adjudicative typologies say that family courts are 'diagnostic' rather than 'litigious' or 'administrative' ... My own view is that family courts cross adjudication typology lines in a manner which defies simple analysis, and therein lies the reason why 'case management' (whether broadly or narrowly defined) is such a complex undertaking in such courts. And it also explains why family court case management (in the narrow sense) systems are bound to be difficult to design, to implement, and to maintain in good operational health.<sup>2610</sup>

Further, the family jurisdiction is a stressful one for judges, registrars, counsellors and lawyers. The stresses derive from dealing with emotional, angry and disaffected parties, with the frequent complaints from unsuccessful parties and determining or facilitating outcomes which are not optimal but may be the best in the circumstances.<sup>2611</sup> These factors can engender low morale, 'burnout' and defensiveness from within family courts and the profession.

8.25. The Commission sought information on the workings of case management in various overseas jurisdictions and examined the many reports on family litigation in common law jurisdictions.<sup>2612</sup> As the DP noted, such

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2609. Family Court *Submission* 348.

2610. I Scott *Correspondence* 23 December 1999.

2611. B Warnick *Submission* 147.

2612. These included: Report of the Special Joint Committee on Child Custody and Access *For the sake of the children* Parliament of Canada Ottawa December 1998; Alberta Law Reform Institute *Family law project overview* ALRI Edmonton Alberta 1998 (ALRI RFD No. 18.1); American Bar Association *Unified family courts: A progress report* ABA Washington DC 1998; Papers from the 'Symposium on Unified Family Courts' (1998) 32(1) *Family Law Quarterly* 1; Family Justice Working Group *Breaking up is hard to do: Rethinking the family justice system in British Columbia* Assistant Deputy Ministers' Sub-committee on Social Policy Family Justice Review Working Group British Columbia 1992; Law Reform Commission (Ireland) *Report on family courts* LRC Dublin Ireland 1996 (LRC 52-1996); Ontario Civil Justice Review *Civil justice review: First report* Ontario Court of Justice & Ministry of the Attorney-General Toronto 1995; Utah Family Court Task Force *Final report to the Utah Judicial Council* Administrative Office of the Courts Salt Lake City 1994; P Boshier et al *A review of the Family Court: A report for the principal Family Court Judge* New Zealand Family Court Auckland NZ April 1993; New Zealand Law Commission's inquiry into 'Women's Access to Justice' consultation papers 1997 New Zealand; S Katz & J Kuhn *Recommendations for a model family court: A report from the National Court Symposium* National Council of Juvenile and Family

jurisdictions likewise exhibit core problems associated with the adjudication and resolution of family disputes, including

- the fragmentation of jurisdiction, such that related problems cannot be litigated in the same court (especially for jurisdictions within federal systems)<sup>2613</sup>
- frequent changes in legislation, and family litigation practices<sup>2614</sup>
- the potential for repeat litigation
- increasing numbers of unrepresented litigants
- arranging effective case management systems, and the incorporation and utilisation of appropriate PDR
- arranging effective case streaming to distinguish 'routine' cases from those needing intensive case management
- the implementation of effective litigation procedures relating to pleadings, discovery and the presentation of evidence and
- the enforcement of court directions and orders.

### *Competing visions of the role of a family court*

8.26. A further issue, raised frequently by practitioners, judges and court administrators in the Commission's consultations, concerned competing visions of the role of the Court.<sup>2615</sup> Again, this is an issue in overseas jurisdictions. The Family Court was described to the Commission as having 'an identity crisis' as to 'whether it is a court of law (with normal judicial processes) or primarily a social service'.<sup>2616</sup>

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Court Judges Reno Nevada 1991. See also ALRC & HREOC *Seen and heard: Priority for children in the legal process* ALRC Sydney 1997 (ALRC 84); ALRC *For the sake of the kids* ALRC Sydney 1995 (ALRC 72); ALRC *Equality before the law: Justice for women* ALRC Sydney 1995 (ALRC 69); ALRC *Matrimonial property* ALRC Sydney 1987 (ALRC 39).

2613. These issues were discussed in ALRC 84, ch 15. See also the High Court's decision in *Re Wakim; Ex parte McNally; Re Wakim; Ex parte Darvall; Re Brown; Ex parte Amann; Spinks v Prentice* (1999) 163 ALR 270.

2614. See R Abella 'The challenge of change' edited version of speech to 8th National Law Conference Hobart 24–28 October 1998 (1999) 13(3) *Australian Family Lawyer* 5. Justice Warnick of the Family Court, noting the increasing complexity of child matters, has referred to the changes to assumptions that operated in the recent past

When the grounds of divorce involved fault, the sense of blame, disqualification, assumptiveness and stereotyping also permeated the disposition of ancillary issues, such as child matters and division of property. The disposition of a child matter [could] be far more prompt [when] one [could rely] on assumptions such as 'young children (or girls) are better raised by mothers than fathers': B Warnick *Submission 147*.

On the impact of the *Family Law Reform Act 1995* (Cth), see H Rhoades, R Graycar, M Harrison Interim Report *The Family Law Reform Act 1995: Can changing legislation change legal culture, legal practice and community expectations?* University of Sydney & Family Court of Australia Sydney April 1999.

2615. Family Court judges *Consultation* 23 September 1998; S Loomes *Submission 291*; N Ackman *Submission 289*; Family law practitioners *Consultation* Darwin 7 October 1999.

2616. Qld Law Society *Consultation* Brisbane 22 September 1999.



Is it to be a court with a conciliation service attached or a conciliation service with a court attached? A lot flows from this: once this is decided, you can identify where the resources are, and should be allocated.<sup>2617</sup>

8.27. The competing visions derive from the legislation and from court 'mission statements' and objectives. The Family Law Act shapes the structure, activities and aims of the Court, and places additional obligations on practitioners in this jurisdiction. The Act requires the Court, in exercising its jurisdiction under the Act, to have regard to the

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<sup>2617</sup>. NSW Bar Association family law practitioners *Consultation* Sydney 16 September 1999.

- need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life
- need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children
- need to protect the rights of children and to promote their welfare
- need to ensure safety from family violence and
- means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and their children.<sup>2618</sup>

8.28. The structure and provisions of the Act emphasise use of primary dispute resolution<sup>2619</sup> and provides for organisations to establish counselling and mediation services,<sup>2620</sup> community mediation and arbitration.<sup>2621</sup> The Court, and legal practitioners, are required to consider the possibility of reconciliation between the parties.<sup>2622</sup> Judges may advise parties to seek counselling if there is a possibility of reconciliation, or if it may improve their relationship to each other or to their children.<sup>2623</sup> The Court, and legal practitioners, must consider whether to advise parties about the availability of counselling for marital breakdown.<sup>2624</sup>

8.29. The Court's objective is currently stated to be 'to resolve and determine family disputes'. Subsidiary objectives include 'being at the forefront of development of innovative services for families in conflict' and 'promoting functional family relationships after separation'.<sup>2625</sup> These objectives are consistent with the breadth of issues to which the Court is required to have regard. It was argued to the Commission that such objectives go beyond what a court can, or should seek to achieve, and blur the focus of what should be the Court's primary business — resolving and determining disputes.

In the Family Law Act the aim is stated to be maintenance of the family unit, but in practice this is not and realistically can't be done. Working out the objectives is a societal problem, not just an issue for the courts, judges or lawyers. There is no societal consensus on the objectives of the Family Court.<sup>2626</sup>

8.30. The issues associated with these competing visions affect the structure of the Court, public and professional expectations of the Court, and the way the Court manages its business. Such matters are beyond the Commission's terms of reference. The issues deserve fuller analysis as they emerge as part of the continuing public debate around the Family Court.

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<sup>2618.</sup> *Family Law Act 1975* (Cth) s 43 (Family Law Act).

<sup>2619.</sup> *id* Part III.

<sup>2620.</sup> *id* Part II.

<sup>2621.</sup> *id* Part III, division 5.

<sup>2622.</sup> *id* s 14C, 14D.

<sup>2623.</sup> *id* s 16B.

<sup>2624.</sup> *id* s 16C.

<sup>2625.</sup> *Family Court Annual report 1998–99*, 3.

<sup>2626.</sup> NSW Bar Association family law practitioners *Consultation* Sydney 16 September 1999.



## The Commission's findings on case duration, case events and settlement

### Duration

8.31. In public discussions on the workings of the Family Court, a common complaint concerns the time taken for cases to be finalised. The Commission's research on cases measured the duration between filing and hearing or resolution of the case.

8.32. The Commission's case sample, with two minor exceptions, was typical of the Court's case load.<sup>2627</sup> In this sample, slightly more than 50% of applications for final orders (Form 7) were resolved in less than six months.<sup>2628</sup> The median duration to completion, for applications for final orders in the sample was 5.23-months from filing to finalisation,<sup>2629</sup> which is within the Court's performance standards. The Court's performance targets were exceeded in 25% of the sample cases; in 10% of the cases, the matters took at least twice as long to finalise as the performance standards require.<sup>2630</sup> Across the Court, 230 cases (23% of applications for final orders) took 12 months or more from filing to finalisation; 52 cases (5% of applications for final orders) took 24 months or more from filing to finalisation.<sup>2631</sup> It is this core of 'problem' duration cases that has received extensive media coverage as the singular problem with family law proceedings and this also was raised frequently in consultations with the Commission.<sup>2632</sup>

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2627. The Commission's case sample included cases in the Melbourne, Brisbane and Adelaide registries cases which had been through a 'callover' process in previous months, to identify and dispose of the older cases in the registry. This could have increased the duration figures for those registries. Further, the Commission's case sample contained a slightly lower proportion of cases assigned to the 'complex track', compared with the proportion for all cases in the Family Court for that year.

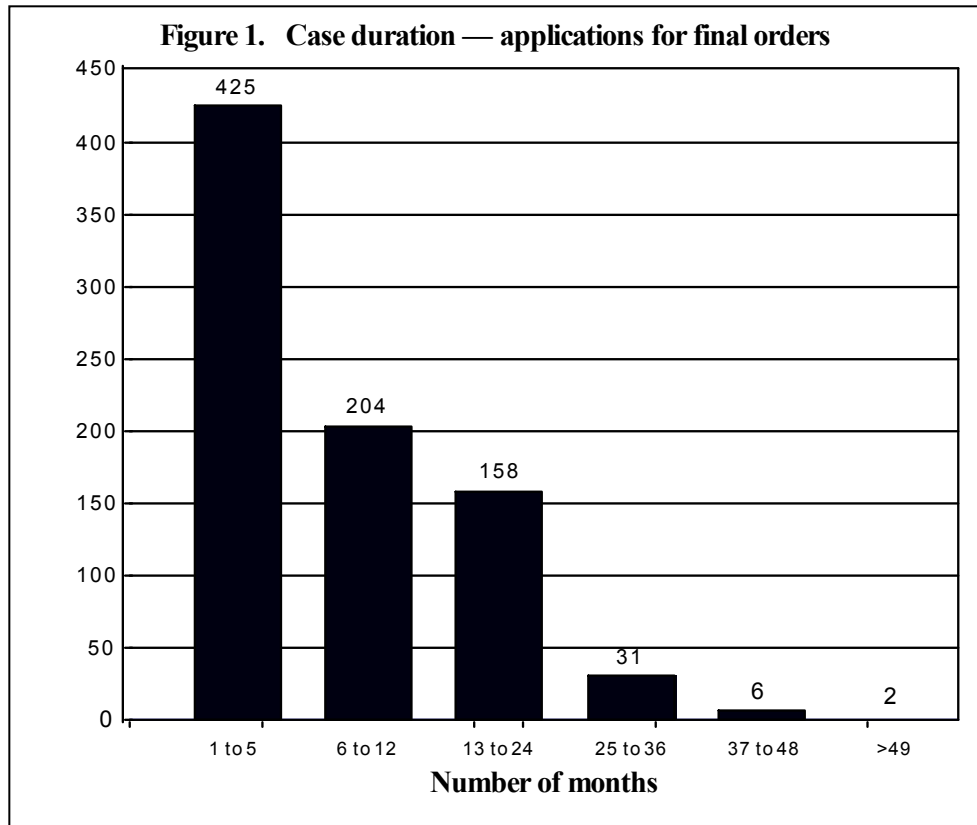
2628. T Matruggio & G McAllister, *Family Court Empirical Report PartOne*, 48 table 27.

2629. *id* 42.

2630. This finding was modified by the existence of a number of cases whose case track was not specified, apparently because they were resolved quickly and early in the litigation process. The median disposition time for these cases was three months, and 90% were finalised in 9.6 months – still higher than the performance standard for 'direct track' cases of six months: R Hunter *Family law case profiles* JRC Sydney 1999, para 340.

2631. Family Court datafile, additional Commission analysis.

2632. Victorian Bar *Consultation* Melbourne 23 August 1999; Law Institute of Victoria *Consultation* Melbourne 24 August 1999; Law Council *Consultation* Canberra 29 September 1999; Law Society of NSW Family Law Committee *Consultation* Sydney 17 November 1999; Legal Aid Qld *Consultation* 21 September 1999; Legal Aid practitioners *Consultation* Canberra 27 September 1999; Legal aid practitioners *Consultation* Parramatta 14 September 1998; Qld Law Society *Consultation* Brisbane 22 September 1999. Public comments on the issue include R McClelland 'Family Court delays out of control' *Media release* 24 May 1999; 'Children in limbo: "Appalling" Family Court delays create two-year backlog' *Adelaide Advertiser* 5 January 1999; 'Justice: our legal system on trial' *Australian* 25 November 1998; 'Family Court delay threatens children' *Courier-Mail* 27 October 1998; 'Court "creaking" for lack of judges' *Sydney Morning Herald* 26 October 1998.



8.33. The Commission concluded in DP 62 that there was no systemic problem with delay in the Court. There is no doubt that for the parties involved, case duration similar to the longest cases in the Commission’s case sample can be a problem. In family cases awaiting resolution, the lives of parties are disrupted, children unsettled and financial circumstances, for one party at least, may be strained. Even so, when duration figures for the Family Court are assessed against other federal jurisdictions they have a shorter median and total duration to finalisation. Each of the courts and tribunals analysed by the Commission had a core of cases which took a comparatively long time to be resolved. The median figures show that the majority of Family Court cases resolved in a shorter time than those in the AAT, which was set up to be a speedy and informal process. Such delays as are seen in the Family Court and other courts do not necessarily evidence inefficient court, tribunal or practitioner practices, but also can be associated with case complexity, sometimes reflecting party choice of tactics. Duration figures also reflect the opportunities which courts and tribunals provide for parties to reach or

test consensual outcomes. In the Commission's case sample, one factor associated with the longer duration cases was that the parties had attended counselling.<sup>2633</sup>

8.34. In family jurisdiction some judges appear to adjourn matters so that parties can test the workability of contact arrangements. In Canberra, one of the slower registries in the Commission's sample, the Commission heard few practitioner complaints about adjournments which occurred in these circumstances. Practitioners noted that the judge 'knows all cases in the list' and arranges to give varying attention to issues in dispute so that cases keep moving to resolution. Justice Faulks noted

it is often better to deal with one part of the matter at a short hearing and then adjourn it to allow the parties to adapt to this before coming again to deal with other issues.<sup>2634</sup>

Such cases may appear from statistics to have excessive case durations despite, in fact, being appropriately and attentively managed by the Court. In such circumstances, the Commission was careful about drawing general conclusions, or ascribing causes for such duration figures. All relevant factors need to be addressed in considering the causes of and solutions to delay.

8.35. The essential complaint to the Commission concerning delay was not the full spectrum of time taken to resolve the case, but that on present case management arrangements, there are extended periods of time when nothing seems to be happening with a case.<sup>2635</sup> In such periods, practitioners receive repeat calls from clients asking 'what is happening to my case' and may initiate interim applications or negotiations to progress the case. From the Commission's vantage point, it is the 'start and stall' progress of cases in present arrangements that generates most concern about Family Court delay.

8.36. The Law Council argued that DP 62 paid insufficient attention to the problems of extended delay in some cases.

It is little comfort to those parties waiting for approximately 2 years for a final hearing to know that just over 50% of applications for final orders are resolved in less than 6 months.<sup>2636</sup>

8.37. The Court stated in its submission that 70% of cases are resolved within four months, but did not explain the basis on which this figure was calculated.<sup>2637</sup> The Court criticised the 'fallacy' in the Commission's conclusions when 'the real

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<sup>2633.</sup> R Hunter *Family law case profiles* JRC Sydney 1999, para 347; ALRC DP 62 para 11.31-32.

<sup>2634.</sup> Family Court judges *Consultation* 28 September 1999.

<sup>2635.</sup> The Court is conscious of this issue, and proposals of the Future Directions Committee seek to address it: Family Court judge *Consultation* 21 December 1999.

<sup>2636.</sup> Law Council *Submission* 375.

<sup>2637.</sup> Family Court *Submission* 348. In particular, it is not clear whether this figure relates to contested cases only or also includes consent order applications.

issue ... is that those that do not resolve should not have to wait for excessive periods for a trial'.

There is significant delay in some Registries for those matters going on to a final judicial determination. This is largely because of past Government neglect of making sufficient judicial appointments and replacing Judges in a timely fashion.<sup>2638</sup>

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<sup>2638</sup>. *ibid.*

8.38. The Court also blamed lawyers' practices in certain registries where counsel are briefed late in the case. Solicitors and parties may delay consideration of settlement until counsel is engaged, with the result that cases settle on the day of a hearing or issues are 'clarified in running'.<sup>2639</sup> The Court elaborated that its consultant

KPMG has identified that one of the major reasons for existing delays in the Melbourne and Adelaide registries is the fact that lost judicial time arises from too many cases settling at the Court doorstep or in running during the trial. The problem seems to be more one of legal culture in those cities than the case management system which operates much better in the rest of Australia. In NSW and Queensland there is still a problem with late settlements after setting down, but these occur at an earlier stage than in the other two states. This is a major issue being addressed by the Future Directions Committee but the answer does not lie in 'Band Aid' solutions of the type suggested by the Commission. The problem is obvious to anyone experienced in case management but seems to have escaped the Commission.<sup>2640</sup>

8.39. The Law Council stated that the major reason for delays in cases reaching hearing was an insufficient number of judges.<sup>2641</sup> The Law Council also identified the increase in workload in the Family Court, an increase in the length of hearings, the effects of the *Family Law Reform Act 1995* (Cth), and increased numbers of unrepresented litigants, as additional factors engendering delay.<sup>2642</sup> In certain registries judges heard significant numbers of interim applications. The appointment of senior registrars and the delegation to them of powers to deal with interim hearings in parenting matters has shortened recent duration figures.<sup>2643</sup> Practitioners also commented on the variable workloads of judges as a factor in delays in case resolution. A response provided by the Court in answer to a parliamentary question confirmed the marked differences in the numbers of sitting days of judges in the Court.<sup>2644</sup>

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<sup>2639.</sup> *ibid.*

<sup>2640.</sup> *ibid.*

<sup>2641.</sup> Law Council *Submission 375*. The Law Council noted that events such as divorce hearings and conciliation conferences, involving a registrar rather than a judge, had less delay than final hearings: Law Council *Submission to Attorney-General: Delay in the Family Court* September 1998, 11.

<sup>2642.</sup> The Law Council stated that in only one registry was the average duration from filing to hearing within the performance standard timeframe for standard track financial cases: Law Council *Submission to Attorney-General: Delay in the Family Court* September 1998, 1-6, 11. Many of the figures quoted by the Law Council are far higher than the average duration from filing to hearing recorded by the Commission for the same registries, although the figures appear to cover a similar period. The Law Council does not identify the source of its figures, so this discrepancy cannot be examined.

<sup>2643.</sup> Family Court *Submission 348*.

<sup>2644.</sup> Commonwealth House of Representatives, *Questions on notice*, 10 February 1999, Question No. 64 (DWilliams, Attorney-General).



8.40. Research by the Justice Research Centre (JRC) found that, where cases take some time to resolve, the issues and outcomes change. In this context, the Law Council has observed that

[t]he delay in obtaining a final hearing itself causes problems because while the substantive issue remains unresolved, this can give rise to numerous applications for interim orders and the discharge or variation in the Judge's Duty List of earlier interim orders. These applications consume scarce judicial time thereby reducing the time available to deal with final hearings. The result is an increase in the long term delay. In addition, the longer a dispute remains unresolved, the more likely it is that the issues in dispute expand. For example, the longer a property dispute is delayed, the more likely it is that the facts of the dispute change: valuations may become outdated or a party may re-partner. In addition, previously resolved issues such as children's matters may unravel and thus have to be included in the list of issues requiring resolution.<sup>2645</sup>

8.41. Practitioners indicated to the Commission that public perceptions about delay in the Family Court also motivated parties to file early in the dispute, 'to secure their place in the queue', to seek interim orders 'as the only hearing they are likely to get from the Court' and to settle their dispute because 'it would take too long to get a hearing'.<sup>2646</sup> Perceptions about delay may therefore create more work for the court in increased filings or interim hearings and engender party dissatisfaction with the process — a sense of having been deprived of 'their day in court'.<sup>2647</sup>

8.42. The Commission's figures show that delays in resolving cases were not uniform across the Court. The shortest mediation duration figure was 3.91 months in Dandenong, and the longest median was 6.51 in Townsville. Four registries finalised 90% of their cases in less than 18 months;<sup>2648</sup> in four registries the 10% of longer cases took more than 21 months.<sup>2649</sup> Not all of these cases were resolved following a hearing. Contrary to the Court's observation quoted at para 8.37, in some registries parties quickly receive a hearing. On the Commission's figures, some registries had a median duration for cases which went to a hearing of less

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<sup>2645</sup>. Law Council *Submission to the Attorney-General: Delay in the Family Court of Australia* September 1998, 7.

<sup>2646</sup>. Family law practitioner *Consultation* Parramatta 14 September 1998; Law Society of NSW Family Law Committee *Consultation* Sydney 17 November 1999; Family law practitioners *Consultation* Canberra 2 September 1999.

<sup>2647</sup>. On the expectations of litigants in the Family Court, see para 1.80-1.86; 6.139.

<sup>2648</sup>. These registries were Sydney (12.81 months), Darwin (16.10 months), Townsville (16.31 months) and Dandenong (17.64 months): Justice Research Centre *Family Court research part one: Empirical information about the Family Court of Australia* ALRC Sydney June 1999, 33 (Justice Research Centre Family Court Research Part One).

<sup>2649</sup>. These were: Brisbane (21.20 months), Adelaide (21.99 months), Melbourne (23.80 months) and Canberra (25.45 months). Duration for the remaining registries was Parramatta (18.81 months), Newcastle (19.81 months) and Hobart (18.21 months): *ibid*.

than 9 months.<sup>2650</sup> In the Dandenong, Sydney and Hobart registries, 75% of cases heard reached a hearing in less than 12 months.<sup>2651</sup> Cases in Dandenong and Sydney were consistently among the fastest to reach hearing or finalisation, while those in Adelaide and Melbourne consistently took longer to be finalised and to reach hearing.<sup>2652</sup> Justice Buckley indicated the Court's concern to address registry variations and bring down the duration figures.<sup>2653</sup>

8.43. The Commission maintains its view, expressed in DP 62, that the evidence does not show *systemic* delay problems in the Family Court. There is a small core of longer duration cases and the evidence shows that some registries are less effective in completing cases in the timelines set by the Court. However, some registries appear very efficient by any reasonable court or tribunal benchmark.

8.44. Registry differences may derive from a lack of resources in particular registries – whether the shortage relates to judges or counsellors to compile family reports.<sup>2654</sup> The disparities may also reflect differing management practices or local cultures.

8.45. Where delays are attributable to practices within the profession, the Court should discuss with practitioners ways to change practices to produce earlier resolution of cases. It was clear from the Commission's consultations in all jurisdictions, that lawyers prepared for, briefed counsel for, and were responsive to case events which they saw to be significant and effective. Conversely, 'routine' events were seen to need minimal preparation or junior solicitor or paralegal attendance. Assumptions about early, routine case events, or the separation of PDR and litigation pathways in Family Court case management may delay the involvement of experienced and specialist lawyers and the resolution of cases.

### Repeated case events

8.46. The Commission's empirical research also allowed computation of the numbers of interlocutory case events in cases. In submissions and consultations, lawyers and some litigants were adamant that there were too many case events in family cases. The Family Court's submission noted

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2650. These were Dandenong (3.29 months); Hobart (7.39 months); Newcastle (7.59 months); Sydney (8.74 months). Two had a median duration to hearing of more than one year – Melbourne (13.47-months) and Adelaide (21.81 months): *id* 34.

2651. These were Dandenong (6.90 months), Sydney (10.32 months) and Hobart (11.89 months): *ibid*. 90th percentile figures were not used as the numbers for this group were too small.

2652. Note that in Melbourne, Adelaide and Brisbane registries, a 'callover' to dispose of older cases may have resulted in an unusually large number of older cases being sampled in these registries. GMcAllister *Correspondence* 12 February 1999.

2653. Family Court judge *Consultation* 21 December 1999.

2654. See para 8.13–8.16; 8.189–8.193.

In most children's cases there is a separate issue as to the interim disposition of the child, and frequently other issues such as the location of the child, enforcement of orders, and disputes as to interim contact or over matters such as education or health that arise throughout the life of the case and not uncommonly after it ... In these circumstances repeat applications are to be expected and indeed often occur when there has been a speedy determination of the original dispute because circumstances have changed. This has little or nothing to do with a case management system but a lot to do with the dynamics of relationships.<sup>2655</sup>

8.47. The number of interlocutory case events attended is a relevant measurement for case management. The Commission counted only the events noted on the Court files: directions hearings, conciliation conferences, interim hearings, prehearing conferences, compliance conferences and what were recorded as 'chambers conferences', or the granting of consent orders. Information sessions and conciliation counselling were not included, although it should be assumed that all parties would have attended an information session and all parties in children's

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<sup>2655</sup>. Family Court *Submission* 348.

cases would have had at least one counselling session.<sup>2656</sup> The table below, therefore, underestimates the number of occasions parties attend court in connection with their cases.

8.48. On the Commission's data, the median number of interlocutory case events attended by parties in all applications for final orders (Form 7) was three.<sup>2657</sup> The table shows that a substantial minority of cases experienced considerably more case events.

**Table 8.1. Applications for final orders – number of case events<sup>a</sup>**

Case types	Median case events	5 or more case events	10 or more case events
All applications for final orders	3	320 (33 %)	67 (7 %)
Children's cases	3	185 (33 %)	38 (7 %)
Financial cases	3	91 (33 %)	18 (6 %)
Children and financial cases	4	44 (37 %)	11 (9 %)

<sup>a</sup>Percentages refer to the case type at the left of each row.

8.49. In the sample studied by the Commission, the Adelaide registry was over-represented in the cases with the highest number of case events. The Adelaide registry had 13% of cases in the whole sample (128 cases) but 28% of those with more than 10 events (14 cases).<sup>2658</sup> Brisbane and Parramatta were under-represented in this category. Brisbane had 22% of the sampled cases (217 cases) and only 4% of those with more than 10 case events (two cases), while Parramatta had 13% of the sampled cases (131 cases) and only 2% of those with more than 10 case events (one case).<sup>2659</sup>

8.50. The table below shows the number of cases in which particular kinds of case event were repeated. Certain of these events are low cost events for the Court and the parties. On the Commission's data, on average each directions hearing added \$685 to the total cost to parties of the case. Each interlocutory case event other than a directions hearing added \$3473 to the cost.<sup>2660</sup> Of these interim case

2656. See para 8.61. It appears from Court figures in annual reports that many cases have more than one counselling session. In 1998–99, 45 334 voluntary or court-ordered counselling sessions were held in the Family Court, compared with 24 035 'new interventions' opened by the Counselling service: Family Court *Annual report 1998–99*, 79.

2657. T Matruggio & G McAllister, Family Court Empirical Report Part One, 37.

2658. Again, this may to some extent be explained by the 'callover' to dispose of the older cases in the Adelaide registry shortly before the sample period. There was also a higher proportion of 'complex track' cases in this registry than the other registries in the sample.

2659. T Matruggio & G McAllister, Family Court Empirical Report Part One, 84; Family Court datafile, additional Commission analysis.

2660. T Fry, Family and Federal Courts Costs Report, 6. The Commission was told There are many examples of matters where the matter is before someone for 10 minutes after a 3 hour wait. This leads to unnecessary expense – directly through lawyers' fees and indirectly through the need to take a day off work or arrange for babysitting: Law

events, the interim hearing is likely to be the most expensive for the Court and the parties. As the table indicates, 60% of applications for final orders involving only children's issues attended at least one interim hearing; of applications involving both children and financial issues, 49% attended at least one interim hearing; and of those involving financial issues only, 30% attended at least one interim hearing.<sup>2661</sup> In the 492 cases where parties attended at least one interim hearing, the median number attended was two; 20% attended more than three interim hearings in relation to that application; and in 101 cases (10% of the applications for final orders) four or more interim hearings were held. In eight cases there were more than 11 interim hearings.<sup>2662</sup>

8.51. Interim hearings play a significant role in the outcome of a case.<sup>2663</sup> The Full Court of the Family Court has held that interim hearings should promote stability in the child's life pending a full hearing of all relevant issues.<sup>2664</sup> Accordingly, in theory, the issues addressed in an interim hearing are not the same as those addressed in a final hearing. In fact, practitioners and judges note that there is considerable overlap.<sup>2665</sup>

8.52. The Court noted the efforts made in recent years to reduce the number of cases in which interim orders are sought.

[A] common practice had developed [prior to the introduction of Simplified Procedures] of seeking interim orders with every application for final orders. That practice had the effect of delaying final hearings by diverting Judge time to hearing interim applications. Following [the Simplification Committee] report, the Rules were changed to provide for separate applications in relation to interim and final applications. Hearings of interim applications were then limited to two hours and were generally dealt with on affidavits and argument without witnesses. However, this did not overcome the problem of frequency of applications, no doubt to preserve or challenge existing arrangements in relation to children. The fact is that these are a core

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Society of SA family law committee *Consultation* Adelaide 6 August 1999. See ch 4, para 4.8, 4.10.

2661. T Matruglio & G McAllister, Family Court Empirical Report Part One, 67. Similar proportions were noted in the report of the Simplified Procedures Committee, which noted that in '63 cases out of 101 ... interlocutory relief was sought in the initiating application': Family Court *Report of the Simplification of Procedures Committee to the Chief Justice May 1994* Family Court Sydney 1994, para 5.6 (Simplification Committee report).

2662. One case was recorded as having 41 interim hearings: T Matruglio & G McAllister, Family Court Empirical Report Part One, 67.

2663. H Rhoades, R Graycar, M Harrison Interim report *The Family Law Reform Act 1995: Can changing legislation change legal culture, legal practice and community expectations?* University of Sydney & Family Court April 1999, 61.

2664. *Cowling and Cowling* [1998] Fam CA 19; *Cilento and Cilento* (1980) FLC 90-847.

2665. The Commission was told that a practitioner who prepared for an interim hearing strictly along the lines suggested by the *Cowling* and *Cilento* cases, without addressing the issues relevant to a final hearing, would be regarded as negligent: NSW Bar Association family law practitioners *Consultation* Sydney 16 September 1999.

feature of family proceedings ... Even if such disputes are resolved at an earlier stage, they often revive.<sup>2666</sup>

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<sup>2666</sup>. Family Court *Submission 348*.

**Table 8.2 Number of each type of prehearing event attended – applications for final orders (Form 7)<sup>2667</sup>**

No. of events	Interim hearings	Directions hearings	Conciliation conferences	Prehearing conferences	Compliance conferences
1	192 (39.0%)	359 (40.6%)	205 (82.0%)	168 (77.8%)	43 (67.2%)
2–3	199 (40.5%)	364 (41.2%)	44 (17.6%)	45 (20.9%)	18 (28.1%)
4–6	77 (15.6%)	132 (14.9%)	1 (0.4%)	3 (1.4%)	3 (4.7%)
7–10	15 (3.0%)	24 (2.7%)	–	–	–
≥11	9 (1.8%)	5 (0.6%)	–	–	–
Total	492 (100%)	884 (100%)	250 (100%)	216 (100%)	64 (100%)

8.53. *Overlap between duration and repeated case events.* The Commission investigated whether the cases which took extended time to resolve did so simply because they had more case events. A small number of the longer cases had multiple events.<sup>2668</sup> The Commission also tested whether the cases with the longest duration and the highest number of case events were the ones which did not resolve and required a hearing. About half the cases which went to a hearing were ones which were of longer duration and/or had more than five case events.<sup>2669</sup> These factors may evidence additional complexity or intractability in the cases.

2667. Justice Research Centre Family Court Research Part One, 17 table 22. In the Commission's sample, in the 885 cases where parties attended a directions hearing, the median number attended was two. In 161 cases (16% of the applications for final orders) four or more directions hearings were held, and in four cases more than 11 directions hearings were held: T Matruglio & G McAllister, Family Court Empirical Report Part One, 67. A prehearing conference is set to be held shortly before hearing to prepare the case for trial. In the sample, 48 cases (23% of those attending at least one prehearing conference) attended two or more prehearing conferences. Compliance conferences are held where there has been some indication that directions have not been complied with, prior to the hearing, as a final check that the matter is ready: Family Court case management guidelines: Practice Direction 97/1 para 8.9; 6.21A(x),(xi) (Family Court case management guidelines); Family Court Report to the Chief Justice of the Evaluation of Simplified Procedures Committee August 1997 Family Court Sydney 1997, para 27.5 (Evaluation Committee Report). Not all registries hold compliance conferences, but in the Commission's sample, 21 cases (33% of those attending at least one) attended two or more compliance conferences.

2668. 230 cases (23% of applications for final orders) took longer than 12 months, and a similar number had more than five case events. But these were not necessarily the same cases. Only 134 cases (13% of applications for final orders) were in both categories. Similarly, 51 cases (5% of applications for final orders) took longer than 24 months to resolve, and 67 such cases had 10 or more case events, but only 20 of these two groups of cases (2% of applications for final orders) both took the extended time and had 10 or more case events: Family Court datafile, additional Commission analysis.

2669. The median duration for cases receiving a hearing was 9.8 months and the median number of court events for such cases was four. Less than half of the 184 cases receiving at least one day of a final hearing were in the categories of cases taking more than 12 months or experiencing more than five case events. Of the 83 cases with more than 10 case events, a duration of longer than 24-months, or both, less than half (39 cases, 47% of these cases, or 4% of applications for final orders) also had a hearing: Family Court datafile, additional Commission analysis.

8.54. The Commission's research supported an earlier study by Professor Thea Brown,<sup>2670</sup> which found that cases in which there were allegations of child abuse had a higher number of case events, and were more likely to go to hearing. The applications for final orders in the Commission's sample in which there were notifications of child abuse or family violence (6% of applications for final orders involving children) were more likely to receive a final judgment,<sup>2671</sup> and had a somewhat higher number of case events,<sup>2672</sup> than the group of all cases involving children's issues. The Justice Research Centre found that cases in the sample involving domestic violence and child abuse allegations were more likely than other cases to involve applications for variation, confirmation or discharge of earlier orders, and concluded that

while [such allegations] did not generally have statistically significant effects on case processing times or methods of resolution, they did appear to add a level of difficulty to a case and to consume greater court resources than might otherwise occur.<sup>2673</sup>

8.55. *The Magellan project.* The Family Court is currently examining the feasibility and benefits of having particular complex cases managed by the same judge. Under the Magellan pilot project, 100 selected cases in which there are allegations of child abuse are being managed from commencement to finalisation by two judges, with the assistance of registrars and counsellors specifically assigned to the Magellan project. The Court has secured the cooperation of Victoria Legal Aid and the Victorian child protection service to provide necessary legal assistance and case reports. Early findings on the scheme have been encouraging,<sup>2674</sup> with a reduction in the number of case events and the cost of resolving these cases.<sup>2675</sup>

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2670. T Brown et al *Violence in families – Report number one: The management of child abuse allegations in custody and access disputes before the Family Court of Australia* The Family Violence and Family Court Research Program Monash University Clayton & the Australian Catholic University Canberra January 1998.

2671. T Matruglio & G McAllister, *Family Court Empirical Report Part One*, 50; 53.

2672. In the Commission's sample, the 688 applications for final orders involving children's issues, had a median of two case events, and 90% had seven or fewer case events: Family Court datafile, additional Commission analysis. See para 5.107–5.108 on repeat events in legal aid family cases. On the Commission's data, the median number of case events was higher for legal aid than private cases. This may reflect their caseload of child abuse cases.

2673. R Hunter *Family law case profiles* JRC Sydney 1999, para 395.

2674. Family Court staff *Consultation* 30 June 1999; T Brown *Correspondence* 19 November 1999 and 22–November 1999.

2675. Of the cases resolved to date, 55% were resolved at the first or second directions hearing, compared with 4% of child abuse cases within the sample analysed by the Commission. Magellan cases took an average of 14 weeks to resolve, compared with 13.2 months for the Commission's similar sample. Magellan cases had an average of 2 case events compared with 6 for the Commission's sample. Magellan cases are not subject to legal aid caps but only 10% of those so far costed would have exceeded the cap. The median case costs of the Magellan project cases to date were relatively low at \$4534, compared with a median of \$7767 for child abuse cases in the Commission's sample: Professor Thea Brown *Correspondence* 19 November 1999.



The Magellan project is in some ways a very good example of how to deal with difficult cases, but you need to avoid rewarding the problem/difficult litigant by giving them special treatment.<sup>2676</sup>

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<sup>2676</sup>. Family Court judges *Consultation* 28 September 1999.

One of the main benefits of Magellan is the fact that you receive an early and fixed hearing date. There is a great deal of cooperation between court counsellors, the Court, Legal Aid and support services in the Magellan project. It is unlikely that this level of cooperation would continue in the mainstream [of cases]. Magellan has good judges who case manage firmly but fairly.<sup>2677</sup>

8.56. The pilot is seen by some to be resource intensive,<sup>2678</sup> but judges involved in the pilot noted that these are redirected, rather than increased, resources.<sup>2679</sup> As discussed in chapter 5, the timeliness and cost effectiveness of Magellan will not be apparent until all its cases have been finalised.<sup>2680</sup> Implementation of a similar regime in other registries will depend upon resources being made available from within the Court and support from legal aid and welfare services.<sup>2681</sup> The Court plans to extend the Magellan pilot to the Parramatta registry. As stated in chapter 5, such an extension provides an opportunity to test further the resources required and the relationship between welfare, counselling support, legal representation and outcomes. Such information is needed for wider application of the scheme. The Court cannot anticipate receiving ongoing support from legal aid and State welfare services. The pilot also could explore the criteria for inclusion in the scheme, possibly by concentrating on cases where parties have psychiatric or intellectual disabilities, and could examine whether there are benefits in using specialist Court counsellors for such cases, who may undertake investigative as well as the assessment function in the family report. Professor Brown will report on such issues for the Court.

### Summary

8.57. The Commission's findings on case duration and case events indicate that there is a substantial minority of cases – 32% of the sample studied – which take longer than 12 months to resolve, have more than five case events and/or are determined by a judge following a hearing.<sup>2682</sup> This is a measure of the intensive work of the Court and legal representatives. The parties, lawyers and the Court devote considerable time and resources to such cases.

## Securing effective settlements

2677. Legal aid practitioner *Consultation* Melbourne 9 September 1999.

2678. Family Court *Consultation* 23 September 1999; Family Court *Consultation* 9 September 1999.

2679. Judges told the Commission:

The Magellan project has not required more court resources. It requires different handling: you put resources in early and save resources down the track: Family Court judges *Consultation* 9 September 1999.

2680. See para 5.109.

2681. Note that the relationship between the State services and the Family Court, and the profile of referred cases, varies from State to State. The Commission has been told that in NSW, the Department of Community Services generally takes responsibility for the cases involving older children and allegations of abuse, but younger children, aged 4–5, are more likely to be in the Family Court: Family law practitioner *Consultation* Sydney 30 March 1999.

2682. Family Court datafile, additional Commission analysis.

8.58. In the Family Court, the overwhelming majority of cases are resolved by consent between the parties. Many applications are lodged as consent or parenting plan agreements.<sup>2683</sup> Of the contested applications, only 5% ultimately are determined by judgment.<sup>2684</sup> These contested cases resolve at various stages of the process and after varied settlement processes and prompts. In the Commission's sample, 35% of applications for final orders settled after one or two case events, 7% at conciliation conferences, 6% at prehearing conferences, and 14% were listed for or attended hearing and settled on the day of or during hearing.<sup>2685</sup>

8.59. On the Commission's analysis, consensual resolution was more likely to be achieved if both parties were represented. Lawyer-led negotiation appeared a significant factor encouraging settlement.<sup>2686</sup> Parties made repeated attempts at settlement at all stages of the process, including before filing their applications.<sup>2687</sup> Settlements were often achieved later in the process.<sup>2688</sup> As stated in chapter 5, unrepresented parties were more likely to withdraw, cease defending or have their cases determined following a hearing.<sup>2689</sup> They were much less successful in brokering a consent outcome. Unrepresented parties most frequently nominated to the Commission 'frustration with the process' as the important reason they withdrew or settled their cases.<sup>2690</sup>

8.60. The *Family Law Act 1975* (Cth) (Family Law Act) and the Court provide for a range of processes and prompts to facilitate settlements. These arrangements are discussed in detail throughout this chapter and include, in addition to designated PDR processes, the provision of family reports and fixed hearing dates.

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2683. In 1998–99, 14 216 applications for consent orders and 419 parenting plans were filed in the Family Court: Family Court *Annual report 1998–99*, 73.

2684. T Matruglio & G McAllister, Family Court Empirical Report Part One, 49; Family Court *Response of the Family Court of Australia to the Attorney-General's Department paper on 'Primary dispute resolution services in family law'* Family Court 1997, xvii.

2685. T Matruglio & G McAllister, Family Court Empirical Report Part One, 49; Family Court datafile, additional Commission analysis. These figures give the percentages of the total contested sample which settled – for figures on the percentages of those which attended conciliation conferences and prehearing conferences, see table 8.2 and para 8.147.

2686. In the Commission's sample, in 93% of applications for consent orders, the applicant was represented, and in 70% the respondent was represented, suggesting that in such cases agreement was achieved between the parties and their solicitors with minimal intervention by the Court. In the sampled applications for final orders, where both parties were fully represented there was a high rate of settlement but not always early in the case. Cases in which the applicant was represented were more likely to be resolved before listing for hearing, but where the applicant was unrepresented or partially represented were more likely to be listed for hearing: T Matruglio & G McAllister, Family Court Empirical Report Part One, 68, 75; Justice Research Centre Family Court Research Part One, 26.

2687. T Matruglio, Family Court Empirical Report Part Two, 18, 33, 61.

2688. id 74–75.

2689. See para 5.119.

2690. id 37. Based on responses to survey questions answered by 45 unrepresented applicants and 57-unrepresented respondents.

The Court, and legal practitioners, have a duty to consider whether or not to advise parties, or people contemplating instituting proceedings, about PDR methods.<sup>2691</sup> Parties are entitled to make use of the counselling facilities of the Court without first filing an application.<sup>2692</sup> Parties contemplating instituting proceedings must be

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<sup>2691</sup>. Family Law Act s 14F, 14G.

<sup>2692</sup>. *id* s 15.

provided with information about the Court's counselling service.<sup>2693</sup> As noted in DP 62, the quality of the Court counselling service and its role in assisting settlement generally were favourably endorsed by practitioners.<sup>2694</sup>

8.61. PDR processes are incorporated into case processes and events, principally through Court-ordered counselling, in children's cases, and conciliation conferences in financial cases. Case management guidelines require parties to attend counselling in most children's matters, and allow referral of a matter to mediation with the consent of the parties.<sup>2695</sup> After filing, the Court may order parties to attend conciliation counselling under s 62F of the Family Law Act. In some circumstances, the Court must advise or direct parties to attend family and child counselling.<sup>2696</sup> To encourage full discussion of issues, statements made in the course of Family Court counselling are not admissible in court.<sup>2697</sup> The Court must not make final orders in a disputed parenting case,<sup>2698</sup> or consent orders for residence or specific issues in favour of a person who is not a parent of the child, unless the parties have attended counselling.<sup>2699</sup>

8.62. In conciliation conferences, held in cases involving financial issues, one important prompt for settlement is the Court requirement that each party's legal representative provide to that party and the registrar a memorandum of costs. This memorandum sets out the actual costs incurred up to and including the conciliation conference; estimated future costs up to and including a prehearing conference; and estimated future costs to the conclusion of a defended hearing.<sup>2700</sup> As the data cited shows, such conferences are effective in facilitating settlements,

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2693. *id* s 17.

2694. See ALRC DP 62 para 11.147. For example, the following comments were received.

It is the view of National Legal Aid that traditional Court based Primary Dispute Resolution Services, such as Family Court counselling, are used effectively by the Courts, and contribute enormously to the very high settlement rate ... The Court's PDR services accelerate the whole dispute resolution process: Legal Aid NSW *Submission 242*. There is often a significant therapeutic part to counselling which should be recognised and encouraged. Counselling is of great assistance to parties who would otherwise have settled in any event. The counsellor can provide strategies to facilitate the continued non-adversarial approach and provide a point of contact where parties can go should a need arise: Law Society of NSW *Submission 240*.

2695. Family Law Act s 19B.

2696. *id* s 16A-16C.

2697. *id* s 62F(8).

2698. *id* s 65F.

2699. *id* s 65G.

2700. The new Family Law Rules O 38 division 1A, as amended by Family Law Amendment Rules 1999 (No 3) dated 19 November 1999, extends the requirement to disclose previously contained in the Family Court case management guidelines para 7.13-7.14. The memorandum of costs must now be provided to each other party as well as the client and the Court. Unrepresented parties and separate representatives are required to supply a similar statement. These statements or memoranda are to be accompanied by a statement of the source of the funds for the costs paid or to be paid, unless, where the source is a third party, the Court or Registrar directs that the source not be disclosed to the other party. The statements or memoranda are not to be retained by the Court. On the requirements for fee and costs disclosure by practitioners, see para 4.26-4.37.

although their rate of success may have decreased following introduction of Simplified Procedures.<sup>2701</sup>

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<sup>2701</sup>. See para 8.145–8.149.

The advantage of a conciliation conference is that it pushes many useful psychological buttons at a time after the initial hostility has dissipated. It occurs in a court room rather than in a 'social science' setting, and this assists clients in perceiving it as a time to resolve the matter. A significant number of agreements are achieved because of this.<sup>2702</sup>

8.63. As noted, in certain smaller registries, judges further encourage settlement by setting short hearings

to break down the case into a number of categories or issues. This means that one or some of the categories can be dealt with and in doing so it becomes easier for the more difficult issues to be resolved ... You need to treat the individuals individually ... Case management, differential case management, and ICS [Integrated Client Services] are all tools, but none on their own can produce a solution.<sup>2703</sup>

8.64. Cases also may be sent for a family conference before a registrar after one primary issue has been decided, to encourage the parties to agree on the remaining issues.<sup>2704</sup> Practitioners endorsed this approach.

It is not usually the central issue itself that makes the matter intractable. It is the history of the relationship that makes agreement impossible. Therefore, the answer is to adjudicate the issues early if they are not substantive issues, to assist the process of agreement and solve less important issues which block resolution of the central issues.<sup>2705</sup>

8.65. Such 'single issue' adjudications were strongly supported by some practitioners.

What is being overlooked in the PDR discussion is limited issue litigation. Very often if a valuation dispute or some other preliminary point can be resolved by the court, then the whole case can be settled. At present a whole case has to be prepared for trial even if a relatively small issue separates the parties.<sup>2706</sup>

Interim hearings may serve such a purpose in many cases.

8.66. The close, attentive oversight required for limited issue determination may be more difficult to reproduce in the larger registries, although the Commission's recommendation 114 and the Court's proposal for consistent registrar oversight of cases<sup>2707</sup> work to overcome such difficulties.

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2702. Family Court judges *Consultation* 28 September 1999.

2703. *ibid.*

2704. *ibid.*

2705. ACT Legal Aid Commission *Consultation* Canberra 27 September 1999.

2706. M Bartfeld *Submission* 314.

2707. See para 8.255–8.256.

8.67. Not all cases are amenable to settlement. The Commission proposed in DP62 that cases be streamed rather than scripted to PDR events, to ensure that these processes were effective and utilised appropriately. There was considerable criticism of the Court's then stated objective and practice of setting hearings as 'the last resort'.<sup>2708</sup>

Quite apart from the public policy statements from the Government and from the Chief Justice that non judicial resolutions should be encouraged (a view with which no practitioner could disagree) the reverse side seems to be a failure to accept that there are entrenched cases that cannot and will not be resolved by conciliation. The attitude to these cases seems to be that if you persist with your litigation you literally do so at your own risk and at your own expense, and with the apparent discouragement of the Court and the system.<sup>2709</sup>

8.68. The Commission's recommendations are directed at processes to secure effective, durable settlements. In the Commission's case sample, 17% of all applications for final orders and consent orders (217 cases) previously had been before the Court.<sup>2710</sup> Such cases, on their repeat application, are more likely to be resolved by a final hearing and determination.<sup>2711</sup> Some such cases may return because of changes in the lives of the parties and a new dispute requiring adjudication.<sup>2712</sup> Others represent settled outcomes which have broken down. The size of the repeat case load sample exemplifies the necessity to allocate sufficient time to ensure, so far as is realistic and practicable, that workable, lasting, consensual resolution of disputes is assured. The Court is alert to such factors and, for example, ensures that settlements reached in counselling sessions are not ratified immediately, to allow parties time to consider the settlement proposal.

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2708. Family Court *Annual report 1997-98*, 133 quoted in ALRC DP 62 para 11.2. This statement still appears in the Court's Service Charter: *Family Court Annual report 1998-99*, 102. On the difficulties caused by such a practice for women in low value property disputes, see para 5.125-5.128.

2709. N Ackman *Submission 289*.

2710. In the Commission's sample, 19% of cases commenced by applications for final orders (Form 7) and 9% of those commenced by applications for consent orders (Form 12A) were reopened cases. In the Commission's sample, the median duration between the filing of the previous application and of the current application was two years. Parties who had been involved in previous applications were more likely than those in the whole sample to have had their initial matter commenced within a short time of separation (median 7.3 months for Form 7 repeat cases, compared with 14.4 months for all Form 7 cases), and to be unrepresented: T Matruglio & G McAllister, Family Court Empirical Report Part One, 15, 9, 11. The matters in issue were more likely to relate to children only than to property or both children and property, regardless of the matters in issue in the previous proceedings. Such repeat cases were more likely to have interim hearings in the later application: Justice Research Centre Family Court Research Part One, 4-6, and to proceed to a final hearing. The Family Law Council (FLC) has also noted that child contact issues frequently give rise to repeat applications: FLC Interim report *Penalties and enforcement* AGPS Canberra 1998; FLC Final report *Child contact orders: Enforcement and penalties* AGPS Canberra 1998; FLC *Submission 226*.

2711. Justice Research Centre Family Court Research Part One, 5-6.

2712. On the typical repeat application, see submission by the Family Court to Senate Legal and Constitutional Legislation Committee for the Committee's inquiry into the Federal Magistrates Bill 1999 and Federal Magistrates (Consequential Amendments) Bill 1999, August 1999 <[http://www.familycourt.gov.au/court/html/body\\_magistrates.html](http://www.familycourt.gov.au/court/html/body_magistrates.html)> (9 September 1999).



## **Simplified procedures**

8.69. In the Commission's consultations, the Court's implementation of simplified procedures was the most vexed and contentious issue.<sup>2713</sup> This is not surprising. Simplification put the Court firmly in charge of the interlocutory stages, challenging lawyers' traditional practice. Under simplification, formal discovery and the provision of family reports were delayed. Information on the case was required to be provided on set forms. The Court determined the relevant information and the stage it was provided. The arrangements for simplification

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2713. The Court, and the Commission in this report, use the terms 'simplified procedures', 'simplified' and 'simplification' to refer to the changes to the Family Law Rules, forms and procedures introduced in January 1996 and subsequently amended.

stated in chapter 6, Professor Ian Scott observed that there has long been a debate within the Court over the competing needs for a simple and standardised process and for a process with the capacity to adapt to parties' circumstances.

Over the years I have known it, the [Family Court] seems to have been agitated by internal diversity. It has felt keenly a need for 'standardisation', as if differences of approach between registries must necessarily be a bad thing. Also, it has been concerned about striking the right balance between (a) simplification and sophistication, and (b) rigidity and flexibility, in its processes (both procedural and managerial). I think the Court should be congratulated for being so open and self-critical about these dichotomies. Most courts I know tend to pretend these issues don't exist.<sup>2714</sup>

8.70. The Family Court has initiated two major reforms to practice and procedures over the past ten years.<sup>2715</sup> The original initiating process for the Court was an application form and, according to the type of matter, a short affidavit or a statement of financial circumstances.<sup>2716</sup> This was replaced in 1989 by pleadings, with interlocutory relief claimed by an application supported by an affidavit.

The intention was noble. It was thought that a Statement of Claim, a Defence and Reply would highlight the issues from the commencement of litigation and hence reduce the cost ... In the main, there was much repetition. Both the applications and the affidavits became lengthy. Anecdotal evidence and some hard data from legal aid [was] that pleadings ... materially increased costs. Apart from those specialising in family law, the profession [did] not come to grips with pleadings in the family law area. The profession would add that inconsistencies between judges about the form of pleadings [did] not [help].<sup>2717</sup>

8.71. The current simplified procedures, introduced in January 1996,<sup>2718</sup> were 'oriented towards the settling process as opposed to preparing parties for a trial'.<sup>2719</sup> In the words of one practitioner

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2714. I Scott *Correspondence* 23 December 1999.

2715. The following summary of the background to simplification is drawn from the Simplification Committee report, para 5.1-5.6.

2716. The Court's Simplification of Procedures Committee noted

Gradually the affidavits became longer and more numerous. The then Chief Judge issued Practice Directions aimed at reducing the paper work but to no avail. Long affidavits were filed frequently, usually containing irrelevant and inadmissible evidence. In matters proceeding to trial there were many affidavits of each party on the file, each having been filed in support or opposition to particular interlocutory applications. All of these affidavits were admitted into evidence at trial: Simplification Committee report, para 5.2.

Following the amendment of the Family Law Act to give rule making power to judges, the Family Law Rules came into effect on 2 January 1985, and retained the initiating procedure.

2717. Simplification Committee report, para 5.6.

2718. An implementation committee oversaw the introduction of the new procedures, and the Evaluation of Simplified Procedures Committee (Evaluation Committee) was formed in early 1996 to evaluate the first 12 months of the new procedures. The initial guidelines were substantially revised and were reissued in April 1997 as Practice Direction No 1 of 1997 (Family Court case management guidelines). This practice direction is still in operation.

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2719. Simplification Committee report, para 6.5, quoting Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act *The Family Law Act 1975: Aspects of its operation and interpretation – Report of the Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act* AGPS Canberra 1992, para 13.46.

[r]ather than penalising the lawyers who were abusing the old system, the Family Court has devised a nightmarish rule-orientated regime.<sup>2720</sup>

The procedures comprise a standard set of steps to ensure that parties utilise PDR, with minimal filed information. As stated, information-gathering procedures were seen to be directed at a contested hearing, not settlement, and were reserved for later in the process.

8.72. The parliamentary Joint Select Committee on Certain Family Law Issues noted lawyers' misgivings in relation to the procedures, including whether the procedures would produce savings, the lack of information provided on the initiating documents, and the introduction of the procedures without prior testing of their efficacy.<sup>2721</sup>

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2720. Law Institute of Victoria Family Law Section *Consultation* Melbourne 24 August 1999.

2721. Joint Select Committee on Certain Family Law Issues *Funding and administration of the Family Court of Australia* AGPS Canberra November 1995, para 4.97–4.98. The Law Institute of Victoria published a highly critical discussion of the impending procedures: K Derkley 'Reform or fiasco? The Family Court's new procedures may backfire, lawyers say' (1996) 70(3) *Law Institute Journal* 8. See also Nicholson CJ 'Simplified Procedures' (1996) 70(5) *Law Institute Journal* 6. Legal aid commissions were also concerned that the procedures traded off access to adequate information against simplicity of forms, and were especially concerned in relation to child protection matters: Legal Aid NSW *Consultation* Sydney 14 December 1999; See also Legal Aid NSW 'Submission 39' to Joint Select Committee on Certain Family Law Issues *Funding and administration of the Family Court of Australia* AGPS Canberra November 1995, para 4.97.

8.73. The simplified procedures have been evaluated, revised and reviewed.<sup>2722</sup> Simplified Procedures are among the matters under consideration by the Court's Future Directions Committee.<sup>2723</sup> A sub-committee of the Court's Rules Committee is also conducting a comprehensive review of forms to remove duplications, consider form design and language and their compatibility with current and future Court technology.<sup>2724</sup>

8.74. With the exception of some few positive comments, which are noted below, practitioners in all consultations and submissions to the Commission were universally critical of the initiation of these changes, the format and utility of compulsory forms and the rules which delay information gathering. These issues are dealt with in sequence.

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2722. These changes were implemented in Practice Direction No. 3 of 1995 and subsequently revised in the current Family Court case management guidelines. Major changes included the following.

- introduction of Information Sessions (introduced at the time the Evaluation Committee was set up), and amending the rules to make it a requirement that parties attend an Information Session
- abolition of pleadings
- revision of the initiating applications for final orders (Form 7) and interim orders (Form 8) to provide basic information only on the parties and the orders sought
- requirement that no documents be filed with the initiating form except a Form 17 'Financial statement' in applications for financial relief
- revision of Form 17 and other forms and applications
- restriction of the right to apply for discovery, subpoenas or a request to answer specific questions until after a conciliation conference unless a registrar gives leave to apply
- requirement that parties and their representatives attend directions hearings and conciliation conferences: Simplification Committee report, annexure H; Evaluation Committee report, para 9.5.

2723. A number of recommendations were referred to the Future Directions Committee for further consideration: Family Court *Correspondence* 21 July 1999. These included

- Revision of the 'Outline of Case' document into a three-part document:
  - Part One containing key issues and a chronology, to be part of or filed with the Form 7 'Application for final orders' document and the Form 7A 'Reply to the application for final orders' document
  - Part Two containing expanded information necessary for the conciliation conference, to be filed with Part One *before* the conciliation conference – replacing the current Form 17A 'Conciliation conference particulars' and
  - Part Three containing, among others, details of the parties; the children (if any); any property, liability and/or financial resources of the parties; the orders sought and the statement of facts. All three parts to be filed *prior* to final hearing: Evaluation Committee Report, para 32.16.1; 32.27. Note the Court has produced a revised form Conciliation Conference Particulars (Form 17A), available on the Court's website at <<http://www.familycourt.gov.au/forms/index.html>> (27 July 1999).
- A document to be prepared for the registrar to complete following an unsuccessful conciliation conference, showing any directions made and identifying the disputed issues – copies of this document to be provided to both parties and kept on file by the Court: Evaluation Committee Report, para 32.16.2.
- Registrars at directions hearings be given a discretion to direct the production of specific documents and particular information if necessary for parties to negotiate on an informed basis: Evaluation Committee Report, para 32.25.

2724. Family Court *Submission* 348.



## **Implementing simplification**

8.75. A frequent criticism of simplification from practitioners concerned its implementation. Many practitioners commented on what they saw as a lack of respect for the concerns of the profession.<sup>2725</sup> These issues were elaborated by members of the Victorian Law Institute's family law section.

The Future Directions Committee has sidelined the profession. [In introducing Simplified Procedures] the Court only paid lip-service to consulting the profession with the forms — they were only provided with draft forms a week before the judges were to make a decision to implement them, and the profession regarded the draft forms as a *fait accompli*. Most changes and new rules are done deals before anyone is properly consulted.

Judges are not consulting with the profession enough and this is the key to the problems with forms and procedure — the judges only see the small number of cases that go to trial, while the forms deal with commencing proceedings in the range of cases — a completely different and separate part of the process.

The problem is that the Court does not trust the practitioners and sees them as self-serving and exploitative. Ironically, the forms are potentially the moneymaker for lawyers who prepare them properly as they are extremely time consuming and therefore expensive to prepare.

[When Simplified Procedures were introduced] We had all the forms thrown at us with a moment's notice — supposedly consultation, but it was a *fait accompli*.

The judges don't consult with the profession early enough. They don't know the nuts and bolts problems that the profession faces in the 95% of the cases that do not go to final hearings.<sup>2726</sup>

The Court stated

It is difficult to imagine any more extensive consultation than that which was engaged in by the Simplified Procedures Committee over some 2 years.<sup>2727</sup>

Some lawyers agreed.

Readers who have followed the development of the Court's Simplified Procedures will be aware that the profession has expressed many reservations about them. The Court

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2725. Law Society of SA Family Law Committee *Consultation* Adelaide 6 August 1999; Family Law practitioner *Consultation* Canberra 3 September 1999; Family Law practitioner *Consultation* Brisbane 1 September 1999; Family Law practitioner *Consultation* Albury 2 December 1998; Family Law practitioner *Consultation* Sydney 28 August 1998.

2726. All of these comments were made by practitioners at Law Institute of Victoria Family Law Section *Consultation* Melbourne 24 August 1999.

2727. Family Court *Submission* 348.

has consulted extensively and although the profession may feel it did not win many of the arguments put forward, it certainly cannot say it was not given a hearing.<sup>2728</sup>

8.76. The dispute between the Court and the profession on this issue appears to relate to the breadth, timing and structure of the consultation. Clearly, lawyers consulted as representatives of the profession need to keep other lawyers apprised of proposed new developments and the Court needs to make greater efforts at explaining changes to procedures. Those judges skilled at eliciting frank comments and listening to practitioners should be assigned to undertake such consultations.

8.77. At a recent meeting with the profession, the Commission was told that the consultation process in the Family Court has improved in recent months, and that the legal profession has been consulted in the development stages of the Future Directions projects.<sup>2729</sup> The Commission commends this development, which should be continued. It is critical to effective reform in the Court.

**Recommendation 98.** Family Court committees dealing with practice, procedure and case management should ensure continuing and effective consultation with legal practitioners, including those from community and legal aid organisations.

### Need for early information

8.78. One point of real difference between the Court and the profession concerns the time at which formal information-gathering should be permitted through discovery and family reports.

8.79. The issue concerning simplification relates to case information; how much information is needed to facilitate settlement of a dispute, or take the matter to trial? When should the information be collected and presented and in what form? How should information gathering and presentation be controlled by the Court to ensure legal costs are proportionate to the issues and mode of outcome? The Simplification initiative represented an effort to grapple with these questions, which beset all courts and tribunals. Such issues are further complicated in family proceedings where the early or detailed exposition by the parties of their grievances (the dispute) can inflame and protract the dispute and retard settlement prospects.

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2728. M Watt 'Family Court to abolish pleadings' (August 1995) *Australian Lawyer* 44.

2729. Law Society of NSW Family Law Committee *Consultation* Sydney 17 November 1999.



8.80. In designing simplification, the Court made a number of assumptions about parties and their knowledge of the issues in dispute, which are set down in the Simplification Committee report .

9.5.6 The financial situation of most parties is simple, ie the breadwinners have fixed wages and outgoings and their property consists of a home, cars, shares, money in the bank and superannuation entitlements.

9.5.7 After living together for a number of years many parties have an idea of the parenting skills and parenting plans and the income, assets and liabilities of the other. This is in stark contrast to jurisdictions where the parties are strangers.<sup>2730</sup>

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<sup>2730</sup>. Simplification Committee report, para 9.5.

8.81. A number of consultations and submissions to the Commission noted important exceptions to this general principle. The situation most commonly cited was that a homemaker wife may have little knowledge of the details of her husband's financial circumstances.<sup>2731</sup>

When a woman doesn't know the extent of the matrimonial assets, it is impossible to advise her confidently as to her entitlements.<sup>2732</sup>

8.82. A study of community legal centre family law property cases conducted by the Women's Legal Services Network reported that 69% of CLCs surveyed stated that difficulty in obtaining full disclosure of assets significantly impeded fair property settlement for their clients.<sup>2733</sup>

Settlements used to happen a lot earlier than they do now because people felt that they had access to all the information they need to negotiate an informed settlement. While there was cost in the formal pleadings/discovery process, ultimately it saved money because agreement could be reached at a much earlier stage in the proceedings.<sup>2734</sup>

Most women can't comprehend why the Family Court doesn't enforce disclosure from the outset of proceedings – they are frustrated by the fact that they know their husband is hiding money but there's no way to prove it.<sup>2735</sup>

Settlement of disputes about property are difficult to achieve without full and frank disclosure. Even in a simple property case accurate information is required about each party's entitlement to superannuation ... Non disclosure is a significant impediment to negotiation. The delays in obtaining disclosure means that there is a delay to meaningful negotiation.<sup>2736</sup>

8.83. A lack of trust between the parties drives formal information-gathering.

There has been a huge generational shift in family law: 20 years ago matters [of all kinds] were more likely to be filed. Now many are settled without filing, and those that are filed have a greater level of distrust between the parties – such cases require more tools to get information.<sup>2737</sup>

8.84. A further assumption in the development of simplified procedures was set out by the Court in its submission to the Commission.

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2731. Top End Women's Legal Service *Submission 145*; Women's Legal Resources Group (Victoria) *Submission 162*; Mt Druitt & Area Community Legal Centre *Submission 308*; Legal Aid NSW *Submission 242*; Law Society of NSW Family Law Committee *Consultation* Sydney 17 November 1999.

2732. Women's Legal Service Perth quoted in N Seaman *Fair shares? Barriers to equitable property settlements for women* Women's Legal Services Network Canberra 28 April 1999, 19.

2733. *id* 18.

2734. *id* 19.

2735. *ibid*.

2736. Top End Women's Legal Service *Submission 145*.

2737. Law Society of NSW Family Law Committee *Consultation* Sydney 17 November 1999.

The procedures are in fact tailored [to the 95% of cases that do not receive a judgment] in the knowledge that the overwhelming majority of cases will not go to judicial decision and therefore there is no requirement for litigation tools until the clients are well down the litigation pathway.<sup>2738</sup>

It is correct to say that 95% of cases are resolved without judgment. However, in the Commission's study, 19% of applications for final orders were listed for hearing, and nearly all of these attended a hearing or were settled on the day of the hearing.<sup>2739</sup> As stated, a number of factors contribute to late settlements, but practitioners were emphatic that late information-gathering is one such factor.<sup>2740</sup>

8.85. Further, the processes and tools for negotiation are not easily quarantined from those needed for a hearing. For conciliation and mediation to work effectively, parties must have relevant information on which to reach a compromise. The imagery of parallel 'pathways' fails to address the reality that negotiation, and court-based PDR, take place in the context of, and utilise information also relevant to, a contested hearing. PDR has been taken to have low information needs and the separate litigation track as requiring fuller information required for a contested hearing. Professor Marc Galanter has noted that

[s]ettlement is not an 'alternative' process, separate from adjudication, but is intimately and inseparably entwined with it. Both may be thought of as aspects of a single process of strategic manoeuvre and bargaining in the (actual or threatened) presence of courts, to which I have attached the fanciful neologism 'litigotiation'.<sup>2741</sup>

8.86. Practitioners confirmed that information needs to be available at the time settlement is under discussion,<sup>2742</sup> and presented in a form that assists identification of the issues in dispute and the relevant evidence. The information need not be formally presented, as it would be for trial. This allows costs savings. However, such information must be accessible and explicable, with the issues in dispute defined.

8.87. In its discussion on simplification the Court has focused on the utility of discovery, subpoenas and family reports for judicial decision-making if the case reaches a contested hearing. Lawyers place more emphasis on the need for

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<sup>2738</sup>. Family Court *Submission* 384.

<sup>2739</sup>. T Matruggio & G McAllister, Family Court Empirical Report Part One, 49. The Court acknowledges the large number of cases settling on the day of a hearing: Family Court *Submission* 348.

<sup>2740</sup>. Family law practitioners *Consultation* Canberra 2 September 1999; Law Society of NSW Family Law Committee *Consultation* Sydney 17 November 1999; NT Legal Aid *Consultation* Darwin 6 October 1999; Law Society of SA Family Law Committee *Consultation* Adelaide 6 August 1999; Legal Aid QLD *Consultation* Brisbane 21 September 1999.

<sup>2741</sup>. M Galanter 'The Federal Rules and the quality of settlements: A comment on Rosenberg's "The Federal Rules of Civil Procedure in action"' (1989) 137 *University of Pennsylvania Law Review* 2231, 2232.

<sup>2742</sup>. See para 8.144–8.146; 8.178.

adequate information to negotiate effectively and settle a case. The Commission's empirical survey showed most represented parties attempted to settle at every stage of proceedings.<sup>2743</sup> Almost half the unrepresented parties in the sampled cases also attempted negotiation with the other party<sup>2744</sup> prior to commencing proceedings or very early after commencing proceedings in the Family Court.<sup>2745</sup> A study by the JRC commented that

the typical family law case, whoever the lawyer and whatever the funding status, is dealt with by means of 'litigotiation' – a mixture of both court-based and out of court processes. The mere filing of a Form 7 does not commit the parties to an inevitably litigious path to resolution.<sup>2746</sup>

8.88. One further assumption that the Court brought to simplification concerned the cost of presenting information. As stated, the Court identified the problem that some lawyers submitted lengthy and irrelevant affidavits at considerable cost to the client. The solution was a series of forms which the Court designed, with some expert assistance,<sup>2747</sup> and prescribed for various applications and case event stages. The Court determined the scope and substance of the information required to be submitted and the time at which such information was to be provided. This was expected to contain costs, particularly in the early stages of proceedings.<sup>2748</sup>

8.89. A major aim of the Family Court in introducing simplified procedures was to provide a process that minimised costs in the early stages of litigation.<sup>2749</sup>

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2743. Response rates for unrepresented litigants were 25% for applicants and 14% for respondents. For represented parties, the response rate of solicitors was 32% for those representing applicants and 28% from those representing respondents: T Matruglio, Family Court Empirical Report Part Two, 2.

Where parties were represented, their solicitors were surveyed. Of those representing applicants 294 (76%) and of those representing respondents 197 (78%) reported they had attempted settlement prior to court contact. Of the solicitors representing applicants, 171 (44%) and of those representing respondents 118 (43%) reported they had attempted settlement at the first court appearance: T Matruglio, Family Court Empirical Report Part Two, 50.

2744. Of the 45 unrepresented applicants, 21 (47%) and of the 57 unrepresented respondents 26 (46%) reported that they had attempted settlement prior to court contact. Of the unrepresented applicants, 11 (24%) and of the unrepresented respondents 13 (21%) reported they had attempted settlement at the first court appearance: T Matruglio, Family Court Empirical Report Part Two, 29.

2745. See also R Hunter *Family law case profiles* JRC Sydney June 1999, para 402.

2746. *ibid.*

2747. The Court has noted the significant contribution of Professor Eagleson, a 'plain English' drafting expert, in preparing the forms: Family Court *Submission* 348.

2748. Simplification Committee report, para 7.5; 9.5.1. See also A Filippello and L Newitt 'Keys to simplification – the new Family Court procedures' (1995) 10(4) *Australian Family Lawyer* 17 and discussion in T Fry 'Costs of actions in the Family Court of Australia – A study of the impact of simplified court procedures upon the costs of actions in the courts' *Unpublished* Department of Econometrics and Business Statistics Monash University Clayton 1998 (T Fry, Family Court Report).

2749. The Simplification Committee's report stated '[t]he hope is not to settle more cases but to settle them earlier in the litigious pathway and hence at less expense to the litigants': Simplification Committee report, para 6.2

The Court commissioned a study to evaluate the impact of simplified procedures on the costs to parties of litigation in the Family Court.<sup>2750</sup> The study used survey data collected as part of the Attorney-General's *Review of scales of legal professional fees in federal jurisdictions*.<sup>2751</sup> The response rate to this survey was small. The sample consisted of 39 cases completed prior to the introduction of simplified procedures in 1996, and 30 cases following their introduction, completed in 1996–97. The study found no significant change in the average cost to parties of cases resolved early in the proceedings. The average costs were lower under simplified procedures for standard track cases and cases involving property only, if they reached the prehearing or hearing stage.

8.90. Pleadings were said to be extremely expensive in the early stages. It is therefore significant that the study found cases resolved early in the process were not, on average, less expensive under simplified procedures. This illustrates well the interrelationship among the many facets of the litigation process. Although parties may not be compiling detailed pleadings or affidavits, they are attending multiple case events to discuss and determine matters in issue and the documents to be disclosed. The Commission's data showed the number of case events as a 'significant driver' of costs in family cases.<sup>2752</sup>

## Forms

### *Issues concerning forms*

8.91. The Family Court's website lists and allows free interactive use of 50 forms in current use.<sup>2753</sup> Forms are also published in the looseleaf services.<sup>2754</sup> Commercial publishers supply and update electronic versions of the forms at a cost of up to \$799 per set.<sup>2755</sup>

8.92. A sub-committee of the Family Court's Rules Committee is currently looking to consolidate and reduce the number of forms.<sup>2756</sup> In DP 62 the Commission outlined a number of concerns relating to the forms used in the Family Court.<sup>2757</sup> Consultations since the release of DP 62 confirmed the

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2750. T Fry, Family and Federal Courts Costs Report.

2751. P Williams et al *Report of the review of scales of legal professional fees in federal jurisdictions* Attorney-General's Department March 1998 (Williams report).

2752. T Fry, Family and Federal Courts Costs Report, 6. See para 4.8–4.11; 4.21.

2753. Family Court *Submission* 348. See Family Court website:  
<<http://www.familycourt.gov.au/html/forms2.html>> (16 January 1999).

2754. Butterworths *Australian Family Law* Vol 2 Sydney; CCH *Australian Family Law and Practice* Vol 3 Sydney.

2755. For example Bing! Software Pty Ltd <<http://www.bing.com.au>> (18 October 1999).

2756. Family Court *Submission* 384.

2757. See ALRC DP 62 para 11.64.

widespread discontent among practitioners.<sup>2758</sup> It is hoped that the concerns outlined in this chapter will inform the Court's review of procedures.

8.93. *Multiplicity of forms and corresponding processes.* As noted, there is a large number of forms in use in Family Court proceedings. Even where forms are straightforward in themselves, parties and non-specialist lawyers can have difficulty identifying the correct form to use for particular circumstances.

8.94. The multiplicity of forms has particular implications for unrepresented litigants. The Rules set out the requirements for forms and other documents to be filed. The forms are listed separately, and the Court's website provides no guidance on what form should be used for particular applications. The pro forma affidavit required to be used in interim applications for parenting orders is published as a Practice Note<sup>2759</sup> and is not included in the list of forms or in the Rules. The Case Management Guidelines set out the Usual Orders<sup>2760</sup> and a number of requirements supplementing the published forms or rules, such as the format for the Outline of Case document to be prepared before the final hearing.

8.95. Some of the requirements, and a list of the more commonly used forms, are set out in a recently published booklet<sup>2761</sup> to assist litigants, but in general terms, and not in the sequence a litigant must follow. The Court's kits simply consolidate the information and forms required for applications for consent orders and for divorces. Legal Aid and CLC lawyers informed the Commission that much of their time in family advice sessions was spent advising about which forms were relevant to the case and assisting parties to complete them.<sup>2762</sup>

Simplified Procedures are ineffective in that there are too many forms and they are not being complied with.<sup>2763</sup>

The issuing of multiple documents ... also self-perpetuates the need within the court for lots of small steps.<sup>2764</sup>

Solicitors who don't have experience in the system may be tripped by the rules because of the complex nature of the system.<sup>2765</sup>

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2758. Victorian Bar Family Law Group *Consultation* Melbourne 23 August 1999; Law Society of SA Family Law Committee *Consultation* Adelaide 6 August 1999; Law Society of NSW Family Law Committee *Consultation* Sydney 17 November 1999.

2759. Family Court Practice Direction No 1 of 1998 (PD 98/1).

2760. Family Court case management guidelines Annexure C. The Commission has been told that the usual orders are frequently announced by number rather than name at directions hearings, but the Court has said it is taking steps to change this: Family Court *Submission* 348.

2761. Family Court *The Family Court Book* Family Court Canberra 1999.

2762. CLC legal practitioner *Consultation* 7 December 1999; Legal practitioners *Consultation* Melbourne 26 August 1999.

2763. Victorian Bar Family Law Group *Consultation* Melbourne 23 August 1999.

2764. Law Society of SA Family Law Committee *Consultation* Adelaide 6 August 1999.

2765. Law Society of NSW Family Law Committee *Consultation* Sydney 17 November 1999.

An increasing number of family court litigants come to Redfern Legal Centre for help with the forms. Often they have a bunch of forms given to them by registry staff with no assistance as to how they are filled out.<sup>2766</sup>

If the system is inefficient, you can't overlay it with efficiencies. [It would be better to] scrap the process and get back to basics.<sup>2767</sup>

The process now is far too sophisticated for the average house, furniture and caravan case. There are far too many steps and processes. We are being suffocated by procedure!<sup>2768</sup>

8.96. ***Confusion over the target audience for the forms.*** Practitioners have commented that the forms, designed to be simple for unskilled people to complete, seek wide-ranging information and do not facilitate narrowing of the issues or identification of the relevant facts.

The forms cover all possible issues to ensure everything is before the judge or registrar. Solicitors can identify what the issue is and put in a short affidavit dealing with those issues, but the procedures require them to tick boxes and attach an affidavit dealing with the issues because there is not enough space on the form. The children's affidavit is a classic example.<sup>2769</sup>

8.97. The Commission was told the forms would cater for a broader audience if the Court included headings or issues to be covered, as in the Outline of Case document, to enable parties to address matters in dispute specifically.

8.98. In its submission, the Law Council said that as a result of Simplified Procedures, unrepresented litigants tend to commence proceedings with applications that are incorrect or seek unrealistic orders; make multiple applications for interim orders or concerning contravention of child orders; and commence proceedings without seeking legal advice, considering non-litigious methods of settling, or understanding the complexity of the process ahead of them.<sup>2770</sup> Other submissions made similar observations.

One of the major problems with the simplified procedures in the Family Court is that it is so easy to complete the initiating forms that the impression is created, wrongly, that proceedings in the Family Court are appropriate for self representation.<sup>2771</sup>

The rules are developed for the lowest common denominators — the self-representing litigants, unsophisticated parties, NESB parties ... There is no distinction between different education levels of clients in directions hearings and explaining processes to

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2766. CLC legal practitioner *Consultation* 7 December 1999.

2767. Victoria Legal Aid *Consultation* Melbourne 26 August 1999.

2768. Law Society of SA Family Law Committee *Consultation* Adelaide 6 August 1999.

2769. Law Society of NSW Family Law Committee *Consultation* Sydney 17 November 1999.

2770. Law Council *Submission* 197.

2771. National Legal Aid *Submission* 360.

the clients. [The Court treats] sophisticated, experienced, represented litigants in exactly the same way. This is demeaning and patronising.<sup>2772</sup>

8.99. It was noted that, although the forms were designed to be comprehensible to unrepresented litigants, parties still need legal assistance — to explain the forms themselves as well as the legal issues involved.

Even though the forms themselves have simplified procedures, there is still a general lack of knowledge within the community as to what is actually involved. We are constantly amazed to find that many people lack a rudimentary knowledge of just how to fill in forms and in some cases, do not know how to refer to a dictionary to explain words they do not understand.<sup>2773</sup>

Both by telephone and in person we regularly assist women with completion of family law documents. This highlights the difficulties women experience with the system. A simple example is the difficulty with framing consent orders acceptable to the Court. Even with, for example, the revised Form 4 ['Application for divorce'] applications, women are uncertain as to the correct completion of forms and the procedure to [be] followed. The need could perhaps be identified as a need to have a personal verbal explanation addressing their particular inquiry ... Whilst the forms are simpler to understand and complete, litigants in person still appear to have difficulty where their matter does not fall within the normal process. For example, where the other party cannot be located in a divorce application. Also, litigants in person often do not use acceptable wording in consent orders and the orders are rejected on this basis.<sup>2774</sup>

Although procedures have been 'simplified' they are still quite complex for non-lawyers and parties are still shell-shocked by the system.<sup>2775</sup>

The issuing of multiple documents is not possible for solicitors working on legal aid — those solicitors cannot afford to work within the system that is there on the tight budget they receive from legal aid.<sup>2776</sup>

8.100. *Simplicity in some forms leads to greater complexity in others, and in the procedures as a whole.* Many of the comments made to the Commission pointed out that the overall cost and complexity of litigation depends not so much on whether a particular form is easy to fill out but on the nature and utility of the processes and documentation taken together. As a result of the lack of information required on applications, information gathering must sometimes be done by attendance at repeat case events, whether at directions hearings or conciliation conferences.

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2772. Law Society of SA Family Law Committee *Consultation* Adelaide 6 August 1999.

2773. Family Law Reform and Assistance Association *Submission* 157.

2774. Women's Legal Resources Centre *Submission* 153.

2775. Legal Aid NSW *Submission* 242.

2776. Law Society of SA Family Law Committee *Consultation* Adelaide 6 August 1999.



I suggest that the real issue is not the costs of preparing documents which are necessary to set out your client's case and present it adequately to the court. The experience of recent years is that wherever the court 'simplifies' forms or procedures at one point (eg the documents required to start court proceedings), the court's requirements for documents become more complex at another point (eg the affidavit required in interim children's matters, the Form 17A and the documents required by the Case Management Guidelines). It appears inevitable that, as long as the court's resources are stretched, the court will externalise costs onto the lawyers and litigants requiring a higher standard of document preparation before the court will be prepared to adjudicate the matter.<sup>2777</sup>

In contrast to the initiating documents, some of the other forms are excessively long and complex, adding to the costs of represented parties and being difficult for unrepresented parties. The 'statement of financial circumstances' and the 'outline of case document' could both be simplified.<sup>2778</sup>

In relation to financial matters ... the complexity of the Form 17 [statement of financial circumstances] perhaps offsets the simplicity of the Form 7.<sup>2779</sup>

Simplified procedures were designed to make the process more flexible, but they have actually introduced more hurdles into the process.<sup>2780</sup>

**8.101. *Some forms have limited utility and may be disregarded by some judges.***

The Commission was told that some forms 'try to cover too many bases'.<sup>2781</sup> The aim to cover all contingencies within a single form can result in forms requiring large amounts of information of limited relevance, obscuring the significance of the matters in issue. It was also noted that work on preparing the documents is sometimes wasted.

Most forms filed prehearing are never used again (for example, Form 17A [Conciliation Conference particulars]). Some aren't used by the Court at all – for example the Outline of Case document, which can take up to a day to prepare in complex cases, is not looked at by the judges in Parramatta registry. In contrast, a judge in the Sydney registry may delay the hearing if there is a minor defect in the Outline of Case.<sup>2782</sup>

**8.102. *Forms are continually changing.*** Partly as a result of practitioners' complaints, there have been many revisions to the forms since the introduction of simplified procedures. Some said that the pace of change itself causes confusion. 'Reform fatigue' has set in for many practitioners.<sup>2783</sup>

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<sup>2777</sup>. B Doyle *Correspondence* 22 October 1999.

<sup>2778</sup>. National Legal Aid *Submission* 360.

<sup>2779</sup>. Legal Aid NSW *Submission* 242.

<sup>2780</sup>. Family Court judge *Consultation* 28 September 1999.

<sup>2781</sup>. Family law practitioner *Consultation* Sydney 25 August 1999.

<sup>2782</sup>. *ibid.*

<sup>2783</sup>. Family law practitioner *Consultation* Sydney 25 August 1998; Law Society of NSW Family Law Committee *Consultation* Sydney 22 September 1998; Family Court judge *Consultation* 23 April 1999.

[There are] constant changes to practice and procedure. Just as the community is coming to accept or 'cop' the Court's decisions, changes are introduced, resulting in confusion, more complexity and costs to clients. Continual reform never allows for the community to understand or accept the changes. 'Simplification' always result in extra steps in procedure and/or extra documents to file.<sup>2784</sup>

[I]f I went away for 6 months and came back to the Family Court I'd be lost.<sup>2785</sup>

I would like the Court to look at the paperwork and start from scratch – what the parties need to know, and when – and not just change one form at a time as they do now. There should be a moratorium on form changes while the Court re-evaluates the whole thing. This is No. 1 on my wish list.<sup>2786</sup>

### *Applications for final orders*

8.103. The current application for final orders, known as Form 7, contains no material allegations of facts on matters in dispute, and simply gives details of the parties and orders sought. In financial cases, a standard form financial statement (Form 17) is attached. In children's matters where child abuse is alleged, this is put in issue by notification on a separate form (Form 66).<sup>2787</sup>

8.104. The Simplification Committee said that Form 7 would be inexpensive and simple to prepare; an encouragement to parties to settle their disputes themselves; and appropriate for the many cases in which the Committee assumed parties have a simple financial situation and good knowledge of each others' parenting skills and finances.<sup>2788</sup>

8.105. Form 7 was designed for use in children's matters, and the Simplification Committee noted 'general agreement that child matter applications should contain only a basis for jurisdiction and the orders sought', in order to allow access to conciliation or mediation prior to the directions hearing as inexpensively as possible.<sup>2789</sup> The Committee considered whether a different application form should be used for financial matters, but after trialling this idea ultimately decided

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2784. Family law practitioner *Consultation* Sydney 26 August 1998.

2785. Law Society of NSW Family Law Committee *Consultation* Sydney 17 November 1999.

2786. Family law practitioners *Consultation* Canberra 2 September 1999. Such a review is currently taking place, as noted at para 8.92.

2787. The Commission was told that there are substantial problems with overuse and inappropriate use of the Form 66, leading to a reluctance or inability on the part of child welfare organisations to investigate allegations. The problem does not concern false allegations, but allegations based on matters such as a child having nits or bruised knees. It was suggested that the form could seek better information and, more importantly, the Court could filter out trivial allegations before referring forms to the welfare organisations: Legal practitioner *Consultation* 14 December 1999. Similar concerns were raised by Family Court staff *Consultation* 17 September 1998; Law Society of NSW Family Law Committee *Consultation* 22 September 1998.

2788. Family Court Simplification Committee report, para 9.5.

2789. id 27.

on a single application form for use in all ancillary cases, supplemented by the statement of financial circumstances for financial cases.<sup>2790</sup>

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<sup>2790</sup>. id 28.

8.106. Lawyers were highly critical of the originating process, in financial and children's matters, and repeatedly told the Commission that there is 'a need to provide more information upfront, so parties can settle upon a known basis, rather than in the dark'.<sup>2791</sup> The Law Council outlined a number of concerns relating to the simplified initiating process, which in summary are as follows.

Although the process of defining the issues in dispute may appear laborious to the outsider, it is necessary. The Law Council suggests that this ultimately shortens trials and promotes settlement. There is no inducement to settle if one is in the dark about the strengths and weaknesses of the opponent's case because the opponent's case has not been identified in sufficient detail. Currently, people can start proceedings easily and quickly without a thorough understanding of the strengths or weaknesses of even their own case ...

The Law Council is firmly of the view that the lack of information available at the commencement of family law proceedings delays the settlement of the dispute. Parties are often unsure what are the key issues in dispute or the major areas of disagreement until the Conciliation Conference. The Law Council's view is reinforced by other commentators who have noted that the Form 7 is particularly inadequate when an application is made to set aside orders altering property interests, pursuant to s 79A, because the respondent has no information as to the grounds relied on. Similar problems occur with applications for leave to issue property proceedings out of time pursuant to s 44(4).<sup>2792</sup>

Other practitioners expressed similar views.

Depending on whether you are an applicant or respondent, the simplified forms may or may not be useful. For example, as an applicant, the new Form 7 is much better than the old one because it is easy to complete and does not require too much detail. However, if you are the respondent or a separate representative, the form tells you nothing about why the applicant has applied for these orders or any other issues that are in dispute.<sup>2793</sup>

8.107. Some practitioners argued strongly that more information was needed in children's matters, noting that the information filed in children's matters is insufficient for the Court to discharge its obligation to take into account the welfare and safety of the child.

[Under the current procedures] you have no way of knowing why a party seeks an order for no contact or supervised contact. The assumption is that if the adult parties know, this is sufficient for the Court, the child protection bodies and the child

2791. Law Institute of Victoria Family Law Section *Consultation* Melbourne 24 August 1999.

2792. Law Council *Submission* 197.

2793. Family law practitioner *Consultation* Sydney 25 August 1998. Similar comments were offered by the Law Society of NSW Family Law Committee *Consultation* Sydney 22 September 1998; Victorian Bar family law practitioners *Consultation* Melbourne 23 August 1999; NSW Bar Association *Consultation* Sydney 16 September 1999; Law Institute of Victoria Family Law Section *Consultation* Melbourne 24 August 1999.

representative ... What you need to know is how is the information being drawn together to construct a case? The assumption they both know is like assuming parties in a car crash both know. Both parties know the background events, but on what basis is the applicant asking the Court to respond in this particular way and make these particular orders?<sup>2794</sup>

The failure to identify the issues in initiating documents, or to narrow the issues at an early stage in the proceedings means that PDR is often unsuccessful.<sup>2795</sup>

[The initiating forms] do not indicate the matters at issue. They certainly do not enable the parties to prepare for trial, knowing what is at issue ...<sup>2796</sup>

8.108. The Commission was told that the NSW Legal Aid Commission, and some private practitioners acting as child representatives, send out a standard questionnaire to the parties to obtain the basic information that will enable them to start preparing and investigating a case (for example, whether State welfare bodies have been involved).<sup>2797</sup>

8.109. In consultations some legal aid lawyers also told the Commission that in their view the Court's initiating process worked well.

Form 7s are very quick to do for routine matters. For urgent matters, there is a Form 8 and a pro forma affidavit. It is possible to commence proceedings, therefore, without aggravating material going into an affidavit. The simplified procedures were designed to allow parties to explain the issues to the registrar at the directions hearing if the matter could not be settled simply. This process works.<sup>2798</sup>

The advantage of the forms is that they are relatively straight forward and simple to complete and allow people to commence their own proceedings without necessarily engaging a lawyer ... The current method of initiating Family proceedings by forms does cost less than the previous system of pleadings ... During the first Directions Hearing the parties should become aware of what the issues are.<sup>2799</sup>

Form 7 takes me 20 minutes. In most of our cases we also file Form 8 and the affidavit.<sup>2800</sup>

8.110. The Commission proposed in DP 62 that the originating form should indicate the issues in dispute between the parties. The proposal was strongly

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2794. Family law practitioner *Consultation* 14 December 1999.

2795. National Legal Aid *Submission* 360.

2796. Legal Aid NSW *Submission* 242.

2797. Family law practitioner *Consultation* 14 December 1999; Family law practitioner *Consultation* Sydney 27 August 1998.

2798. Legal Aid ACT *Consultation* Canberra 27 September 1999.

2799. Legal Aid NSW *Submission* 242.

2800. Legal Aid ACT *Consultation* Canberra 27 September 1999.

supported by private practitioners and legal aid lawyers in submissions and consultations.<sup>2801</sup>

8.111. The Family Court's submission, in replying to the general criticisms set down in DP 62, described the Commission's proposal as

a facile recommendation, which is made without any understanding of the historical context in which the current originating documents evolved. These originally consisted of affidavits in which every minor issue relating to the history of the marriage or relationship was canvassed at great length and at considerable cost. This also had the effect of inflaming the emotions of the parties. In an attempt to overcome these problems the Court introduced pleadings, about which there is now a general consensus that they were unworkable. Although they reduced the volume of originating documents, in most cases, the intricacies were beyond unrepresented parties and many practitioners.<sup>2802</sup>

8.112. In fact, DP 62 recited the chequered history of practice and procedure reform in the Court.<sup>2803</sup> The Commission's proposal is not advocating a return to pleadings but a recognition of the need to identify issues in dispute if matters are to be effectively streamed for case management, consensually resolved or progressed to trial. Some of the reforms currently contemplated within the Court do address the need for early definition of the issues.<sup>2804</sup> These matters are well illustrated by consideration of the documentation in financial and children's matters.

8.113. The Commission acknowledges the difficulty of developing an initiating process that enables parties and others to know what is at issue, while minimising the potential for the filing of very large documents or exacerbating the dispute between the parties. The Commission considers that the strong and consistent criticisms noted above justify revisiting the initiating process, taking into account the problems with earlier forms and the techniques being adopted to address the current problems. As noted, the briefs of the Forms sub-committee and the Future Directions Committee include such issues.<sup>2805</sup>

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2801. Those supporting this proposal included: Law Council *Submission 375*; Victorian Bar *Submission 367*; ACT Bar Association *Submission 370*; Women's Legal Resources Centre *Submission 350*; National Legal Aid *Submission 360*; Family Court judges *Consultation 28 September 1999*; Law Institute of Victoria *Consultation Melbourne 24 September 1999*; Victoria Legal Aid *Consultation Melbourne 26 August 1999*; Legal Aid Qld *Consultation Brisbane 21 September 1999*; NT Legal Aid *Consultation Darwin 6 October 1999*.

2802. Family Court *Submission 348*.

2803. DP 62 para 11.51-11.58.

2804. The Court's Trial Management Committee noted that trial management can be put into effect from the commencement of the litigation path, by measures designed to identify, narrow and reduce issues and the evidence about issues. Its recommendations develop this aim: Family Court 'Trial Management Committee Report' June 1999 Unpublished, attached to Family Court *Submission 348*. See para 8.253; 8.265.

2805. See para 8.9; 8.92.

**Recommendation 99.** The Family Court's Forms sub-committee, in consultation with practitioners, should investigate options for revising the initiating process in children's matters and in financial matters. In relation to children's matters, the review should take into account the information needed by child representatives and routinely sought directly from the parties by legal aid commissions and others acting as child representatives.

*Forms in financial matters*

8.114. *Consent orders.* Where parties reach agreement prior to filing an application with the Court, they file an application for consent orders from the Court using Form 12A.<sup>2806</sup> Additional documentation is not generally required. A registrar will normally make the agreed order, but has discretion to refer the matter to a judge, judicial registrar or magistrate.<sup>2807</sup>

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2806. Family Law Rules O 14.

2807. id O 14 r 8.

8.115. Form 12A is now 11 pages long and requires parties to supply background information to the orders sought, including details of any family law, domestic violence or child welfare proceedings or orders and, where financial orders are sought, details of the property, income, liabilities, financial resources and contribution of both parties. Parties are required to disclose the basis on which they have reached agreement and the effect of financial orders sought on the property and liabilities of each party.

8.116. The previous Form 12A did not require financial information to be supplied if both parties had received independent legal advice. The Simplification Committee set out the reasons for the change in its report

8.5.2 The decision of the High Court in *Harris and Caladine* (1990) FLC 92-217 has caused considerable uncertainty and confused the use of this procedure which is extremely cost effective for the parties in the formalisation of settlements. In the judgment of five of the seven High Court Judges there is a stated requirement that judges (or if power is delegated, registrars) must take into account statutory criteria when making consent orders, although this obligation is less demanding than in defended proceedings.

8.5.3 To prevent this uncertainty the Court should urge the Government to introduce legislation to allow the Courts to accept consent orders where parties have had independent legal advice without the need for the Court to exercise a discretion. Registered child agreements have the force of a consent order but do not require any judicial overview or discretion.<sup>2808</sup>

The current version of Form 12A was introduced in response to these concerns.

8.117. The Commission received many complaints about the complexity of Form-12A in financial matters, the cost of completing it, and the difficulty of reaching consensus as to the details of the basis and effect on each party of the orders sought.

Form 12As are very cumbersome.<sup>2809</sup>

The new Consent orders forms also take a long time – you have to provide a lot of information even where the parties and their solicitors are all agreed.<sup>2810</sup>

Form 12A is a hideous document. A nightmare. It creates conflict as you have to ascribe values to property.<sup>2811</sup>

The cost of filling in the new ... consent orders (Form 12A) is stupendous.<sup>2812</sup>

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2808. Simplification Committee report, para 8.5.

2809. Legal Aid ACT *Consultation* Canberra 27 September 99.

2810. Family law practitioners *Consultation* Canberra 2 September 1999.

2811. Law Institute of Victoria Family Law Section *Consultation* Melbourne 24 August 1999.

2812. Family law practitioners *Consultation* Canberra 3 September 1999.



One area where there is scope for savings is in the requirements for consent arrangements ... At present, requirements of the Form 12A suggest that the Court will protect a party who enters an unfair settlement. Although this may be the policy behind the Form 12A, it is a policy which is easily circumvented, either by having orders made in most magistrates courts or by lodging a consent order after one side has filed a Form 7 and Form 17 and the other side has filed a Notice of Address for Service.<sup>2813</sup>

8.118. Estimates provided to the Commission of the cost of completing the Form-12A application, engrossing, filing and serving it ranged between \$800 and \$1200.<sup>2814</sup>

8.119. Several practitioners told the Commission that in order to save client costs, practitioners now file an application for final orders (Form 7) and then submit short minutes of consent orders – a process which can be completed for around half the price.<sup>2815</sup> This practice appears to nullify the point of the revised Form 12A application. The Family Law Amendment Bill 1999 provides for the introduction of legally binding financial agreements which may be made before, during or following dissolution of a marriage. To be binding, such agreements would have to be signed by both parties; not terminated or set aside by a court; and contain an annexure certifying that each party has received either or both independent financial or legal advice as to the effect of the agreement. Such a provision would provide a statutory basis for settlements that would not require close scrutiny by the Court. This might resolve some of the difficulties with Form 12A.

8.120. One practitioner suggested to the Commission that costs could be reduced if consent orders in financial matters were divided into categories receiving increasing levels of scrutiny according to the amount of property involved.<sup>2816</sup>

**Recommendation 100.** The federal Attorney-General, in consultation with the Family Court, should consider whether the Family Law Act should be amended to allow consent orders to be made by the Court without

2813. B Doyle *Correspondence* 22 October 1999.

2814. Family law practitioner *Correspondence* 22 October 1999; Family law practitioner *Correspondence* 20 October 1999; Family law practitioner *Correspondence* 23 November 1999; Family law practitioner *Correspondence* 27 September 1999; Family law practitioners *Consultation* Canberra 2-September 1999; Family law practitioners *Consultation* Canberra 3 September 1999; Family law practitioners *Consultation* Brisbane 21 September 1999.

2815. Family law practitioner *Consultation* 14 October 1999; family law practitioner *Consultation* Canberra 2 September 1999; Law Institute of Victoria Family Law Section *Consultation* Melbourne 24 August 1999.

2816. B Doyle *Correspondence* 22 October 1999. The suggestion was that consent orders for property below \$20000 be dealt with in a 'small claims' jurisdiction with minimal intervention; between \$20000 and \$300 000 in a summary court or by registrars, with 'a small amount of scrutiny which is sufficient to avoid gross manifest injustice' and the Family Court with matters of greater value – over \$300 000 with greater scrutiny of more detailed documents.

independent consideration where parties provide a certificate confirming they have received independent legal advice.

**Recommendation 101.** In revising its forms and procedures, the Family Court should consider whether, consistent with the decision in *Harris v Caladine*, Form 12A can be modified to limit the information required where parties are legally represented and advised.

8.121. **Financial statement.** In cases involving financial issues, both parties must file a financial statement (Form 17) with their application or response. In this statement they are expected to make full and frank disclosure of their financial

circumstances.<sup>2817</sup> Each party also must serve on the other party, within 14 days of the directions hearing, copies of their three most recent tax returns and assessments; their most recent superannuation account statement and financial statement of the superannuation fund; and the three most recent financial statements and tax returns of 'any relevant partnership, trust or company except a public company'.<sup>2818</sup>

8.122. The Commission was told repeatedly by practitioners, and some judges, that the Form 17 and requirements of O 17 are too prescriptive, and do not provide sufficient disclosure for cases with more complex financial situations. Form 17 is said to be time-consuming and therefore costly to complete, and to require unnecessary detail for 'routine' cases.

Form 17 ... is very invasive in the information required, but it doesn't necessarily provide information necessary to resolve the matter ... it is very easy to leave out additional income information from a Form 17.<sup>2819</sup>

The form 17 document for people on social security is ridiculous. This gets back to the need for flexibility.<sup>2820</sup>

The Form 17 [statement of financial circumstances] requires detailed information that is not necessary and takes a long time to complete. Where financial circumstances are in a state of flux, which is the case for most clients, such circumstances can be better explained in an affidavit. Also, the form focuses on the details, for example, how much the client spends on a haircut, which has the effect of bogging the dispute down in details.<sup>2821</sup>

The Form 17 is difficult for parties, particularly unrepresented parties, to comprehend. A short Form 17 for people with little or no income and assets should be available.<sup>2822</sup>

8.123. **Conciliation conference particulars.** Prior to the conciliation conference, each party must deliver to the other, and to the registrar, the documents set out in O 24 r 3, including their conciliation conference particulars (Form 17A).<sup>2823</sup> This form asks the party to quantify the value of the possessions of each party at the commencement of cohabitation, their financial and non-financial contributions, and the consequences of the orders sought. The form is not placed on the Court file and is returned to the party at the end of the conciliation conference. At the conference, each party must produce 'all relevant and significant documents in the party's possession, custody or control, or which, with reasonable diligence, the

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2817. Details of the matters that must be disclosed are set out in Family Law Rules O 17 r 3.

2818. id O 17 r 4.

2819. Family Court judge *Consultation* 28 September 1999.

2820. Family Court of WA judges *Consultation* 23 September 1999.

2821. Family law practitioner *Consultation* Sydney 25 August 1999.

2822. Legal Aid NSW *Submission* 242.

2823. id O 24 r 3.

party can obtain' relating to the financial statement (Form 17); the value of any item of property in which any party attending the conference has an interest; or the financial matters referred to in the conciliation conference particulars.<sup>2824</sup>

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<sup>2824</sup>. id O 24 r 2.

8.124. The Form 17A, which was recently revised, was also the subject of criticism to the Commission.

The new Conciliation conference particulars ... [form is a] real shocker. I did one this morning and it took 2 and a half hours — it used to take 1 hour.<sup>2825</sup>

The new Form 17A tells [the parties] a little, but not all that they want. When you don't get the information up front you need a complex document at the back of the process.<sup>2826</sup>

[The Form 17A] is the worst form. Registrars say this is disastrous.<sup>2827</sup>

8.125. Some solicitors minimise costs by requiring clients to be more active in completing the forms.

I get clients to give me the answers for the Form 17A. This is sent to them, so is not time I spend with the client.<sup>2828</sup>

8.126. Consultation was raised as an issue in relation to these forms. In relation to complaints by lawyers, the Court noted

[t]he current Form 17 resulted from some two years of consultation with the legal profession which had representatives from the bar and solicitors' branches on the Committee ... Form 17 was designed largely by the legal profession. The Court gave the profession what it wanted.<sup>2829</sup>

Again, some practitioners raised doubts about the effectiveness of such consultation.

The practitioners consulted on [Form 17] were at best a select group of specialist practitioners who specialised in the most complex financial cases. This is obvious from the form.<sup>2830</sup>

### ***Forms in children's matters***

8.127. Applications for interim orders concerning children's matters were made in 72% of disputed cases in the Commission's sample.<sup>2831</sup> Where such orders are sought, the applicant files an application for interim orders (Form 8), which provides basic information about the parties and the orders sought, accompanied by an affidavit which must substantially comply with a pro forma affidavit

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2825. Family law practitioners *Consultation* Canberra 2 September 1999.

2826. Law Society of SA Family Law Committee *Consultation* Adelaide 6 August 1999.

2827. Law Institute of Victoria Family Law Section *Consultation* Melbourne 24 August 1998.

2828. Law Society of SA Family Law Committee *Consultation* Adelaide 6 August 1999.

2829. Family Court *Submission* 348.

2830. Family law practitioner *Consultation* 14 December 99.

2831. T Matruglio & G McAllister, Family Court Empirical Report Part One, 42.

designed by the Court.<sup>2832</sup> The other party files a response in similar format (Form8A) and a pro forma affidavit.

8.128. In DP 62, the Commission included comments from practitioners concerning the pro forma affidavit. The Law Council supported the development of pro forma documents but noted 'the need for ongoing review of the pro forma affidavit itself'.<sup>2833</sup> One experienced practitioner noted that

[a]lthough the pro-forma Affidavit ensures that the basic facts are addressed by all litigants, most practitioners find it difficult, within the format of that document, to set out the complexities and context of many interim parenting matters. The result is that many practitioners annex a long narrative to the pro-forma Affidavit, making for a lengthy and quite cumbersome document.<sup>2834</sup>

8.129. In consultations following DP 62, practitioners were divided as to the efficacy of the affidavit. Some considered them useful.

I hate doing pro formas, but I'm used to them now. They are good — they do provide the information that people need. The commercially produced software allows enough space.<sup>2835</sup>

8.130. Most comments received were critical, usually of the format.

The standard affidavit in children's matters ... is complex, and it's hard to understand the completed form. It provides no way of explaining or understanding what is actually going on. The form is aimed at LIPs, but these tick-a-box forms are crippling for everyone else. You can't put them on WP systems, and you can't dictate them.<sup>2836</sup>

The problem with the forms is their format. For example the form 8 affidavit is impractical and cannot adequately tell the story of the client's evidence. It would be preferable to have set headings which must be covered in the affidavit but otherwise allow a narrative style.<sup>2837</sup>

[The pro forma affidavit] may be useful for LIPs, but it's a nightmare for practitioners, especially if representing the respondent. There is a double problem for respondents because you must work out what the issues are from the application, then fill in all the boxes and try to indicate your response on those issues. It has been suggested that the

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2832. PD 98/1.

2833. Law Council *Submission 197*.

2834. A Wearne 'Recent developments in parenting cases' *Paper* College of Law Sydney March 1999. Some practitioners have claimed that parties are confused by the appearance of the form, and use the affidavit as a 'substitute for pleadings': M Hauptmann speaking at session on 'Preparing a defended case for hearing in the Family Court' *Comment* A State Legal Conference 99 Sydney 31-March 1999.

2835. Family Court practitioners *Consultation* Darwin 7 October 1999. A similar point was made by Legal Aid ACT *Consultation* Canberra 27 September 1999.

2836. Family law practitioners *Consultation* Canberra 2 September 1999.

2837. Law Institute of Victoria Family Law Section *Consultation* Melbourne 24 August 1999.

pro forma be available as an option rather than a requirement. This was done in Brisbane and was successful, as there was scope for practitioners to adapt it to the needs of the case. Many clients don't fit the script.<sup>2838</sup>

The pro forma affidavit is not working — solicitors annex yards of paper, and litigants in person can't work out what to do with it ... There is a lack of willingness in the Family Court to control process and affidavits. They do not want to control hearsay.<sup>2839</sup>

The children's [pro forma] affidavit tells you nothing.<sup>2840</sup>

8.131. The Court's response to DP 62 rejected criticisms of the pro forma affidavits.

Some members of the profession have been critical of the pro forma affidavit, as set out in paragraph 11.67 [of DP 62]. It is a curious result that such a document is capable of being used by litigants in person but not the profession. The Court is currently considering the means of satisfying the needs of both.<sup>2841</sup>

[DP 62] quotes complaints about the pro forma affidavit for interim children's matters. Particular reference is made to the volume of affidavit material accompanying these forms. On one level, this is because lawyers have constantly refused to accept Court directions that only a limited amount of information is required. The Court has already responded to comment received directly and a review of the pro forma is under way.<sup>2842</sup>

Practitioners concurred that one way of ensuring such documents meet a range of needs is to make use of the pro forma optional, so that it need not be used in cases where it is not appropriate.

**Recommendation 102.** Where the Family Court produces pro forma documents, use of such documents should be optional. As an alternative, it should be permissible to file a document that addresses, as relevant, a stated list of matters, as with the present Outline of Case document.

### *Outline of case document*

8.132. If a case goes to a hearing, then at least 2 days prior to the hearing, parties must file and serve an Outline of Case<sup>2843</sup> document, summarising the relevant facts, chronology, evidence to be relied on and relevant case law.<sup>2844</sup>

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2838. Law Society of NSW Family Law Committee *Consultation* Sydney 17 November 1999.

2839. Victoria Legal Aid *Consultation* Melbourne 28 August 1999.

2840. Law Society of NSW Family Law Committee *Consultation* Sydney 17 November 1999.

2841. Family Court *Submission* 348.

2842. *ibid.*

2843. Family Court case management guidelines, para 9.4.

2844. Family Court case management guidelines, appendix F.

8.133. In consultations conducted by the Commission, while some approved of the format of the present Outline of Case document and considered it an example of what good counsel should routinely do to prepare for a hearing,<sup>2845</sup> several critical comments were made. It was said that the current document is expensive to complete and may not advance proceedings, as many judges currently do not look at the document.<sup>2846</sup>

[I]ncreasingly practice directions both at first instance and appeal require the most detailed analysis of one's case, together with chronologies, which are often not able to be read by the Judge beforehand as cases are often allocated to the Judge on the day the hearing commences. Moreover these documents are mostly prepared primarily by the solicitor for cost reasons, and often do not in any way reflect the position or direction which the barrister who is ultimately running the case wishes to take. These documents are no more than aide-memoirs and the fact that a case diverges 180 degrees from the matters argued or proposed therein, is hardly ever a matter of comment let alone criticism.<sup>2847</sup>

The Outline of Case document takes 1 day's work. You can't do an Outline of Case document in under 4 hours, so it costs around \$1000 – and the 2 counsel will do completely different chronologies. They should have to agree on this between themselves.<sup>2848</sup>

8.134. As noted, the Court's Evaluation Committee recommended that the Outline of Case document be redrafted into a three-part document.<sup>2849</sup> This recommendation is under consideration by the Court's Future Directions Committee.

8.135. The Court's Trial Management Committee has recommended that the Outline of Case and other documents provided for the hearing should be renamed 'Papers for the Judge' and should be filed and served at least five working days prior to the hearing.<sup>2850</sup> The Committee recommended some consolidation of the current requirements for the Outline of Case.<sup>2851</sup>

2845. Family Court staff *Consultation* 1 April 1999.

2846. Family law practitioners *Consultation* Sydney 14 September 1998; Family law practitioner *Consultation* Sydney 25 August 1998; Law Society of NSW Family Law Committee *Consultation* Sydney 22 September 1998. Some Family Court judges confirmed this view: Family Court Judges. *Consultation* 14 September 1998. The Court's submission disputed the statement: Family Court *Submission* 348.

2847. N Ackman *Submission* 289.

2848. Family law practitioners *Consultation* Canberra 3 September 1999.

2849. See para 8.73, fn 148.

2850. Family Court *Submission* 384.

2851. The Committee recommended that annexure F to the Family Court case management guidelines should be amended

- to highlight that only relevant orders should be listed
- to combine the current headings C (short history of background events), D (name, date of birth, current residence and any final orders relating to residence of children), E (chronology of relevant events)
- to delete the requirement to list propositions of law and authorities relied on; any unusual propositions of law to be referred to at the new Trial Management Conference (to be held one month prior to the approximate hearing time, after the prehearing conference which is



8.136. The Court's Future Directions Committee is addressing the need to reduce the number of forms and the expense associated with them. A sub-committee within the Court's Rules Committee will work on this issue in detail.

**Recommendation 103.** The Family Court, and its Future Directions Committee, should give priority to a reconsideration of simplified procedures, particularly for financial matters. At all stages the Court should ensure its consultations include legal practitioners with collective experience in representing a wide range of family litigants (in terms of social background and socio-economic status), and community and legal aid organisations that assist unrepresented parties. Issues that should be taken into account include

- the cost to parties of the current forms and procedures – including costs to parties and their representatives produced by changes to the forms and procedures

*Recommendation 103 cont'd*

- the information needed to define issues, identify relevant facts, and conciliate effectively
- the need for forms and procedures which can accommodate a range of cases
- the needs of unrepresented parties
- the information needs of child representatives
- the clear identification of issues in dispute so that parties are required to compile certain forms, such as the Outline of Case document, jointly, and respondents' forms are required to answer those of the applicant.

### Discovery and subpoenas in the Family Court

8.137. Originally, discovery and subpoenas were available to parties in family proceedings without restrictions. The Simplified Procedures Committee observed that although 'discovery is a very important step in the resolution of matters which the Family Court deals with', 'discovery is a very costly procedure and in some cases can be oppressive'.<sup>2852</sup> One judge made the following observations.

Discovery is very expensive if done properly. Unlike civil litigation, where the event is confined to a short period of time, in family law there may be 20 years of documents. An enormous number of documents can be discovered and it tends to be the case that the relevant document is always left out. [Informal discovery] has problems too as there are frequently allegations of stealing documents. [While there is no easy answer, it may help] to have an earlier intervention in cases to determine what are the relevant documents. However, conciliation conferences can be ineffective, as it is very difficult for deputy registrars to extract the relevant information from parties. There is no guarantee that a judge could improve on this. No process is more open to abuse than discovery, though it is true that if you can't get the information you can't resolve the case. In family cases, the parties often don't know what each other's property is, so providing information is extremely difficult.<sup>2853</sup>

8.138. Lawyers said that most family property applications involve assets such as the family home and superannuation, or debts. All necessary information will be available through the documents to be filed under O 17, provided parties comply

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<sup>2852</sup>. Family Court Simplification Committee report, para 17.1. There is no doubt that subpoenas and discovery are used for oppressive reasons in some cases. In one case reported to the Commission, a litigant was said to have subpoenaed various members of his former wife's family seeking financial and banking records going back a number of years in what appeared to be a 'fishing expedition', without having to demonstrate any potential relevance to his case: Confidential *Submission 268*. See also I Serisier 'Preparing a defended case for hearing in the Family Court' *Paper A State Legal Conference 99 Sydney 31 March 1999*.

<sup>2853</sup>. Family Court judges *Consultation 28 September 1999*.

with this order. The cases in which discovery or subpoenas are necessary are those in which there are complications such as family businesses, family trusts or

overseas property, and unequal access to information by the parties.<sup>2854</sup> Submissions to the Commission noted that sometimes parties abuse discovery, but not systematically.<sup>2855</sup>

8.139. The Simplified Procedures Committee recommended that discovery, specific questions and subpoenas should not be available without leave of the Court, except in interim proceedings or after a conciliation conference. Order 20 was amended accordingly and provides that such leave is to be granted only if there are 'special circumstances' to justify it.<sup>2856</sup> Registrars do occasionally grant leave for early discovery if needed.<sup>2857</sup>

8.140. Similarly, subpoenas<sup>2858</sup> and requests for answers to specific questions<sup>2859</sup> are not available without leave until after the conciliation conference (if any) has been held; and such leave is only to be given in 'special circumstances'.

8.141. The Commission was told that the rules concerning discovery result in undue restrictions on the availability of information. In some registries, the Commission was told that the Court's procedures regarding subpoenas increased the cost to the parties.

It is inefficient to get even an order for inspection – it is cumbersome and takes much too long. This is one small part of the process which easily could be improved but causes delays and problems. It has taken me three physical attendances at Court over a week to inspect some relatively straightforward subpoenaed documents. Then they only bring out the documents one at a time, or one volume at a time, and you cannot compare affidavits. This is a ridiculous way to treat experienced practitioners.<sup>2860</sup>

8.142. The Family Court is not alone in limiting or constraining discovery processes.<sup>2861</sup> This is now standard procedure in most courts and tribunals, which

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2854. As stated, this is usually the 'homemaker wife': Top End Women's Legal Service *Submission 145*; Women's Legal Resources Group (Victoria) *Submission 162*; Mt Druitt & Area Community Legal Centre *Submission 308*; Legal Aid NSW *Submission 242*; Law Society of NSW Family Law Committee *Consultation Sydney 17 November 1999*. See also Women's Legal Resource Group Melbourne quoted in N Seaman *Fair shares? Barriers to equitable property settlements for women Women's Legal Services Network Canberra 28 April 1999*.

2855. Law Society of NSW Family Law Committee *Consultation Sydney 17 November 1999*.

2856. Family Law Rules O 20 r 2.

2857. Family Court staff *Consultation Sydney 17 September 1998*; Family Court staff *Consultation Sydney 14 September 1998*, Family Court *Submission 348*.

2858. Family Law Rules O 28 r 1.

2859. id O 19 r 1.

2860. Law Society of SA Family Law Section *Consultation Adelaide 6 August 1999*. With regard to subpoenas, one Family Court judge told the Commission

The number of times that these orders are badly abused is small. In [some registries] they have a video surveillance camera in the inspection room and this caters well for the requirements of preserving confidentiality of documents and preventing documents from being removed or stolen: Family Court judges *Consultation 28 September 1999*.

2861. See for example 'Limitation of discovery on notice' *Federal Court of Australia Rules O 15 r 3(1)*.

generally limit the ambit of discovery to matters 'directly relevant' or particular categories of documents. However, the Family Court also prescribes the timing of discovery. In the Family Court Rules there is no bar on the ambit or availability of discovery and subpoenas after the conciliation conference.

8.143. Informal discovery agreed between the parties is said to be widely used among experienced practitioners, and encouraged by registrars.<sup>2862</sup> However, the Commission was told there are some pitfalls to this practice.

Informal discovery can be more expensive. I had a case in which there were 3 discovery sessions, and each time different documents were produced. It took a huge amount of time to identify what had been there previously and what was missing. If formal discovery had been available from the outset, it would have cost far less.<sup>2863</sup>

8.144. Practitioners consistently were emphatic in asking the Commission to make a recommendation that the Family Court make discovery and subpoenas more readily available in the early stages of a case.<sup>2864</sup> Lawyers, legal professional associations and legal aid commissions all agreed that the process of negotiation and conciliation is unfortunately delayed by late disclosure of needed information.

The Law Council believes that settlements are being delayed until discovery can occur. Anecdotal reports suggest that it is not uncommon for a basic settlement to be agreed upon prior to or at the Conciliation Conference, but not finalised until discovery has occurred verifying the required details. Anecdotal reports also suggest that there has been an increase in the number of parties settling under pressure, without proper information because of the delay in discovery. This usually disadvantages the party who had limited understanding and control of the parties' finances during the marriage.<sup>2865</sup>

Limiting discovery until after the Conciliation Conference encourages the parties to agree to informal discovery. Solicitors are, however, inherently and justifiably cautious about advising clients to settle without formal discovery or some verification, on oath, that the information provided is a full and frank disclosure ... It appears, anecdotally, that some settlements are being delayed until a second Conciliation Conference, following formal disclosure ... In cases where it is clear, in advance, that the matter will not settle at the Conciliation Conference without formal discovery, the discretion ought to be exercised to allow discovery to occur prior to the Conciliation Conference so that the resources of the Court and the parties are not wasted.<sup>2866</sup>

Granting discovery at an earlier stage of the proceedings, prior to the conciliation conference, would encourage settlement. Although informal discovery is possible, solicitors may not feel that it is appropriate to advise their clients to settle without the extra

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2862. Law Council *Submission 197*.

2863. Law Society of NSW Family Law Committee *Consultation* Sydney 17 November 1999.

2864. *ibid*; Law Society of SA Family Law Committee *Consultation* Adelaide 6 August 1999; and see also comments quoted in para 8.145–8.146.

2865. Law Council *Submission 197*.

2866. Legal Aid NSW *Submission 242*.

assurance that full disclosure has been made which is provided by formal discovery.<sup>2867</sup>

There is a degree of frustration. Under the rules, once you have filed an application, nothing much can be done for a long time. Where the other party is difficult, and cooperation or informal discovery is not possible, there is a considerable delay before anything constructive can be done. At conciliation conferences you have to tell clients that you can't do much at this stage — until you have access to subpoenas and proper discovery. There is not sufficient appreciation that lawyers don't embark on this sort of process (discovery) unless they can justify it. The Court doesn't come into contact with the great majority of people who settle by negotiation.<sup>2868</sup>

8.145. Many practitioners claimed that conciliation conferences are less likely to achieve settlement than they were prior to the restriction on discovery.

In the past, Conciliation Conferences succeeded in getting settlements because there was full disclosure prior to the conference. The reason for their success has been taken away ... If there were proper disclosure, practitioners would be prepared for the Order 24 conference and would expect to be able to settle.<sup>2869</sup>

In my view discovery being unavailable before the Conciliation Conference is often a factor which hinders settlement.<sup>2870</sup>

Conciliation conferences are now less likely to settle [following introduction of Simplification]. A conciliation conference has 3 stages: (1) Identifying issues; (2)- Information seeking and swapping; (3) Negotiation. The middle phase is occupying more and more time, so there is not enough time for negotiation. In Canberra conciliation conferences take 3 hours.<sup>2871</sup>

[T]he registrar who conducted the case conference was faced with widely conflicting allegations of [a] general nature and the conference was simply a waste of time for everyone involved. The old forms of application and response provided some detail both to the parties and the registrar conducting a case conference. The form 17A does not entirely overcome these difficulties ... In the example I have mentioned, my own client will have incurred quite substantial costs up to and including the Conciliation Conference, still without basic matters of fact having been determined with reasonable accuracy.<sup>2872</sup>

People won't settle prior to the Conciliation Conference because they have no opportunity before this to test the other party's claims regarding their financial position.<sup>2873</sup>

8.146. Similar claims were made with regard to subpoenas.

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2867. National Legal Aid *Submission 360*.

2868. Law Society of NSW Family Law Committee *Consultation* Sydney 17 November 1999.

2869. Law Society of NSW Family Law Committee *Consultation* Sydney 22 September 1998.

2870. Family Court file survey response 837 (solicitor for applicant).

2871. Family law practitioners *Consultation* Canberra 2 September 1999. The Court's Evaluation Committee's research on this claim is discussed at para 8.149.

2872. Family Court file survey response 312 (solicitor for respondent).

2873. Law Society of NSW Family Law Committee *Consultation* Sydney 22 September 1998.

[I]t is a disadvantage not to be able to issue a subpoena before Conciliation Conferences and means that often the conference is a waste of time, if practitioners can't advise whether a proposal for settlement is fair or not.<sup>2874</sup>

Lack of subpoena power before Conciliation Conference adds to the cost. In many cases, one party doesn't trust the other (surprise surprise!). Accordingly, they don't accept what the other says is their bank balance, super balance etc, until these details have been independently supplied. Although parties are required to supply documents to the other side, these are often not complied with (again surprise surprise!). Now, all these cases are forced to go to conciliation stage.<sup>2875</sup>

8.147. The Commission's empirical research provides some support for these observations. Certainly there were repeat conciliation conferences. Practitioners indicated that such conferences may simply identify the issues and documentation required and a subsequent conciliation conference or negotiation effects the settlement. In the Commission's sample, 401 of the applications for final orders included some property issues.<sup>2876</sup> Of these, 250 (62% of cases with financial issues) attended at least one conciliation conference;<sup>2877</sup> 44 attended two to three conciliation conferences; and one attended more than three. Seventy cases (17% of cases with financial issues; 28% of cases attending at least one conciliation conference) were recorded as settling at this stage.<sup>2878</sup> A further 107 settled before being listed for hearing, and 41 after being listed for, or commencing, a hearing but without receiving a judgment.<sup>2879</sup>

8.148. The Simplification Committee acknowledged practitioners' views concerning difficulties over the timing of discovery but gave higher priority to the goal of maintaining minimal documentation in the early stages.<sup>2880</sup>

8.149. In its report on the impact of simplified procedures, the Evaluation Committee acknowledged overwhelming dissatisfaction with the change to the procedures for discovery. To test whether the changed rule had reduced the effectiveness of conciliation conferences, as claimed by practitioners, the Committee surveyed firms with substantial practices in the Melbourne, Brisbane and Parramatta registries on the results of their ten most recent conciliation conferences. Of the 22 responses, 17 said that lack of cooperation with requests for information was a factor in failure to resolve at least one of their last ten conciliation conferences; six of the 22 said the unavailability of subpoenas was a

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2874. Family Court file survey response 833 (solicitor for respondent).

2875. Family Court file survey response 220 (solicitor for applicant).

2876. T Matruglio & G McAllister, *Family Court Empirical Report Part One*, 64.

2877. *id* 39.

2878. *id* 49. It is possible that some further cases were settled as a result of the conciliation conference but were recorded as finalised by consent orders drawn up on the basis of the agreement reached at the conference.

2879. *id* 53.

2880. Simplification Committee report para 9.6; 17.1.

factor.<sup>2881</sup> The Evaluation Committee noted that the reasons put forward by the practitioners for failing to settle particular cases varied according to the area

Of the 52 Melbourne cases which did not resolve all financial issues at a conference (12 of which settled later) practitioners attributed the failure to resolve to the lack of discovery in 26 cases and to personal issues unique to the case or client in 23 cases. Practitioners in the Parramatta Registry attributed only 2 failures to resolve to the lack of discovery, but 19 (out of a potential 45) to personal issues, and Brisbane practitioners attributed 26 failures to the lack of discovery and 13 to personal issues.<sup>2882</sup>

The Evaluation Committee was unable to express a firm view on whether the change had been beneficial.

The Committee cannot say if the perceived advantages of the rule introduced by the simplified procedures (including costs savings and eliminating inappropriate — and often automatic — use of discovery) have benefited some cases and parties. It can say that the Rule is held responsible by many legal practitioners and some Court staff for unnecessary adjournments,<sup>2883</sup> tactical time-wasting and an alleged reduction in settlements at directions hearings and conciliation conferences. The (admittedly defective) statistics about directions hearings settlement rates provide some support for these assertions. The conciliation conference settlement and adjournments statistics do not.<sup>2884</sup>

8.150. The Evaluation Committee recommended that

a registrar at a directions hearing should have a discretion to direct the production of specific documents and information if satisfied that this would materially improve the capacity of one or all parties to negotiate on an informed basis.<sup>2885</sup>

This recommendation has not been implemented to date<sup>2886</sup> as, in the Court's view

the reference to 'special circumstances' in Order 20 Rule 2 is sufficient to enable registrars to order the production of documents where they are thought to be relevant and useful. The matter is however under further consideration by the Future Directions Committee.<sup>2887</sup>

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2881. Evaluation Committee Report, para 25.3.

2882. *id* para 26.12.

2883. The Committee tested this claim and found that in 1996–97 13.7% of conciliation conferences were adjourned, as against 17.2% in 1995–96 and 18.5% in 1994–95. A survey in November 1996 found 'a multiplicity of reasons' for adjournments, the most common being a need to obtain further information from one or both parties: *id* para 26.8; 25.4.

2884. *id* 49.

2885. *id* 42–43.

2886. The discretion of registrars or the court to make discovery generally or in relation to specific documents under O 20 r 4 continues to be subject to O 20 r 2 which states that such directions are not available prior to the conciliation conference unless 'special circumstances' apply.

2887. Family Court *Submission* 348.



8.151. The Court noted that discovery is restricted in the *Federal Magistrates Act 1999* (Cth) (Federal Magistrates Act).<sup>2888</sup> However, the provision in that Act, consistent with its summary processes, is simply a requirement that discovery be by leave. The Federal Magistrates Act does not set a time restriction delaying discovery to a particular point in the process.<sup>2889</sup>

8.152. In support of its present restrictions on discovery, the Court quoted to the Commission comments made in a newspaper article by a senior litigation partner of Blake Dawson Waldron (Geoff Gibson) saying that

many lawyers and most of their clients were increasingly concerned about the cost of pre-trial procedures like discovery of documents which was now regarded as 'out of control' ... This was the evil that Simplified Procedures addressed by limiting discovery.<sup>2890</sup>

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<sup>2888</sup>. *ibid.*

<sup>2889</sup> .Section 45 of the Federal Magistrates Act provides that

- (1) Interrogatories and discovery are not allowed in relation to proceedings in the Federal Magistrates Court unless the Federal Magistrates Court or a Federal Magistrate declares that it is appropriate, in the interests of the administration of justice, to allow the interrogatories or discovery.
- (2) In deciding whether to make a declaration under subsection (1), the Federal Magistrates Court or a Federal Magistrate must have regard to:
  - (a) whether allowing the interrogatories or discovery would be likely to contribute to the fair and expeditious conduct of the proceedings; and
  - (b) such other matters (if any) as the Federal Magistrates Court or the Federal Magistrate considers relevant.

The Federal Magistrates Court may make rules relating to discovery under Federal Magistrates Act s 82.

<sup>2890</sup>. R Gluyas 'Law firms back Clayton's court' *Australian* 17 September 1999, quoted in Family Court *Submission 348*.

The comments by Mr Gibson were made in the context of discussion on private arbitration of commercial disputes, not on family law matters.<sup>2891</sup> Practitioners and judges commenting to the Commission on this issue were clear that, whatever the problems with discovery in family law matters, they could not be equated with discovery in commercial matters.

Compared to commercial cases, discovery is not a big deal in the Family Court. You can easily identify bundles of documents. Sometimes the best tool is to subpoena a person's bank for documents such as loan applications. This is not expensive.<sup>2892</sup>

8.153. In its submission on DP 62, the Family Court denied that any need for earlier discovery has been shown.

The alleged disadvantage of limiting information early in the case is not borne out by the evaluation report on simplified procedures. Allowance has not been made for the self-interest involved in these criticisms ... First there was extensive consultation with the legal profession in relation to simplified procedures and representatives of solicitors and the bar were on the Committee. Second, the evaluation shows that the conferences are at least as successful since simplified procedures.<sup>2893</sup> ... The practice in NSW is that formal discovery is rarely used and there is extensive subpoenaing of documents, most of which are never read.<sup>2894</sup>

8.154. In DP 62, the Commission proposed that the Family Law Rules be amended to provide that registrars have a discretion to grant discovery and subpoenas prior to the conciliation conference where this would enable parties to negotiate on an informed basis. Further, in deciding whether to grant discovery, registrars should consider whether discovery should be restricted to particular documents or categories of documents or granted in stages. Such decisions should take account of the issues in the case, the resources and circumstances of the parties; the likely cost of the discovery or subpoenas to the party or third parties concerned; and the likely effect of making the order on the parties, including their ability to negotiate on an informed basis. This proposal was regarded as too cautious by some practitioners,<sup>2895</sup> but was welcomed by others.<sup>2896</sup>

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2891. Elaborated in his paper 'The cancer in litigation' and cited in ALRC DP 62 in respect of Federal Court litigation: G Gibson *The cancer in litigation* Blake Dawson Waldron Lawyers Melbourne 1997, cited in ALRC DP 62 para 2.5 and 2.11.

2892. Law Society of NSW Family Law Committee *Consultation* Sydney 17 November 1999.

2893. However, as noted at para 8.149, the Court's own survey showed nearly half the cases in Melbourne and Brisbane were believed not to have settled because of the unavailability of discovery. In 1990 the Court reported a settlement rate at conciliation conferences of 51%, noting this figure was an increase on the previous year and was 'a slight correction to the overall decline in settlement rates': Family Court *Annual report 1989-90*, 37. By the time of the Evaluation Committee's report, the settlement rate was said to be 41%: Evaluation Committee report, para-26.8.

2894. Family Court *Submission* 348.

2895. A number of practitioners argued that discovery should be available as of right, with no scrutiny by the Court unless the other party objected: Law Council *Submission* 375; M Bartfeld *Submission* 314; Law Society of NSW Family Law Committee *Consultation* Sydney 17 November 1999; Top End Women's Legal Service *Consultation* Darwin 7 October 1999.

8.155. While many practitioners wanted discovery available at any time without a requirement to seek leave, others agreed that discovery needs to be controlled. Some preferred such controls to focus on restricting the range of discovery by reference to the matters in issue. Suggestions included greater use of limited, 'tailor-made' discovery; the use of discovery conferences; and a limited timeframe for complying with discovery orders.<sup>2897</sup> It was noted that, as the Court's originating process no longer identifies issues in dispute between the parties, simplification was making discovery more complex. Certainly, the link between clear identification of the matters in issue and effective controls on discovery is clearly established.<sup>2898</sup> Uncontrolled discovery is seen to be closely related to imprecise identification of issues.

In property matters, there being no pleadings, the questions in the proceedings are seldom properly identified. Thus discovery is requested in relation to 'all matters in question in the proceedings' which often seem to be taken as requiring the listing of documents in relation to any financial transaction in the history of a marriage. This breadth of discovery cannot be permitted. A request for discovery should nominate the issue(s) to which it relates e.g. inheritance received from husband's mother during cohabitation – bank statements, letters from solicitors for the executor. There should be power in the Court to award costs if discovery is sought in respect of matters not genuinely in issue and/or to disallow requests on that basis.<sup>2899</sup>

[National Legal Aid] is conscious of the risk that discovery can be used oppressively, and supports an approach that controls the use of this process. The suggested use of limited tailored discovery [outlined in DP 62] may be a more appropriate approach to this problem.<sup>2900</sup>

If issues are identified, targeted discovery and the provision of information can be directed at those areas really in dispute rather than the shotgun approach presently being taken.<sup>2901</sup>

8.156. In response to the proposals in DP 62,<sup>2902</sup> the Court stated

These matters are subject to consideration by the Future Directions Committee. It is doubted whether the Rule revision suggested in 11.2 would alter current practice.<sup>2903</sup>

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2896. Victorian Bar *Submission 367*; Women's Legal Resources Centre *Submission 350*; National Legal Aid *Submission 360*; Victorian Bar *Consultation* Melbourne 28 September 1999.

2897. Law Council *Submission 197*.

2898. This link is discussed in C Beaton-Wells 'Solving the problems of pleadings: Are there lessons to be learnt for civil justice reform in general?' (1988) 8(1) *Journal of Judicial Administration* 36, 39.

2899. B Warnick *Submission 147*.

2900. National Legal Aid *Submission 360*.

2901. M Bartfeld *Submission 314*.

2902. See ALRC DP 62 proposal 11.2-11.4.

2903. Family Court *Submission 348*.

8.157. Although the Family Court accused lawyers of acting out of self-interest in this respect,<sup>2904</sup> it is nevertheless clear from the comments of practitioners and some judges that the resolution of family financial disputes requires early, clear identification of the issues in dispute and the capacity to obtain information relevant to those issues. Parties need to know the extent of the property and obtain corroboration for or otherwise test the claims of the other party.

8.158. The Commission does not support unrestricted discovery at any stage of the process. It does suggest that the Court seek to ensure that there is early identification of issues in dispute and that discovery of documents directly relevant to such issues be permitted, not just in 'exceptional circumstances', but, as recommended by the Simplification Committee, where it could assist the parties to conciliate on an informed basis. This will generally necessitate disclosure before the conciliation conference so that such conference provides a more effective settlement opportunity for parties. In facilitating such changes, registrars should be encouraged to investigate the need for, the anticipated scope and purpose of discovery and whether the documents are directly relevant to matters properly in issue between the parties, and make orders accordingly.

**Recommendation 104.** In consultation with relevant organisations, the Family Court should revise Order 20 rule 2 of the Family Law Rules to provide that

- registrars or the Court have discretion to grant discovery and subpoenas at any time where this will assist the parties to conciliate on an informed basis, or is needed to prepare for hearing
- where appropriate, the Court may grant discovery in relation to documents directly relevant to particular identified issues properly in dispute or by reference to particular documents or defined categories of documents directly relevant to such issues
- where there are many documents, consideration will be given to granting discovery in stages without the need to verify lists of documents
- non compliance with discovery may be dealt with by costs orders in appropriate cases (costs to be taxed and paid forthwith, at the interlocutory stages) or preclusionary sanctions.

## Expert evidence

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2904. See comments quoted at para 8.153.

## **Privately funded experts**

8.159. Some of the general issues related to the use of experts and expert evidence in court and tribunal proceedings are examined in chapter 6. It is clear from such comparative analysis that the Family Court is much more directly involved than most other courts in the way in which expert evidence is collected and presented to it. Expert evidence is commonly used in the Family Court, through

- reports of family and child counsellors, social workers, psychologists or psychiatrists reports in proceedings involving the care, welfare and development of children, and
- property valuation and other financial expert evidence in proceedings involving matrimonial property.<sup>2905</sup>

8.160. Expert evidence regarding children is subject to Court supervision and control to protect children from 'systems abuse'.

8.161. Family Court judges have expressed satisfaction with the current processes for the provision of opinion evidence in family reports and from valuers and accountants in property matters.<sup>2906</sup>

### *Disclosure of expert evidence*

8.162. The Family Law Rules require valuations of property and medical or psychiatric reports to be produced at or before conciliation conferences in relation to proceedings with respect to financial matters.<sup>2907</sup> The Rules require that affidavit evidence, including expert evidence, must be filed as directed at a prehearing conference or no later than 28 days before the day fixed for the hearing.<sup>2908</sup> At a prehearing conference, registrars usually direct that reports of expert witnesses be exchanged not less than 28 days before the hearing.<sup>2909</sup> Concerns have been expressed to the Commission concerning the exchange of expert reports in family law proceedings. The Family Court and Law Council support early exchange and filing of expert reports.<sup>2910</sup>

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2905. Information about the numbers, types and cost of experts in Family Court proceedings was set out in ALRC DP 62 para 13.7–13.11.

2906. I Freckelton et al *Australian judicial perspectives on expert evidence: an empirical study* AIJA Melbourne 1999, 110.

2907. Family Law Rules O 24 r 2; Family Court case management guidelines para 7.9.

2908. Family Law Rules O 30 r 2. Affidavit evidence must generally be filed as directed at a prehearing conference or no later than 28 days before the day fixed for the hearing: O 30 r 2AA.

2909. Family Court case management guidelines para 8.7(j).

2910. Family Court *Submission 264*; Law Council *Submission 197*.

8.163. The Family Court generally directs property experts to confer and to prepare a joint statement setting out those parts of their evidence on which they agree or disagree.<sup>2911</sup> Conferences of experts are less often directed in children's cases.<sup>2912</sup>

8.164. The Law Council supported the wider use of the Court's power to order experts to confer and further consideration of the timing of such conferences. The Law Council suggested that conferences should be held earlier in the process, rather than a few days prior to the day of the hearing, as is often the case at present.<sup>2913</sup>

**Recommendation 105.** The Family Court should order experts to confer as early as is feasible in proceedings, including in children's cases.

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2911. Fam Law Rules O 30A r 9(2); Family Court case management guidelines (Usual Order No 8). Some Family Court judges advise that they invariably order experts to confer and to prepare a joint statement under Family Law Rules O 30A; Lawyers often arrange informally for such experts to confer and agree: Law Council *Submission 197*.

2912. L Dessau, 'Trial management: Balancing the competing interests of justice' *Paper 7th National Family Law Conference Canberra 13-18 October 1996*, 95.

2913 .Law Council *Submission 197*.

*Agreed or court appointed experts*

8.165. The form of expert evidence used most commonly in Family Court children's matters, and occasionally in property matters which affect children's welfare, is the family report.<sup>2914</sup> The family report is ordered under s 62G of the Family Law Act and prepared by experts employed by the Court. In addition to family reports, O 30A of the Family Law Rules provides that the Court has power to appoint court experts at any stage of proceedings, on application by a party or of its own motion.<sup>2915</sup> The expert must be a person agreed upon between the parties or, if agreement is not possible, a person nominated by the Court.<sup>2916</sup> The Court may receive the report and evidence and permit oral examination of the court expert.<sup>2917</sup> Where a child representative is appointed, that representative usually will seek and facilitate the appointment of an O 30A expert.

8.166. The Commission was told that O 30A reports are now frequently ordered or agreed, to allow parties to submit expert evidence in interim hearings and because of restrictions on the preparation and timing of family reports. Legal aid practitioners noted that court counsellors often have limited expertise in child abuse and family violence matters, and in such cases O 30A experts are generally required.

There would be less need to have recourse to private reports if Family Court counsellors had the expertise to investigate and report on matters involving child abuse and family violence. These matters are the core business of the Family Court, being the matters likely to require judicial determination. It shouldn't be necessary to have to go outside the Family Court to get reports dealing with these issues.<sup>2918</sup>

The Court quite often uses Order 30A reports by independent experts where the parties can afford the cost and in cases where psychiatric evidence is needed.<sup>2919</sup>

8.167. The Family Law Act limits the number of times children may be interviewed and examined, and specifically restricts parties from using independent experts to examine children regarding abuse without the leave of the court. If such examination is conducted without leave, the evidence is not admissible, except where the examination was for the purpose of deciding whether to bring proceedings based on allegations of abuse.<sup>2920</sup>

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<sup>2914</sup> .Discussed in detail at para 8.169–8.193.

<sup>2915</sup> Family Law Rules O 30A r 3(1).

<sup>2916</sup> id O 30A r 3(2).

<sup>2917</sup> id O 30A r 4(2).

<sup>2918</sup> National Legal Aid *Submission* 360. The Commission was informed that the Court is recruiting counsellors with expertise in abuse cases.

<sup>2919</sup> Family Court *Submission* 348.

<sup>2920</sup> Family Law Act s 102A. Where an application has been made to have a child further examined or interviewed by more than one expert, the Family Law Act sets out factors that the Court must consider in deciding whether to grant leave to have the child further examined: Family Law Act s-102A(3). The Commission recommended in its report *Seen and heard* (ALRC 84) that, in deciding

8.168. The Family Court advised that, in its experience, the involvement of a single expert is common and advantageous in children's matters, but is unlikely to be agreed in financial matters. The Court agreed that, where possible, the expert should be chosen jointly by the parties, and not imposed by the Court, except in the case of children's matters where a counsellor is appointed.<sup>2921</sup> Family law practitioners and judges generally agreed that, in common 'house and garden' property cases, parties should be required jointly to instruct valuers.<sup>2922</sup> In DP 62, the Commission proposed joint instruction in such cases and continues to make such recommendation.

**Recommendation 106.** Parties and the Family Court should, as a matter of course, consider whether an expert (or experts) agreed between the parties should be appointed in a case or to deal with a particular issue. Examples of categories of case where the use of agreed experts will often be appropriate include property disputes where valuation of assets is in issue. The Family Court also should direct parties to agree a joint expert valuer in simple property issues.

## Family reports

8.169. The Family Law Act and Rules make provision for the Court to order family reports to be prepared by a family and child counsellor or welfare officer in any proceedings where the care, welfare and development of a child under 18 is relevant.<sup>2923</sup> In particular, the Court may order a family report to satisfy itself that proper arrangements have been made for the care, welfare and development of children, before a decree nisi is made absolute,<sup>2924</sup> or before making residence or specific issues orders in favour of a person not a parent of the child.<sup>2925</sup> The report

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whether to grant an application that a child be interviewed or examined by an expert, the Court should consider any wishes expressed by the child as well as the other specified considerations, and that s 102A(3) of the Family Law Act should be amended to this effect. The Commission also recommended that the Family Court should collect and maintain statistics concerning the number of times experts, including Family Court counsellors, interview each child in each litigated matter in the Family Court. These statistics should be used to conduct a regular assessment of whether children are over-interviewed during family law proceedings: ALRC 84 rec 146; rec147.

2921. Family Court *Submission 264*.

2922. Women's Legal Resources Centre *Submission 153*; Forensic Accounting Special Interest Group *Consultation* Sydney 20 April 1999.

2923. Family Law Act s 62G; Family Law Rules O 25 r 5.

2924. id s 55A(2). A decree nisi is a conditional order dissolving the marriage. It will be ordered to become absolute unless reason is shown why it should not. Parties cannot remarry until the decree absolute has been granted.

2925. id s 65G(2)(a)(ii). In these circumstances the Court is required to order a family report unless satisfied there are circumstances that make it appropriate to make the residence or specific issues orders without it: id s 65G(2)(b).



may be received in evidence in any proceedings under the Family Law Act;<sup>2926</sup> copies may be released to the parties or their lawyers, or the child representative; and the Court may permit oral examination of the person making the report.<sup>2927</sup> The counsellor or welfare officer who prepared the report is generally required to be available for cross-examination on its contents.<sup>2928</sup>

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2926. *id* s 62G (8); Family Law Rules O 25 r 5 (2)(b).

2927. Family Law Rules O 25 r 5(2).

2928. I Coleman 'Children and the law: The Family Court experience and the criminal law experience' *Paper* NSW Bar Association Seminar Sydney 9 September 1996, 12.

8.170. Under the Court's case management guidelines, the standard time for ordering family reports is after the prehearing conference.<sup>2929</sup> Prehearing conferences are usually held no earlier than 14 weeks before a hearing is scheduled,<sup>2930</sup> so that the family report is normally produced, at the earliest, three weeks prior to the hearing. The reports can be ordered earlier in cases where there are exceptional circumstances or allegations of child abuse.<sup>2931</sup> Early ordering does not necessarily result in earlier delivery of the report, but may allow a more detailed investigation, and more time for preparation of the report.

8.171. The Commission proposed in DP 62 that family reports be made available earlier in proceedings where needed.<sup>2932</sup> The Commission proposed that reports be given priority in cases where parties are unrepresented or where there are allegations of family violence or child abuse. Submissions and consultations overwhelmingly supported this proposal.<sup>2933</sup> The proposal was not supported in the Family Court's submission, primarily on the grounds that an earlier time for ordering the reports would result in substantially more reports being ordered, which would place intolerable demands on the Court's counselling service.<sup>2934</sup>

8.172. The Commission also proposed that, where parties agree, the counsellor who conducted conciliation counselling should also prepare the family report to reduce the problem of parties having to explain their case again to different Court officers and others. This proposal received limited support,<sup>2935</sup> but the predominant view was against the proposal, because of the difficulty of separating the information received in confidential counselling from reportable information, and a possible consequential loss of confidence in conciliation counselling, or

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2929 .Family Court case management guidelines, para 8.14.

2930 The time standard under the guidelines for standard track child matters is for the prehearing conference to be held 14 weeks after filing and for the hearing to be held 14 weeks after the prehearing conference: id para 15.8.

2931. id para 2.13.

2932. ALRC DP 62 para 11.80–11.108; proposal 11.5.

2933. Those supporting this proposal include Law Council *Submission 375*; Victorian Bar *Submission 367*; National Legal Aid *Submission 360*; Legal Aid NSW *Consultation* Sydney 15 September 1999; Law Institute of Victoria Family Law Section *Consultation* Melbourne 4 August 1999; Professor T Brown *Consultation* Melbourne 9 August 1999.

2934. Family Court *Submission 348*.

2935. For example, the following comments from a submission.

I have some serious doubts as to whether confidentiality of counselling is important to the people going through the process but I have no empirical evidence to support the proposition one way or the other. However, I have had the experience of trying to explain to a client why some monstrous statements made to the counsellor could not be repeated in evidence. This area is worthy of more research and discussion: M Bartfeld *Submission-314*.

Others supporting this view included Ministry to Solo Parents and their Families *Submission 293*; Legal aid practitioners at CLE presentation Sydney 15 September 1999.

prejudice to parties.<sup>2936</sup> The Commission accepts these concerns and has not proceeded with this suggestion.

8.173. The Commission understands that the Court's Future Directions Committee is considering the viability of earlier family reports targeted at key issues.<sup>2937</sup> The Court has noted that

[t]his is because of the tension between the value of reports in interim proceedings and as a settlement tool and the fact that a full report at an early stage requires resources that the Court does not have. Pilot projects are being undertaken at certain registries, but the sort of shift in emphasis and resources suggested by the Commission [in DP 62] is not contemplated.<sup>2938</sup>

8.174. The Future Directions Committee is developing a proposal to make early family reports available in certain matters. The suggestion is that a counsellor asked to prepare a family report will complete the necessary interviews and observations and initially prepare a short form family report summarising the issues for the parents and children and the counsellor's assessment and recommendations. There would also be an interview between the counsellor and the parties at which the counsellor explained the findings and recommendations. If the matter was to proceed to trial, the counsellor would prepare a full report based on the same interviews. It is proposed that this system initially will be run as a pilot project.

#### ***Purposes of family reports***

8.175. ***Final hearings.*** The central utility of family reports for the Court is the provision of independent information on the facts in issue for judges. Justice Warnick has noted

without 'running a trial' and generally after interviews measured in terms of hours, rather than days, most family reports show a great deal of perception and far more often than not, any recommendations in the report accord with the views which I have reached after a trial over some time, often days.<sup>2939</sup>

8.176. The Court's submission supported this view

Judges almost universally find family reports extremely helpful in determining cases and many judges would not be willing to make a determination in difficult cases

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2936. Those opposed to this proposal include Family Court *Submission 348*; Law Council *Submission 375*; Victorian Bar *Submission 367*; National Legal Aid *Submission 360*; ACT Bar Association *Consultation Canberra 28 September 1999*.

2937. Family Court staff *Consultations 1 April 1999 and 18 May 1999*; Family Court *Correspondence 21 July 1999*.

2938. Family Court *Submission 348*.

2939. B Warnick *Submission 147*.

without the assistance of a family report ... Family reports are usually the most cogent and relevant independent evidence presented on parenting issues.<sup>2940</sup>

8.177. Professor Thea Brown's research on the management of cases involving allegations of child abuse (which led to the establishment of the Magellan project), found that the recommendations or findings in family reports were followed by judges in 76% of the cases for which they were prepared.<sup>2941</sup> This study stated that

the most frequent reference of the judge and judicial registrar in reasons for the decision, apart from the individual's circumstance and credibility, was to the findings of the family report.<sup>2942</sup>

This observation indicates how important it is that these reports be done well, as well as in a timely fashion.

8.178. *Effect on settlement.* Family reports also assist settlement.<sup>2943</sup> Comments to the Commission emphasised the importance of the family report as a source of independent information on the children for the parties. Given the distress and self-absorption of some family litigants, the family report can serve as a concrete reminder of the views and interests of children. Where one or both parties are unrepresented, it may be the only source of information on the best interests of children.<sup>2944</sup> The Commission was told that the independent information provided in family reports can assist in resolving the legal issues in such cases.

Not only is the information [in family reports] valuable but the report provides a therapeutic process for the families. Parties are provided an independent analysis of the family relationships and this is very helpful to their understanding. Late reports are essentially a historical accident. Family reports are too valuable a tool not to use earlier. They limit the dispute considerably: for example, if mum sees on paper that the children do respond well to dad and do like spending time with him, this can be a breakthrough in a case ... Early family reports also have an impact on resources. That is, you need to have an over-listing system for hearings, even in children's matters. Family reports are crucial to this: if they are available sufficiently prior to the hearing, it gives the parties an opportunity to reconsider their case and matters inevitably drop out of the list ... Canberra counsellors do a higher number of reports per counsellor than other registries.<sup>2945</sup>

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2940. Family Court *Submission* 348.

2941. T Brown et al 'Mandated co-ordination: Aspects of the interface between the Family Court and the Victorian State Child Protection Service' *Paper Children at Risk: Now and in the Future* Australian Association of Family Lawyers and Conciliators Seminar Melbourne April 1997, 15.

2942. *ibid.* See also ALRC 84 para 16.36.

2943. Family Court judges *Consultation* 23 September 1998; Family law practitioners *Consultation* Sydney 14 September 1998; Law Society of SA *Consultation* Adelaide 2 September 1997; Family Court judges *Consultation* 2 September 1997.

2944. Family Court judges *Consultation* 23 September 1999; Family law practitioner *Consultation* Sydney 30 March 1999; Law Council *Submission* 197.

2945. Family Court judges *Consultation* 28 September 1999.

The early availability of a family report could facilitate earlier settlements. This could be particularly helpful for unrepresented litigants who are less likely to obtain a private report because of the cost and because of their unfamiliarity with the court process. As has been noted, matters involving unrepresented litigants are less likely than other matters to settle. A family report, which provides independent information on the issues in dispute, could assist more of these matters to settle, particularly if available early in the proceedings before the parties have adopted entrenched positions.<sup>2946</sup>

There should be a change in case management guidelines which allow for a report to be prepared and released when the matter is in a pre trial list. It is the writer's view that the production of a report helps early resolution of most cases where a report has been prepared.<sup>2947</sup>

8.179. Professor Brown also found that reports by the Court counsellors and by State child protection services were helpful in resolving child abuse cases. Family reports were ordered in 34% of the cases she studied, and in 39% of these cases were accepted as the basis of settlement.<sup>2948</sup> Reports by the State child protection service resulted in resolution in 86% of the cases where they clearly substantiated abuse (18% of the sample cases) because the parties agreed to accept the report.<sup>2949</sup> A sub-study in Professor Brown's research found that where there was a family report and a child representative, 50% of the child abuse cases attending a prehearing conference were settled at that conference.<sup>2950</sup> The study recommended that in child abuse cases, where the family was not already known to the State child protection service, a family report should be ordered early in the process at an initial hearing.<sup>2951</sup> Based on this research, early availability of family reports is a feature of the Magellan pilot project (see para 8.55–8.56).

8.180. The Family Court has stated that, while there are benefits in having family reports available earlier in proceedings, routine ordering of very early family reports would not be more successful in promoting settlements than processes such as conciliation and mediation, adding

[w]hile there are sound reasons for receiving reports earlier in particular cases, it is difficult to find evidence for the general success of the family report as an early settlement mechanism.<sup>2952</sup>

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<sup>2946</sup> National Legal Aid *Submission 360*.

<sup>2947</sup> Family Court case file survey response 430 (solicitor for applicant).

<sup>2948</sup> In a further 25% of cases receiving family reports, the reports were explicitly accepted by the judge.

<sup>2949</sup> T Brown et al *Violence in families – Report Number One: The management of child abuse allegations in custody and access disputes before the Family Court of Australia* The Family Violence and Family Court Research Program Monash University Clayton & the Australian Catholic University Canberra February 1998, 92.

<sup>2950</sup> id 92.

<sup>2951</sup> id 93.

<sup>2952</sup> Family Court case file survey response 430 (solicitor for applicant).

8.181. An article by Dr Carole Brown suggests that family reports can and do play a part in the processes of conciliation and negotiation. Noting that reports 'must address three audiences simultaneously',<sup>2953</sup> Dr Brown described the roles of family reports as reporting to the Court, providing a document for use in evidence and independent information to parents.

On reading the evaluation report, the parents should not be surprised by its contents. Just as important as writing the report is giving parents feedback about what conclusions and recommendations will be made. This can be linked with educating them about any professional assistance that may be required for their children after the hearing ... In presenting the data, the evaluator will be mindful of the impact of his or her assessment on the parents and the children and will be concerned that the protective functions that assist the children and the parents to adjust to the divorce are preserved. The lawyers, on the other hand, will be concerned with the biases, ambiguities or imprecise language, and the validity of the evidence.<sup>2954</sup>

8.182. The Court expressed concern that, while the availability of reports assists settlement, 'what is not clear is the extent to which such settlements are coerced'.<sup>2955</sup> Some members of the Court considered that if family reports were made available early, problems could arise with 'counsellor decided outcomes'. Counsellors may make more guarded statements if they perceive that legal aid funding may depend on what they say.<sup>2956</sup> A further concern is that the preparation of family reports can be intrusive for families, and the production of multiple or updated reports constitute 'systems abuse' of children.<sup>2957</sup> The Commission received some comments critical of family reports, and of the weight judges give to them.<sup>2958</sup>

8.183. *Interim hearings.* Family reports are said to be particularly important in interim hearings in children's matters. Lawyers indicated to the Commission that

2953 C Brown 'Custody evaluations: Presenting the data to Court' (1995) 33(4) *Family and Conciliation Courts Review* 446, 459, quoting D Skafta *Child custody evaluations* Sage Beverley Hills CA 1985, 200.

2954. id 457, 459.

2955. Family Court *Correspondence* 21 July 1999.

2956. Family Court staff *Consultation* 30 June 1999; Family Court *Correspondence* 21 July 1999.

2957. Family Court *Correspondence* 21 July 1999.

2958. The Women's Legal Service Brisbane noted, 'the fear is that family reports are being relied on too much rather than that they are not available: Women's Legal Service Brisbane *Consultation* Brisbane 20 September 1999. Other practitioners expressed similar concerns: Family law practitioners *Consultation* Darwin 7 October 1999. In the Commission's study, family reports were sought in 85 of the sampled files (13% of all children's matters) and in 45 cases listed for hearing (47% of listed children's matters), reflecting the focus on ordering family reports for the purposes of a final hearing. Of these reports, 49 (58%) were ordered prior to the prehearing conference — as noted, this is allowable under the Family Court case management guidelines only in exceptional circumstances or in cases where child abuse is alleged. Of the listed cases receiving family reports, 23 settled following listing (51%, compared with 57% of all listed cases) and 22 received a judgment: T Matruggio & G McAllister, Family Court Empirical Report Part One, 55, 58. The Commission was told that, since the introduction of simplified procedures, few inhouse Family Court reports have been produced: Law Society of Qld *Consultation* Brisbane 22 September 1999.

parties frequently obtain private reports from social workers, psychologists and psychiatrists for interim hearings.<sup>2959</sup>

8.184. A report on the effects of the *Family Law Reform Act 1995* (Cth) noted that non-residence parents seeking contact were more likely to have orders made in their favour at interim hearings than at final hearings.<sup>2960</sup> A reason for this was said to be the lack of information available to the Court at the time of the interim hearing.<sup>2961</sup>

Many of the solicitors who were interviewed agreed that demonstrating a risk of 'serious violence' at an interim hearing is 'dependent on your affidavit drafting ability'. As the allegations are not tested at an interim hearing, and there is no Court-ordered Family Report to assist the decision maker, solicitors said the assessment of whether contact poses a risk to the child will often hinge on the nature, and the details, of the allegations raised in the resident parent's affidavit material.<sup>2962</sup>

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2959. For example

At the present time in South Australia the private psychosocial professionals are being utilised to provide timely and efficient reports as this service is not being provided by the Family Court counselling service. This 'local use' of early family reports greatly assists in dispute resolution. It also allows the parties to focus on the needs of children early in the proceedings before litigation becomes entrenched and protracted: Children's Interests Bureau Board *Submission 170*. Also, Law Society of SA Family Law Committee *Consultation Adelaide 6 August 1999*; Victorian Bar Family Law Group *Consultation Melbourne 23 August 1999*.

2960. H Rhoades, R Graycar, M Harrison Interim Report *The Family Law Reform Act 1995: Can changing legislation change legal culture, legal practice and community expectations?* University of Sydney & Family Court Sydney April 1999, 60-61.

2961. id 40; 55.

2962. id 55.

Judges/judicial registrars generally noted that their principal concern in interim hearings is to ensure the safety of the parent and child, and to obtain enough material to assess the allegations, the effect of the violence upon the resident parent, and the quality of the relationship between the child and contact parent. Most noted that such allegations present a 'real problem' at the interim stage, where there is little material upon which to base those assessments. Like the solicitors, judges admitted that the affidavit material is 'pretty important' at an interim hearing. One judge ... indicated his dissatisfaction with these hearings by saying, 'What we do in interim matters is highly artificial. We present it as a judicial exercise but it's more artful dodging'.<sup>2963</sup>

8.185. In relation to applications for relocation, the authors noted

The presence of a report about the children, and the ability to test the parties' evidence, appeared to have been the factors which made the difference between the outcomes of final hearings and interim applications where violence was an issue.<sup>2964</sup>

8.186. The Family Court, reviewing interim hearings in 143 cases handled by a child's representative,<sup>2965</sup> concluded that

it is appropriate to have a Family Report as early as possible only in certain cases such as where there are sexual abuse allegations or where there may be a risk to children. Otherwise the normal options for dispute resolution should be pursued first.<sup>2966</sup>

#### *'Short' or interim reports*

8.187. The Commission received a variety of comments on the value of short or interim reports. Some support for reintroduction of a system of 'duty reports' or 'short reports' was expressed in the submissions and consultations, to ensure that at least some information is available.<sup>2967</sup> However, it also was noted that such a

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2963. id 56.

2964. id 66.

2965. The review found that 17 cases settled or dropped out without receiving a family report. In the 126 cases in which a report was ordered, 22 settled by the next interim hearing; 45 settled before the prehearing conference, 46 (in four of which the report was prepared following the prehearing conference) settled before trial, and 13 went to trial: Family Court *Submission 264*.

2966. Family Court *Submission 264*.

2967. Family law practitioner *Consultation* Sydney 25 August 1998; Family Court judges *Consultation* 10-September 1997; Law Society of SA *Consultation* Adelaide 2 September 1997.



practice would have the potential to duplicate work.<sup>2968</sup> Others commented that short reports can miss key issues,<sup>2969</sup> and may help resolve the interim hearing but

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2968. Family Court judge *Correspondence* 12 February 1999. The Commission understands that, in South Australia, the Legal Services Commission, family law related experts and legal practitioners have considered the development of a new protocol for obtaining early interviews and reports. This protocol would involve a less detailed report being available earlier in the decision making process. A broader based family assessment would still be required if cases went to final hearing: Law Society of SA *Consultation* Adelaide 10 September 1997. The English Law Commission's court welfare officer 'checklist' may provide a template for such abbreviated reports: Law Commission *Family Law: Review of child law guardianship and custody* HMSO London 1988 (Law Com No. 172), para 3.17.

2969. Law Institute of Victoria Family Law Committee *Consultation* Melbourne 24 August 1999.

not produce a long term solution.<sup>2970</sup> Other studies have noted practitioner concerns about the reliability of duty reports, and a preference for (written) interim family reports.<sup>2971</sup>

[M]any of the solicitors who were interviewed said they would like to see a return to the use of interim family reports in cases involving allegations of violence and abuse.<sup>2972</sup>

One judge commented that she is often assisted by the counsellor's assessment of the mother's level of fear and ability to cope with contact. Several judges remarked that they would like to see a return to the use of interim Family Reports to assist with determinations of contact.<sup>2973</sup>

8.188. Judges told the Commission that family reports were most useful when the counsellor was 'the eyes and ears of the Court', observing the interaction between the parties and the children, and the wishes of the children. Short reports would need to contain such insights to be of real value.

### *Resource issues*

8.189. As noted, a major reason offered against providing more family reports is the cost involved to the Court. The Court's estimates of costs have varied. In 1997, the Court stated to the Attorney-General that reports take five to eight times more counsellor hours than a conciliation conference.<sup>2974</sup> In its submission to the Commission in June 1999, the Court stated that reports may require 20 hours or more of a counsellor's time.<sup>2975</sup> In later correspondence the figure given was 'up to (24-40) hours' to prepare, and it was said that this would amount to at least 12 times more counsellor hours than a conciliation counselling intervention.<sup>2976</sup> In its submission of October 1999, the Court stated that it had set a benchmark figure of 24 hours for a family report.<sup>2977</sup> Practitioners informed the Commission that their

2970. Family Court judges *Consultation* 21 September 1999.

2971. H Rhoades, R Graycar, M Harrison Interim Report *The Family Law Reform Act 1995: Can changing legislation change legal culture, legal practice and community expectations?* University of Sydney & Family Court Sydney April 1999, 57.

2972. id 56.

2973. id 57.

2974. Family Court *Response of the Family Court of Australia to the Attorney-General's Department paper on 'Primary dispute resolution services in family law'* Family Court Sydney 1997, 27. This was possibly meant to refer to a conciliation counselling session, since conciliation conferences are normally held only in property matters.

2975. Family Court *Submission* 264.

2976. Family Court *Correspondence* 21 July 1999.

2977. Family Court *Submission* 348. The Commission asked some practitioners to estimate the likely cost of private reports ordered under O 30A. One said that the cost was approximately \$120 per hour at 10-12 hours for a family of two adults and two children: Family law practitioner *Correspondence* 5 October 1999. Another said that the cost is normally \$1600 for a report on two adults and two children taking eight hours to prepare: Family law practitioner *Consultation* Canberra 3 September 1999.

private family reports were generally prepared in 10 to 12 hours, for a family of two adults and two children.<sup>2978</sup>

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<sup>2978</sup>. A Family Court judge told the Commission that reports may take up to 12 hours to prepare: Family Court judge *Consultation* 22 July 1999.

8.190. The Court noted the potential impact on its counselling services, if the number of family reports provided was substantially increased.

The matter of resource impact also needs to be considered carefully. The amount of counsellor time that is required for a counselling intervention averages between two and four hours. A family report on the other hand is a very resource intensive endeavour that is also emotionally intrusive and stressful for the family. It requires a number of interviews and investigative procedures with all members of the family, often in a number of different group configurations depending upon the family structure. The average time taken for a family report is 24 hours. To transfer resources from voluntary counselling to family reports would require a reduction of approximately 6 counselling interventions for each additional family report. While the various direct advantages of family reports are often cited, the comparative cost and opportunity costs also need to be considered.<sup>2979</sup>

8.191. The Commission's proposal does not envisage family reports being made generally available, but that cases involving family violence or child abuse, or where both parties are wholly or partly unrepresented, be prioritised for such reports.<sup>2980</sup> The Commission does not suggest that reports should be ordered routinely in cases meeting these criteria, but that attention should be drawn specifically to the question of whether a family report is needed in a given case.

8.192. Some practitioners commented on a tendency by the Court to shift costs from the Court to the parties in some areas. The limited availability of family reports was said to be an example of this, as parties may consequently have to fund their own reports under O 30A.<sup>2981</sup>

8.193. The Commission considers that the available empirical research, and the preponderance of views, support the need for appropriate independent information to be available to the Court and the parties prior to the adjudication of children's issues, either at interim or final proceedings. As noted, improved case management could reduce the reliance on interim hearings and the need for short or interim family reports.<sup>2982</sup>

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2979. Family Court *Submission 348*.

2980. In the Commission's sample, there were in total 239 cases falling into the category we have identified as high priority for family reports. This constituted 35% of the applications for final orders in which there were children's issues. In 187 cases there were notifications of family violence or child abuse (27% of cases involving children's issues). In 20 of these cases, both parties were unrepresented or partially represented (3% of cases involving children's issues). In a further 52 cases (7% of cases involving children's issues) both parties were unrepresented or partially represented, and there were no notifications of child abuse: Family Court datafile, additional Commission analysis.

2981. Family law practitioner *Consultation 14 December 1999*; Law Society of SA Family Law Committee *Consultation Adelaide 6 August 1999*.

2982. See para 8.40-8.41.

**Recommendation 107.** The Family Court should ensure that family reports are given priority in cases in which both parties are unrepresented or where there are allegations of family violence or child abuse. Particular care should be taken to ensure that such reports are made available in a timely fashion and are clearly focussed on the key issues in dispute.

### Social science research

8.194. The determination of issues in family law proceedings concerning the care, welfare or development of children often requires Family Court judges to make findings on social facts. For example, this would include matters in relation to the reliability of the expressed wishes or preferences of children; the effects on children of separation from a parent; the capacity of parents to provide for the intellectual needs of the child; or risk factors in child abuse.<sup>2983</sup>

8.195. Social science research is an obvious source of information of assistance in making such findings. The Court accesses social science research in a number of ways. Family reports may volunteer a summary of details of social science research or the persons assigned to prepare a family report may be directed to provide details of recent relevant research. Social science research also may be contained in information obtained through the appointment of court experts or as part of the evidence of expert witnesses. Section 66J of the Family Law Act specifically permits 'relevant findings of published research in relation to the maintenance of children' to be taken into account in considering financial support matters.

8.196. Justice Mullane conducted a survey of judges and judgments in the Family Court<sup>2984</sup> which showed that these methods are not often used. In particular, where findings of social fact were made in judgments, the basis on which the social fact is established was often not stated. The results as to the stated or implied sources of findings of social facts were: previous findings of the Full Court as to a social fact (2%); expert evidence by court counsellor, court expert or other expert witnesses (32%); research nominated by the judge and specified in the judgment (1%); 'research' – but the judge did not identify the research (5%); and no source stated (60%).<sup>2985</sup>

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2983. ie factors to be considered by the Court in determining what is in the child's best interests: Family Law Act s 68F.

2984. G Mullane 'Evidence of social science research: law, practice, and options in the Family Court of Australia' (1998) 72 *Australian Law Journal* 434, 452–453.

2985. The study was conducted for the purposes of statistical analysis and submission to the 1992 Commonwealth Joint Select Committee on the Operation and Interpretation of the Family Law Act and is discussed in G Mullane 'Evidence of social science research: law, practice, and options in the Family Court of Australia' (1998) 72 *Australian Law Journal* 434, 452–453.

8.197. Justice Mullane concluded that judges often appear to rely on their own private knowledge to arrive at findings of social facts,<sup>2986</sup> and that processes for accessing social science research evidence should be further examined and improved. The Court and the Law Council agreed.<sup>2987</sup>

8.198. The Family Court suggested that the s 66J power to take social science research into account could be expanded to apply whenever the best interests of children are being determined. The Court also stressed the need for judicial education concerning the use of social science findings. The Commission agrees.<sup>2988</sup>

**Recommendation 108.** The processes by which the Family Court establishes social facts should be reviewed with the aim of making such processes more transparent and open to challenge by the parties. Where the Court relies upon social science research provided by experts, including court experts, such reliance should be disclosed fully.

**Recommendation 109.** The Attorney-General should request the Family Law Council to report on whether the Family Law Act should be amended to provide specifically that whenever the best interests of children are being determined, the Court may have regard to any relevant, accredited and published research findings. Any such material relied upon should be expressly acknowledged by the Court.

## Case management

8.199. As stated, interlocutory events in the Family Court have a dual purpose – to facilitate settlement and advance the case toward trial. Each purpose requires appropriate information and attention to the issues in dispute. Case events such as counselling or conciliation conferences, primarily aimed at resolution, can identify and narrow the issues in dispute, even if unsuccessful. Events primarily aimed at progressing the case towards trial also facilitate negotiation between the parties. Currently, set case events are scheduled, which parties are expected to attend, but can be excused by the Court.

2986. The results of the survey were said to be consistent with the following hypotheses: in custody judgments most judges do at times rely on their own beliefs as to social science research; of those that do so, only 36% always identify the research relied upon, 25% never do so and 39% sometimes do so; generally Family Court judges have not studied the relevant areas of social science as part of degree studies; Family Court judges do read articles about relevant research in newspapers, journal, books and so on; Family Court judges (69%) perceived a need for experts and the parties to assist the court by more often referring to relevant research: id 454.

2987. Law Council *Submission 375*.

2988. Family Court *Submission 264*. Also see para 2.147–2.240 on education and training for judges.

## **Issues in case management in the Family Court**

8.200. In DP 62 the Commission raised a number of concerns regarding the case management practices in the Family Court. The recurring theme in discussion of the Court's processes and case management was the need for flexibility within the system to allow it to identify and adapt to the specific needs of individual cases.

The case management system in the Family Court is a good process and the steps with it are appropriate *provided you can step in and change them according to the individual needs of each case.*<sup>2989</sup> (Emphasis added.)

It was the inability to change steps, to be exempt from or modify processes, which was and remains the consistent criticism of current practice.

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<sup>2989</sup>. Legal Aid ACT *Consultation* Canberra 27 September 1999.

8.201. The Commission's case management proposals in DP 62 were directed at a number of the identified problems in the Court. The proposals aimed to ensure consistent oversight of cases; flexible, less standardised processing; or at least more flexible delivery of processes; such that orders or processes could be customised as appropriate for particular cases; and to engender accountability within the Court.

8.202. The Commission suggested that registrars be assigned cases which they continue to manage until finalisation. The Commission envisaged registrars associated or 'teamed' with particular judges and able to refer intractable, complex or urgent cases to the judge as required. The proposal was described as a type of modified, docket arrangement. Unfortunately this term, in the federal context, invited unintended comparison with the Federal Court's individual docket system and of the two courts' different caseload volumes. It created attendant anxiety for some Family Court judges of an increased workload.

8.203. In response to the Commission's proposal, the Family Court stated that

all relevant case management experts, including Dr Maureen Solomon and Professor Ian Scott, are agreed that a docket system cannot work in the Family Court.<sup>2990</sup>

Dr Solomon told the Commission

I confess to being in the dark about the view attributed to me that individual or team dockets cannot work in the family court setting. The only possibility would be some specific response to a specific problem posed to me during discussions with the group from [the] family court ... My engagement with the court was for a single day's seminar and no written report. Individual dockets work quite well in many US Family Courts.<sup>2991</sup>

8.204. The Commission's research on case management in family matters in several Canadian and US courts provided examples of effective, working, docket management systems in family jurisdictions.<sup>2992</sup> The term refers to a calendaring arrangement in which particular 'dockets' or caseloads are assigned to particular judges and/or registrar equivalent officers.

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2990. Family Court *Submission 348*; A Nicholson 'The case for the defence' *Australian Financial Review* 3-September 1999.

2991. M Solomon *Correspondence* 28 November 1999. Professor Scott's response also indicated a lower level of involvement than was implied by the Court's comments

I have helped the Family Court from time to time but I am not familiar with the details of their systems as they exist at present, therefore, I am not in a strong position to evaluate comments that may be made about their strengths and weaknesses: I Scott *Correspondence* 24 November 1999.

2992. New York City Family Court; Superior Court of New Jersey, Passaic County Family Court; Ontario Supreme Court of Justice, Toronto registry; Supreme Court of British Columbia, Vancouver and New Westminster registries.



8.205. An example of this approach to case management is that taken by the New Westminster Registry of the Supreme Court of British Columbia. Contested family law cases are assigned to a master or judge on the filing of the first contested notice of motion. Case management is focussed on a litigation plan which requires the parties to set an early trial date, explore avenues of settlement short of trial and to bring all interlocutory applications before the assigned judge or master.<sup>2993</sup> The assigned judge is not the trial judge. An evaluation of the project found that it was 'moderately' successful in reducing the number and complexity of chamber (interlocutory) applications.<sup>2994</sup>

8.206. In the Superior Court of Justice, Ontario,<sup>2995</sup> the Toronto registry is conducting a case management pilot by which cases are allocated to judges who have responsibility for the duration of the cases.<sup>2996</sup> The intention is to expand the system province wide, if successful.<sup>2997</sup>

8.207. In docket management systems, judges do not always individually manage and adjudicate such cases, but are available to have matters referred by masters, magistrates or registrars, who, in the first instance, take ongoing responsibility to manage the docket cases. For example, in the New York City Family Court, cases assigned to one of four divisions within the Court, remain the responsibility of the same judge and staff of that division.<sup>2998</sup>

8.208. Other jurisdictions do not employ a system of continuous management, but judges are involved in early case events, such as intervention hearings to identify matters in dispute and facilitation processes appropriate to the case. For example, in the Supreme Court of British Columbia, Vancouver, an early intervention hearings program involves the assignment of one judge each day to meet informally (for 45 minutes) with litigants and counsel in six family law cases. While an evaluation of the program has not been undertaken, the Court has heard that the effect on the parties of a judge's comment on the issues in dispute has been to assist many parties to gain a more realistic understanding of what to expect

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2993. Under the project, masters and judges perform the same functions, except with respect to the granting of final orders which must be carried out by a judge.

2994. Currently one judge and one master are occupied almost exclusively with project files. In 1998, they case managed 756 files and to 30 November 1999, the figure was 606 files: Justice B Preston, Supreme Court of British Columbia *Correspondence* 3 December 1999. There are plans to expand the project province wide: Justice B Preston, Supreme Court of British Columbia *Correspondence* 12 November 1999.

2995. Formerly known as the Ontario Court (Provincial Division).

2996. This scheme is to be expanded, in addition to other major changes in the jurisdiction such as the introduction of Unified Family Courts.

2997. All case management initiatives in Ontario are affected by the current structural changes including the expansion of 'unified family courts': Chief Justice LeSage 'Report on the Ontario Court (General Division) upon the opening of the Court of Ontario for 1999' *Speech* 6 January 1999 <<http://www.ontariocourts.on.ca/scj.htm>> (22 September 1999).

2998. New York State Unified Court *Family justice program* <[ucs.ljx.com/famjst.html](http://ucs.ljx.com/famjst.html)> (14 October 1998).

from the Court, enabling them to better review their own positions and to be open to considering other modes of resolution.<sup>2999</sup>

8.209. Case management systems should engender accountability within courts and tribunals, encouraging optimal, efficient working practices. This was a further reason for the Commission's case management proposals. One problem with present case management in the Family Court raised with the Commission is that inefficient practices can be hidden and judges or registrars have few incentives, other than their own sense of professionalism, to manage their caseloads effectively. Cases generally are overlisted and allocated on the day to the judicial officers and registrars available to hear the matters. Judges who are very efficient in dealing with their own list may be 'rewarded' by inheriting cases not reached by less efficient judges. A former judge of the Family Court, Tony Graham QC, noted

I frankly love the docket system ... At the present time, with case management systems, you have these bureaucrats who are giving you cases to do, and organising you. And they're organising judges who have spent their life in the law, and they know how the system runs. But I like the [docket] system because it means that if you are efficient, and if you're hardworking, then the results of that will be seen. And the people who are less efficient can be helped. So I'm all in favour of the docket system ... If you had your docket system running, and you had your own list, then you could do it at your own pace, and you wouldn't get that crooked handball to a stationary person. You would have some control over the way you're handling cases. In other words, if you did have a case that lasted for seven or eight days, you'd be able to say, 'Well now it's time I had half a day off to recharge the batteries', instead of going in there and finding that half a day's taken by you being given a case from some other list.<sup>3000</sup>

8.210. Case management arrangements require close attention to court caseloads and resources. A major concern of the Court in relation to the Commission's proposals in DP 62 concerned the ostensible discounting of the Court's caseload. In DP 62, the Commission cited a caseload of 36 106 for 1997-98, comprising applications for final orders (Form 7) and consent orders (Form 12A).<sup>3001</sup> The Court stated the figure should be 64 485 for 1997-98, or 64 903 for 1998-99. The Court's figure included contested and consent applications, parenting plans and Full Court appeals, and counted all interim applications as additional matters.<sup>3002</sup> Such matters are part of the work of the Court, but not necessarily the work

2999. Justice R Collver, Supreme Court of British Columbia *Correspondence* 19 November 1999. The early intervention occurs upon the filing of a defence, answer or counter petition and does not affect the rest of the case management process of the court. However, it should be noted that except for emergency applications, no applications in contested matters are heard if the early intervention meeting has not taken place: 29 December 1995 Practice Direction, Supreme Court of British Columbia. The program is continuing.

3000. T Graham 'Law report', *transcript* 31 August 1999 at <<http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s48019.htm>> (1 September 1999).

3001. ALRC DP 62 para 11.15, table 11.1.

3002. Family Court *Submission* 348.

associated with case management.<sup>3003</sup> Interim applications comprise case management work for the Court, but if all courts counted such in their caseloads, all court figures would be significantly higher than currently reported. The Family Court comparison of their 104 864 applications for divorce, final orders, consent orders and interim orders filed in 1997-98 with the Federal Court's 3496 matters filed in same year<sup>3004</sup> is, in this context, a misleading comparison. If the Federal Court's interlocutory hearings were included, their figure would be considerably higher than 3496.

8.211. The Commission entirely agrees that assessment of case management options requires full assessment of both judge and registrar work. The Commission argues that a more accurate calculation of the workload for case management purposes is 27 595 matters in 1998-99, calculated using the Court's figures. The cases included in the Commission's calculations for these purposes, and the number of such cases before the Court in 1998-99, are set out in the table below. It is noted that some parties may file applications in more than one of the categories identified.

**Table 8.3. Family Court caseload for 1998-99<sup>3005</sup>**

<b>Application</b>	<b>No. of filings</b>
final orders (Form 7)	21 285
maintenance (Form 12)	1 774
appeal from court of summary jurisdiction	193
reviews of decisions of Judicial Registrars and Registrars (Form 44)	466
enforcement summons – child support	98
enforcement summons	500
contempt – s 112AP	74
contravention of order	348
contravention of child order	1 765
child support application/appeal (Form 63)	1 003
appeal from decision of Child Support Registrar (Form 64)	47
Child Abduction Convention matters	42
<b>Total</b>	<b>27 595</b>

3003. All courts, in providing figures on caseloads to the Productivity Commission, discount work that is essentially administrative – such as bankruptcies in the Federal Court. The Commission would argue that divorce and consent applications in the Family Court fall into this category. For discussion of the work of the Productivity Commission, see para 1.40.

3004. Family Court *Submission* 348.

3005. Family Court *Submission* 348.

8.212. The Commission's recommendations with respect to case management would require implementation by the Family Court, given the autonomous nature of federal court operations in Australia.<sup>3006</sup> The Commission's analysis and the result of our research and consultations are intended to assist the Family Court, as with other federal courts and tribunals, in their reform endeavours on case management. Accordingly, the following discussion is organised by reference to particular themes raised in our inquiry.

### **Effective case events**

8.213. The Family Court's current case management system schedules a series of case events, namely directions hearings, conciliation conferences (for financial matters), conciliation counselling (for children's matters) and prehearing conferences. Interim or procedural hearings are held to resolve matters arising during the case. Compliance conferences are held shortly before a hearing where one or both parties has not complied with directions.

8.214. Comments made to the Commission indicated that some of these events are ineffective at narrowing or resolving issues or advancing the matter for trial. The most common event, the directions hearing,<sup>3007</sup> is intended

to assist the proceedings toward a timely and appropriate resolution. This is done by the registrar obtaining information from the parties, facilitating settlement discussions and making ... directions for the progress of the case.<sup>3008</sup>

8.215. Directions hearings are generally the first case event. Subsequent directions hearings provide a deadline that may prompt parties and practitioners to action. On the Commission's data, 51% of settlements were recorded at directions hearings,<sup>3009</sup> reflecting the efficacy of earlier counselling and/or inter-party negotiation. Given the size of the lists, the directions made are largely routine. Where practitioners have several cases in the same list, they attend to their other cases as well. The majority of comments to the Commission argued that directions hearings themselves provide limited scope for addressing the issues in the case.

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3006. See ch 1.

3007. In the Commission sample of 981 applications for final orders, 885 attended at least one directions hearing. The most commonly held case events were directions hearings (1158 were held) and interim hearings (750 held): T Matruglio & G McAllister, Family Court Empirical Report Part One, 39-40.

3008. Family Court case management guidelines para 2.2. In a survey response, the Commission was told

The registrar on the first date was realistic and assisted both parties to be more realistic: Family Court case file survey response 357 (solicitor for the applicant).

3009. T Matruglio & G McAllister, Family Court Empirical Report Part One, 49.

[D]irections hearings ... are not a meaningful event any more and don't do anything: they are just a formality. They should be handled internally through the court administration.<sup>3010</sup>

Directions hearings are a waste of time and money — they never settle anything. There is no time to discuss the case (because the lawyers have to be back in Court for their other cases in the list) and there are no adequate facilities in the Court in Canberra to discuss settlement, and there is no information available — so practitioners just go through the motions.<sup>3011</sup>

The directions hearing is not an event, just a formality. There are 4 per half hour.<sup>3012</sup>

Attempts at conciliation at a directions hearing are hopeless. You are just pushed along the road a bit.<sup>3013</sup>

8.216. It was argued that telephone, fax or email could be used for directions hearings.<sup>3014</sup> This now occurs in many other courts and tribunals.<sup>3015</sup> Any such development would need to take account of the presence in this jurisdiction of a

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3010. Qld Law Society Family Law Committee *Consultation* Brisbane 21 September 1999.

3011. Family law practitioners *Consultation* Canberra 2 September 1999.

3012. Law Society of SA Family Law Committee *Consultation* Adelaide 6 August 1999.

3013. Law Society of NSW Family Law Committee *Consultation* Sydney 17 November 1999.

3014. Family law practitioners *Consultation* Canberra 2 September 1999; Law Society of NSW Family Law Committee *Consultation* Sydney 17 November 1999.

3015. See para 6.42; ALRC DP 62 para 9.57–9.75; ALRC Issues Paper 23 *Technology – what it means for federal dispute resolution* ALRC Sydney 1998 (IP 23), para 5.5–5.15.

number of unrepresented parties, and perhaps practitioners, who by reason of inexperience or for tactical reasons, might misuse the power to contact the Court by such means. In a recent case the Full Court of the Family Court deplored

the tendency for people to believe that it is an appropriate way to communicate with courts, or this court at least, by sending facsimile transmissions to the registrar in the belief that they will come to the attention of the trial Judge. Ordinarily speaking, that is not a proper way for any litigant to seek to communicate with the court. Whilst it is appropriate to communicate with the registry about procedural matters in that fashion, no doubt, it is not an appropriate way for a litigant, whether represented or unrepresented, to seek to communicate with the judge who is to hear the case.<sup>3016</sup>

8.217. A pilot scheme in the Parramatta Registry called Integrated Client Services (ICS) is set to improve the utility of the first case event by providing a diagnostic approach to the dispute. A case conference is held immediately after the information session to explore the possibility of settlement and to consider what PDR procedures might be useful. The conference is managed by a registrar and counsellor, and provides an opportunity to identify issues, settle the case or make directions to enable it to progress. It allows PDR to be tailored to the case, not scripted as a routine process.

8.218. An early review of the pilot gave qualified support to the scheme,<sup>3017</sup> and subsequent improvements have enhanced the workings of the scheme.<sup>3018</sup> The Court has said in its annual report that it intends to introduce this system in all registries.<sup>3019</sup>

8.219. The Commission received few comments on ICS, but most supported the use of the case conference, although with some reservations about the resource implications.<sup>3020</sup>

The Integrated Client Services scheme is a valuable attempt to take advantage of the suitability of most family law matters to early categorisation. It has benefits for clients in reducing the number of court attendances required. However, it is a very time consuming process for practitioners and would add to client costs in those matters which don't settle. The Court has to be sensitive to the needs of practitioners and ensure that there aren't unreasonable demands made on their time, which is disruptive to their practices and adds to legal costs for clients. There is not currently any publicly available information on the impact of the scheme on the number of matters settling at an early

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3016. *Buljubasic & Buljubasic* [1999] (1999) FLC ¶ 92-865, 86,221 (Lindenmayer J).

3017. Kearney McKenzie & Associates Final Report 'Evaluation of integrated client services pilot' *Unpublished* Family Court Canberra March 1998.

3018. Family Court judges *Consultation* 21 December 1999; Family Court *Consultation* 14 September 1998.

3019. Family Court *Annual report 1997-98*, 21.

3020. Law Society of NSW Family Law Committee *Consultation* Sydney 22 September 1998; Legal aid practitioners *Consultation* Sydney 14 September 1998; Family Court registrars and staff *Consultation* 14 September 1998.

stage. There should be monitoring of the success of the scheme together with ongoing research to assist in identifying the features that distinguish a matter likely to settle from a matter likely to proceed to a hearing.<sup>3021</sup>

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3021. National Legal Aid *Submission 360*.

### *Requirement that parties attend*

8.220. In 1991 the Family Court introduced the requirement that

the parties, wherever possible, should attend on the first return day and at the prehearing conference as well as at the conciliation conference ... the parties will be required to attend an information session at the Court prior to the first return day if they have not already done so prior to the commencement of proceedings.<sup>3022</sup>

The Court's annual report for 1991–92 described this requirement as 'one of the most successful, and most controversial aspects of the Guidelines so far', stating that 'these measures have significantly increased the number of settlements reached on the first directions hearing'.<sup>3023</sup>

8.221. This requirement has continued to be controversial, and its success is open to some doubt. Parties are normally required to attend an information session, conciliation counselling in children's cases, and all case events including directions hearings.<sup>3024</sup> While it is well recognised that parties need to attend events such as conferences, practitioners told the Commission that parties find the requirement to attend directions hearings expensive, confusing and stressful.<sup>3025</sup> One third of the parties in the Commission's sample were required to attend Court for at least five case events, in addition to an information session and, for matters involving children, conciliation counselling<sup>3026</sup> – a substantial cost in terms of work time lost and child care arrangements.

Requiring a party to go to: information session, first directions hearing, Conciliation Conference, counselling (if ordered), prehearing conference [causes] enormous inconvenience and cost to a party. Simple solutions are ignored by the court. For example, why isn't an information session video available for parties to watch? Most parties take a day off work to attend court. Most are now saying that they will lose their jobs if they take more time off.<sup>3027</sup>

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3022. Family Court *Annual report 1991–92*, 4.

3023. *ibid.*

3024. Family Court case management guidelines para 1.9(1)(a); 2.2–2.4; 7.3; 8.3.

3025. Practitioners commented that

[r]equiring parties to attend was an attempt at remedying the old problem of clients not knowing how the case was progressing. Now they are over-involved in all the interlocutory stages ... Clients are not feeling they are part of the process. The process costs too much, they are required to go to everything, which causes delay ... The Court finds it critical that clients know what is going on and this is dealt with by having them at everything. Clients should be relieved from being there: Law Society of SA Family Law Committee *Consultation Adelaide* 6 August 1999.

In the Newcastle registry there is no room for all the clients who are required to turn up to directions hearings, and no facilities to negotiate anyway: Law Society of NSW Family Law Committee *Consultation Sydney* 17 November 1999.

3026. See para 8.48 table 8.1.

3027. Family Court case file survey response 220 (solicitor for the applicant).



8.222. Practitioners told the Commission that, while directions hearings are routine for the lawyers and Court officers, they are extremely stressful for parties.

Clients get all psyched up [for directions hearings] and absolutely terrified, even if you tell them nothing will happen ... It is costly and difficult for clients to have their attendance [at a directions hearing] excused, and the Court is hard on them if their

attendance is not excused. Clients get nothing from directions hearings ... The registrar says things like 'I will make standard orders 1, 2, 3, 4' and the client has no idea what that means ... I would like the Court to re-evaluate clients having to turn up to everything ... Every time they add these steps, the parties have to pay more money.<sup>3028</sup>

8.223. The requirement that parties attend all case events is modified for those in remote areas or who for other reasons have difficulty getting to the Court building. The Court's video conference facilities are used in regional centres and are set to be expanded.<sup>3029</sup>

8.224. Much of the discontent with the requirements of party attendance concerns the number of occasions parties attend Court and the efficacy or otherwise of that attendance. The requirement for attendance could be modified to apply only to certain significant events. Alternatively, the timing of case events could be made more flexible — for example, information sessions could be arranged outside standard work hours. Case events also could be revised and consolidated so they are of more significance for parties. The Commission understands that reform proposals currently being developed within the Court seek to address some of these issues<sup>3030</sup> (see paragraphs 8.251; 8.255–8.256).

### **Lack of flexibility or continuity in case management**

8.225. The Commission was also told by many practitioners and parties that the organisation of case events and processes is too prescriptive.<sup>3031</sup> It was said that 'the matters are fitted to the Court and not the Court to the matters',<sup>3032</sup> that 'the process is too sophisticated for most cases ... there are too many processes'.<sup>3033</sup> The Law Council argued 'the perception of over servicing' derives from 'the number of interlocutory processes and the degree of case management'.<sup>3034</sup> Some practitioners referred to an inflexible approach that added to the costs for parties. The following anecdote was typical.

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3028. Family law practitioners *Consultation* Canberra 2 September 1999.

3029. Family Court *Submission* 348.

3030. Family Court judges *Consultation* 21 December 1999. Parties are no longer required to attend the first directions hearing in the Family Court of Western Australia: Family Court of WA judges *Consultation* 23 September 1999.

3031. For example

One of the major deficiencies of the Family Court's differential case management system is that there isn't sufficient differentiation, or sufficient management, of cases in the system. As all matters are sent through the same processes, it can't really be said that they are being managed at all: National Legal Aid *Submission* 360.

This point was also made by: Victoria Legal Aid *Consultation* Melbourne 26 September 1999; Law Society of SA Family Law Committee *Consultation* Adelaide 6 August 1999; Law Society of NSW Family Law Committee *Consultation* Sydney 17 November 1999; Qld Law Society *Consultation* Brisbane 22 September 1999.

3032. Family law practitioners *Consultation* Sydney 25 August 1998.

3033. Law Society of SA Family Law Committee *Consultation* Adelaide 6 August 1999.

3034. Law Council *Submission* 197.

I had a client who took a day off work for the directions hearing, and her sister came too for support. The other party and solicitor did not turn up, and I rang the solicitor, who said he had forgotten. He and I agreed we were ready to proceed straight to the conciliation conference, but the registrar would not allow this. The registrar insisted on adjourning the directions hearing because it's in the rules that both parties and solicitors must be there. He said my remedy was an order for costs. I did not want to seek this as it would jeopardise our ability to negotiate, for the sake of about \$300.<sup>3035</sup>

8.226. The Commission also was told of parties being required to attend repeated counselling or other PDR events where one party was intransigent,<sup>3036</sup> or there had been extensive unsuccessful negotiation,<sup>3037</sup> more information was required for further progress, or the issue was one that was unsuitable for repeated counselling.<sup>3038</sup> A number of comments to the Commission expressed concern at what was described as 'the lack of real choice' in engaging in PDR processes.<sup>3039</sup> As noted, the requirement to attend certain PDR events is contained in the Family Law Act as well as in the case management guidelines (see paragraph 8.60–8.61).

8.227. Submissions and comments argued that referral to PDR processes should be better tailored.<sup>3040</sup> In response, the Court noted

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3035. Law Society of NSW Family Law Committee *Consultation* Sydney 17 November 1999.

3036. For example

I had arranged on three occasions for both of us to undergo Court Counselling via phone link-up from my end. The Court then on one occasion ordered us to undergo Court Counselling prior to any orders being made for contact, however, on all four occasions my ex-wife was unwilling to undergo such counselling ... therefore counselling was unsuccessful in every sense ... I believe Court Counselling, or Dispute Resolution, should be compulsory prior to court hearings in the Family Court, however, how do you get someone, like my ex-wife, to talk and be fair at any such counselling?: J McCallum *Submission 187*.

3037. For example

Feedback from many of the Court's clients has been that each time they attended a court hearing (even if it was only for procedural directions) they received a new referral to PDR. In practice this can mean that time and time again the same family sit through another 'first session' approach without appropriate follow-up. Effective PDR requires time, no matter how skilled the practitioner is. Rushed agreements without in-depth assessment and the opportunity of appropriate follow-up may not last: Australian Psychological Society *Submission 163*.

3038. For example

Why waste the clients' time with more PDR [after one or two unsuccessful sessions]? They need a decision. This [system] is just bullying clients into settling: Law Society of NSW Family Law Committee *Consultation* Sydney 22 September 1998.

3039. Women's Legal Service Brisbane *Submission 218*. Similar comments were made by almost all practitioners or legal assistance bodies dealing with the Family Court who commented to the Commission on the use of PDR.

3040. For example

It is the view of National Legal Aid that to a significant degree, parties are well able to [assess] their own suitability for PDR processes ... It is considered desirable to make the referral to the Primary Dispute Resolution Process at the earliest opportunity in the Court process. If the Court were to undertake this, then there are numerous options available, and one would include a pre-filing information questionnaire to be completed by possibly

An assessment of whether the parties are disposed to, or appear to have the capacity to, settle their dispute is not without its difficulties and where possible the Court makes this assessment. However, experience suggests that many cases are resolved where resolution appears unlikely and it is usually considered to be worth trying particularly where the issues remaining in dispute seem outweighed by the litigation costs. Cases are not in practice sent off for further PDR where it is clearly hopeless. The fact that with hindsight it has been unsuccessful in certain cases must be measured against success rates.<sup>3041</sup>

8.228. The Commission's consultations noted that in some registries there was an ability to adapt the system to individual cases.<sup>3042</sup> Such local variations should be encouraged if they work effectively. As Professor Ian Scott noted of local variations, this provides opportunities to see and test innovations.<sup>3043</sup>

8.229. The Court's formal response noted the extent of problems that arose previously in the absence of a structured case management system.

The perception of over servicing is rather empty unless compared with the situation prior to case management. When the parties and practitioners were in control of the running of the cases, delays were measured in multiple years, adjournments without reason were abundant and there was considerably more dissatisfaction among litigants. For example, the delay in Sydney was 4 years and 10 months. In these circumstances children's situations changed and the real estate market was volatile so that numerous interlocutory applications were brought. Some practitioners preferred the previous system because the Court did not question the pace at which they proceeded, nor were they exposed to criticism by the Court in front of their clients.<sup>3044</sup>

8.230. Lack of continuity in the management of cases was a related concern raised with the Commission by lawyers and litigants. Parties encounter a number of different Court officers presiding at successive appearances.<sup>3045</sup> This can require

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counter staff at the Family Court, or by solicitors acting for parties filing applications, and this assessment could be based on a standard interview or questionnaire ... It is considered possible to have a set of referral principles and standards, and suitability criteria developed, but again National Legal Aid would suggest that such a referral criteria should contain some flexibility in all cases, other than ones where there is a history which would suggest that a child is at risk of abuse or harm: National Legal Aid *Submission 217*.

3041. Family Court *Submission 348*.

3042. For example

The ACT has a good Family Court [registry] ... [The judge] has done a fantastic job. He tailors proceedings to suit the individual cases and orders early family reports [when necessary]: Legal Aid ACT *Consultation Canberra 27 September 1999*.

3043. I Scott *Consultation 20 January 2000*.

3044. Family Court *Submission 348*.

3045. For example

Every time you go to court there is a different judge. We have had the same judge a couple of times, but most of the time we have a different judge or magistrate, or registrar: Confidential interview *Consultation Macquarie Legal Centre Sydney 6 July 1998*.

them to repeat their story a number of different times. The problem is compounded if the family also has contact with the State courts or welfare services.<sup>3046</sup> Further, where a different person presides at each event, a different view may be taken of the case at each event, resulting in inconsistent directions and a need for further case events.

Cases heard in the Family Court appear to be fragmented in that there is no continuity before the same person on the bench at each appearance, the person presiding has no knowledge of the nuances of the particular proceedings, has not read the material placed before them in affidavits, and conflicting rulings in the same matter can and have been handed down ... Users of family law proceedings expect that their dispute will be

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3046. For example

Continuity of care and assistance is important in the family jurisdiction as people are often travelling between the children's courts, magistrates' courts and the Family Court: Court Network *Consultation* Melbourne 8 September 1999.

heard in front of the same judicial registrar each time. Repeatedly we hear complaints that for each appearance there was a different person on the bench ... This fragmentation rankles many litigants ... Surely a person can expect a matter to proceed and all evidence be heard with continuity, which does not currently occur.<sup>3047</sup>

8.231. In some of the smaller registries, continuity is achieved in practice because there are only one or two judicial officers.

Since January 1994, I have used something very like a differential case management system. Once you identify the difficult or intractable cases, they are assigned to the judge. This way you maintain continuity and [parties] can't keep changing the story. The list for hearings at Dandenong is always around 1100.<sup>3048</sup>

8.232. The Court has recognised that the current case management guidelines construct the process as a series of critical events, and problems can arise relating to the 'gaps' between such events.<sup>3049</sup> Draft reforms currently under preparation within the Court seek to address the issue of continuity in management (see paragraph 8.255–8.256).

## Compliance

8.233. Non compliance with procedures, rules and directions generates considerable frustration for judges and other Court officers, practitioners and litigants. The Court, practitioners and litigants may differ in their views about the causes and who is responsible for the problem, and what should be done to address it. There is general agreement, however, with the view that there is 'a culture of non compliance' in the Family Court.<sup>3050</sup>

Non compliance is endemic in the Family Court. Directions should be renamed 'suggested course of action, if you feel like it' ... The present system, which limits sanctioning to contempt applications, does not address urgent non compliance [issues].<sup>3051</sup>

Non compliance can delay settlement, add to costs and repeat case events and can be used as a weapon to frustrate and exhaust the resources of the other party.

### *Responsibility for non compliance*

8.234. While there was general agreement that non compliance presents a serious problem in the Family Court, the Commission was told that in some registries there are fewer such problems because of local, cooperative legal cultures, in which

3047. Family Law Reform and Assistance Association Inc *Submission 157*.

3048. Family Court judges *Consultation 9 September 1999*.

3049. Family Court judges *Consultation 21 December 1999*.

3050. Compliance Committee report in Family Court *Submission 348*.

3051. ACT Bar Association family law practitioners *Consultation Canberra 28 September 1999*.

practitioners and the Court work effectively together and focus on issues in dispute.<sup>3052</sup>

8.235. Practitioners emphasised the need for the Court to take steps to identify non compliance and enforce its orders and directions, stressing the effects on their clients when the other party fails to comply with requirements.

At present it is possible for one party to deliberately exhaust the other party's funds and non compliance is a problem — this is the responsibility of the Court.<sup>3053</sup>

It is notorious that parties are often frustrated by continual breach of procedural and other orders resulting in multiple adjournments. It is desirable that powers of registrars or the Court be revised to make appropriate orders short of contempt proceedings, and the formality and strict onus necessary for same. It is not considered that ultimate costs consequences are adequate in the case of continued delay by dilatory conduct of a party. Such delay is not consistent with, and frequently contrary to, the goals and duties of the Court.<sup>3054</sup>

I have had cases where one party said through an agent that they would file documents and they didn't, and at the next directions hearing the registrar said you must file it, they promised to file, and still didn't. The Court kept giving him one more chance — it went up to 12 court events before the Court grasped the nettle and did something. Even then it was not effective: the Court made costs orders, but this was ineffective and pointless [as the father had no money]<sup>3055</sup>

Case management issues become very difficult where the Courts do not use their enforcement powers. In the experience of the writers, where there has been non compliance with orders, the sanctions for non compliance are often nugatory. The systems in place for enforcement of orders are under utilised and seemingly powerless. There is a need for a real sanction both for the recalcitrant individuals involved, but also for general community compliance and acceptance of the authority of the Court.<sup>3056</sup>

Some pointed to a link between non compliance and the lack of continuity of management.

The problems of unsanctioned abuse of process might be solved by having a hearing at the start by a judicial registrar to make interim orders, and have a registrar carry the case

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3052. Family law practitioners *Consultation* Canberra 2 September 1999; Family law practitioner *Consultation* Parramatta 7 September 1998; Legal practitioners *Consultation* Albury 2 December 1998; Family law practitioners *Consultation* Darwin 7 October 1999; Family Court staff *Consultation* 7 October 1999.

3053. Victoria Legal Aid *Consultation* Melbourne 26 August 1999. In one NSW case a party failed to comply with the same order to file documents at 12 consecutive case events before the Court made a costs order against the party: Law Society of NSW Family Law Committee *Consultation* Sydney 17 November 1999. Others making similar points included ACT Bar Association family law practitioners *Consultation* Canberra 28 September 1999.

3054. ACT Bar Association *Submission* 370.

3055. Law Society of NSW Family Law Committee *Consultation* Sydney 17 November 1999.

3056. National Council of Women of Australia *Submission* 347.

throughout, rather than the current system of having half a dozen different court officers involved in the succession of case steps.<sup>3057</sup>

8.236. In its formal submission and other comments to the Commission, the Court blamed practitioners for non compliance.<sup>3058</sup>

The need for adjournments caused by parties being unprepared would be much reduced if the practitioners involved provided their clients with proper representation.<sup>3059</sup>

Comments by judges of the Family Court of Western Australia made similar observations.

The lawyers are to be blamed for the lack of preparedness of cases and the multiplicity of events per case. Attempts to resolve the case are done at far too late a stage and efforts need to be made to bring this to the front of the process.<sup>3060</sup>

Lawyers are the most strident critics of the Court and not enough focus has been placed in the DP on the problems that lawyers cause.<sup>3061</sup>

#### *Family Court Compliance Committee*

8.237. The Family Court established a Compliance Committee, whose report was provided as part of the Court's submission on DP 62.<sup>3062</sup> This Committee acknowledged 'a culture of non compliance associated with the Court' and identified Court practices that were regarded as contributing to this culture.<sup>3063</sup> The Compliance Committee recommended that the profession be consulted before any changes are made to the current requirements.

8.238. The Compliance Committee's recommendations included the following.

- Rename directions 'procedural orders' and directions hearings 'procedural hearings' to emphasise that they are to be taken seriously by parties.

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3057. Family law practitioners *Consultation* Sydney 14 September 1998.

3058. Family Court judges *Consultation* 23 September 1998.

3059. Family Court *Submission* 348.

3060. Family Court of WA judges *Consultation* 23 September 1999.

3061. *ibid.*

3062. Family Court *Submission* 348.

3063. The Court was said to have encouraged the culture of non compliance by

- doing nothing to dispel the commonly held view that a procedural direction is something less than a Court order
- remaking or extending the time for compliance with orders which have been breached
- fixing unrealistic times for compliance
- establishing events which contemplate non compliance (such as compliance check mentions)
- being unwilling to enforce compliance: Compliance Committee report, attached to Family Court *Submission* 348.



- Unrepresented parties should be expected to comply with all procedural requirements, and compliance should be addressed in the Information Session and the kit provided.
- Generally, no specific event to be held for the purposes of confirming compliance: the parties to be responsible for complying and for taking action where the other party fails to comply.
- Preclusionary sanctions where a respondent fails to file documents within a specified time.
- Provision for a complying party to seek that the matter be listed for an undefended hearing or the application be dismissed where the other party has failed to comply.
- Consideration of costs orders for failure to comply. Where such orders are made, consideration of orders restraining that party from taking further steps until the costs have been paid.
- Revision of the prehearing conference and compliance conference events.
- A pilot project to assess the benefits of fixing trial dates only after the evidence in chief has been filed.<sup>3064</sup>

8.239. The Commission notes that the suggestion that parties take all responsibility for identifying and seeking remedies for non compliance may have some undesirable consequences. Some parties, especially if unrepresented, will have trouble identifying the compliance problem and the appropriate remedy. Others will pursue every point of non compliance, whether or not the progress of the case is affected. Compliance disputes could become another battleground for aggressive litigants.

#### *Issues in promoting compliance*

8.240. Sanctions for non compliance are important, but are not always enforceable. Adjournment may serve the purposes of the noncomplying party. Preclusionary sanctions which, for example, refuse to admit a document, may jeopardise the best interests of the child. This difficulty was recognised in comments made to the Commission.

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3064. *ibid.*

The problem [with compliance] is that the Court is a toothless tiger in children's cases. No matter how efficient the system, people will fail to comply, and there is no remedy.<sup>3065</sup>

Compliance is an enormous problem because you disadvantage the side who has complied — eg by adjourning the hearing date.<sup>3066</sup>

The Family Court is uniquely hobbled by the nature of the jurisdiction: non compliance by one party causes delay, which benefits that party in most cases. Therefore, striking the matter out of the list due to non compliance will further benefit the non-complying party to the detriment of the other party and the child.<sup>3067</sup>

There is no capacity for a judge to refuse to hear a case due to noncompliance with the forms, and consequently there is in effect a penalty for complying with the forms due to the costs of doing so.<sup>3068</sup>

Costs sanctions are not sufficient, and cannot deal with situations such as the frequent scenario of being served with affidavits at a hearing.<sup>3069</sup>

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3065. Family law practitioners *Consultation* Canberra 3 September 1999.

3066. Family Court of WA judges *Consultation* 23 September 1999.

3067. Family Court judges *Consultation* 28 September 1999.

3068. Victorian Bar Family Law Group *Consultation* Melbourne 23 August 1999.

3069. ACT Bar Association family law practitioners *Consultation* Canberra 28 September 1999.

8.241. The Commission considers it essential that the Family Court begin to address the matters that hinder development of a culture of compliance. As noted in chapter 6, case management systems appear to require some 'policing' by judges.<sup>3070</sup>

8.242. Much of the discussion above assumes that non compliance is generally wilful. However, the complexity of rules and procedures can also make compliance difficult.<sup>3071</sup> Consolidation and improvement of forms should reduce accidental failure to comply arising out of the complexity of procedures.<sup>3072</sup> The consolidation of case events also should reduce the likelihood of conflicting directions, and improve case preparation, as events will be seen to be more meaningful. One practitioner commented to the Commission that the new emphasis on non compliance within the Court could 'become distracting from the need to move matters through with the least disruption'.<sup>3073</sup> Another stated

There is no justification for formal rules that are mostly ignored and more importantly the breach of which are unlikely to visit strong consequences on the perpetrator. When the Court is dealing with, inter alia residence and/or contact of children, it is impossible for a Court to permit the failure to comply with forms or procedures to impact on the outcome of the case. No threats to do so can ultimately be permitted to interfere with natural justice relating to matters as dear to the heart of the community as one's children and one's assets.<sup>3074</sup>

8.243. Similar views have been expressed in other law reform contexts.

[R]ules of court should not be framed on the basis of imposing penalties, or producing automatic consequences for non compliance with the rules or orders of the court. The function of rules of court is to provide guidelines not trip wires and they fulfil their function most where they intrude least in the course of litigation.<sup>3075</sup>

8.244. In family jurisdiction, non compliance clearly derives from a number of different factors, and solutions need to address these squarely. One problem identified by the Court is a lack of competence, diligence and cooperativeness on the part of some legal practitioners. Many lawyers undertaking family litigation are inexperienced in this jurisdiction. It is not clear from the Court's comments

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3070. See para 6.16–6.19; I Scott *Consultation* 20 January 2000.

3071. The Commission was told

If compliance with the forms was insisted on, no case would ever be heard as the requirements are too onerous: Victorian Bar Family Law Group *Consultation* Melbourne 23 August 1999.

3072. The Court is currently examining ways to improve its forms and procedures through the work of the Future Directions Committee and the Forms sub-committee. See para 8.73; 8.250–8.256.

3073. Law Society of NSW Family Law Committee *Consultation* Sydney 17 November 1999.

3074. N Ackman *Submission* 289.

3075. *Note of Reservation to the Report of the Committee on personal Injuries Litigation* Cmnd 3691 (1968) 151–152, para 2, quoted in M Zander 'Reports: The Government's plans on civil justice' (1998) 61–(3) *Modern Law Review* 382, 388.

whether it is these novice lawyers or specialist, experienced lawyers who are the problem. The solution would vary in these instances. The Commission's recommendation in chapter 3, that legal professional associations set up mentoring arrangements in family jurisdictions, could assist with non compliance which derives from lawyer inexperience.<sup>3076</sup> If the fault is with experienced practitioners, this might be remedied by personal costs orders; complaints to disciplinary authorities and/or specialist accreditation bodies; consultation with professional associations or full discussion in user group meetings.

8.245. The Court also must look to its own processes and identify the circumstances and causes of non compliance and whether compliance can be improved by consistent case management arrangements with flexible, customised processes and orders – in short the Court's prescriptive, elaborate, standardised processes may be part of the problem. These issues do not appear to have been addressed by the Court's Compliance Committee, but are part of the Court's Future Directions brief.

8.246. Another issue related to the problem of non compliance concerns certain vexatious or relentless litigants who use Court procedures to harass the other party.

Violence pays in Family Court proceedings – a bullying party can get results due to the inability of the system to stand up to them.<sup>3077</sup>

NLA supports greater use by the Court of its powers to sanction breaches of procedure, control litigation excesses and strike out vexatious claims. There appears to be a reluctance on the part of the Court to control proceedings in this way, which allows vexatious, generally unrepresented litigants, to use the Court process to further harass and intimidate their ex-partner.<sup>3078</sup>

8.247. The Family Court has the power to dismiss applications by such parties and prevent them from making further applications without leave.<sup>3079</sup> The Commission noted in DP 62 that before orders can be made under s 118 or O 40 r 6, the party seeking such orders must have responded to repeated Court applications that had no merit. For cases in which the pattern of applications falls short of vexatious, the options open to the Court are effective management of interlocutory and hearing procedures, costs sanctions, the use of s 118 to strike out specific proceedings where appropriate, or calling the matter on for hearing.

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<sup>3076</sup>. See rec 22.

<sup>3077</sup>. Women's Legal Service Brisbane *Consultation* Brisbane 20 September 1999.

<sup>3078</sup>. National Legal Aid *Submission 360*.

<sup>3079</sup>. Where satisfied that proceedings are frivolous or vexatious, the Court has power to dismiss proceedings; make orders as to costs; and, on the application of a party, order that the person who instituted the proceedings may not institute any further proceedings without leave of the Court: Family Law Act s 118. Such orders can be made on the application of a party or on the Court's own motion: Family Law Rules O 40 r 6. This issue was addressed in ALRC 73.

8.248. The Commission has previously recommended that the Court make more rigorous use of its powers under s 118.<sup>3080</sup> It was suggested that in considering making such orders the Court should explicitly take into account evidence of a history of domestic violence or harassment.<sup>3081</sup> In this context, the Court noted that

[i]t is also suggested [in DP 62] that the Court should in some cases make greater use of its powers to sanction breaches of procedure or strike out vexatious claims. This may well be true in some individual cases, but each case needs an examination to see whether this is fair comment. The Court is unlikely to be in a position to act of its own volition to strike out vexatious claims in the absence of an application, and the contention that it should have struck them out is often made after the event when there was no such motion during the trial.<sup>3082</sup>

8.249. The Court recently amended O 40 r 6 to provide a more detailed statement of the powers of the Court in relation to frivolous and vexatious proceedings.<sup>3083</sup>

**Recommendation 110.** The Family Court and its Future Directions Committee, in considering the recommendations of the Compliance Committee, should identify clearly the various causes, circumstances, processes and registries in which there is significant non compliance. The Future Directions Committee should distinguish between inadvertent and deliberate non compliance, and the range of solutions and responses required. Such measures in response to non compliance should avoid automatic sanctions. The Court should retain primary responsibility to initiate sanctions for failure to comply, and disallow frivolous or repetitious party complaints concerning failure to comply. Processes, procedures or forms that are unduly complex, or generate non compliance, should be identified and modified, or should be monitored on a continuing basis.

## **Case management proposals within the Court**

8.250. As stated, the Court's Future Directions Committee is developing proposals for substantial changes to the structure and content of case management events.

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3080. ALRC 73. Note that in the Federal Court it has also been suggested that the strict rules governing summary judgment should be relaxed where this would promote just disposal of a case: See para-10.120-10.124.

3081. Women's Legal Service Brisbane *Submission 218*.

3082. Family Court *Submission 348*.

3083. Family Law Amendment Rules 1999 (No 3) Statutory Rules 1999 No 279.

The Court's Trial Management Committee has recommended restructuring of the prehearing conference and compliance conference.<sup>3084</sup>

8.251. A proposal of the Future Directions Committee would replace the information session and first directions hearing with a single first return date event. This would include 'some or all elements of an information session, early settlement discussion, assessment of the needs of the case and formal directions'.<sup>3085</sup> If necessary, directions could be made at this point for counselling, conciliation conference, discovery or subpoenas, or referral to a judicial determination. This would answer many of the concerns raised in relation to the utility of directions hearings and the requirement that parties attend the first directions hearing. The model allows customised orders and appropriate interventions and appears to be a considerable improvement on the current first directions hearing.

8.252. The Trial Management Committee proposed that the prehearing conference be held earlier in the process than under the current guidelines.<sup>3086</sup> At the conference, orders would be made to prepare the case for trial – preparation of family reports, filing of affidavits, exchange of expert reports and conferences of experts. At this point, parties would be given an indication of a 14 day period within which trial dates would be allocated, and a Trial Management Conference fixed for one month prior to the approximate hearing time.

8.253. At the Trial Management Conference, the parties and, if possible, the judge who will hear the case (in standard track and complex track cases only), would finalise the trial plan. At this time all affidavit evidence and family and expert reports should be available. The judge would ensure directions have been complied with, and make further orders as necessary. Attendance at this conference would be optional for represented parties, but compulsory for their legal representatives and for unrepresented parties.<sup>3087</sup> In the Adelaide registry where a similar status conference has been added, parties were sceptical of the benefits of one more case event. The Court has indicated its intention to limit the number of case events, a reform the Commission continues thoroughly to commend.

**Recommendation 111.** The Family Court should adopt the Future Directions Committee's proposal that the Court replace the current first directions hearing with a case conference as the first return date in all registries. In considering this proposal the Court should have regard to

- consolidation of case events where possible, to minimise the number of times parties and lawyers must attend Court

3084. Trial Management Committee report attached to Family Court *Submission 348*.

3085. Family Court 'Future Directions – Family Court of Australia' (draft proposals for discussion) *Unpublished* 5 November 1999.

3086. Family Court case management guidelines, ch 15.

3087. Trial Management Committee report, attached to Family Court *Submission 348*.

- early identification of the matters in issue
- ensuring the officer presiding at the case conference has discretion to make directions for any procedures or processes, including discovery or obtaining family reports, as well as referral to PDR processes.

8.254. The Future Directions Committee sees benefits in more flexible arrangements and case streaming 'according to particular case needs rather than the arbitrary length of a possible hearing'.<sup>3088</sup> One option under consideration is to extend the Magellan project for management of cases with allegations of child abuse or family violence. Another is judicial conciliation in a limited range of cases, to be piloted in one registry. The Committee is also examining whether it is desirable to expand the range of cases able to access a fast track for judicial determination of a discrete issue.

8.255. A major proposal under consideration by the Future Directions Committee is the introduction of staff teams to supervise and manage cases from commencement to finalisation. The Committee envisages the creation of a new position, caseflow manager, a person responsible for scheduling of events and liaising with legal practitioners, judicial officers and Court staff. This person would work with Court and judicial staff and undertake much of the paper-work of case

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3088. Family Court 'Future Directions – Family Court of Australia' (draft proposals for discussion) *Unpublished* 5 November 1999.

processing. It is envisaged that as far as possible, the counsellor and registrar to whom a case is initially assigned would conduct subsequent events in that case – enabling consistent case management.

8.256. Such a system is expected to provide a number of benefits, including: a more comprehensible procedure for parties; continuous oversight and management of cases; case events not dependent on the scheduling of court events; early identification of cases with particular problems or exceptional circumstances; and more effective use of staff resources. Streaming of cases could be accomplished in a more sophisticated fashion, attuned to the needs of particular cases under this system. It could take account of the particular nature and needs of individual cases, not simply the time required for trial.

8.257. The Commission's proposals on case management, which were the subject of harsh public criticism by the Family Court, derived from concerns for continuity, flexibility and early attention to the issues. These same concerns appear to motivate the proposals of the Future Directions Committee. The major point of difference is that under the Commission's model, more prominence was given to the need for judges to be seen to have authority over and be available for intervention in the interlocutory stages with respect to cases from a particular docket of cases of which they had oversight, and which they would determine if not resolved consensually. Even here, the difference may be limited. The Commission was told that registrars will be encouraged to refer complex, intractable or urgent matters to duty judges. The Commission therefore supports the general approach of the Future Directions case management proposals. These arrangements should likewise allow reconsideration of certain of the strictures associated with simplification and the problem areas for non compliance.

8.258. The Commission recommends that the Court limit the number of events, processes, forms and formalities, seek genuine simplification of processes, and implement varied options for routine and complex cases. Routine cases should not be over-managed or over-formalised. Complex or intractable cases should not be permitted to generate repeat interim applications without reference of such matters to a duty judge. As discussed below, there are deficiencies in the Court's computer system which need to be remedied if reform is to be successful.

**Recommendation 112.** The Family Court should implement the Future Directions Committee's proposal to develop the process of streaming cases according to their needs. In considering this proposal, the Family Court should ensure that the guidelines provide sufficient flexibility, and attention to the needs of a particular case, so that parties are not directed repeatedly to PDR or other processes unless the circumstances of the case require it (see recommendation 114).



**Recommendation 113.** In establishing the specifications for the Casetrack computer system, the Family Court should ensure that cases in which there are multiple or repeated applications are automatically identified and are capable of being consolidated and/or referred to a duty judge.

**Recommendation 114.** The Family Court should develop further the Future Directions Committee's draft case management proposals, to the extent that they enable consistent oversight of cases. In considering the proposals, the Court should give particular attention to

- the need to ensure that problematic cases can be assigned to particular judicial officers or registrars for management, or directed to the same judicial officer or registrar for all relevant case events
- the need for assessment of cases early in the interlocutory process by a person who has the knowledge, skills and authority to identify and direct the case to appropriate procedures
- consolidation of interlocutory events
- minimising the number of case events parties are required to attend. Represented parties should not be required to attend purely procedural events
- where possible, adapting the timing and arrangement of case events to minimise disruption to the parties (see recommendation 111). The Court should consider whether it is practicable to use electronic communication such as email, telephone or fax to a greater extent for the purposes of directions and procedural matters, and whether the new Casetrack system will facilitate such practice.

## Hearings and appeals

### Trial management

#### *Listing of final hearings*

8.259. Listing of cases to ensure efficient use of court resources and minimum disruption to parties is a difficult task in all courts. In the Family Court, matters are allocated either to a 'specific judge list' or a 'reserve list' and given a date or a 'not before' commencement date. Cases needing a certain hearing date for reasons such as urgency or the need to travel long distances to get to the hearing, are given priority in the list to ensure they are heard on the day they are listed. Listed cases not reached are referred to the Case Management Judge for re-listing.<sup>3089</sup> The Court overlists to allow for cases settling on the day of trial (see further paragraph

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3089. Family Court case management guidelines, ch 11.

8.58; 8.84). Overlisting inevitably results in some cases not being heard on the day they are listed for hearing.

8.260. One option considered in some overseas jurisdictions limits the time parties are allowed for oral presentation of a case. Parties are given a fixed date with a set amount of time allocated for hearing. If the hearing runs over that time, the case is not carried over to the following day but adjourned to another date and a further fixed time set. These arrangements are expected to encourage parties to define and better manage oral presentation.<sup>3090</sup> The Family Court practice limits the time available for interim hearing presentation.

8.261. In DP 62, the Commission reported on the sense of frustration felt by some litigants and practitioners at the delay experienced and problems with the over-listing practices of the Family Court.<sup>3091</sup> The Court has said that it

is aware of, and tries to accommodate a number of tensions namely, the problem of delay, the need for an overlist system, the need to make optimal use of resources, the need to have a professional system of listing such that certain cases are not in the reserve list but are in the specific Judge list. It is a difficult exercise to balance all of these competing interests.<sup>3092</sup>

The Family Court told the Commission that only 1% of applications for final orders (Form 7) do not reach hearing on the day they are listed.<sup>3093</sup>

8.262. As stated, the variation in judges' sitting days in the Court was also the subject of much comment. This can be addressed by benchmarks set by the Court of expected full sitting days for judges.

**Recommendation 115.** The Family Court should set benchmarks for the number of full sitting days for judges each year.

### *Conduct of final hearings*

8.263. Under the Family Law Rules, the Court may give directions as to the order of evidence and addresses and generally as to the conduct of the trial.<sup>3094</sup> Evidence in chief is given by affidavit unless otherwise ordered by the Court<sup>3095</sup> and under

3090. I Scott *Consultation* 20 January 2000.

3091. See ALRC DP 62 para 11.186–11.188.

3092. Family Court *Correspondence* 21 July 1999.

3093. Family Court *Submission* 348.

3094. Family Law Rules O 30 r 1A. See also Family Law Act s 123(1)(ba) which gives the Court power to make rules of court (including rules in relation to trial management) and s 101 giving the Court power to restrain abusive use of cross-examination.

3095. Family Law Rules O 30 r 2.

case management guidelines, parties are required to file an Outline of Case document summarising the relevant facts, orders sought, and propositions of law and authorities.<sup>3096</sup>

8.264. In the sample covered by the Commission study, few hearings took longer than two days – 73% of the sample hearings took one day and 14% took two days. The maximum number of hearing days for a case in the sample was eight.<sup>3097</sup>

8.265. In DP 62, the Commission invited comments on whether the Family Law Rules should explicitly set out the powers of judges in relation to trial management, including that they may limit the time for examination and cross-examination of witnesses.<sup>3098</sup> The few submissions commenting on this proposal supported greater use by the Court of its trial management powers.<sup>3099</sup> The report of the Court's Trial Management Committee identified some ways in which trials can be shortened by

- greater flexibility in providing 'proportionality' [a comparison between the gravity of the issue or the amount involved and the estimated legal costs]
- reversing the compliance/progression dynamic
- the use of Trial Plans
- [the] elimination of practices which erode court time<sup>3100</sup>

and has made recommendations to achieve this aim. The Committee noted that

[t]rial management is not something which is effected only during a trial. It can be put into effect from the commencement of the litigation path, by measures designed to identify, narrow and reduce issues and the evidence about issues.<sup>3101</sup>

### *Judgments*

8.266. *Delivery of judgments.* In its report on Family Court appeal and review, the Family Law Council (FLC) reported mixed views from court users on whether

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3096. Family Court case management guidelines, annexure C and F.

3097. As noted, there was a slightly lower proportion of complex track cases for the sample than for the Court over the year as a whole, which may have affected the maximum figure. The Commission has been told that the average hearing length in 1997 was 2.2 days for children-only matters, 1.7-days for property-only matters, and three days for children and property matters: Law Council *Submission 224*. The Commission regards average figures as less helpful than median figures for indicating the experience of the majority of cases.

3098. ALRC DP 62 question 11.1.

3099. N Ackman *Submission 289*; National Legal Aid *Submission 360*; R Young *Submission 316*; M Bartfeld *Submission 314*.

3100. Family Court *Submission 348*.

3101. Family Court *Submission 348*. The Committee has recommended the establishment of a 'small claims track' in addition to the three defended tracks currently in place to meet the identified objective.

delay in appeal processes was a problem.<sup>3102</sup> One issue highlighted was the delay sometimes experienced in obtaining the judgment at first instance. The Council observed that this delay 'places litigants in a difficult position as they are unable to determine whether or not there is any substantive basis on which to appeal'. It recommended that the Family Court's case management guidelines should be amended to provide for speedier first instance judgments and that the time limits for appeals should not run until written reasons have been provided.<sup>3103</sup>

8.267. The time standard adopted by the Court for the delivery of judgements is 75% within three weeks of trial, 90% within 35 days and 100% within three months.<sup>3104</sup> The Family Court's case management guidelines specifically provide that judgments are to be delivered no later than three months from the date of reservation.<sup>3105</sup> The Court is examining options to assist judges to meet these time standards.<sup>3106</sup>

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3102. Family Law Council *Family law appeals and review: An evaluation of the appeal and review of family law decisions* AGPS Canberra 1996, 22-23.

3103. *id* 47-48.

3104. R Chisholm 'Timely delivery of judgments' *Paper* Prepared for a judges meeting at the Third National Family Court Conference Melbourne 20-24 October 1998.

3105. Family Court case management guidelines para 15.12.

3106. R Chisholm 'Timely delivery of judgments' *Paper* Prepared for a judges meeting at the Third National Family Court Conference Melbourne 20-24 October 1998.

8.268. In DP 62, the Commission invited comment on whether there is a widespread problem with delay in handing down judgments. Submissions suggested that there is no widespread problem.<sup>3107</sup> This appears to be confirmed by Court statistics showing that in 1998–99 only 8% of judgments were reserved and of these, 77% were delivered in less than three months, and only 8% took more than six months.<sup>3108</sup>

8.269. In cases of unacceptable delay in the delivery of judgements, the Court's case management guidelines state that practitioners should direct their written complaints to the president of their law society or bar association, who then forwards the complaint to the judge administrator of the region.<sup>3109</sup> The case management guidelines do not address the circumstance of an unrepresented party who may wish to make a complaint about delay in the delivery of a judgment. However the Court's *Service charter* does specify, among other things, the right to timely decisions by the Court, and outlines a procedure for making complaints.<sup>3110</sup>

8.270. *Ex tempore judgments.* The majority of judgments in the Family Court are delivered ex tempore (orally at the conclusion of the hearing) or handed down within one month. Submissions and consultations support the use of ex tempore judgments in appropriate cases with one practitioner observing that

[Judges] can do ex tempore judgments in 20 minutes in 9 out of 10 cases. Our clients want a decision and do not need to read 50 page judgments explaining the reasons.<sup>3111</sup>

8.271. National Legal Aid observed that ex tempore judgments 'allow for quick and reasonably detailed reasons for judgment'. A judge of the Family Court has suggested that matters be listed on the basis that the time allocated to them include time for the delivery in court of an ex tempore judgment.<sup>3112</sup>

8.272. *Short form judgments.* In DP 62, the Commission invited comments on whether the Court should introduce short form judgments to enable parties to receive a considered decision more speedily.<sup>3113</sup> Some judges supported the proposal, noting the significant time demands of judgment writing.<sup>3114</sup>

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3107. Law Council *Submission* 375; National Legal Aid *Submission* 360; M Hart *Submission* 374; Confidential *Submission* 233; M Bartfeld *Submission* 314.

3108. Family Court *Submission* 348.

3109. Family Court case management guidelines, para 15.12.

3110. Family Court *Service charter*: see Family Court *Annual report* 1998–99 102–103 appendix three. See ch2 for discussion of the handling of complaints against federal judges.

3111. Law Institute of Victoria Family Law Section *Consultation* Melbourne 24 August 1999. See also R-Young *Submission* 316.

3112. R Chisholm 'Timely delivery of judgments' *Paper* Prepared for a judges meeting at the Third National Family Court Conference Melbourne 20–24 October 1998.

3113. See ALRC DP 62 question 11.3.

3114. Family Court judges *Consultation* 9 September 1999.

8.273. There was little support from practitioners for the introduction of short form judgments. National Legal Aid argued that

[p]arties have invested time and money in the litigation and are entitled to a complete explanation of the reasons for judgment. Short form judgements may lead to an increase in appeals as judges' reasons will be unclear. Alternatively, the Full Court will endorse short form judgments and the community will be left largely in the dark about how the Family Court is working, how it applies the law, its philosophy and values.<sup>3115</sup>

8.274. These arguments were echoed in the Law Council's submission which pointed out the importance of giving adequate reasons for decisions. It argued that

- judgments can help parties to understand why a court made certain decisions
- the right of appeal or further appeal may be effectively lost if reasons for a court's decision are not properly articulated
- short form judgments may override the common law obligation of judicial officers to provide sufficient reasons for their decisions.<sup>3116</sup>

8.275. One Family Court judge stated that even if short form judgments are made available, there is little scope for their use in the family law jurisdiction because 'Family Court litigants like to have the judgment fully explained to them and lack of reasons is a standard ground of appeal'.<sup>3117</sup>

8.276. One submission supported the introduction of 'skeleton' judgments which

give the result and some of the more important findings of fact and, where an appeal is contemplated or where one of the parties requires a full judgment, notice [can] be given requesting a full judgment.<sup>3118</sup>

8.277. There was a suggestion some judges 'cover themselves' by writing lengthy judgments in cases which *appear* to be 'complex', as evidenced by the high number of interlocutory disputes.<sup>3119</sup>

8.278. The Commission considers that judgments giving adequate reasons for decisions are particularly important in the family law jurisdiction. Parties need to know why a decision adversely affecting their financial situation or access to their children has been made. The Commission does not recommend the introduction of short form judgments but suggests this issue be kept under consideration by the Court.

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3115. National Legal Aid *Submission 360*.

3116. Law Council *Submission 375*.

3117. Family Court judge at Victorian Bar Family Law Group *Consultation Melbourne 23 August 1999*.

3118. The rules relating to the times for filing notices of appeal would need to be altered to accommodate this approach: M Bartfeld *Submission 314*.

3119. Law Institute of Victoria Family Law Section *Consultation Melbourne 24 August 1999*.

## Appeals

8.279. Appeals to the Full Court are heard by three or more judges of the Family Court sitting together, where a majority of those judges are members of the Appeal Division.<sup>3120</sup> The Appeal Division is constituted by the Chief Justice, the Deputy Chief Justice and other judges (not exceeding six) appointed to the Appeal Division.<sup>3121</sup>

8.280. Appeals in the Family Court are managed to hearing by regional appeal registrars.<sup>3122</sup> The case management guidelines standard for the disposal of appeals is six months from filing of notice of appeal to the hearing.<sup>3123</sup> The Family Court recently reported that increases in the numbers of appeals and financial constraints have made it more difficult to adhere to the six month standard.<sup>3124</sup>

8.281. In DP 62 the Commission noted the increased proportion and number of unrepresented appellants<sup>3125</sup> over recent years.<sup>3126</sup> Many of the issues relating to unrepresented parties in first instance matters also apply to appeals. The FLC's report on family law appeals and review noted that

[p]roblems resulting from unrepresented appellants include delay, failure to address the merits of the appeal, the length of time taken to present oral submissions, unmeritorious appeals and problems associated with the complexity of court procedures.<sup>3127</sup>

8.282. Particular problems relate to the preparation of the appeal book and to the presentation of the grounds of appeal at the hearing. For example, a Family Court judge observed in one case that

the Appeal Book contains a mishmash of complaints which the appellant makes in relation to the trial itself, the evidence given by witnesses in the course of it, and alleged prejudice and/or bias on the part of the trial Judge. Most of these matters are not in fact grounds of appeal at all, and given that the appellant is appearing in person, as I have already indicated, I think it preferable if we review the evidence that was before the trial Judge in order that we might ascertain whether any appellable error has occurred.<sup>3128</sup>

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3120. Family Law Act s 4(1).

3121. id s 22(2AA); (2AC).

3122. Family Court case management guidelines, ch 14.

3123. id para 14.8, 14.10.

3124. Family Court *Annual report 1998-99*, 43.

3125. See ALRC DP 62 para 11.210-11.214.

3126. Rising from 46 in 1995-96 to 108 in 1997-98: Family Court *Annual report 1995-1996*, 55; Family Court *Annual report 1996-1997*, 43, 47. See further ALRC DP 62 para 11.210 table 11.14.

3127. Family Law Council *Family law appeals and review: An evaluation of the appeal and review of family law decisions* AGPS Canberra 1996, 38.

3128. *Jimmy Huu Loc Nguyen and Cathy Bach Yen Vuong* (unreported) Appeal No SA 12 of 1996 (Baker J).



8.283. The Commission proposed, in DP 62, that the Family Law Act be amended to allow a single judge of the Family Court to stay or dismiss any appeal proceedings where no reasonable cause of action is disposed, or the proceeding is frivolous or vexatious, or an abuse of the process of the Court.<sup>3129</sup> Currently, only a Full Court may dismiss an appeal, on the grounds that the appellant has not met a

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<sup>3129</sup>. See ALRC DP 62 proposal 11.11.

requirement of the Rules or regulations, or 'in some other way has not shown reasonable diligence in proceeding with the appeal'.<sup>3130</sup> The Court noted in this regard

The Chief Justice made representations to the Attorney-General seeking amendments relating to appeals and to the Appeals Division of the Court. The Family Law Amendment Bill 1999 provides for some of these matters. Clause 76 of that Bill provides that either the Full Court or a single Judge may:

- (a) join or remove a party to an appeal
- (b) make an order by consent disposing of an appeal
- (c) make orders relating to the conduct of an appeal
- (d) hear and determine a reinstatement application where an appeal is deemed to be abandoned
- (e) hear an application to stay an order of the Full Court.<sup>3131</sup>

The Commission notes that this provision applies only to the Child Support legislation.

8.284. The few submissions and consultations commenting directly on this proposal supported the introduction of such a provision into the Act.<sup>3132</sup> There was also a suggestion that the right of appeal from the exercise of such a decision should be restricted.<sup>3133</sup> The Commission is reluctant to recommend limiting appeal rights in the absence of any investigation of the implications of such a move, but would encourage the Attorney-General to investigate this option if the following recommendation is accepted.

**Recommendation 116.** The Family Law Act should be amended to permit a single judge in an appeal to exercise the powers of the Family Court to stay or dismiss any proceeding where

- no reasonable cause of action is disclosed
- the proceeding is frivolous or vexatious or
- the proceeding is an abuse of the process of the court.

## Process of reform in the Family Court of Australia

8.285. The Family Court sees itself, and is taken to be, a significant reformist court. The discussion in this chapter illustrates the range of matters under consideration

3130. Family Law Rules O 32 r 18.

3131. Family Court *Submission 348*.

3132. Law Council *Submission 375*; Victorian Bar *Submission 367*; Family Court judges *Consultation 28-September 1999*.

3133. Victorian Bar Family Law Group *Consultation Melbourne 23 August 1999*.

by the Court and the scope of past and current reforms. The Commission's analysis concerns the effectiveness or otherwise of the Court's reforms.

8.286. Some of the reforms, such as the implementation of PDR processes, have brought considerable improvement to case resolution. They are internationally recognised as important innovations in a difficult jurisdiction. The Court has been manifestly less successful in its reforms to practice and procedure. The introduction of pleadings, for example, was by common consensus, a failure. Family practitioners evaluate the Simplified Procedures as a similar failure. The comments cited in this chapter testify to the frustration and concern generated by these changes. Practitioner criticisms from around Australia, city, suburban and regional, are strikingly consistent and have been made since 1996. The comments are made not only by private practitioners whom the Court has dismissed as financially self-interested, but also by many CLC and legal aid lawyers who seek to provide legal services within a confined budget. The consensus view is that procedures under simplification are more time consuming and costly for parties, and delay settlement.

8.287. In the Commission's analysis, the essential criticism and problems concerning simplification relate to the implementation of the new practices. The procedures were a script, not to be departed from. Registrars appear to have been discouraged from exercising discretion, even where the case patently calls for a departure from set procedures. With forms designed to cater for the full range of cases, practitioners experience difficulties adapting them to particular cases. The resulting frustration from parties and lawyers has considerably soured relations between the Court and its clients. The forms and procedures act not as guidelines of expected practice but as 'tripwires' for the unwary. Such general prescriptions engender non compliance, cynicism from the Court and frustration within the profession. The Future Directions process is aimed at redressing many of these difficulties. Given the Family Court's recent history of practice and procedure reforms, this will be an important test for the Court.

## **Data collection**

8.288. Court reforms to case management and practice and procedure need to be planned and evaluated.<sup>3134</sup> Such processes depend on relevant and reliable data. At present the Court's data on case processing lacks uniformity, comprehensiveness and utility. Monitoring and evaluation of case processing is a significant deficit in the Court. The Court's draft Corporate Information Technology Plan prepared in October 1998, noted

Unfortunately, many of the Court's current business problems result from the inadequacies of the current case management processes and systems. There are different

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3134. See para 1.36-1.46.

practices in each registry, there are multiple non integrated systems that only partially automate case servicing and there is a heavy reliance on paper files to track, manage and record. As a result, case servicing is driven by file availability and is fragmented at multiple separate case processing points. The coordination problems are further exacerbated by tracking cases at the application level when actual servicing is done at the consolidated issue level so there are inconsistent views of the case at each management control point. The control problems and inefficiencies become most apparent when files are lost or when updating case information after circuits.

Most significantly, the current systems do not support the dissemination of case information in the format necessary for efficient Court operations, eg some system generated Court Lists are manually amended and photocopied for distribution. Additionally, post appearance processing relies on the accurate recording, transcription and interpretation of manually updated bench sheets away from the decision point and after a time delay. The most common support task is the production of documents but the current systems do not provide modern linked document-database capabilities.

One of the key problems facing the Court is that the current systems do not provide accurate and complete performance reports and this limits the Court's ability to manage case servicing and undertake process improvement. The Court also wants to use case resolution data to predict the most appropriate case servicing for particular case characteristics but this is difficult with the current Court data.<sup>3135</sup>

8.289. Such data collection problems are long standing. Computerisation of the Family Court registries was a slow process, beginning in August 1988 in Canberra and finishing with the computerisation of Darwin in 1995. The prototype of the counselling database, CRIS,<sup>3136</sup> was introduced into the Court in 1993 and fully integrated into all registries in 1998. However, there is no wide area network (WAN) access to CRIS between registries. 'Blackstone', the Court's computer system, was designed as a case management system, and did not incorporate a built-in management information system.

It is difficult to extract ad hoc statistical reports from the Blackstone and CRIS systems following information requests, as they are not flexible and were not designed with this facility. Such information can be obtained, but programming is required, all of which is done in house.<sup>3137</sup>

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3135. The draft also commented that the current Court reports

- do not appear to be aligned directly with the Court's provision of services, its corporate goal and vision
- are not linked to the Court's quality assurance practices
- use inconsistent data, that is, recordable actions are open to interpretation
- use data that is gathered as a separate manual process: Family Court *Draft CMS Functional Analysis Version 3.3* 8 October 1998, 6-7.

3136. CRIS is used to record information about counselling interviews and outcomes, to produce letters to clients and to diarise the scheduling of dates for counselling staff.

3137. T Matruglio & G McAllister *Part one: The status of data collection and evaluation research in the Federal Court, the Family Court and the Administrative Appeals Tribunal* ALRC January 1998.

8.290. The inadequacies of the Court's data collection system have been reported on regularly.

- In 1985, by the Family Law Council.<sup>3138</sup>
- In 1990, by the Buckley report, which commented that

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3138. The Family Law Council commented

The Court does not have a satisfactory system for the uniform collection of statistical information of its cases. This makes court administration and control difficult and makes it virtually impossible to compare one registry with another. In particular there is continuing confusion and unsatisfactory information as to the number of cases which are defended cases in the different registries: Family Law Council *Administration of Family Law in Australia* AGPS Canberra 1985, 7.

together with the disparity of registry systems, particularly in the listing of contested hearings, the lack of a proper management information system makes proper assessment of the overall operation of the Court and comparative analysis among registries impossible.<sup>3139</sup>

- In a 1995 report by the Civil Justice Research Centre.<sup>3140</sup>
- In 1995, by the Joint Select Committee on Funding and Administration.<sup>3141</sup>
- In 1996, by the first Coaldrake report.<sup>3142</sup>
- In 1997, by the Australian National Audit Office (ANAO), which noted

Key objectives and goals of the Court Plan are not linked to performance measures. Performance measures presently used by the Court are limited to

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3139. Family Court *Report of the Working party on the Review of the Family Court* Commonwealth of Australia Canberra 1990, para 12.186 (the Buckley report). The report also noted:

Since its inception the Court has not had a satisfactory statistical and information base nor has it had sufficient internal expertise to develop one. An effective information system is necessary for planning, management, accountability and the obtaining of resources. Caseload management in particular relies on an efficient and accurate management information system: para E.54.

Some service standards and levels have been developed by the Court but differing practices and procedures and unreliable statistical collection systems make accurate measurements and comparisons difficult: para E.28(a).

The lack of a management information system to provide appropriate workload measures for the judicial work of the Court prevents proper assessment of overall judicial resource needs: para 8.9.

3140. T Matruglio 'Matters heard in the Family Court of Australia' (May 1995) 7 *Civil Issues*. The study was carried out at the request of the Family Law Committee of the Law Society of NSW, following the release of statistics by the Family Court which showed that there was a higher proportion of matters going to a defended hearing in Sydney than in other Family Court registries in Australia. The report examined defended hearings statistics in the Family Court and concluded that the statistics did not allow for valid comparisons to be made across registries. Differences in the types of applications dealt with in each registry were not allowed for in the statistics, and there was no guarantee that the collection of information was standardised across registries. The report suggested that, if the issue of hearing rates between registries was to be further examined, a survey should be conducted which would systematically track a sample of case files in a number of registries.

3141. Joint Select Committee on Certain Family Law Issues *Funding and administration of the Family Court of Australia* AGPS Canberra November 1995. The Family Court advised the Committee that the major deficiency in its Blackstone system software is that it does not have a built-in management information system: para 4.38. The Joint Select Committee recommended that the Court update its information technology platform in order to improve client services and management efficiency given the failure of the existing system to meet adequately the current needs of the Court: para-4.40.

3142. P Coaldrake 'Evaluation of the implementation of the recommendations of the Working Party on the Review of the Family Court (Buckley report)' *Unpublished* Family Court January 1996. The report recommended that the Court 'renew its commitment to the development of timely and accurate management information and comprehensive performance management systems'.

throughput or compliance with Case Management Guidelines. There is a lack of quality control mechanisms to ensure the accuracy and completeness of data

collected. In many cases, the data collected by the Court is not analysed in any strategic sense to improve the economy and/or efficiency of the Court's operations. Without adequate performance information it is difficult to assess the efficiency of the Court satisfactorily.<sup>3143</sup>

- In the Commission's 1998 research report on data collection and evaluation research, which noted that the Court's 'management information systems are generally inadequate' and it still relies heavily on manually recorded information that is particularly 'prone to error'.<sup>3144</sup>

8.291. The data collected by the Family Court on outcomes, case duration and settlement processes relates to cases on the defended trial list and provides no indication of the proportion of the caseload settled through counselling or other PDR processes; nor of the number of cases settled at any stage prior to a defended hearing. The Court does not record within its data systems information on the outcomes or processing of all cases lodged; the number of active cases in the Court; when cases not on the active pending cases list are resolved; the duration of all cases; or the amount of Court time or resources expended in finalising cases.

8.292. The Family Court has statistics on the amount of time spent on counselling and conciliation conferences, and some figures on their success rate, but no explanation of how the Court arrives at these figures.<sup>3145</sup> For example, the Court states that in 1997-98 the Counselling Service dealt with 25 297 cases in person and 59678 interviews in person.<sup>3146</sup> The information does not indicate how many were repeat users in particular cases or what outcomes were achieved.

8.293. To monitor, measure and develop its case management system and workload adequately, the Court needs routinely to record sufficient information to identify the size of its active caseload; the type of case; duration to completion of all cases; the number and timing of case events per case; the stage at which cases settle; the amount of Court resources taken up per finalised case; number of registrar, counsellor and judge hours taken to finalise cases; and the mode of outcome. This is the sort of information which the Court had to extract manually from its files in order for the Commission to conduct its empirical research in support of this inquiry. This information should be separately available for each

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3143. The ANAO recommended that the Family Court undertake more systematic analysis of performance information and provide users with more information on trends (and their cause) in Court operations and activities: Australian National Audit Office *The Administration of the Family Court of Australia* AGPS Canberra 1997, 30.

3144. The major deficits identified were that key objectives and goals of the Court were not linked to performance measures, which measure only throughput and conformity with case management guidelines; and that there is a lack of quality control ensuring accuracy and completeness of data: TMatruglio & G McAllister *Part one: The status of data collection and evaluation research in the Federal Court, the Family Court and the Administrative Appeals Tribunal* ALRC January 1998, 1, 3.

3145. See further ALRC DP 62 ch 10.

3146. Family Court *Annual report 1997-98*, 28.



registry and distinguish between cases involving children's issues only; financial issues; and cases involving both children and financial issues. The Court's new technology covenant, set for full implementation by November 2000,<sup>3147</sup> should provide such integrated case management and management and performance information.

8.294. The Court intends from 1999–2000 to assess its performance across three key outputs – litigation, primary dispute resolution and public information – against indicators reflecting quality, quantity and price, as well as measurement against time standards. However, the Court noted

At this stage, the case management and financial systems are inadequate for the purpose and so interim, surrogate performance indicators have been developed.<sup>3148</sup>

8.295. Casetrack and the proposed new output measures should overcome the deficiencies in the Court's data collection and performance indicators in due course. Progress in overcoming such clear deficiencies has been slow and has come at significant cost in terms of measured evaluation of Court case management and practice and procedure reforms.

## **Communication**

8.296. As described above, the Court's response to DP 62 ranged from personal criticism of the Commission to a denial of all the criticisms made or repeated in the paper. Faults in the system were blamed on lawyers or on government underspending on the Court and legal aid. Practitioners noted concerning the Court's response

If you make any criticism, however mild and well-intentioned, it's World War III.<sup>3149</sup>

8.297. A former judge of the Court commented in similar terms in a radio broadcast

[T]he court itself is unnecessarily defensive when people do criticise it, the court's hierarchy [is defensive]. And, for example, retired judges who in the past have criticised the court in any way, are described as 'disaffected', and I suppose I run that risk of being called disaffected in the next couple of days, which risk I'll take. The Law Reform Commission research was described by the Chief Justice as 'amateurish'. The Attorney-General was described as 'wasting public money' in talking about creating a Federal Magistracy. Now it seemed to me that this sort of response to well-meaning criticism would stifle debate rather than encourage it, because what is required is debate

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3147. Family Court *Submission* 348.

3148. Family Court *Annual report 1998–99*, 34.

3149. Law Institute of Victoria Family Law Section *Consultation* Melbourne 24 August 1999.

from lawyers, from the Law Reform Commission, from the litigants and from the court. And I think it is disappointing.<sup>3150</sup>

8.298. This is not to say that the Court avoids engaging with all criticism. Those experts engaged directly or consulted by the Court report favourably on their open, self-critical exchanges with the Court.

The [Family Court] is a very unusual Court. It is about the most self-critically open judicial institution I know.<sup>3151</sup>

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3150. T Graham 'Law report' *transcript* 31 August 1999 at <<http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s48019.htm>> (1 September 1999).

3151. I Scott *Correspondence* 23 December 1999.

8.299. The Commission also found many Family Court judges prepared to discuss and evaluate their processes and practices. The Commission does not object to – indeed its consultative processes are designed to encourage – robust debate and critical exchange. Our experience in relation to DP 62 is relevant as it indicates the response to be expected when persons who are not Court-sanctioned experts criticise the Family Court. This is the point of concern. Such exaggerated defensiveness discourages the necessary frank exchange which courts and tribunals need to cultivate with their public.

8.300. In all its consultations, the Commission was made aware of the poor relationship between the Family Court and practitioners. Again one must be careful to distinguish in this regard between the relationship which practitioners have with judges and staff in their particular registry and with ‘the senior management’ of the court. It is the latter that is of concern. Practitioners often spoke glowingly of the staff and judges in their registries, their dedication and the utility of local, user group meetings. The difficulties concern the communication which practitioners seek concerning changes to matters such as practice and procedure – which have a direct impact on the work of practitioners.

8.301. Courts and practitioners do not share the same interests in litigation. Courts should not be ‘captured’ by the profession. Practitioners’ interests can run counter to litigant, court and societal concerns. Notwithstanding this qualification, courts need to develop good working relations with members of the profession who are the core, repeat users of the process and who have intimate working knowledge of all facets and stages of litigation. The Court has a consultation process but not always a disposition to elicit frank comments, attend to criticisms or respect the views of critics. Practitioners deplored and regretted the poor relationship they had with the Court. The Family Law Section of the Law Society of South Australia stated that problems with the case management system had been raised repeatedly with the Chief Justice ‘but nothing happens’.<sup>3152</sup>

There’s a lot less camaraderie between practitioners and Family Court judges than 15–20 years ago – it’s very sad. They think we’re always complaining and we think they don’t ever listen.<sup>3153</sup>

The Court is very cynical about practitioners. The basic problem is that the Court does not trust practitioners. They think lawyers are only orientated to make more money.<sup>3154</sup>

8.302. In chapter 1, the Commission cited the Ontario Civil Justice Review description of administrators, the judiciary and the bar involved in their civil

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3152. Law Society of SA Family Law Section *Consultation* Adelaide 6 August 1999. On the need for better communication and coordination regarding legal aid cases, see para 5.192.

3153. Law Society of SA Family Law Section *Consultation* Adelaide 6 August 1999.

3154. Law Institute of Victoria Family Law Section *Consultation* Melbourne 24 August 1999.

justice system as 'the solitudes', institutions which do not communicate or cooperate, each blaming the others for faults in the system.<sup>3155</sup> In consultations and submissions on the Family Court, the Commission has noticed a similar sense of separation between the relevant constituent groups.

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3155. See para 1.157.

### **Is there a need for further external review?**

8.303. The Commission is more optimistic about the prospects for case management and practice in the Court than it was at the time DP 62 was published. The Court has now provided details to the Commission of proposed reforms to data collection, case management and case practice and procedure.<sup>3156</sup> The Commission welcomes such initiatives and the extensive research and deliberation which this has necessitated.

8.304. As against such anticipated beneficial reforms, the Court currently presents as a beleaguered and defensive institution. Practitioners indicated they had little confidence that the Court would 'get it right' and that case practice and management would improve. In such circumstances, the Commission recommends that the Attorney-General, within two years of the release of this report, establish a review as set out in Recommendation 117. That timeframe would allow time for the Court to implement its revised data collection and management system, to improve communication with the legal profession, to have clearer information about the ICS and Magellan projects, and to respond to and implement the Future Directions Committee proposals.<sup>3157</sup>

8.305. The Commission has no doubts concerning the Family Court's commitment to finding solutions to the many problems the Court faces. However, the history of internal reform in the Family Court would suggest that some independent evaluation of the effects of change and proposed changes is warranted. The Commission takes this decision reluctantly. The Court has been subject to a number of inquiries over the past decade.<sup>3158</sup> The Commission is conscious of the effort that the Court is put to, in providing information and responses to such reviews. Inquiries can have an adverse impact on morale. The Commission is aware that a number of judges feel unappreciated and besieged by criticism. The Commission is reluctant to add to these difficulties for a court which already faces stressful and demanding work. However, the jurisdiction is too important and too fraught for matters to be left simply to internal Court deliberations.

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3156. Family Court judge *Consultation* 21 December 1999; Family Court *Submission* 348.

3157. See para 8.55–8.56; 8.218; 8.250–8.256.

3158. For example: Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act *The Family Law Act 1975: Aspects of its operation and interpretation* AGPS Canberra 1992; Joint Select Committee on Certain Family Law Issues *The operation and effectiveness of the Child Support Scheme* AGPS Canberra 1994 (the Price Committee); Joint Select Committee on Certain Family Law Issues *Funding and administration of the Family Court of Australia* AGPS Canberra 1995; House of Representatives Standing Committee on Legal and Constitutional Affairs report *To have and to hold* AGPS Canberra 1998; ANAO *Use of Justice Statement funds and financial position* Audit report No 4 AGPS 22 August 1996 at: <[http://www.anao.gov.au/rptsfull\\_97/audrpt33/contents.html](http://www.anao.gov.au/rptsfull_97/audrpt33/contents.html)> (20 January 2000); ANAO *The administration of the Family Court of Australia* Audit report No 33 15 May 1997 at: <[http://www.anao.gov.au/rptsfull\\_97/audrpt22/contents.html](http://www.anao.gov.au/rptsfull_97/audrpt22/contents.html)> (20 January 2000).

8.306. If the Attorney-General considers a review is warranted the review should have appropriate powers and expertise to investigate, obtain information and evaluate Court outcomes. The review should focus on reforms to the Court's data system and its capacity to evaluate workload and performance, case outcomes and

costs (including duration of matters, the number of prehearing events and their costs), the case management system, funding priorities and the allocation of resources between court administration and case management.

8.307. The review should extend beyond an efficiency audit and include consideration of whether resources are appropriately targeted for the operation of the Court's case management system. The review should have access to expert opinion on the management of courts and their case management systems.

8.308. Such a review would be consistent with the recommendation of the Joint Select Committee on Funding and Administration of the Court that there should be regular reviews of the management and administration of the Court, which are external to the Court.<sup>3159</sup>

8.309. None of the inquiries in relation to the Family Court has focussed on the issues identified above.<sup>3160</sup> Since those inquiries many additional changes to the

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3159. Joint Select Committee on Certain Family Law Issues *Funding and administration of the Family Court of Australia* AGPS Canberra 1995, para 3.34.

3160. The 1992 Joint Select Committee covered a wide range of substantive and procedural matters with only a very limited consideration of case management and its funding. It briefly considered pleadings but not case management generally: Joint Select Committee on Certain Aspects of the Operation and Interpretation of the Family Law Act *The Family Law Act 1975: Aspects of its operation and interpretation* AGPS Canberra 1992. The Joint Select Committee on funding and administration in 1995 broadly considered funding and efficiency but not in relation to specific areas such as case management. It recommended that the Court order its priorities to ensure that funds are available to preserve and enhance its client focus, and that the Court work with staff and the representatives of staff to fund adequately those aspects of Family Court administration with high levels of client contact: Joint Select Committee on Certain Family Law Issues *Funding and Administration of the Family Court of Australia* AGPS Canberra 1995. The ANAO's 1997 performance audit on the administration of the Court examined only the non judicial activities of the Court — case management was not considered. That audit focussed on the structure and organisation of matters such as corporate planning, performance measurement, management information and reporting systems, and human resources. It did not examine the priorities of funding, the actual efficiency of services or the quality of service: ANAO *The administration of the Family Court of Australia* Audit report No 33 1997 at: <[http://www.anao.gov.au/rptsfull\\_97/audrpt22/contents.html](http://www.anao.gov.au/rptsfull_97/audrpt22/contents.html)> (20 January 2000). Another audit of the Court by the ANAO was limited to the use of justice statement funds and the Court's general financial position: ANAO *Use of Justice Statement funds and financial position* Audit report No4 1996 at: <[http://www.anao.gov.au/rptsfull\\_97/audrpt33/contents.html](http://www.anao.gov.au/rptsfull_97/audrpt33/contents.html)> (20 January 2000). The Coaldrake reports were concerned with organisational and management structure at the higher level: P Coaldrake 'Evaluation of the implementation of the recommendations of the Working Party on the Review of the Family Court (Buckley report)' *Unpublished Family Court* January 1996; P Coaldrake 'Review of the Top Structure of the Family Court of Australia' *Unpublished Family Court* June 1997. The Buckley report considered many aspects of case management, particularly the principles of case management, and recommended establishing committees to oversee the process and the insertion of time standards. The report also recommended that family reports be ordered, with the exception of urgent matters, at the prehearing conference or immediately thereafter. However, the report did not discuss specific resourcing issues, initiating procedures, discovery or procedures for dealing with complex and protracted cases.

Court's operations have occurred or are intended to be introduced.<sup>3161</sup> Those additional changes need to be evaluated.

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3161. See para 8.250-8.256.



**Recommendation 117.** Within two years of the release of this report, the Attorney-General should consider establishing an independent review to examine practice, procedure and case management in the Family Court. The review should assess funding needs and measure the performance of the Court, including

- the efficacy of its originating processes, forms and case management procedures
- the duration and outcomes of cases, and
- the effectiveness of the Court's information technology system and data collection.

The inquiry should extend beyond an efficiency audit to include an examination of whether the Court's resources are allocated and used effectively, having regard to the identified priorities of the Court's role and operation.

## 9. Practice, procedure and case management in federal merits review tribunals

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### Introduction

9.1. This chapter examines case and hearing management in federal merits review tribunal<sup>3162</sup> proceedings. The Commission produced a separate issues paper on this topic and made proposals for changes to tribunal case and hearing management in a chapter of Discussion Paper 62.<sup>3163</sup> In these previous publications, as in this report, the Commission has focussed on the Administrative Appeals Tribunal (AAT), the Social Security Appeals Tribunal (SSAT), the Migration Review Tribunal (MRT), and the Refugee Review Tribunal (RRT) which are set to be amalgamated into a single tribunal, to be called the Administrative Review Tribunal (ART).<sup>3164</sup>

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3162. Referred to as 'review tribunals'.

3163. ALRC Issues Paper 24 *Review of the adversarial system of litigation: Federal tribunal proceedings* Sydney 1998 (ALRC IP 24); ALRC Discussion Paper 62 *Review of the federal civil justice system* Sydney 1999 (ALRC DP 62), ch 12.

3164. In February 1998, the Government announced its intention to amalgamate the AAT, the Social Security Appeals Tribunal (SSAT), the Immigration Appeals Tribunal (IRT), and the Refugee Review Tribunal (RRT) into a single tribunal, to be called the Administrative Review Tribunal (ART): D Williams 'Reform of merits review tribunals' *News release* 3 February 1998 <<http://law.gov.au/aghome/agnews/1998newsag>> (1 August 1999). A notable omission was the Veterans' Review Board (VRB). From 1 June 1999, decisions previously reviewed by the IRT became reviewable by the Migration Review Tribunal (MRT), a new tribunal created through merging the IRT and the Migration Internal Review Office (MIRO): *Migration Legislation Amendment Act (No 1) 1998* (Cth).

9.2. The terms of reference require the Commission to consider, among other things, the relationship between courts and tribunals. There are many aspects to this relationship including the influence of significant High Court and Federal Court decisions on the substantive law relevant to administrative review and the scope of judicial review.<sup>3165</sup> These substantive issues are not dealt with in any depth in this chapter. Issues relating to the structure of the ART and the breadth, type, coverage and nature of decisions in merits review are beyond the Commission's terms of reference. The discussion and recommendations in this chapter primarily concern review processes, party representation and participation, case conferences and other prehearing case events, tribunal investigative functions, and case management systems, with particular reference to processes and practices for divisions of the new ART.

## Review tribunals and the administrative justice system

9.3. Each year federal administrative agencies and government departments make millions of decisions which affect the benefits, entitlements and rights of persons and entities inside and outside Australia. Administrative decisions may be reviewed internally (by another senior officer within the same agency), by review tribunals and by the courts (in particular, the Federal Court and the High Court). As the figures below indicate, only a small proportion of these decisions are sought to be reviewed.

- In the social security jurisdiction one estimate has 36 million reviewable decisions made each year.<sup>3166</sup> Less than 0.2% of such decisions are disputed. In 1997–98, there were 43 074 internal reviews of such decisions by Centrelink officers, 9214 applications for first tier external review by the SSAT and 1735 applications concerning social welfare decisions in the AAT.<sup>3167</sup> During the same period there were 33 social security related applications lodged with the Federal Court.<sup>3168</sup>

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3165. eg relating to the scope of natural justice; the duty of inquiry; the status of executive policy in administrative review; the extent to which the written reasons of administrative decision makers should be scrutinised by the courts. Many recent High Court and Federal Court cases have arisen in judicial review of immigration decisions making and are discussed in J McMillan 'Federal Court v Minister for Immigration' (1999) AIAL Forum (22), 1.

3166. J Browne 'Disputes in the Commonwealth government – an opportunity for customer service improvement' *Conference paper* The management of disputes involving the Commonwealth – Is litigation the answer? Canberra 22 April 1999; Dept of Family and Community Services (DFACS) *Consultation* Canberra 3 September 1999.

3167. Dept of Social Security *Annual report 1997–98*, 301.

3168. *ibid*; J Browne 'Disputes in the Commonwealth government – an opportunity for customer service improvement' *Conference paper* The management of disputes involving the Commonwealth – Is litigation the answer? Canberra 22 April 1999, 113, noted that there were approximately 54000 requests for internal review in Centrelink in 1997–98.

- In 1997–98, Comcare received 9024 claims for compensation,<sup>3169</sup> 1972 requests for reconsideration of compensation decisions and was the respondent in 693 applications for merits review in the AAT.<sup>3170</sup>

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3169. Comcare also managed approximately 22 500 active claims, that is, claims with recorded activity during the period: Comcare *Annual report 1997–98*, 13.

3170. id 26–29.

- In 1997–98, 58 463 veterans' entitlements claims were lodged with the Repatriation Commission<sup>3171</sup> and 11 312 applications for review were received by the Veterans' Review Board (VRB).<sup>3172</sup> During the same period there were 1720 applications for review of VRB decisions lodged in the AAT,<sup>3173</sup> and 21 decisions handed down by the Federal Court in veterans' matters.<sup>3174</sup>
- In 1997–98, the Australian Taxation Office (ATO) received 10 624 727 tax returns and 76 229 objections to assessment.<sup>3175</sup> During the same period 1604 matters were lodged for review by the AAT and the Small Taxation Claims Tribunal<sup>3176</sup> and 19 taxation appeals (relating to 51 AAT applications) were filed in the Federal Court.<sup>3177</sup>
- In 1997–98, over 67 100 residence, 3 263 200 business and temporary entry visa and 12 055 humanitarian visa applications were approved.<sup>3178</sup> During the same period there were 5189 internal review applications lodged with the Migration Internal Review Office (MIRO),<sup>3179</sup> 2693 review applications lodged with the Immigration Review Tribunal (IRT),<sup>3180</sup> 7398 with the RRT<sup>3181</sup> and 269 migration and citizenship review applications lodged with the AAT.<sup>3182</sup> In the same period 675 Migration Act<sup>3183</sup> matters were filed with the Federal Court.<sup>3184</sup>
- In 1998–99, there were 126 applications for review of decisions of the Australian Customs Service lodged with the AAT and nine appeals to the Federal Court from decisions of the AAT.<sup>3185</sup>

9.4. Applicants in review tribunal proceedings are strikingly diverse. They may be individuals claiming refugee status, overseas business people seeking extension of temporary visas, war veterans and widows, disability claimants

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3171. The Repatriation Commission, the Dept of Veterans' Affairs and the National Treatment Monitoring Committee *Annual reports 1997–98*, 121, 124–125.

3172. *id* 121.

3173. Veterans' Review Board *Annual report 1997–98*, 32.

3174. *id* 28.

3175. Commissioner of Taxation *Annual report 1997–98*, 73.

3176. AAT *Annual report 1997–98*, 105.

3177. *id* 117.

3178. DIMA *Annual report 1997–98*, 24, 31, 61. These figures refer to the number of visas granted, which are determined in part by the government's migration and humanitarian program targets. The number of applications for visas refused is not provided.

3179. DIMA *Annual report 1997–98*, 106.

3180. Immigration Review Tribunal *Annual report 1997–98*, 22.

3181. Refugee Review Tribunal *Annual report 1997–98*, 16.

3182. AAT *Annual report 1997–98*, 107.

3183. *Migration Act 1958* (Cth).

3184. See ALRC DP 62 para 10.20.

3185. Australian Customs Service *Consultation* Canberra 3 September 1999.

seeking pensions or benefits, Commonwealth employees or seafarers claiming workers' compensation, small business entities, such as pharmacies or tax agents

affected by business licensing decisions, or businesses affected by customs, tariff or diesel fuel rebate decisions.<sup>3186</sup> Their interests in challenging administrative decisions, and the skills and resources available to them in this process, differ markedly.

9.5. Internal review decision makers and review tribunals generally have all the powers and discretion of the original decision maker and may affirm the original decision, vary it, send it back to the original agency or substitute a new decision.<sup>3187</sup> As well as correcting individual errors, such review is also meant to have a normative effect, improving the quality and consistency of primary decision making.

9.6. Some review decisions are more amenable than others to consensual resolution. Many decisions are varied or set aside because the tribunal receives new evidence. Compensation cases may be associated with a related dispute between the applicant and an employer (who is not a party to the AAT proceedings). This may complicate the prospects for settlement. Agency and party positions in AAT social welfare applications, which have had internal review by the agency and a determination by the SSAT, may be difficult to modify consensually in the AAT proceedings. Immigration and refugee cases are decided by reference to comprehensive, binding and explicit criteria. There is little scope for compromise in such 'yes or no' cases and review authorities or department officers have no authority to award a visa to applicants who do not qualify under the legislation.

9.7. These differences are reflected in the numbers of cases sought to be reviewed and the numbers which continue through stages of the review process. As shown above, some classes of decision undergo an elaborate review process and a decision may be examined and investigated some four or five times.

9.8. The AAT has statutory authority under around 328 separate enactments to review specific administrative decisions.<sup>3188</sup> Its high volume work derives from social security, veterans' affairs, Commonwealth employees' compensation and taxation decisions. The MRT and the RRT are final merits review bodies concerned with certain visa refusal and cancellation decisions under the Migration Act. The SSAT reviews certain decisions made by officers of Centrelink under delegation from the Secretaries of the Department of Family and Community Services and the

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3186. In this chapter, the term 'applicant' is used to refer both to applicants for review of the primary decision of an agency and to non-government respondents in cases involving an appeal by an agency from a decision of the SSAT or VRB.

3187. eg *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) s 43(1); *Migration Act 1958* (Cth) (Migration Act) s 349 (MRT); s 415 (RRT); *Social Security Act 1991* (Cth) (Social Security Act) s-1253(1).

3188. See AAT *Annual report 1998-99*, appendix 8 for a full list of reviewable decisions as at 30 June 1999.

Department of Education, Training and Youth Affairs (DETYA) and certain decisions made by the Department of Veterans' Affairs (DVA) in relation to age pension entitlements. The VRB reviews decisions relating to veterans' pensions or allowances made by the Repatriation Commission under the *Veterans' Entitlements Act 1986* (Cth) (Veterans' Entitlements Act). The SSAT and VRB are first tier merits review tribunals from which decisions may be appealed to the AAT.

The nature of review tribunal proceedings

9.9. In federal jurisdiction, tribunals are part of the executive arm of government and provide administrative, not judicial, decision making and dispute resolution processes.<sup>3189</sup>

9.10. Review tribunals are directed to make the correct or preferable decision after considering the whole of the evidence,<sup>3190</sup> and to ensure that their decisions are in accordance with relevant legislation. Neither the applicant nor the respondent agency carries a burden of proof to prove or disprove a fact.<sup>3191</sup>

9.11. In review tribunal proceedings there is no necessary conflict between the interests of the applicant and of the government agency. Tribunals and other administrative decision making processes are not intended to identify the winner from two competing parties. The public interest 'wins' just as much as the successful applicant because correct or preferable decision making contributes, through its normative effect, to correct and fair administration and to the jurisprudence and policy in the particular area. The values underpinning administrative review are said to encompass the desire for a review system which promotes lawfulness, fairness, openness, participation and rationality.<sup>3192</sup> The provision of administrative review can be seen to fit neatly into a model of pluralist and participatory democracy.<sup>3193</sup>

9.12. The AAT is required to conduct its proceedings with as little formality and technicality and with as much expedition as the relevant legislation and

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3189. See the discussion in ch 1 regarding the constraints imposed by ch III of the Constitution on the exercise of the judicial power of the Commonwealth.

3190. See *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577. While Bowen CJ and Deane J used the phrase 'correct or preferable' in *Drake* to describe the question for the determination of the AAT, the ARC prefers the phrase 'correct and preferable': see Administrative Review Council Report 39 *Better decisions: review of Commonwealth merits review tribunals* AGPS Canberra 1995 (ARC 39) 10, fn 31.

3191. However, while there is no formal burden of proof, in some circumstances there may be a 'practical' burden on one of the parties. For example, where either party raises a specific fact for consideration, the responsibility for proving the existence of that fact may be accepted as falling on that party, particularly where the fact in question is solely within that party's knowledge.

3192. See ARC 39, ch 2; G Fleming 'Review of migration decision-making — rival goals and values' (1999) 10 *Public Law Review* 131, 135.

3193. id 131, 136.



proper consideration of the matters before it permit.<sup>3194</sup> Other federal review tribunals are expressly required to provide a means of review that is 'fair, just, economical, informal and quick'.<sup>3195</sup> The immigration and refugee tribunals are also required to 'act according to the substantial justice and merits of the case'.<sup>3196</sup>

9.13. Review tribunals like the MRT, RRT, SSAT and VRB were intended to be 'investigative' with the tribunal controlling the proceedings, defining issues, deciding on the factual material to be considered and calling witnesses on its own motion. In some proceedings parties may be restricted to answering questions

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3194. AAT Act s 33.

3195. Migration Act s 353 (MRT), s 420 (RRT); Social Security Act s 1246 (SSAT).

3196. Migration Act s 353(2)(b)(MRT); s 420(2)(b)(RRT).

from tribunal members, with no right to examine witnesses or address the tribunal, and there is less emphasis placed on a single determinative hearing, with oral argument and case presentation.

9.14. The Commission considers that the legislation and practice of review tribunals should further emphasise the administrative and investigative character of tribunal processes.<sup>3197</sup> Tribunal processes can and should be arranged to permit enhanced inquiry by tribunals, discontinuous hearing processes, and resolution of certain issues on the papers. Cooperative training and working arrangements between tribunals and the government departments and agencies whose decisions are under review may also be beneficial. The Commission's proposals in this regard should not be taken to threaten the flexible decision making processes adapted to different types of case or to undermine tribunal independence. Rather these are proposed to enhance and render more effective the distinguishing characteristics of administrative review.

### **Management performance standards**

9.15. Since the early 1980s, public sector adoption of the 'new managerialism' has led to increased reliance on performance monitoring and measurement. Tribunals too are increasingly setting goals and adopting performance indicators.<sup>3198</sup>

9.16. Management performance standards, which may be expressed as tribunal-wide or member targets of cases to complete in set time periods, can have a direct and very real effect on decisions about how cases are to be conducted. Increasingly, tribunal funding is calculated by reference to the number of cases the tribunal is expected to complete in the funding year. This impacts on the way tribunals arrange and allocate their resources. In addition to tribunal targets, there may be individual case 'quotas' set for members, such that they are expected to complete a particular number of cases per month or per year. If such targets do not appropriately reflect the time required to prepare, consider and decide cases, or if the standards are too prescriptive and set without due regard to the diversity of case types, the quality of decisions will be affected. Some matters are routine and simple but others have complex facts or legal issues or difficult, distressed or confused parties. Such cases require members' time and patience.

9.17. Performance standard setting for tribunal members raises a number of important issues. Such standards can have particular impact if they serve as indicators of a member's efficiency and effectiveness. Tribunal members, generally

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3197. The Commission is not suggesting that tribunals have an investigative function of the kind conferred on the Ombudsman, but explicit powers to inquire into decisions under review.

3198. M Neave 'In the eye of the beholder – measuring administrative justice' *Paper* 1999 National Administrative Law Forum Canberra 30 April 1999.

appointed on limited term contracts, have a real incentive to be seen to be efficient and compliant with performance standards to justify renewal of their contracts. Members may cut corners, limiting the necessary investigation into a matter, cutting down necessary hearing times or dispensing with relevant witnesses. If the performance measures prescribe a standard length of time for a hearing, this necessarily limits the time taken to hear directly from witnesses, many of whom will be inexperienced in telling their story and may have language difficulties. Lawyers and administrators are already prone to utilise 'filling' in their interviewing of witnesses, such that, as Binder and Price described in their text on legal interview and counselling

each jilted, 35 year old mother of two is *unconsciously assumed* to be . . . like each of her predecessors. The general picture is not needed; the lawyer need only ask for some details. The lawyer has heard it all before, though in fact the lawyer may never have heard it even once.<sup>3199</sup>

Such 'filling' is a particular problem where interviewing is undertaken under time pressures, whether generated by time billing or performance standards. Unconsciously armed with a general mental picture, interviewers in such situations allow their expectations to substitute for a full narration of the event. The stereotype may serve to discount witnesses in cases turning on issues of credit.

9.18. The Commission supports efforts to improve members' productivity and accountability but such initiatives should have due regard to the diversity in cases. The standards should not be so prescriptive that they deter members taking the time to undertake appropriate investigation and allow proper time for evidence to be ventilated at the hearing.

9.19. There are no ultimate savings if parties, aggrieved at attenuated, 'unfair' merits review processes, then lodge appeal or judicial review applications. In this context, it is important to attend to the subtext of parties' grievances in judicial review; notably, their frequently articulated concerns about process, especially the processes by which tribunals made findings on credit or their examination of witnesses. The Commission was repeatedly told by practitioners that the sensibilities of applicants concerning these matters generates judicial review claims.<sup>3200</sup> The impact of productivity targets should be monitored within each

3199. D Binder & S Price *Legal interviewing and counselling: A client centred approach* West Publishing St-Paul 1977, 38-52 (their emphasis).

3200. In many cases, the Federal Court has expressed dissatisfaction with credit findings of the RRT: eg *Kathiresan v MIMA* (unreported) Federal Court 4 March 1998; *Habte v MIMA* (unreported) Federal Court 13 November 1997; *MILGEA v Che Guang Xiang* (unreported) Full Federal Court 12 August 1994; *Shahzad v MIMA* (unreported) Federal Court 9 April 1998; *Epeabaka v MIMA* (1998) 150 ALR 397 and other cases cited in Refugee Review Tribunal Legal Research Issues Paper No 14 *Credibility* RRT 4 September 1998. See also *Meadows v MIMA* (unreported) Full Federal Court 23 December 1998 and *Selliah v Minister for Immigration and Multicultural Affairs* [1999] FCA 615.

tribunal, any increase in judicial review applications noted, and the stated grounds of review considered.<sup>3201</sup>

9.20. The Administrative Review Council (ARC) recommended, and the Commission agrees, that review tribunals should continue to develop performance appraisal schemes for their members, covering all aspects of the work of members,

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3201. Comcare noted that mechanisms for soliciting the views of agencies on tribunal decision making quality, timeliness and other issues affecting the quality of members' decisions are also desirable: Comcare *Submission 349*.

other than outcomes in particular cases.<sup>3202</sup> While substantial cases of non compliance with performance standards may be appropriate grounds for removal of members, standards should take into account the fact that members have varied levels of skills, training and access to resources and must be consistent with members' independence in decision making.<sup>3203</sup> Consultations emphasised the need for relevant performance standards to be determined by tribunal management in close consultation with tribunal members.<sup>3204</sup>

**Recommendation 118.** Federal review tribunals should set performance standards for their members. Such standards should be developed in cooperation with members. The impact of performance standards should be monitored, including their effect on case processing and on the quality and durability of the decisions made.

## Decisions on the papers

9.21. Many federal merits review tribunals have the power to make final determinations 'on the papers' and without an oral hearing.<sup>3205</sup> A key objective of review tribunals is the need for expeditious decision making. While other objectives of review generally mean a hearing is required, decisions on the papers can usually reduce the time taken to resolve cases.

9.22. In DP 62, the Commission proposed that decisions on the papers should be more widely available in review tribunals, but only following appropriate consideration, and after procedurally fair opportunities have been afforded to the

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3202. ARC 39, 87 recommendation 46. Professor Marcia Neave identifies a number of concerns that need to be addressed if performance measurement is to enhance administrative justice. These include that the costs of performance measurement should not outweigh the benefits; that 'efficient' should not be privileged over 'effectiveness'; that prescriptive performance measure not be used inappropriately; that the difficulties in using performance measures to assess quality be recognised and allowed for: M Neave 'In the eye of the beholder – measuring administrative justice' *Paper 1999 National Administrative Law Forum Canberra 30 April 1999*.

3203. Similarly, care should be taken to ensure that directions given by tribunal management concerning the conduct of reviews are consistent with member independence, eg the power of the Principal Members of the MRT and RRT to give directions as to the conduct of reviews, including directions relating to the 'application of efficient processing practices': Migration Act s 353A (MRT); 420A (RRT); power of the President of the AAT to give directions as to the procedure to be followed in connection with a proceeding before the AAT (where the hearing of the proceeding has not commenced): AAT Act s 33(2)(a).

3204. RRT *Consultation* Sydney 18 October 1999; MRT *Consultation* Sydney 9 October 1999.

3205. The powers of existing tribunals to make decisions on the papers were described in ALRC DP 62 para 12.95–12.104. See AAT Act s 34B; Social Security Act s 1266; Migration Act s 359, s 360, s 362B (MRT); s 424, s 425, s 426A (RRT).

parties to respond.<sup>3206</sup> The Commission noted that such procedures generally will require communication or attempted communication with the applicant.

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<sup>3206</sup>. ALRC DP 62 proposal 12.6.

9.23. Several submissions supported some greater scope for the practice of decisions on the papers.<sup>3207</sup> Others disagreed and expressed concerns that the Commission's proposal did not incorporate safeguards sufficient to protect applicants' interests in presenting their cases at a hearing.<sup>3208</sup> The Law Council expressed concern that increased availability of the power to make decisions on the papers would result in a substantial move away from the fundamental concept of a transparent merits review process. The Council stated that 'significant safeguards' are required to ensure that this does not occur, including that a final determination should not be made without an oral hearing, unless the informed consent of the parties has been obtained.<sup>3209</sup>

9.24. The AAT and SSAT opposed the Commission's proposal. The AAT stated that it continued to believe that an applicant should not be denied the right to an oral hearing unless they consent to a decision being made on the papers.<sup>3210</sup> The SSAT observed that some SSAT applicants have not had the opportunity of direct contact with agency internal review decision makers and have not had an opportunity to respond to the case as set out in the papers. It was therefore important that the tribunal enabled applicants to present their case fully and be assisted in understanding Centrelink's case.<sup>3211</sup> The National Welfare Rights Network expressed concern that social security applicants often were not in a position to give informed consent about whether a decision on the papers is appropriate.<sup>3212</sup>

9.25. Review tribunal members are likely to be reluctant to exercise a discretion to make decisions on the papers adverse to applicants because this discretion may become subject to judicial review. The Commission supports internal case management which directs members to consider whether a decision on the papers can or should be made. Such decisions should have full regard to the interests of the applicant. The Migration Act provisions provide a good model.<sup>3213</sup> These allow review tribunals to make a decision on the basis of the documents provided by the applicant and Department of Immigration and Multicultural Affairs (DIMA), if the tribunal considers that it should decide in the applicant's favour on the basis of the material before it or if the applicant consents to the tribunal deciding the review on the papers.

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3207. ASIC *Submission 184*; Comcare *Submission 209*; MRT *Submission 273*; RRT *Submission 211*; DIMA *Submission 216*; Freehill Hollingdale & Page considered that in commercial AAT cases decisions on the papers should only be available with the parties' consent: Freehill Hollingdale & Page *Submission 339*.

3208. SSAT *Submission 365*; Freehill Hollingdale & Page *Submission 339*; National Welfare Rights Network *Submission 380*; LCA *Submission 375*.

3209. LCA *Submission 375*.

3210. AAT *Submission 372*.

3211. SSAT *Submission 365*.

3212. National Welfare Rights Network *Submission 380*.

3213. Migration Act s 360(2)(a)(b) (MRT); s 425(2)(a)(b) (RRT).

9.26. The Commission continues to emphasise that, even where a decision on the papers is not appropriate, members should be encouraged to consider alternatives to a full oral hearing, such as obtaining written statements from witnesses and written reports from expert witnesses.<sup>3214</sup> Inevitably such documentary and written evidence will be associated with cases where parties are represented. Such processes should not be used to the disadvantage of unrepresented and unskilled parties. The Commission's observations simply emphasise that administrative processes allow discontinuous and varied hearing and adjudication processes. Tribunal members should be encouraged and trained to utilise the full range of appropriate and effective decision making processes.

## Review tribunal membership and panels

9.27. Federal review tribunals have different membership arrangements and legislative requirements for the constitution of the tribunal. Tribunal membership structure, the different skills members bring to the investigation and adjudication of review applications, and the participation of registrars,<sup>3215</sup> case officers,<sup>3216</sup> research and administrative staff,<sup>3217</sup> impact on the case management approaches used by tribunals.

### Membership structures

9.28. The AAT has a complex membership structure consisting of a president, presidential members, senior members and other members, full and part time. They have legal or other special knowledge or skill.<sup>3218</sup> AAT tribunal panels may

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3214. eg in reviewing decisions made under the *Safety, Rehabilitation and Compensation Act 1988* (Cth), where medical evidence is in issue, invariably both sides seek to lodge fresh medical reports, but having done so there might be scope for a greater reliance on the papers rather than calling medical experts to hearings: *Comcare Submission 209 & 349*.

3215. In the AAT prehearing case management is largely conducted by legally trained conference registrars.

3216. In the MRT case teams (tribunal staff led by senior case officers) undertake much of the preliminary and research work involved in review applications.

3217. eg in the AAT, associates and the principal registry library provide research and other decision making support to members; in the MRT a decision support unit, including specialist migration lawyers, assists members and case teams; RRT members are assisted by a research unit which investigates and compiles 'country information' and maintains a library of refugee-related information; SSAT members are supported by a National Secretariat, including two legal research officers who provide information to assist decision making.

3218. The President of the AAT must be a Federal Court judge and other judges are appointed as presidential members. A person other than a judge may be appointed as a Deputy President, a senior member or a member. Deputy Presidents must be senior lawyers. Senior members must be lawyers or have special knowledge or skill relevant to the duties of a senior member. In practice, they are usually legally qualified. Other members need not be legally qualified but are appointed because of their expertise in various areas relevant to the AAT's jurisdiction: AAT Act s 5-7.



be constituted by one to three members as determined by the president,<sup>3219</sup> or otherwise as required by legislation.<sup>3220</sup>

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3219. AAT Act s 21.

3220. The AAT Act specifies the constitution of the AAT for the purpose of dealing with security appeals: AAT Act s 21AA. Other legislation which confers jurisdiction on the AAT makes provision for the AAT to be constituted in a particular way, eg for the purpose of reviewing a decision to refuse or cancel a visa on character grounds the Tribunal must be constituted by a presidential member alone: Migration Act s 500(5). See also *Archives Act 1983* (Cth) s 46(2); *Freedom of Information Act 1982* (Cth) s 58B(2); *Insurance Acquisition and Takeovers Act 1991* (Cth) s 67(4).

9.29. The MRT consists of a principal member, senior members and other full and part time members.<sup>3221</sup> For the purpose of a review the MRT can be constituted by panels from one to three members.<sup>3222</sup> However, in practice, review is usually undertaken by a single member. The RRT consists of a principal member, deputy principal member, senior members and other members.<sup>3223</sup> For the purpose of a review the RRT is constituted by a single member.<sup>3224</sup>

9.30. The SSAT consists of a national convener, senior members and other members.<sup>3225</sup> The SSAT must be constituted by three or four members, except in special circumstances.<sup>3226</sup> Such panels generally include an executive member with particular expertise in the operation of the agencies whose decisions are reviewed by the SSAT.<sup>3227</sup> Senior and executive members are generally appointed on a full time basis and other members on a part time basis.<sup>3228</sup>

9.31. The VRB has a principal member, senior members, services members and other members. Services members are selected from lists of persons submitted by organisations representing veterans.<sup>3229</sup> The VRB is constituted by a panel of three, consisting of the principal member or a senior member, a services member and one other member.<sup>3230</sup> The principal member is full time and other members part time.<sup>3231</sup>

### Factors affecting case management

9.32. The case management and adjudication processes of these diverse tribunals are dictated in large part by the varied legislative frameworks within which they operate, including the nature and structure of tribunal membership and staffing and

- the nature of the decision subject to review

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3221. Migration Act s 395.

3222. Migration Act s 354.

3223. Migration Act s 458.

3224. Migration Act s 421(1).

3225. Social Security Act s 1322(2), s 1324(1).

3226. Social Security Act s 1328.

3227. While executive members are a well established feature of the SSAT the position has no separate statutory basis from ordinary members of the SSAT. Executive members are usually detached officers of DFACS or Dept of Education, Training and Youth Affairs (DETYA): *SSAT Annual report 1998-99*, 10. Other members are selected for particular expertise in one of the disciplines of law, welfare or community work or medicine: *SSAT Annual report 1998-99*, 10-11. As at 30 June 1999 there were 32 executive members, 95 community or welfare members, 106 legal members and 38 medical members.

3228. *SSAT Annual report 1998-99*, 9-10.

3229. Veterans' Entitlements Act s 158.

3230. Veterans' Entitlements Act s 141. With the approval of the Minister a panel of two, may be constituted for a particular review or reviews: s 141(2).

3231. Veterans' Review Board *Annual report 1997-98*, 12.

- the relative complexity of the facts or law
- the nature of applicant and agency participation in proceedings
- the representation and skills of applicants and agencies.

9.33. For example, an AAT customs tariff classification dispute concerning complex facts and law and substantial amounts of duty, where parties are legally represented, will be conducted in a very different manner to review proceedings in the SSAT where the applicant is unrepresented and the respondent agency does not participate in the proceedings.

9.34. In complex cases where both parties are represented it may be appropriate for the tribunal to deal with the case in a manner similar to a court. If the law and facts in such cases are to be investigated by the tribunal and the participation of parties limited, merits review could be very time consuming and a significant additional public expense.

9.35. The extent to which parties participate and are represented in prehearing processes, such as in preliminary conferences or other contact with the tribunal, varies between review jurisdictions. The presence or absence of participation and representation is a major influence on case management and is a significant focus of this chapter. The presence or absence of representation affects the extent to which tribunals themselves must investigate case facts and issues or assist the applicant to present their case. Where the applicant is unrepresented the tribunal generally will have to adopt a more interventionist approach and apprise itself about the facts and the law. Some of the tasks may be undertaken by the respondent agency, if the agency is a party and participates in the proceedings.

9.36. Limits on participation and representation may significantly reduce the opportunities and the efficacy of processes for settlement. These, as much as adjudicative processes, often need skilled intermediaries to be successful.

### **Multi-member panels**

9.37. Decision making, particularly in the absence of representatives, may be more effectively and efficiently undertaken by joint discussion and consideration by several tribunal members representing varied perspectives and experience. An example is the composition of panels in the SSAT, which may comprise a legal member, an executive member (bringing specialist knowledge of social security administration) and a welfare member. Multi-member panels may have some advantages over single member tribunals and, in particular

- multi-member panels may be more suitable where the tribunal takes an active role in the process of gathering and assessing evidence (in that the applicant may feel the process is fairer if one member of a panel asks searching questions as compared with a situation in which a single member questions and tests the applicant's evidence)
- panel members may be chosen for their varied and particular expertise in law, medicine, chemistry, engineering and other disciplines

- several members working together may be more likely to ensure that all relevant information is brought out and tested at or before the hearing

- participation on multi-member panels may provide effective training and development for new or under-skilled members.<sup>3232</sup>

9.38. These advantages must be weighed up against any additional costs of providing multi-member panels.<sup>3233</sup> In the Commission's view, the disadvantage of requiring increased resources to provide multi-member panels may be outweighed by improved applicant satisfaction, increased member skills and confidence, increased efficiency, and a reduction in the number of applications for judicial review (and thus savings).

9.39. The RRT, in particular, is a very pared-down merits review model. The tribunal member is the investigator, hearing advocate and decision maker. Such an array of skills and roles is not easily combined in the one person.<sup>3234</sup> The resolution of cases in the RRT is almost entirely dependent upon the member's particular skills in identifying issues, eliciting and evaluating information, resolving the matter and clearly setting out the reasons in writing. As investigators as well as decision makers, members need to be skilled in questioning witnesses and determining the credibility of the witness while retaining an unbiased position. They are required to undertake examination and cross-examination, often through an interpreter and with witnesses and applicants who have limited, if any, understanding of what information is legally relevant. This task is made more difficult when questioning witnesses of another culture and in a language other than English.

9.40. In the RRT, the member is required to present adverse material to the applicant and question them about the accuracy of their evidence. Currently, this is usually done at the hearing stage. Credit issues arise in about 30–40% of hearings in the RRT.<sup>3235</sup> Under the present structure, the member may be perceived as the adversary as well as the decision maker. This problem is exacerbated by the unfamiliarity of the 'inquisitorial role' in our legal system.<sup>3236</sup>

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3232. See ARC 39, 32; Committee for the Review of the System for Review of Migration Decisions *Non-adversarial review of migration decisions: The way forward* AGPS Canberra 1992, 63–64.

3233. These advantages may be contested. For example, the RRT doubts that multi-member tribunals assist in determining credibility issues, given the existing protection provided to applicants by the strict requirements of the Federal Court in relation to credibility findings: RRT *Submission 274* referring to *Meadows v MIMA* (unreported) Full Federal Court 23 December 1998.

3234. See K Cronin 'Dispute resolution in administrative law' *Paper* National Administrative Law Forum Canberra 2 May 1997 in J McMillan *Administrative law under the Coalition Government* Australian Institute of Administrative Law Canberra 1997, 72; K Cronin 'Non-adversarial adjudication – some thoughts on the workings of tribunal decision-making' *Paper* Immigration Review Tribunal Annual Conference Sydney 27 August 1996.

3235. RRT *Correspondence* 23 December 1999.

3236. Susan Kneebone has observed that members and advisers are uncomfortable with an inquisitorial role in the hearing, and indeed tend to be confrontational in their approach to questioning. This is manifested in two ways. First, there is a tendency on the part of some members to adopt the role of a cross-examiner, sometimes questioning very aggressively. Secondly, and paradoxically, if

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a member appears to be too proactive or investigative in questioning, the member will be accused of bias! : S Kneebone 'The RRT and the assessment of credibility: an inquisitorial role?' (1998) 5 *Australian Journal of Administrative Law* 78, 94. See also L Certoma 'The Refugee Review Tribunal' *Unpublished RRT*, 1994.

9.41. The Commission heard evidence from tribunal members in all federal jurisdictions of the ultimate benefits which derive from the 'fairer' atmosphere in credibility cases where one member of a multi-member tribunal undertakes the bulk of questioning. It can be difficult for members who have investigated and 'found' inconsistencies in applicants' accounts and who inevitably feel committed to their own findings, to evaluate dispassionately whether such inconsistencies necessarily invalidate the application. The National Welfare Rights Network noted that one important advantage of multi-member panels is that collaborative decision making provides protection against bias.

This is important in inquisitorial processes where the decision maker can become wedded to material found by their own investigations or inquiries and in tribunals which regularly deal with unrepresented consumers.<sup>3237</sup>

9.42. Members of the SSAT indicated they consider that multi-member panels are able to process cases more quickly and cost effectively than single member panels.<sup>3238</sup> Panels often hear several cases in one day with particular panel members charged with responsibility for drafting particular decisions. The decisions are then circulated to other panel members for approval. At various times during the hearing, members are enjoined to consider whether they have sufficient evidence to make the decision. The panel is said to allow members more confidently and accurately to make decisions. The panel can work to shorten the hearing and keep the focus on relevant evidence.

9.43. Certainly, panels bring special benefits in relation to training and development of tribunal members, enabling them to work through the review proceedings alongside more experienced members. The professional development of members can be promoted by placing members with others who can act as mentors to help address shortcomings in member performance in the conduct of questioning at hearings, writing reasons or other aspects of review proceedings.

9.44. In DP 62, the Commission suggested that RRT and MRT case investigation may be facilitated by multi-member panels.<sup>3239</sup> A responsible member would examine the application, decide on measures of investigation, order the disclosure of documents and draft a report in which the facts are set out, the arguments of the parties are summarised and a draft decision prepared. Where issues of credit are involved, the responsible member could undertake the questioning of witnesses and applicants. This may help to ensure that the applicant experiences the hearing as a fair process.<sup>3240</sup>

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3237. National Welfare Rights Network *Submission 380*.

3238. SSAT *Consultation* Sydney 30 July 1998.

3239. ALRC DP 62 para 12.118-12.123.

3240. DIMA stated that these tasks are performed by case officers at a far lower cost per review than would be occasioned by the use of multi-member panels: DIMA *Submission 385*.



9.45. Consultations with members of the MRT and RRT revealed no enthusiasm for the routine use of multi-member panels. The principal member of the RRT, Dr Peter Nygh, stated that, given the numbers of cases involving credit in the RRT the Commission's proposal would have multi-member panels used frequently in the refugee review jurisdiction. Members further stated that generally such panels have no advantages and would make proceedings more lengthy. However, the MRT and RRT saw merit in having the option to constitute multi-member panels in rare cases. The MRT, for example, sometimes uses multi-member panels in cancellation of spouse visa cases,<sup>3241</sup> leading and complex cases and for professional development of members.<sup>3242</sup>

9.46. The Commission's recommendation below is not directed to produce routine use of panels but to give the president or divisional executive members of the ART the option to constitute multi-member panels where appropriate. The use of multi-member panels in the AAT appears quite high. In 1998-99, 31% of hearings in the general and veterans' divisions of the AAT involved multi-member panels.<sup>3243</sup> In the year to 30 September 1999, multi-member panels were used in 64% of compensation cases and 53% of veterans' cases, compared with only 9% of social security cases.<sup>3244</sup> The MRT used multi-member panels in 1% of cases.<sup>3245</sup> There can be costs to the tribunal in such high panel usage. However, the use of panels can be an important mechanism for dealing effectively with complex cases and for members' professional development. The Commission accepts that in the refugee jurisdiction, if panels were arranged for credit cases, this would involve regular use of this arrangement. Even so, panels may be arranged in such cases to facilitate member training in dealing with these difficult issues.

**Recommendation 119.** The new Administrative Review Tribunal should be permitted to use multi-member panels in all review jurisdictions, to be constituted as appropriate. Multi-member panels should be used at the discretion of the president or divisional executive member, as required, for cases which are particularly complex or require specialist member expertise,

3241. Cancellation of spouse visa cases are sometimes heard by a two member panel consisting of one female and one male member: MRT *Consultation* 9 November 1999. Dr Peter Nygh, principal member of the RRT, noted he had 'no objection to the suggestion that in rare cases a multi-member tribunal will be appropriate, even in the RRT'. Such arrangements could be accommodated within the arrangement under s 443 of the Migration Act 1958 which allows referral of decisions involving an important principle to the AAT, to be heard by a multi-member panel, including the principal member of the RRT: RRT *Correspondence* 23 December 1999.

3242. However, as at 8 December 1999, only 1% (13) of 1290 cases then constituted had been constituted to two member panels and none to three member panels: MRT *Correspondence* 8 December 1999.

3243. AAT *Annual report 1998-99*, 110.

3244. AAT *Workload indicators September 1999*, Tables: Constitution of tribunals by registry: All jurisdictions.

3245. MRT *Correspondence* 8 December 1999.

or where there are significant benefits for the continuing professional development of tribunal members.

## **Party roles, participation and representation**

9.47. The following section of this chapter examines the roles of parties in review tribunal proceedings and how these roles differ as between existing review tribunals.

9.48. These differences derive in part from different legislative provisions concerning parties to review proceedings and the extent to which parties may participate or be represented in review hearings. In the AAT the applicant for review and the agency that made the decision subject to review are participating parties and have a right to be represented at the hearing.<sup>3246</sup> In the MRT, RRT and SSAT the agency does not generally participate in proceedings, and in the MRT and the RRT the participation of applicant advisers or assistants at the hearing is restricted.<sup>3247</sup>

9.49. The objective in review tribunal proceedings is for the tribunal to make the correct or preferable decision after considering the whole of the evidence. The case is initially disclosed through the agency's reasons for decision and other material documenting the decision, which must be provided to the tribunal and the applicant within statutory time limits.<sup>3248</sup> Unless the tribunal is able to make a decision on the papers (see paragraph 9.21–9.26 above) on the basis of the documentation provided by the agency, further information will be needed. This information may come from the agency, the applicant, from other agencies or persons, such as assessors or experts or from all these sources.

9.50. Review tribunals all have permissive, information gathering powers which enable them to obtain the further information they need to make a decision. For example, the AAT may inform itself on any matter in such manner as it thinks appropriate,<sup>3249</sup> including by requiring relevant documents to be lodged by the decision maker<sup>3250</sup> and summoning a person to give evidence or produce documents.<sup>3251</sup> The MRT and RRT may get any information that they consider relevant,<sup>3252</sup> including by summoning any person to give evidence or produce documents.<sup>3253</sup> Obtaining information in this way may be time consuming and costly for tribunals and less effective than if such information was provided voluntarily, or on direction, by the applicant or respondent.

9.51. It is in this context that the roles and participation of parties in review tribunal proceedings should be considered. In administrative proceedings tribunals can manage and control party participation and secure party cooperation and assistance in arriving at the correct or preferable decision.

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3246. AAT Act s 32.

3247. See further at para 9.96.

3248. AAT Act s 37 (AAT); Social Security Act s 1261 (SSAT); Migration Act s 352 (MRT), s 418 (RRT); Veterans' Entitlements Act s 137 (VRB).

3249. AAT Act s 33(1)(c).

3250. AAT Act s 37(1)–(2), s 38(1).

3251. AAT Act s 40(1A). The AAT may order that the fees and allowances of a person summoned to appear as a witness by the AAT are to be paid by the Commonwealth: AAT Act s 67(3).

3252. Migration Act s 359(1)(MRT), s 424(1)(RRT).

3253. Migration Act s 363(3)(MRT), s 427(3)(RRT).

9.52. A combination of practice rules, directions, costs incentives and case management should enhance a constructive role for party representatives in preparing and presenting cases and brokering negotiated outcomes. In those cases amenable to compromise, representative negotiation 'in the shadow of the tribunal' appears to be as effective as similar, court based negotiation.

## Tribunal inquiries

9.53. In the AAT the current practice is for parties to be encouraged, under the direction of the tribunal, to gather relevant material. The AAT is the primary investigator in a very limited number of cases. In contrast, the SSAT, the MRT and the RRT were set up as explicit, inquisitorial review tribunals. Review tribunal arrangements to inquire and obtain information vary according to the type of information sought. For example

- where the issue concerns departmental decision making processes or record keeping or medical issues, the questions may be within the expertise of particular members such as the executive members of the SSAT or specialist medical members of the AAT
- the RRT, which requires data on the political or social environment and events in other countries, has a research unit which investigates and compiles 'country information' and maintains its library of refugee related information
- the MRT uses case officers to investigate cases, including assembling evidence, arranging for submissions to be made and commissioning relevant reports
- particular aspects of migration case investigation is undertaken by specialist bodies such as the National Office of Overseas Skills Recognition (NOOSR) or Medical Officers of the Commonwealth, whose findings bind the tribunal.

## A duty to inquire

9.54. The Commission has examined what types of legislative provisions might be effective in ensuring that tribunals are able to undertake appropriate investigation of case facts and issues and whether their existing powers are sufficient. The answers to these questions are most relevant in the context of the proposed ART. Even if broadly expressed powers such as those in s 33 of the AAT Act give sufficient discretion to the tribunal to undertake inquiries, a further question concerns whether this provision is sufficiently directive to encourage investigation of relevant issues. The New South Wales *Administrative Decisions*

*Tribunal Act 1997* (NSW) (ADT Act), for example, gives greater emphasis to explicit tribunal power to conduct inquiries.<sup>3254</sup>

9.55. The Commission proposed that federal merits review tribunals should be required to inquire into any relevant fact in issue where

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3254. The *Administrative Decisions Tribunal Act 1997* (NSW) (ADT Act) provides that the Administrative Decisions Tribunal (ADT) may call witnesses of its own motion and examine and cross-examine witnesses to such extent it thinks proper; provides the ADT with a range of express powers to control proceedings before it, including powers to require material to be placed before it in writing, to decide which matters will be dealt with by oral evidence or argument, to require the presentation of parties' cases to be time limited; places the ADT under an obligation to ensure that all relevant material is disclosed to enable it to determine all the relevant facts in issue in any proceedings; provides that the ADT may inquire into any matter in such manner as it thinks fit. ADT Act s 73, s 83.

- the fact is relied on by an applicant
- a finding in relation to that fact is necessary in order for the tribunal to reach its decision and
- it is practicable for the tribunal to inquire into that fact.<sup>3255</sup>

9.56. This formulation was proposed so as to clarify tribunals' responsibilities to inquire consistent with the review objective of reaching the correct or preferable decision. It is also in line with the approach taken in Federal Court cases concerning whether tribunals acted unfairly in failing or ceasing to investigate an issue.<sup>3256</sup>

9.57. Some submissions suggested that the proposed ART legislation should contain an explicit and comprehensive statement of tribunal powers and responsibilities, including legislative provisions placing the Tribunal under an obligation to ensure that all relevant material is disclosed to enable it to determine all the relevant facts in issue.<sup>3257</sup>

9.58. The Law Council supported the Commission's proposed statement of tribunal investigative responsibilities.<sup>3258</sup> There was no support from tribunals for the imposition of a general duty to inquire into case facts and issues. The AAT submitted that the suggested formulation could place rigid investigative requirements on the ART, without adding substance to the common law position.

That is, the Tribunal may be required to make (or direct a party to make) marginal investigations. In the AAT's view, flexibility is desirable when deciding the extent of evidence required to establish a fact. The suggested formulation has the potential to impede that flexibility.<sup>3259</sup>

9.59. The principal member of the RRT in correspondence with the Commission strongly opposed the proposal as 'its incorporation as a statutory direction will aggravate our problems'.<sup>3260</sup>

9.60. While some submissions expressed concern about the possible imposition of new duties on tribunals and agencies, National Legal Aid submitted that the formulation of the duty proposed by the Commission over-emphasised the role of the parties in providing all the relevant material and failed to give weight to the circumstances in which it would be appropriate for the tribunal to conduct its

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3255. ALRC DP 62 proposal 12.10.

3256. *Fernando v MIMA* (unreported) Federal Court 5 November 1997; *Minister for Immigration and Ethnic Affairs v Singh* (1997) 144 ALR 284, 291; *Garcha v Minister for Immigration and Multicultural Affairs* (1997) 145 ALR 55, 63; *Sun Zhan Qui v MIEA* (1997) 151 ALR 505.

3257. M de Rohan *Submission* 175.

3258. LCA *Submission* 375.

3259. AAT *Submission* 372.

3260. RRT *Correspondence* 23 December 1999.

own inquiries.<sup>3261</sup> Comcare supported the imposition of such a duty in principle but noted agency concerns that respondents might be required to fund inquiries which were not practicable for the tribunal to inquire into.<sup>3262</sup>

9.61. The Commission's proposal was not intended to impose additional, investigating functions upon tribunals but to clarify the common law position. It was not intended to impede their flexibility, or to generate grounds for judicial review. The proposal received unqualified support only from the Law Council and strong opposition from tribunals who see a statutory formulation of a duty to inquire as impeding their functions. In the circumstances the Commission does not recommend the formulation set down in DP 62. The Commission does continue to see a need for tribunal guidelines to members concerning their responsibility to inquire into relevant facts and issues. Tribunal members have such a responsibility at common law. It is appropriate that they are reminded of it, particularly in cases where unrepresented parties may be unable to investigate and present evidence for their case.

### **Investigative resources**

9.62. It is not enough that, in the ART, guidelines remind members of their responsibility to inquire. There are a number of factors necessary to assist tribunal investigation.

- The resources available to tribunals and their members (for example, whether a tribunal has the resources to conduct its own investigations, the tribunal and member caseload and management performance targets). Tribunal members need to be mindful of the time and resources needed to conduct inquiries.
- Factors relevant to the parties (for example, their knowledge, experience and whether parties are represented and able to provide the necessary information to the tribunal).
- The personal preferences of tribunal members, the membership and 'culture' of the tribunal. Tribunal 'culture' may encourage or discourage member inquiries.

9.63. Resources are an important constraint on tribunal investigations. Investigation can take time and require expenditure on staff resources or on expert advice or opinion. A more active investigative review model has implications for the allocation of resources overall, between primary decision making and review tribunals and between first and second tier review. The issues that arise include

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3261. National Legal Aid *Submission 360*.

3262. Comcare *Submission 349*.

- at what stage of decision making and review should the particular resources necessary to investigate case facts be allocated?
- to what extent would enhanced investigative approaches by review tribunals produce a shift in responsibility and costs away from the agency and the applicant to the tribunal and is this desirable?
- would expenditure by review tribunals inquiring into matters at the prehearing stage be offset by savings through earlier settlement of cases, without the need for a hearing?



9.64. These issues must be considered in relation to different review jurisdictions. The Commission's recommendations concerning the planning and implementation of dispute management and resolution schemes in federal government departments and agencies<sup>3263</sup> would allow consideration to be given to such issues within each portfolio. Certainly, there seems no good reason why a case which could be resolved by medical evidence should advance to another level of review before such evidence is obtained.

9.65. It is not possible to make general recommendations on these matters. Proposals for reform should be directed to particular review jurisdictions. The Commission considers that planning for integrated review processes should include legal aid commissions (LACs).<sup>3264</sup> LACs provide additional investigative resources funded by government. In certain jurisdictions it may be more cost and time effective to have the SSAT refer cases to a LAC to obtain medical reports rather than have LAC involvement to get the same report at the AAT review stage. Any such arrangements should be carefully evaluated to measure cost and time savings to the review system as a whole.

**Recommendation 120.** The new Administrative Review Tribunal should issue guidelines for members stating that members should inquire into any relevant fact in issue where

- the fact is relied on by an applicant
- a finding in relation to that fact is necessary in order for the Tribunal to reach its decision and
- it is practicable for the Tribunal to inquire into that fact.

## The agency

### Agency representation

9.66. In the AAT, respondent government agencies are always represented by agency officers or by outside lawyers from private firms or the Australian Government Solicitor (AGS) and, on occasions, by counsel.<sup>3265</sup> In the other review tribunals the agency is not a party or does not participate in the review although, as discussed below, the tribunal may require the agency to provide further information to assist it to reach a decision.

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3263. See ch 6, para 6.140–6.155, rec 68–70.

3264. See para 5.132–5.146.

3265. Where the proceedings are before the AAT following a decision of the SSAT or VRB, the agency will have been unrepresented before the relevant first tier tribunal.

9.67. In the MRT and the RRT the department is not a party to the proceedings, so the question of departmental representation does not arise. In the SSAT while the agency is a party and may make written submissions, the agency, unlike the applicant, cannot make oral submissions or be represented before the Tribunal. The Repatriation Commission is a party to all proceedings before the VRB, but as a matter of practice seldom attends VRB hearings.

9.68. The AAT stated that agency participation can be of considerable assistance to a review tribunal, particularly in relation to fact finding, identification of the relevant law, in examining witnesses and, where appropriate, making submissions.<sup>3266</sup> The AAT suggested that the ART should have a discretion to require agencies to participate in review proceedings.<sup>3267</sup> Similar views about the importance of agency representation were echoed in agency submissions and in consultations.<sup>3268</sup>

9.69. In the ART agencies will be parties but may choose whether or not to participate directly in proceedings. The National Welfare Rights Network considered that it was inappropriate for agencies to be represented at hearings when the applicant is unrepresented.<sup>3269</sup>

9.70. The Commission considers that even where, as in the MRT, RRT and SSAT, agencies are not generally parties or participants in review proceedings, the ART legislation should nevertheless allow for agency representatives to participate at hearings as the agency considers appropriate and useful. The ART also could invite such participation.

9.71. Where agencies are represented and participate in review proceedings and applicants are unrepresented, tribunal members may, in fact, have greater scope to assist the unrepresented party. Agency representatives should be required, under model litigant rules, to assist the tribunal to reach the correct or preferable decision.<sup>3270</sup> The Commission recommends explicit endorsement of this obligation, as discussed below.

## Duties of agency representatives

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3266. AAT *Submission 210*. The AAT stated that where a case turns on credibility 'it is desirable for the member to be more removed from the questioning process than is the present case in some tribunals' (ie the IRT and RRT). The SSAT also noted that skilled representation can assist complicated cases, but warns that it should not be assumed that cross-examination and adversarial methods are the best methods for testing evidence effectively: SSAT *Submission 200*.

3267. AAT *Submission 372*.

3268. ASIC *Submission 184*; Comcare *Submission 209*; Australian Customs Service *Consultation Canberra 27 September 1999*.

3269. National Welfare Rights Network *Submission 380*. The Network proposes that the income support division (ISD) of the ART should permit representation only for consumers but that the new ART appeal panel permit representation for both.

3270. The federal government's model litigant rules are discussed in ch 3, para 3.129-3.168.

9.72. In the conduct of review tribunal proceedings, agency representatives have been held by the Federal Court to have a duty to assist the AAT in reaching the correct decision.<sup>3271</sup> Under this principle, the role of the agency's representative is equated to that of counsel for the Crown, particularly with regard to disclosure

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<sup>3271</sup>. *McDonald v Director-General of Social Security* (1984) 6 ALD 6.

of evidence.<sup>3272</sup> The agency should ensure that all relevant facts and documents are before the AAT, whether favourable to the applicant or not, and should not place undue emphasis on defeating the application.<sup>3273</sup>

9.73. Notwithstanding such obligations, the AAT noted instances where respondent agencies or their representatives were uncooperative or excessively combative in matters before the AAT. This was demonstrated by

- failure to comply with deadlines for lodgement of documents
- deliberate late disclosure of material
- failure to disclose material evidence which could have assisted an applicant's case and
- focussing solely on defeating the application during the hearing.<sup>3274</sup>

9.74. The quality of some agency representation was criticised by AAT members, practitioners and on occasion by agencies themselves. Generally the criticisms were very specific, focussing on particular officers or firms. Comments were directed in particular at the quality of inhouse Department of Veterans' Affairs representatives in some registries which was said to have been adversely affected by funding, staffing cuts and staff turnover. AAT members and conference registrars commented that it was often difficult to get agency advocates to focus on preparation for conferences. Inappropriately adversarial conduct by private firms representing Comcare also drew adverse comment. AAT members noted that some firms acting for government compensation agencies dealt with AAT compensation cases as if they were personal injury claims in state courts.<sup>3275</sup>

9.75. Certain solicitors representing applicants who responded to the Commission's national AAT case file survey questionnaires raised similar concerns about the conduct of agencies and their representatives in the cases in which they were involved. These criticisms are set down in DP 62.<sup>3276</sup> Consultations and submissions also identified a range of concerns with agency conduct in review proceedings and with the mechanisms available to the AAT to deal with non compliance with directions.

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3272. J Dwyer 'Overcoming the adversarial bias in tribunal procedures' (1991) 20 *Federal Law Review* 252.

3273. *Re Cimino and Director-General of Social Services* (1982) 4 ALN N106; *Re Stewart and Department of Employment, Education and Training* (1990) 20 ALD 471; *Scott v Handley* [1999] FCA 404 (13 April 1999); J Dwyer 'Overcoming the adversarial bias in tribunal procedures' (1991) 20 *Federal Law Review* 252, 255.

3274. AAT Submission 210.

3275. eg AAT Consultation Melbourne 25 August 1999; AAT Consultation Brisbane 21 September 1999; AAT Consultation Sydney 24 September 1999; AAT case file survey questionnaire practitioner comments; DVA Consultation 27 September 1999.

3276. ALRC DP 62 para 12.235.

9.76. One such concern relates to the provision of the 'T' documents in which the respondent's case is initially disclosed.<sup>3277</sup> 'T' documents must be lodged with the AAT by the agency within 28 days of the agency receiving notice of the review application. Review proceedings cannot commence in any real sense until the agency provides these documents. There may be considerable numbers of documents to be provided.<sup>3278</sup> Compliance with this requirement differs markedly as between review jurisdictions.

9.77. In particular there is a low level of compliance with timely provision of 'T' documents in veterans' entitlements cases, and this notwithstanding that such cases have been reviewed in the VRB. The AAT time standard is 35 days from the AAT's dispatch of notice of the review application to receipt of the 'T' documents. This standard was complied with in 54% of veterans' cases compared with 67% of compensation cases, 91% of social security cases and 82% of taxation cases.<sup>3279</sup> Poor performance in this respect was not uniform across registries, with Brisbane veterans' cases recording near perfect compliance (98%) and Sydney only 19% compliance.<sup>3280</sup>

9.78. Delay is also said to arise because agencies inappropriately restrict the delegation of decision making in relation to the conduct of AAT cases. In the veterans' and social welfare jurisdictions, agency inhouse advocates attend conferences and conduct hearings on behalf of the respondent agencies. The AAT advises that, in both jurisdictions, the advocates themselves do not have the appropriate delegation to make concessions despite the fact that advocates are generally at the same or a higher officer ranking than relevant delegates of the departments.<sup>3281</sup> The AAT stated that this necessitates adjournments to obtain

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3277. AAT Act s 37 requires agencies to provide a statement which sets out the reasons for the decision and refers to the facts, evidence and other material on which it was based. Copies of all relevant documents in the decision maker's possession or control must also be lodged.

3278. The Commission's national AAT case file survey collected information about the number of individual documents in the 'T' document, as one measure of the documentary burden of review applications. The median number of individual 'T' documents filed was 20 and the maximum number of documents was 417. 'T' documents were lodged in 1386 cases (87% of sampled cases). The documentary burden was heaviest in compensation cases which had a median of 36 individual 'T' documents: ALRC *Part one: Empirical information about the Administrative Appeals Tribunal* ALRC Sydney June 1999, para 6.2, table 6.2. (ALRC, AAT Empirical Report Part One).

3279. AAT *Workload indicators September 1999*, Table: Timeliness for the year to 30 September 1999: All registries.

3280. Melbourne registry was 33%, Adelaide registry 77%: AAT *Workload indicators September 1999*, Table: Timeliness for the year to 30 September 1999: All registries.

3281. In the veterans' jurisdiction, there are currently approximately 600 applications before the Sydney registry of the AAT. For all of these matters, the authority to concede is vested in one officer of the Department of Veterans' Affairs. In the social security jurisdiction, a single officer is responsible for concessions in over 300 matters. Where the agency has sought review of an SSAT decision, the concession decision is referred to the Canberra office: AAT *Submission 372*.

instructions or information, adversely affecting the efficiency of the prehearing process.<sup>3282</sup>

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3282. Advocates frequently cite the non-availability of their instructing officer as a reason for non-compliance with practice directions. Planning settlement is made more difficult without an instructing officer. During the first conference, the advocate, the applicant and the conference registrar are often required to anticipate what the advocate's supervisor will accept as evidence of a particular matter. Concessions in relation to particular aspects of a case are also affected. While the authorisation of decision making power is a matter for individual agencies, from a case management perspective the AAT considered that the conference process would be considerably improved if departmental advocates had the authority to make all relevant concessions to settle or proceed at the hearing: *AAT Submission 372*.

9.79. The AAT advised that similar problems arise in the compensation jurisdiction, where the respondent's representative, usually an AGS or private solicitor, often appear to have difficulty obtaining instructions. When introducing mandatory conciliation conferences in the compensation jurisdiction the AAT required attendance of a person with authority to settle.<sup>3283</sup>

9.80. The AAT submitted that legislation governing procedure before review tribunals should explicitly mandate a form of 'counsel assisting' role for representatives in review tribunal proceedings. In this regard, no distinction should be drawn between representation which is provided by government agencies or that which is provided by private contractors on behalf of government.<sup>3284</sup> The Law Council agreed with this approach<sup>3285</sup> but agencies were less supportive of a prescription of their representatives' role.

9.81. The Commission proposed reinforcing the duties of agency representatives through legislation constituting the ART to mandate a 'counsel assisting' role for agencies and agency representatives in review tribunal proceedings, based on existing judicial statements.<sup>3286</sup> Specifically this obligation could provide that the role of agencies and agency representatives should be to assist the tribunal to reach the correct or preferable decision.

9.82. An alternative option to secure the same outcome would be for the Attorney-General to issue a legal services direction to this effect. Under recent changes to the *Judiciary Act 1903* (Cth) related to the 'untying' of Commonwealth government legal work from the AGS, the Attorney-General can issue legal services directions capable of applying to agencies and to the AGS or private lawyers representing agencies in review tribunal proceedings.<sup>3287</sup> The Attorney-General has sole power to enforce compliance with legal services directions.<sup>3288</sup> Legal services directions are discussed in more detail in chapter 3, in the context of the Commonwealth's obligation to act as a model litigant.

9.83. On balance the Commission prefers the legal services direction option. The principle that government agencies should assist the tribunal in its decision making is already part of the common law. Inclusion of the principle in ART legislation or legal services directions simply underscores the obligation. The legal services directions already include other model litigant principles and are well

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3283. AAT *Submission 372*.

3284. AAT *Submission 210*. Another submission said that it is important to clarify the role of agency representatives in merits review tribunal proceedings, especially where government legal work is outsourced and where non-legal advocates appear for agencies: M de Rohan *Submission 175*.

3285. LCA *Submission 375*.

3286. ALRC DP 62 proposal 12.20.

3287. The Attorney-General has issued such legal services directions under s 55ZF of the *Judiciary Act 1903* (Cth), with effect from 1 September 1999. Attorney-General's Department *Legal Services Directions* Attorney-General's Department Canberra 1999.

3288. *Judiciary Act 1903* (Cth) s 55ZG(2), inserted by the *Judiciary Amendment Act 1999* (Cth).

publicised to agencies and lawyers undertaking government representation. In the circumstances agencies and their lawyers may be better apprised of this role and responsibility if it is included within the model litigant principles in a legal services direction.

**Recommendation 121.** The federal Attorney-General should specify in the model litigant obligations, set down in legal services directions under the *Judiciary Act 1903* (Cth), that agencies and agency representatives in the conduct of federal review tribunal proceedings have duties to assist the tribunal to reach its decision.

### Agency investigation

9.84. In review tribunal proceedings the respondent agency's case is initially disclosed in documents lodged with the tribunal and provided to the applicant. As stated, in AAT proceedings the agency must provide 'T' documents within 28 days of the agency receiving notice of the review application.<sup>3289</sup> In each of the specialist tribunals, the agency or departmental secretary is required to provide statements of the reasons for the decision, the facts on which it was based and relevant documents.<sup>3290</sup>

9.85. Review tribunals often need to obtain further information from, or check details with, departmental officers. For example, the MRT may find it necessary to get information from migration compliance officers to confirm what actually happened when the officer detained an applicant, where the information on file simply indicates that an applicant tried to 'abscond'. Agencies may also respond to requests to obtain additional medical or psychological reports concerning the applicant.

9.86. Review tribunals have powers to obtain information from agencies. For example, the AAT has power to require the primary decision maker to lodge additional statements in relation to reasons for a decision where these are considered by the tribunal to be inadequate,<sup>3291</sup> and the SSAT has the power to require the Secretary of the agency<sup>3292</sup> to provide relevant information or documents or to exercise the Secretary's powers to require another person to provide relevant information or documents.<sup>3293</sup>

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3289. AAT Act s 37.

3290. Social Security Act s 1261; Migration Act s 352 (MRT), s 418 (RRT).

3291. AAT Act s 37(2), s 38.

3292. That is, the Secretary of DFACS or DETYA.

3293. Social Security Act s 1268, s 1269.



9.87. The migration and refugee tribunals have the power to require the Secretary of DIMA to arrange for any investigation or medical examination that the tribunal thinks necessary with respect to the review and to give the tribunal a report of that investigation or examination.<sup>3294</sup>

9.88. The Commission was informed that it can be time consuming to secure such 'formal' responses in writing and an unnecessary complication to summons officers as witnesses. Certainly it is difficult to obtain information in a time frame consistent with the tribunals' obligations to provide speedy decision making. In cases where such assistance is required, this could be facilitated by the agency electing to participate directly in ART proceedings. Where the agency is not a participant in review proceedings, effective alternative arrangements need to be established.

9.89. The Commission was informed by then IRT members and practitioners that the relationship between the IRT and DIMA in relation to investigation was not well structured for cooperative investigation. The principal member of the MRT stated that, while there is now greater scope for DIMA to make submissions to the MRT and for the MRT to invite submissions, there needs to be an agreed process in place to ensure that this can be done efficiently and that the views expressed in any submission 'accurately reflect the views of the Department, rather than one work area or individual within the Department'.<sup>3295</sup> In the past the Migration Internal Review Office (MIRO) within DIMA served to assist the tribunal with routine inquiries. With the abolition of MIRO, there is no longer this point of contact to assist with inquiries about immigration decisions, particularly with inquiries concerning practices in, or visa decisions made in the overseas posts. In such cases the MRT generally must contact the overseas post which can further delay proceedings.

9.90. The absence of an effective 'bridge' to the relevant department may leave review tribunals with 'the worst of both worlds'; that is, they are deemed to be 'inquisitorial', but have no effective means to inquire where the information sought is within the department.

9.91. The 'bridge' between the SSAT and Centrelink is provided, in part, by the executive members of the panel (usually detached officers of Centrelink). Where further information is required from Centrelink, these executive members are usually responsible for obtaining the information. The Commission was told that such links work well, allow easy access to 'line' or supervising officers to check

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3294. Migration Act s 363(1)(d)(MRT), s 427(1)(d)(RRT).

3295. S Tongue *Submission 231*.

factual information and create a supportive relationship between the department, agency and tribunal.<sup>3296</sup>

In the SSAT, a real value of the executive member is experience in the public sector and technical knowledge of complex computer systems, records and work practices. Frequently, the nature of the matter in dispute requires sophisticated interrogation of Centrelink computer systems to which executive members have direct access in their role in the tribunal ... Income support payments are an area of government service that increasingly relies on computer rather than paper records and telephonic rather than personal contact. The viability of review by an external body like the SSAT (or proposed ART) will depend on the skills now in executive member positions.<sup>3297</sup>

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3296. This highlights again an essential difference between the nature of administrative tribunals and courts. In the latter any such links with the executive would be seen as anathema to judicial independence.

3297. SSAT *Submission 365*. The ability of review tribunals to access electronic records and information held by agencies is an increasing feature of review tribunal decision making, eg. in the MRT and RRT: MRT *Consultation 9* November 1999.

9.92. Computer links between agencies and tribunals are important mechanisms for facilitating tribunal investigation. Most agencies have established or are in the process of establishing computer links with tribunals for these purposes.

9.93. Responses to DP 62 revealed concerns that, while such cooperation could help resolve many review applications, applicants or their representatives may perceive such links between review tribunals and agencies as unfair or evidencing a lack of independence.<sup>3298</sup> For example, the Law Council stated tribunals should not rely upon the investigative assistance of the department or agency because it will lead to the loss of the real and perceived independence of review tribunals. The Commission notes concerning this proposal that it should not be assumed that the information sought is necessarily adverse to the applicant's case. SSAT members described examples to the Commission where the information obtained validated the applicant's claim.<sup>3299</sup>

9.94. These concerns are valid, but may be adequately addressed by ensuring that information obtained from the agency is disclosed to the applicant. Formal transparent links may in fact be less of a threat to independence than the sorts of informal links that may otherwise develop.<sup>3300</sup> To help address concerns about contact with agencies undermining the independence of tribunal decision makers, such contact can be undertaken through case officers or tribunal research sections, rather than directly by members. There need to be effective arrangements for communication and investigative assistance between review tribunals and agencies. Tribunals request agencies to provide information because this may be a reliable, or the only, place to obtain the information. To seek information does not assume the tribunal will accept the veracity of, or give greater weight to, the information obtained.

**Recommendation 122.** Federal review tribunals and the agencies whose decisions are subject to review should focus on developing appropriate arrangements and procedures for contact and communication to enable investigative assistance to be given by the agency to the tribunal in particular cases. Such arrangements should accord with the requirements of procedural fairness to applicants and should be arranged in such a manner as not to undermine the independence of tribunal decision makers.

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3298. AGS *Consultation* Canberra 29 September 1999; Freehill Hollingdale & Page *Submission* 339; LCA *Submission* 375. Comcare also noted that possible perceptions of 'bias' would need to be addressed but supported in particular consideration of the role of a tribunal/agency liaison committee or officers: Comcare *Submission* 349.

3299. SSAT *Consultation* Sydney 30 July 1998.

3300. RRT *Consultation* Sydney 18 October 1999.

## The applicants

### Applicant participation and representation

9.95. All applicants in AAT proceedings have a right to be represented, including at the hearing. Most applicants before the AAT are represented,<sup>3301</sup> generally by lawyers, but the level of applicant representation varies considerably between AAT review jurisdictions.<sup>3302</sup> Unrepresented applicants are assisted to participate in AAT review proceedings by the tribunal (see paragraphs 9.107–9.108 below).

9.96. In the MRT and RRT, the applicant is entitled, where there is to be a hearing, to appear to give evidence and to have another person present to ‘assist’ them. The participation of advisers or assistants at hearings is limited by law.<sup>3303</sup> Assistants are not entitled to present arguments to the MRT or address the tribunal, other than in ‘exceptional circumstances’,<sup>3304</sup> and neither the applicant nor an assistant is entitled to examine or cross-examine any person.<sup>3305</sup> When appearing before the RRT to give evidence, the applicant is not entitled to be ‘represented’ or to examine or cross-examine any other person.<sup>3306</sup> In practice, when advisers are present, members usually ask them at the end of the hearing whether any other matters should be raised with the applicant. In some RRT cases, there is a type of ‘re-examination’ of the applicant conducted by the adviser.<sup>3307</sup>

9.97. In SSAT proceedings, applicants may be represented at hearings, but in practice are usually unrepresented.<sup>3308</sup> Parties to proceedings before the VRB may be represented at hearings but not by legal practitioners.<sup>3309</sup> Most applicants are

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3301. The Commission’s survey of AAT case files found that 67% of applicants were recorded as represented, and mostly by lawyers: See ALRC, *AAT Empirical Report Part One*, table 7.1.

3302. For example, while 90% and 86% of the applicants in the Commission AAT national case file survey sample were represented in the veterans’ affairs and compensation jurisdictions respectively, only 29% of applicants in the sampled social welfare cases were represented. See ALRC, *AAT Empirical Report Part One*, table 7.1.

3303. See Migration Act s 366A (MRT); s 427(6) (RRT).

3304. Migration Act s 366A(2). The MRT has no discretion to depart from this rule: Migration Act s 363A.

3305. Migration Act s 366D.

3306. Migration Act s 427(6). However, advisers are usually given the opportunity to address the tribunal and to make oral submissions in relation to matters arising from the evidence taken at the hearing. See RRT *Annual report 1996–1997*, 36.

3307. P Nygh *Correspondence* 23 December 1999.

3308. Data collected by the SSAT in 1996 indicated that representatives, which include family members and other non specialist representatives, attended the hearing in about 15% of SSAT cases. A further 4% of cases had a representative who did not attend the hearing. The major sources of specialist representation were welfare rights and community legal centres: SSAT *Submission 200*.

3309. Veterans’ Entitlements Act 1986 s 147(2)(a).

represented,<sup>3310</sup> generally by members of the Returned and Services League and related or private advocates.

9.98. Applicants initiate the review process and may be required by legislation or tribunal practices or procedures to provide particular information about their case. In the AAT failure to comply with a direction of the tribunal, which might include a direction to provide information or evidence, may result in the tribunal dismissing the application without proceeding to review the decision.<sup>3311</sup> In MRT and RRT proceedings, the Migration Act prescribes a code of fair procedure for the tribunal when seeking additional information or comment from the applicant. The code allows the tribunal to make a decision without any delay if the applicant fails to respond to a request for further information or comment within the prescribed period.<sup>3312</sup>

## Representation and case outcomes

9.99. As noted in DP 62, the Commission's AAT case file survey found a relationship between representation and applicant 'success'.<sup>3313</sup> Unrepresented applicants in the AAT sample were more likely to be unsuccessful in having the decision under review set aside, varied or remitted. After excluding agency appeals, applicants were successful in 42% of all the sampled AAT cases. An unrepresented applicant 'won' (albeit sometimes only in the sense of getting the case remitted) 23% of the time compared with 51% of the time for represented applicants. Where the applicant had a final hearing the figures were 17% 'success' for unrepresented applicants and 54% if represented. Research conducted by the University of Wollongong and the Justice Research Centre delivered similar results.<sup>3314</sup>

9.100. As noted, the Commission's AAT case file survey also found that representation was related to whether cases were resolved by consent or by a contested decision.<sup>3315</sup> Cases were more likely to be resolved by consent and less

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3310. In 1997-98, 66% of applicants at VRB hearings were represented: VRB *Annual report 1997-98* 17.

3311. AAT Act s 42A(5).

3312. Migration Act s 359B, s 359C, s 360 (MRT); s 424B, s 424C, s 425 (RRT).

3313. ALRC, AAT Empirical Report Part One, 7.4-7.5, table 7.4. The success or otherwise of the applicant was assessed by reference to AAT decision codes on the AAT's computerised case management system (AATCAMS) information sheet. Briefly, applicants were deemed to have been successful for these purposes if the decision subject to review was set aside, varied or remitted, either by AAT decision or by consent. Many of the consent outcomes could be considered to be 'win/win' situations, where the government party also received some benefit through a settlement which represented a compromise by the applicant on a bargaining position earlier adopted.

3314. See H Gamble & R Mohr 'Litigants in person in the Federal Court of Australia and the Administrative Appeals Tribunal: A research note' *Paper Sixteenth AIJA Annual Conference Melbourne 4-6 September 1998*.

3315. ALRC, AAT Empirical Report Part One, para 7.6.

likely to be resolved by hearing and determination by the AAT where the applicant was represented.<sup>3316</sup> This effect was not due solely to a greater proportion of cases settling in review jurisdictions in which representation is more common.<sup>3317</sup> This research highlights the role that representatives play in securing consensual settlement of review applications.

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3316. 79% of cases with applicant representation resolved by consent, compared to 54% of cases where there was no applicant representation. 17% of cases with applicant representation were resolved by hearing and determination, compared to 35% of cases where there was no applicant representation: *ibid.*

3317. The relationship between representation and consent outcomes was also found to be statistically significant when considering only social welfare cases, only veterans' affairs cases and only taxation administration cases.

An independent representative gives the consumer confidence that a negotiated settlement is an appropriate result rather than letting the tribunal decide by way of hearing.<sup>3318</sup>

9.101. The Commission's survey confirmed more cases with unrepresented applicants were disposed of before any prehearing case event or after one prehearing case event and more stayed on to a final hearing. That is, unrepresented applicants tend to 'drop out early' or 'go the full distance' through the process. This finding is also consistent with commentary on the results of the University of Wollongong and Justice Research Centre research<sup>3319</sup> and observations made by the AAT in its submission.

With respect to applicants, experienced representatives are able to use review tribunal processes strategically; persisting with an application only when they consider that there is a prospect of success, and withdrawing or settling an application when it is realistic to do so. Unrepresented applicants may not have sufficient experience to properly evaluate their prospects of success during the course of an application ... A conclusion is that unrepresented applicants lack the knowledge or experience to use pre-hearing proceedings to best advantage.<sup>3320</sup>

9.102. Active engagement of applicant representatives, in negotiation with agencies and in case preparation, is clearly important to the early resolution of review applications. This fact alone has implications for priorities in and the arrangements for government funding for administrative dispute resolution. In particular, it may be more cost-effective to allow or provide legal or specialist non-legal representation (whether through legal aid, community legal centres, specialist advocacy services or other means) at the case preparation or prehearing stages, rather than at hearing. It also provides strong arguments for funding organisations such as welfare rights centres and refugee and immigration advice and casework services which provide cost effective expertise and help filter out applications with insufficient merit.

9.103. The reasons why unrepresented parties are less successful and experience different case outcomes are complex and will vary from case to case. Lawyers generally may be unwilling to represent applicants with unmeritorious cases. Where legal aid is available, it is reserved for applicants with meritorious cases.<sup>3321</sup> A proportion of unrepresented parties may simply want an opportunity to be heard on their concerns, notwithstanding that these concerns do not constitute grounds for setting aside the primary decision. Empirical research on case

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3318. National Welfare Rights Network *Submission 380*.

3319. H Gamble & R Mohr 'Litigants in person in the Federal Court of Australia and the Administrative Appeals Tribunal: A research note' *Paper Sixteenth AIJA Annual Conference Melbourne 4-6-September 1998*.

3320. *AAT Submission 210*.

3321. eg most applicants with representation in the AAT's social welfare jurisdiction are represented by lawyers funded by legal aid: P Alexander *Correspondence 7 June 1999*.

outcomes does not take into account the merits of particular review applications or ascertain the particular knowledge and skills of different individual applicants. Unrepresented applicants vary in relevant knowledge and skills. An applicant's need for legal representation often arises from characteristics of the applicant, rather than characteristics of the review jurisdiction.

For example, applicants may require representation because they do not understand the requirements of the legislation governing their application and therefore the nature of the evidence required to support their case or because they lack the confidence to make written or oral submissions that are relevant to the tribunal's consideration. Such factors are independent of the jurisdiction or type of decision for which review is sought.<sup>3322</sup>

9.104. Lack of representation is sometimes said to ensure informality in proceedings, but while unrepresented parties may feel more comfortable with informal processes, this may be at the expense of a favourable outcome.

The appearance of informality in tribunals may encourage applicants to assume they can simply tell the tribunal their stories in their own way, but such accounts are all too often of little legal relevance to a tribunal whose focus of interest is dictated by legislative criteria ... Applicants who have told their stories, whether irrelevant or insufficient, may feel satisfied with the process, but lose their case.<sup>3323</sup>

9.105. Without an assessment of applicant skills and the relative merits of unrepresented applicants' cases, it is not possible to evaluate whether or to what extent the outcomes evidence disadvantage caused by lack of representation. Even so, the findings should make policy makers cautious about excluding representatives from the review process. The research is consistent with some unrepresented parties abandoning meritorious cases or persisting too long with unmeritorious cases.

### **Assisting unrepresented applicants**

9.106. All federal merits review tribunals assist unrepresented applicants by providing some guidance and support for applicants. Assistance commonly includes interpreters and translation services and written and other information about tribunal processes. Responsibility for liaison with applicants is often assigned to a specific tribunal officer. In its *Better decisions* report, the ARC recommended that review tribunals should provide appropriate assistance to applicants, particularly those who are unrepresented, and that this assistance should be characterised by

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3322. P Alexander *Correspondence* 7 June 1999.

3323. HGenn & Y Genn *The effectiveness of representation at tribunals* Lord Chancellor's Dept London 1989 and H Genn 'Tribunals and informal justice' (1993) 56*Modern Law Review* 393.



- as far as practicable, a single point of contact throughout the review process
- appropriately designed literature and other explanatory material
- reimbursement of travel and incidental expenses for applicants without adequate means.<sup>3324</sup>

9.107. In the AAT the respondent agency is usually represented, underscoring the inequality of resources and legal skills between applicant and agency. AAT practice and procedure is modified when the applicant is unrepresented. The AAT's General Practice Direction and Conciliation Conferences Direction apply only to applications made by represented applicants.<sup>3325</sup> This means, for example, that unrepresented applicants are not required to provide written statements of issues and contentions or attend compulsory conciliation conferences in the compensation jurisdiction.

9.108. The AAT enables and encourages parties to pursue their application without representation and provides assistance to unrepresented applicants in the following ways.<sup>3326</sup>

- Unrepresented applicants are provided with a series of information pamphlets explaining each stage of the review process, together with the AAT's Charter, a list of legal aid offices, community legal centres and other service and welfare organisations which may be able to assist the person.
- After the 'T' documents (the agency's statement and reasons and other relevant documents) are received, the AAT's outreach information officer contacts an unrepresented party by telephone to provide information about AAT processes. A video about AAT procedures may also be provided.
- At conferences, the convening member or conference registrar explains the AAT's conference processes, answers questions and generally ensures that unrepresented parties are assisted to participate fully in all discussion about their cases. Members or conference registrars may help unrepresented parties to understand the issues by discussing the merits of the case and identifying possible areas of conflict in the evidence to be presented.<sup>3327</sup> In some circumstances, the AAT may take more active steps

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3324. ARC 39, 103, rec 62.

3325. AAT General Practice Direction 18 May 1998; AAT Conciliation Conferences Direction 18 May 1998.

3326. AAT *Submission* 144; J Mathews 'Assisting unrepresented parties in the AAT' (1998) 72 *Reform* 38.

3327. The AAT considered that conferences provide an effective way of assisting unrepresented parties to evaluate their case, and where necessary, prepare for a hearing. Where appropriate, conference convenors can give a frank evaluation of an unrepresented party's case and may also encourage settlement: AAT *Submission* 210.

to assist applicants in preparing the case, for example, by helping to arrange for witnesses to be called on behalf of the applicant or for further medical or other reports to be obtained.

- On the day of the hearing, the members' associate or the tribunal attendant familiarises the person with the hearing room and will often explain the likely course of the hearing. Hearing procedure will usually be modified. For example, the order of presentation may be reversed so that the respondent agency presents its case first. Steps may be taken to reduce the formality of the hearing, for example, by not allowing parties to stand when addressing the tribunal and not requiring the unrepresented party to give evidence from the witness box.<sup>3328</sup>

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3328. J Mathews 'Assisting unrepresented parties in the AAT' (1998) 72 *Reform* 38, 40.

9.109. The ability of review tribunals to assist unrepresented applicants is limited by the requirements of procedural fairness,<sup>3329</sup> the resources and time available to the tribunal and dependent upon the skill and personal attributes of individual tribunal members.<sup>3330</sup>

9.110. As noted in DP 62, in the Commission's AAT case file survey, unrepresented applicants were questioned about the assistance received through AAT case conferences. The responses were ambivalent about the value of this assistance.<sup>3331</sup> Some 47% (73) of those responding agreed or strongly agreed that the AAT registrar or member helped negotiations or promoted settlement of the case.

9.111. Some unrepresented parties expressed clear satisfaction with the assistance they received from the AAT, including, as noted in DP 62, 'given all help required'; 'positive advice, co-operation, vital facts regarding my case' and 'helpful, encouraging, patient and very professional assistance'.<sup>3332</sup> Others were dissatisfied and there were some unrepresented applicants who said that they had received no assistance at all from the AAT. The survey comments, previously cited in DP 62, provide some interesting comments about the assistance which the applicants expected or wanted to be provided.

I received no assistance from AAT to present my case. Although I believed I had a good case I had no legal grounding and therefore no basis to proceed. Whilst the AAT is supposed to be informal, I believed that it was also less than strictly legal which I found not to be the case. I would have appreciated the AAT determining if I was representing myself and providing an hour or so with an independent person (AAT or otherwise) to advise me about the things I should be doing. Instead, I came to the first conference without any clue. The legality aspect did not really appear until the second conference when I discovered I was fighting a legal precedent. Had I been given an understanding of this prior to the first conference, I may not have proceeded or proceeded differently.<sup>3333</sup> (Unrepresented applicant in a compensation case)

Expecting only a conference due to cancellation of first conference I was nervous when had to face reps of Comcare, employer, legal rep Comcare, AAT member, without warning and etc. I have no complaints about the way I was treated except to state there is a difference between a conference and a full blown hearing.<sup>3334</sup> (Unrepresented applicant in a compensation case)

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3329. National Legal Aid observed, however, that where one party to the dispute is a government department with more resources, including legal representation, and much greater familiarity with the tribunal process it is not appropriate to limit the assistance provided to an unrepresented party appearing before the tribunal out of concerns about fairness to the government department: National Legal Aid *Submission 360*.

3330. AAT *Submission 210*.

3331. ALRC DP 62 para 12.209-12.211.

3332. ALRC DP 62 para 12.210.

3333. AAT case file survey response 1056 (unrepresented applicant).

3334. AAT case file survey response 679 (unrepresented applicant).

Duration of case very long. Role of AAT not clear. Far conferences/hearing when you live in the countryside. Big legal terminologies for simple officers. Cost involvement is of concern. Other departmental pressures are of concern. Finally to get the rights through the AAT is very hard for simple officers.<sup>3335</sup> (Unrepresented applicant in a compensation case)

Dealing with Commonwealth officers which always have access to legal assistance more than the applicant is always at a disadvantage. Access to legal assistance could be more equitable and would almost certainly speed the process up.<sup>3336</sup> (Unrepresented applicant in a compensation case)

The AAT or some other body should provide legal advice (or an adviser) if requested ... I could not afford personal legal advice and feel I lost the case because I did not have the necessary legal experience to present my argument properly.<sup>3337</sup> (Unrepresented party in a social welfare case)

At all times I felt pressured by both the tribunal and the other party's legal representative to get my own legal representation ... There appeared to be no avenue for true unbiased resolution for a non-represented person.<sup>3338</sup> (Unrepresented party in a social welfare case)

I was ill prepared as I did not understand what was required. Some representation or assistance on case preparation would have helped. Also a viewing of typical proceedings may have helped.<sup>3339</sup> (Unrepresented party in a social welfare case)

I was left to flounder without any assistance from the AAT and was therefore not able to put my case without legal representation.<sup>3340</sup> (Unrepresented party in a social welfare case)

9.112. An innovation adopted by Centrelink in the context of service delivery is the One Main Contact (OMC) client service system which has aims to build a 'one to one relationship' between a particular assigned customer service officer (CSO) and each client. Each 'customer' of Centrelink is able to maintain contact with the same CSO.<sup>3341</sup> The Commission considers that this approach may have broader application to the way in which review tribunals deal with certain categories of applicant, particularly those who are relatively unskilled, may be anxious about or disaffected with government systems and need close guidance throughout the

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3335. AAT case file survey response 60 (unrepresented applicant).

3336. AAT case file survey response 1094 (unrepresented applicant).

3337. AAT case file survey response 661 (unrepresented party).

3338. AAT case file survey response 987 (unrepresented party).

3339. AAT case file survey response 553 (unrepresented party).

3340. AAT case file survey response 944 (unrepresented party).

3341. Centrelink *Balancing the business – One main contact: The art of service: A guide for managers & teams for implementing and sustaining OMC* Centrelink Canberra July 1999.

review process.<sup>3342</sup> The OMC approach is a response to customer feedback showing that Centrelink customers face problems with having to deal continually with different staff, being overwhelmed by a 'faceless' bureaucracy, and having to explain their story repeatedly. Similar problems are faced by unrepresented applicants in review proceedings,<sup>3343</sup> and the Commission heard echoes of these concerns in the complaints of litigants in the Family Court.<sup>3344</sup> As the survey comments make clear, many such applicants readily identified the limited assistance they needed to understand and deal with the review process.<sup>3345</sup>

### **Applicant representation in the ART**

9.113. In the context of debate concerning the proposed ART model, the federal government has proposed that the role and level of participation by representatives in the ART should continue to vary as between existing review jurisdictions, and that, except where portfolio legislation specifies otherwise, representation at proceedings should only be allowed in exceptional or prescribed circumstances and where agreed by the minister responsible for the particular review jurisdiction.

9.114. Some submissions received by the Commission supported current arrangements for representation in federal tribunals and recommended that such arrangements continue in the ART.<sup>3346</sup> Others, while not supporting the present representation provisions, were most concerned to argue against any further restrictions of representation and the participation of representatives.

9.115. By common consensus, the most effective representatives for review parties were said to be those lawyers and non-lawyers who understand the jurisdiction,

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3342. The AAT's pilot case management arrangements for social security review applications which provide for an ongoing point of contact for the parties for the duration of the application. AAT *Social security case management pilot: Preliminary report upon alternatives to existing case management practices within the Administrative Appeals Tribunal* 17 August 1999.

3343. CSOs are allocated a pool of customers and reallocation is minimised. CSOs may broker assistance from other staff with specialist skills but will follow up the outcome and maintain contact with the customer. Principles of OMC include that 'customers only need to bring to Centrelink knowledge of their situation and a preparedness to tell the truth'. Customers are thenceforth assisted to get the most of each contact, including by being told when they make an appointment what they need to bring. Centrelink *Balancing the business – One main contact: The art of service: A guide for managers & teams for implementing and sustaining OMC* Centrelink Canberra July 1999.

3344. See para 8.230.

3345. See ch 5, para 5.148–5.149.

3346. RRT *Submission 211*; DIMA *Submission 216*; DIMA *Submission 385*. DIMA stated that a fair exposition of the case is ensured by requiring tribunal members to take a strongly investigative approach and maintaining research support for members. DIMA pointed to the specialised caseload of the immigration and refugee division stating that members will not need to hear detailed legal arguments from applicants and can manage without professional representation provided they have appropriate preliminary training and sufficient access to experienced legally-qualified support staff within the tribunal: DIMA *Submission 216*.

the processes and present relevant information. Representatives can help the tribunal to identify and interpret the relevant law, elicit facts and formulate reasons. Governments and parties may wish for a simpler review system; however, the complex factual and legislative framework within which some decisions are made can make this objective unrealistic. The Commission's research indicates that restrictions on the participation of representatives may increase the numbers of cases resolved by a hearing, in turn increasing tribunal costs and case durations. Submissions emphasised that representation in itself does not necessarily lead to formality or inappropriately 'adversarial' procedure.<sup>3347</sup>

9.116. The Commission considers that legislation, policy and practice concerning federal review tribunal proceedings should focus, not on excluding, but on better defining and managing representatives. Legislative strictures on particular types of participation – for example, limiting examination and addresses to the tribunal – may serve to limit the tribunal's discretion to seek assistance from representatives where this is appropriate or necessary in the case. Any provisions for ART management of party and representative participation should be judiciously targeted to allow management, not inappropriate restriction, of representation or participation. Where there is scope for resolution of the case without a hearing, full participation by representatives should be encouraged, as should assistance by representatives in written case preparation.

9.117. Even where, as in the MRT and RRT, the legislation seeks to constrain the mode of the hearing so that the hearing is based on direct interaction between the decision maker and the applicant, the legislation should nevertheless provide tribunals with discretion to permit representative participation at hearings as considered appropriate and useful. This is not to import a formal, elaborate hearing, with the representative examining witnesses and the member conducting 'cross-examination'. Applicants may be more comfortable and forthcoming if their representative began by questioning them and the tribunal better informed if the representative could address the tribunal on issues orally, rather than reserve this input for later written submissions.

**Recommendation 123.** Legislation and practice directions for the new Administrative Review Tribunal should provide the tribunal with discretion to permit applicant representatives to participate in hearings as the members consider appropriate and useful. Such discretion should be applicable to all divisions, including the immigration and refugee division and the income support division.

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<sup>3347</sup>. AAT *Submission 210*; M de Rohan *Submission 175*.

## Case management issues

### The AAT's case management model

9.118. The features of the AAT's case management model were summarised in DP-62.<sup>3348</sup> The AAT model received broad, if qualified, support from agencies and legal practitioners. In particular the AAT conference program was credited as highly successful in effecting settlement of disputes.<sup>3349</sup> Most AAT cases are resolved without the need for a contested hearing before the tribunal.<sup>3350</sup>

9.119. The general view was that the model does not require any radical change but needs to be 'fine-tuned', in particular to address concerns about the time taken to resolve review applications. AAT Senior Member Bruce Barbour has summarised the present situation as follows

Although [AAT] preliminary conferences continue to be a very successful alternative dispute resolution (ADR) process, we seem to have reached a plateau in relation to outcomes and time-lines. Most matters, approximately 70 per cent, are resolved during the pre-hearing conference process. This has been the same for some time.<sup>3351</sup>

9.120. The case management reforms recommended by the Commission for the AAT focus on issues associated with the implementation of team case management (see paragraphs 9.124–9.132) and compliance with case management directions (see paragraphs 9.164–9.175).

### Case duration in the AAT

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3348. ALRC DP 62 para 12.35. The basic mechanism of prehearing case management in the AAT is the preliminary conference, conducted by tribunal members or conference registrars, either by telephone or face to face. Conferences are used to both explore settlement options and to ensure that matters are better prepared for hearing should settlement not occur. Initial disclosure of the agency's case is contained in a statement required by s 37 of the AAT Act and copies of relevant documents (the 'T' documents). Where the applicant is legally represented, statements of issues are exchanged and then refined at a first conference and statements of facts and contentions and experts' reports exchanged before a second conference. Unrepresented applicants are assisted through the provision of information about the review process and assisted at conferences to understand the issues and what is needed to prepare their case.

3349. Settlement rates are not necessarily a measure of the effectiveness of conference proceedings. Some review applications are not amenable to consensual resolution. See discussion at para 9.6.

3350. In 1998–99, the AAT reported that 83% of veterans' cases, 68% of social security cases, 85% of compensation cases and 85% of taxation division cases were finalised other than by hearing. AAT *Annual report 1998–99*, 107 table 5.5. The Commission's national AAT case file survey showed that the case categories with the highest proportions of cases resolved by consent were veterans' affairs (81%) and compensation (79%). See ALRC, AAT Empirical Report Part One, para 5.1, table 5.1.

3351. B Barbour 'Alternative —> Appropriate: A shift in thinking about tribunal processes' *Paper* Council of Canadian Administrative Tribunals Conference Vancouver 11 October 1999.

9.121. The Commission's national case file surveys found that the median duration of cases finalised in the AAT was longer than for cases in the Federal Court and Family Court. This is contrary to one of the founding objectives of the tribunal which was set up to provide speedier resolution of cases than judicial processes.<sup>3352</sup> In DP 62, the Commission noted that while these results do not constitute evidence of systemic problems with delay in AAT proceedings, they clearly indicate room to expedite and improve case resolution.<sup>3353</sup>

9.122. Some factors contributing to lengthier case duration are clearly the responsibility of agencies, such as failure to provide 'T' documents in a timely manner. Others are clearly the responsibility of the tribunal, such as the time taken to deliver decisions.<sup>3354</sup> However, overall, case duration is the result of multiple factors and may involve all participants. Such factors include the time to prepare cases adequately for hearing, the need to provide settlement opportunities, instances of non compliance by parties, late instruction of counsel, and failure by the tribunal to provide timely conference or hearing dates.

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3352. As stated in ALRC DP 62, the median time to disposition of the sample cases in the AAT, measured from the time application was made to the AAT, to the final outcome of the case was 8.13 months. The 90th percentile time to disposition was 17.97 months. That is, 10% of the sample cases took 18 months or more to finalise. The 90th percentile time to disposition was 21.60 months for compensation cases, 23.91 months for taxation administration cases, 19.40 months for veterans' affairs cases and 12.37 months for social welfare cases: ALRC, AAT Empirical Report Part One, table 4.7-4.8. More recent AAT statistics show that in the year to 30 September 1999, 35% of compensation cases, 12% of social security cases, 29% of veterans' cases and 28% of taxation cases took longer than 12 months from application to final disposal: AAT *Workload indicators September 1999*, Table: Timeliness for the year to 30 September 1999: All registries.

3353. ALRC DP 62 para 12.36-12.39.

3354. The AAT time standard is 60 days from the last day of the hearing to delivery of the decision. This standard was complied with in 59% of taxation cases, 65% of compensation cases, 75% of social security cases and 79% of veterans' cases: AAT *Workload indicators September 1999*, Table: Timeliness for the year to 30 September 1999: All registries.



9.123. There is currently a low level of compliance in the AAT with time standards between the first and last prehearing conference in the compensation jurisdiction as compared with other jurisdictions.<sup>3355</sup> The contributing factors may be inherent in the case type, such as the need to obtain medical expert reports, but also may include factors that can be addressed by tribunal case management.

### Team case management

9.124. In most cases AAT conferences are conducted by conference registrars.<sup>3356</sup> Cases are allocated by an AAT member who acts as a prehearing coordinator. Cases are generally, but not always, managed by the same conference registrar throughout the process. An AAT member acts as a listing coordinator. After cases are listed for hearing they are allocated to a member or members who are then responsible for the case until it is finalised.

9.125. In DP 62, the Commission suggested that further improvements in AAT case management could be secured if AAT cases were managed by the same 'team' of conference registrar and member throughout the prehearing process.<sup>3357</sup>

9.126. The Commission's conclusions in this regard derived in part from analysing case management practices in certain overseas jurisdictions where there are demonstrable benefits from using teams of members and registry staff who consistently manage and determine a particular docket of cases. The Commission considers that this option deserves detailed consideration in the AAT and for the ART.

9.127. Such a case management system would not place members in charge of all conferences but would allow registrars or other tribunal staff to retain responsibility for prehearing case events in most cases. However, allocation of a 'docket' of cases to teams of members and registrars allows for increased accountability from members and registrars for the effective, timely resolution of cases; for consistent dealing with cases; and flexibility to involve members in making early determinations in appropriate cases. It also affirms that case

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3355. The AAT time standard is 168 days from first conference to last conference. This standard was complied with in 48% of compensation cases compared with 55% of veterans' cases, 65% of taxation cases and 78% of social security cases: AAT *Workload indicators September 1999*, Table: Timeliness for the year to 30 September 1999: All registries.

3356. However, members conduct the majority of conferences in the Canberra registry. In Hobart, conferences are conducted by the district registrar: AAT *Annual report 1998-99*, 25. The AAT claims that the use of conference registrars has led to an increase in the number of matters finalised by the tribunal, as members are now available for hearings on days which were previously devoted to the prehearing process: AAT *Submission 210*. However, one submission suggested that using conference registrars rather than members to conduct preliminary conferences is a waste of members' expertise. That is, members should conduct conferences where appropriate: L Rodopoulos *Submission 178*.

3357. ALRC DP 62 proposal 12.1.

management is part of the overall review process and subject to direction or intervention by members, where appropriate.

9.128. The AAT already uses elements of this system. As stated, AAT cases are managed by the same conference registrar throughout the prehearing process, unless that conference registrar is unavailable. The conference registrar who conducts the first preliminary conference conducts any further conferences, makes any decisions relating to future listing and deals with requests or queries from the parties which are not ordinarily dealt with by registry officers.<sup>3358</sup> Conference registrars act under the general supervision of a prehearing coordinator, an AAT member<sup>3359</sup> with responsibilities for the overall management of the prehearing process for a particular registry.<sup>3360</sup>

9.129. The AAT is piloting new case management arrangements for social security review applications which provide for an ongoing point of contact for the parties for the duration of the application.<sup>3361</sup> The aim of the social security pilot is to implement differential case management strategies in consultation with the parties through a case coordinator. Such management may include more flexible and expeditious<sup>3362</sup> approaches to conferencing, individual or joint discussions with the parties and facilitating negotiations and assisted resolution.<sup>3363</sup> More generally the AAT is looking to streaming to improve case management outcomes and durations.

Streaming can be used in a variety of ways. For example, streaming can be used to ensure appropriate processes are used in distinguishing between matters where parties are represented or self-represented; matters which involve a question of law, which may be able to be fast-tracked through to a final decision, and matters that involve a question

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3358. AAT *Submission 372*.

3359. The Sydney and Melbourne registries have two prehearing coordinators, one for bulk jurisdictions and the other for non-bulk matters: AAT *Submission 372*.

3360. Conference registrars will also commonly seek advice from members with specific expertise in a particular jurisdiction when a novel or complex issue arises during the conference process: AAT *Submission 372*.

3361. The pilot involves all applications lodged in the Melbourne registry of the AAT in the social security jurisdiction from 1 October 1999 for 6 months: AAT *Social security case management pilot: Preliminary report upon alternatives to existing case management practices within the Administrative Appeals Tribunal* 17 August 1999.

3362. The time standard for the pilot provides for a maximum case duration of 24 weeks from lodgement to finalisation. The AAT's target time standard for social security cases is for 90% of cases to be finalised within 12 months. The median time to disposition of the social security cases sampled by the Commission, measured from the time application was made to the AAT, to the final outcome of the case was 5.33 months (or 23 weeks): AAT *Empirical Report Part One*, table 4.7.

3363. AAT *Social security case management pilot: Preliminary report upon alternatives to existing case management practices within the Administrative Appeals Tribunal* 17 August 1999; AAT *Submission 372*.

of fact, which may necessitate more investigation. There may also be scope to stream according to the merit of the case.<sup>3364</sup>

9.130. Members and staff of the AAT expressed reservations about broader adoption of the team management approach. These reservations included the following.<sup>3365</sup>

- A team management system may cause listing delays by removing flexibility in relation to the listing of cases for hearing. A matter allocated to a member may be delayed if that member is not available. Currently the AAT can minimise the period between the final conference and hearing by using part time presiding members or members from other states or by listing the matter before the most readily available member.
- Concerns about the increased workload of members if they are required to be involved at an earlier stage in more review applications.
- A team management system would not significantly increase the AAT's flexibility to involve members in prehearing decision making.<sup>3366</sup> The AAT concedes that where a member has been involved in a matter during the prehearing process, it would be desirable, where possible, for that matter to be listed for hearing before that member. However, this may not always be appropriate where a member has been required to make findings in relation to the merits of an application.<sup>3367</sup>
- Currently, the constitution of the tribunal to hear a matter is decided at the completion of the prehearing process. At this stage the prehearing coordinator is able to identify the issues in contention, the nature of the dispute, the urgency of the case and the general complexity of the matter. These factors influence whether the matter is listed before a presidential member, a senior member, a part time member or a multi-member tribunal. The AAT considered that it is preferable to list matters at the completion of the prehearing process when more is known about the nature of the case rather than when the application is received.

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3364. B Barbour 'Alternative → Appropriate: A shift in thinking about tribunal processes' *Paper* Council of Canadian Administrative Tribunals Conference Vancouver 11 October 1999.

3365. AAT *Consultation* Sydney 24 September 1999; AAT *Submission* 372.

3366. The AAT advises that when an interlocutory issue arises prior to or during the conference process matters are referred to an available member to conduct an interlocutory hearing (if necessary) and make a determination. Where there is non compliance by a party without reasonable excuse, the matter is usually referred to the prehearing coordinator for the listing of a directions hearing before a member to issue a formal direction. This directions hearing is heard by the prehearing coordinator in many cases, but is commonly referred to another member: AAT *Submission* 372.

3367. *ibid.*

- The benefits of assigning individual conference registrars to the full range of AAT matters may be lost if, as suggested in DP 62, conference registrars are assigned to specific review jurisdictions within the AAT or ART.<sup>3368</sup>

9.131. In summary, the AAT submitted that the case management system recommended by the Commission may have disadvantages for the tribunal in view of its existing prehearing processes and multi-tiered membership structure.

9.132. The Commission agrees that the present hierarchical membership and staffing arrangements in the AAT may be more difficult to accommodate within a team management system where members and registrars operate individual calendars and are responsible for scheduling case events. However, these reservations about broader adoption of the team management approach identified by the AAT may be less applicable in the ART, which is expected to have a simplified, flatter membership structure and be subject to fewer constraints in the constitution of tribunals. In relation to concerns about over-specialisation, a team case management approach could still be adopted with a mixed docket of cases, so that each team was allocated cases from a range of ART review jurisdictions. However, this approach may be dependent on cross appointment of ART members to different divisions of the ART.

**Recommendation 124.** The Administrative Appeals Tribunal should focus development of its case management processes on reducing case duration in all review jurisdictions and on engendering a culture of compliance with directions. The AAT should examine the efficacy of arrangements, within the constraints of its membership structure and statutory requirements for the constitution of the tribunal, in which each case is allocated to particular decision makers who take responsibility for the allocated cases from commencement to finalisation.

## Power to issue directions

9.133. At present AAT case management is not as efficient as it could be because on many occasions a member must be brought in to issue standard directions. The

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<sup>3368</sup> The benefits in having conference registrars assigned to the full range of AAT matters are said to include that: such a system promotes dialogue between conference registrars; improves the scope for identifying best practice across the organisation; fosters the development of an integrated tribunal; allows registrars to develop expertise in dealing with a variety of situations and client types; and better maintains morale and job satisfaction. While specialisation is more important for members, who must have a high level of expertise in specific case types, similar factors favour the cross appointment of members who possess skills that are relevant to a number of divisions. In addition, cross appointment of members to various jurisdictions allows greater listing flexibility: *AAT Submission 372*.

Commission agrees with submissions that conference registrars in the ART should have statutory powers to issue directions relating to procedural matters, similar to those of judicial registrars in the Federal and Family Courts.<sup>3369</sup> These additional powers are required for efficient case management regardless of the implementation of a team case management system.

9.134. While some agencies have expressed concern that such additional powers might be used inappropriately by conference registrars,<sup>3370</sup> the Commission considers that this concern is based on experience of non compliance with directions and concern about the ease with which adjournments are granted. These problems are addressed by other recommendations.

**Recommendation 125.** Federal tribunal conference registrars should have statutory powers, similar to those of judicial registrars in the Federal Court and the Family Court, to issue directions relating to procedural matters.

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3369. AAT *Submission 210*.

3370. Department of Veterans' Affairs *Consultation 27 September 1999*. In contrast, Comcare supported granting tribunals power to make disciplinary and case management cost orders and providing conference registrars with additional powers: Comcare *Submission 349*. The National Welfare Rights Network supported the proposal only if it were limited to matters in which the applicant has legal representation: National Welfare Rights Network *Submission 380*.

## Return of summonses

9.135. In DP 62 the Commission proposed that a system for the automatic return of summonses should be adopted in the AAT.<sup>3371</sup> In response, the AAT noted that the Tribunal's summons procedures are not uniform across registries, but are tailored to suit the volume of summonses and the availability of members in each registry.<sup>3372</sup>

9.136. The Sydney and Melbourne registries require parties to attend return of summons hearings which are constituted as a running list and a 'one stop shop' for inspection, claims for privilege and resolution of objections to such claims.<sup>3373</sup> The AAT advised that at liaison meetings, party representatives generally express satisfaction with the processes in the Sydney and Melbourne registries.<sup>3374</sup> In Perth, attendance by the parties at a return of summons hearing is only required where there is, or is likely to be, a claim for privilege. In Canberra, the process is similar to an automatic return of summons procedure.

9.137. The AAT stated that the system that operates in Perth would become unmanageable if that registry had a significantly higher number of summons requests.<sup>3375</sup> In addition, the AAT considered that where unrepresented parties are involved, an automatic return of summons system would be inappropriate because attendance at a return of summons hearing enables the AAT to advise unrepresented parties of their rights in relation to claiming privilege over documents produced under summons.<sup>3376</sup>

9.138. The Commission does not recommend automatic return of summonses be adopted across all registries of the AAT or all registries or divisions of the ART but, as suggested in DP 62 and by the AAT,<sup>3377</sup> to facilitate flexibility in summons procedure. The AAT Act should be amended to remove the requirement that documents returned under summons be produced at a directions hearing or hearing<sup>3378</sup> and provide that all members (not just presidential or senior members) should be able to give leave to inspect a document produced under a summons.<sup>3379</sup>

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3371. ALRC DP 62 proposal 12.2.

3372. AAT *Submission* 372.

3373. *ibid.*

3374. *ibid.*

3375. Because any return of summons procedures that require the Tribunal to notify parties individually of the receipt of summons documents would place significant additional strains on registry resources, especially where the volume of summonses in a particular registry is large: AAT *Submission* 372.

3376. *ibid.*

3377. *ibid.*

3378. cf AAT Act s 40(1A), s 40(1B).

3379. cf AAT Act s 40(1D).

**Recommendation 126.** The *Administrative Appeals Tribunal Act 1975* (Cth) should be amended to

- remove the requirement that documents returned under summons be produced at a directions hearing or hearing and
- provide that all members (not just presidential or senior members) should be able to grant a party leave to inspect documents.

## Case management and settlement

9.139. Settlement conferencing is not always appropriate in review tribunal proceedings. Review tribunals are intended to operate in a manner that is relatively economical, informal and quick. Settlement processes may not be necessary or desirable if expeditious adjudication is available. As previously stated, some review applications are not amenable to consensual resolution because there is little scope for compromise under the relevant legislative framework. Where parties are unrepresented, and on present research less adept at securing settlement, it may be appropriate to focus on speedy adjudication. There are also concerns that the use of alternative dispute resolution is not consistent with the function of tribunals to make the correct or preferable decision.<sup>3380</sup>

9.140. Opportunities for negotiation should be a part of the process provided by review tribunals in relevant jurisdictions. In the review jurisdictions presently covered by the AAT, any diminution in the level of withdrawals or consent determinations would create extensive backlogs in hearing caseloads. In cases where there is discretion to vary the primary decision, settlement opportunities should be afforded earlier in the process to avoid cases settling at or just before hearings when they could have settled earlier and at less cost to the parties<sup>3381</sup> and to the tribunal.

9.141. Historically the AAT's policy has been that, wherever possible, resolution without a hearing should be encouraged. This is reflected in current practice directions and in the policy approach that it is more desirable to schedule additional conferences in the hope of eventually getting settlement than to rigorously case manage for hearing. More recently the trend has been to provide less time for settlement opportunities.<sup>3382</sup>

<sup>3380</sup> These issues were discussed in ALRC IP 24, para 9.9–9.23; ALRC DP 62 12.45–12.46.

<sup>3381</sup> Clearly, cases resolved by consent can be expected to cost less to run. The Commission's AAT case file survey confirms this. The survey found a significant difference in the cost of compensation cases, depending on whether cases were resolved by a decision of the tribunal, by consent or by dismissal. The median total legal cost for cases that resolved by consent was \$4000, compared with \$5512 for cases that were dismissed and \$9860 for cases resolved by a contested decision: ALRC, AAT Empirical Report Part Two, table 5.6.

<sup>3382</sup> AAT *Consultation* Melbourne 25 August 1999.

9.142. Case settlement can best be effected through the involvement and participation of the parties, as well as their representatives. The general practice in the AAT is that, in most cases, only the parties' legal representatives attend preliminary conferences and where applicants are represented, most preliminary conferences are conducted by telephone. If parties do not attend personally, the opportunities for conferences to explore settlement options are reduced. However, conferences with parties present may be more time consuming and expensive for the AAT and the parties.

9.143. One particular case management problem, identified by the AAT and in the Commission's data, is related to late settlement in compensation cases.<sup>3383</sup> In response to this problem, and with the cooperation of applicant and respondent representatives, the AAT introduced mandatory 'conciliation' conferences for compensation cases where both parties are represented.<sup>3384</sup> All parties are required to be present and, at the commencement of the conciliation conference, each party must certify that they have authority to settle the application.<sup>3385</sup> In such conferences the conference convenor adopts an active, interventionist stance in the conference making it clear to both parties that there will be a meaningful attempt at settlement and that the tribunal will assist this to happen.<sup>3386</sup> Comcare and the AAT advised the Commission that the time taken to resolve compensation cases before the AAT has decreased since the implementation of the conciliation process. More cases have been settled by agreement and the cost of administrative review has decreased.<sup>3387</sup>

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3383. The Commission's case file survey found that 28% of all cases (and 51% of compensation cases) which attended a final hearing were nevertheless resolved by consent, with some variation to the original decision: ALRC, AAT Empirical Report Part One, para 5.6, table 5.6. However, it is problematic to consider consent variation of the original decision as an applicant 'success' because the outcome may in fact constitute a concession by the applicant from an interim bargaining position. Therefore, while the results are consistent with a failure on the part of agencies or their representatives to properly assess the merits at an early time (delays in briefing counsel are one possible reason for this: Law Council Administrative Law Committee *Consultation* Sydney 6 May 1999) they are equally consistent with applicants 'holding out' for their ambit claim until the latest possible time before accepting the agency's offer.

3384. AAT Conciliation Conference Direction 18 May 1998.

3385. *ibid.* As noted above (see para 9.78-9.79) agency decision making structures do not always permit this.

3386. AAT *Submission 210*. In this context the Commission notes that while there are many different definitions and practices encompassed by the term 'conciliation', generally conciliation is regarded as a more advisory process than mediation. During conciliation conferences, the convenor is likely to take a more active role in setting out options and discussing with the parties the merits of their respective cases than is usually the case in AAT conferences. However, under existing conference processes AAT conference convenors often express views on the adequacy of the evidence and, sometimes, on the likely outcome of the case, particularly where one party is unrepresented: JMathews 'Assisting unrepresented parties in the AAT' (1998) 72 *Reform* 38, 40.

3387. Comcare *Submission 209*. The AAT advises that in the 1998-99 financial year, there were 1517 cases completed in the compensation jurisdiction compared to 1427 in the 1997-98 financial year. Despite the rise in completions, the number of hearings in the compensation jurisdiction had dropped markedly from 476 hearings in 1997-98 to 303 in 1998-98. Although the statistics show



9.144. In cases where redundancy or dismissal from service issues arise and there is some prospect of these issues being settled between the employer and employee, Comcare requests the employer's representatives to attend the conciliation conference.<sup>3388</sup> These service issues are unrelated to the decision under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (SRC Act) and if all issues are resolved the employment outcome will not appear as part of the compensation consent decision issued by the tribunal. The Commission supports the continuation of this practice which is consistent with effective dispute management by federal agencies.

### Case management in the specialist review tribunals

9.145. The specialist merits review tribunals use different case management arrangements. Most applications in these jurisdictions go to a hearing, although there is scope for deciding 'on the papers'.<sup>3389</sup> There are no explicit arrangements to secure 'settlement'. In each of these tribunals, the agency or departmental secretary is required to provide statements of the reasons for the decision, the facts on which it was based and relevant documents.<sup>3390</sup> In practice, the applicant's file or a copy of the file or the relevant documentation is sent to the tribunals. There are few prehearing case events or preliminary meetings and submissions indicated that there is no, or very limited, need for such events.<sup>3391</sup> In the SSAT most

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only a slight increase in the proportion of applications settled (from 80% in the year to 30-September 1998 to 84% in the year to 30 September 1999) they indicate that matters that previously settled during or at the commencement of a hearing are now more likely to settle earlier in the process. The AAT has seen only minor improvements in timeliness in the compensation jurisdiction since the advent of conciliation conferences: AAT *Submission 372*; AAT *Workload indicators September 1999*, Table: Percentage of applications settled.

3388. Licensed authorities and corporations (such as Australia Post and Telstra) and the Department of Defence, which administers the Military Compensation Scheme, already appear in proceedings in the AAT, both as the relevant decision maker and the employer.

3389. Neither the former IRT nor the RRT report in their annual reports the number of cases that are decided by review 'on the papers' as opposed to a hearing. The RRT advised that, as at 30 April 1999, since the inception of the Tribunal, 228 out of a total 24 884 applications have been decided on the papers without a hearing in the way most favourable to the applicant, and a further 8851- (35%) decisions were decided without a final hearing because the applicant failed to attend: RRT *Submission 274*. In the SSAT, while applications may be decided on the papers or by telephone hearings, most applications are decided through a hearing attended by the applicant. If the review raises purely legal questions a hearing may take place in the absence of the applicant.

3390. Social Security Act s 1261; Migration Act s 352 (MRT); s 418 (RRT).

3391. S Tongue *Submission 231*; MRT *Submission 273*; RRT *Submission 211*. In its 1992 report, the Committee for Review of the System for Review of Migration Decisions (CROSRMD) stated that it should be standard practice for immigration and refugee tribunals to conduct preliminary meetings to assist in the identification of all relevant evidence: Committee for Review of the System for Review of Migration Decisions *Non adversarial review of migration decisions: The way forward* AGPS Canberra 1992, 57. Submissions made in 1997 to the Senate Legal and Constitutional Legislation Committee also suggested a need for preliminary conferences in RRT proceedings: See Senate Legal and Constitutional Legislation Committee: Consideration of Migration Legislation Amendment Bill (No 4 & 5) 1997 — Victorian Immigration Advice and

applications are listed and heard six to eight weeks after the application is lodged – a timeframe that does not require prehearing attendances.<sup>3392</sup>

### **Case officers**

9.146. In the MRT preliminary and research work is undertaken by case teams (tribunal staff led by senior case officers). Case officers prepare the Tribunal's brief. Case teams follow administrative procedures as directed by the principal member. These include advising applicants of the current status of their application, clarifying which criteria DIMA considers the applicant has failed to satisfy and

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Rights Centre *Submission 1*, 9 September 1997, 7; Victorian Immigration Advice and Rights Centre *Submission 1A*, 15 September 1997, 10; Refugee Advice and Casework Service (Aust) Inc *Submission 5*, 15 September 1997, 7.

3392. SSAT *Submission 365*.

preparing, prior to the hearing, for the benefit of the applicant and the member conducting the review, an outline of issues in dispute and on which further evidence may be needed.<sup>3393</sup>

9.147. The major task of the case team is to produce a 'first examination' document designed to contribute to the decision making process and the Tribunal's reasons for decision. The main objectives of the first examination are to

- brief the member on the evidentiary issues
- provide the member with recommendations as to the future processing of a case, including any letter which may be sent to the applicant, and any further investigations which the Tribunal may make
- provide words that the Tribunal can consider adopting into its reasons for decision as appropriate
- highlight for a member the key documents in the departmental file.<sup>3394</sup>

9.148. An MRT administrative circular provides that in only two circumstances should case teams prepare a draft statement of decision and reasons for the member's consideration.

- If the critical issue is based on an objective criterion which the applicant is unable to satisfy.
- If the critical issue is based on subjective criteria and the case team is of the view a decision can be made in the applicant's favour on the papers.<sup>3395</sup>

9.149. Concerns have been expressed that if tribunal members adopt case officer research without further contribution or evaluation this might be taken to be acting under dictation.<sup>3396</sup> However, DIMA emphasised that, provided the tribunal member fully turns his or her mind to the relevant issues and matters involved and reaches an independent conclusion, the member would not be acting under dictation even if certain evidentiary matters, and even the draft decision, had first been considered and developed by case officers.<sup>3397</sup>

9.150. Another concern relates to the skill and experience of case officers, some of whom have limited experience in case preparation, evaluation, investigation or questioning witnesses. If they have greater experience than their members, including part time members, they may inappropriately dominate decision

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3393. S Tongue 'The new Migration Review Tribunal: What does it mean for migration agents?' <<http://www.mrt.gov.au/speech.htm>> (21 May 1999).

3394. MRT *Administrative Circular* 3/1999, 12 August 1999.

3395. *ibid.*

3396. National Welfare Rights Network *Submission* 380. The SSAT noted that the presence of executive members on a multi-member panel would help avoid this problem: SSAT *Submission* 365.

3397. DIMA *Submission* 385.

making. The exact extent to which MRT case officers will be involved in preparing what are, in effect, draft decisions is unclear, notwithstanding the content of the administrative circular cited above.

9.151. The case officer model can, but does not necessarily, facilitate communication with, or assistance from, the agency or department. If case officers are junior administrative staff it may even retard such communication. If the officers are more senior and recruited from the department, the tribunal may be seen to be co-opted, rather than merely assisted by the agency.

9.152. The MRT case management system has operated for only a short time. Case officers began processing cases in August 1999 and it was not until November 1999 that all MRT cases became subject to this system. Notwithstanding the concerns expressed above, the case officer model is an interesting initiative. It deserves close evaluation as a model which may be adapted to other administrative review proceedings, in particular, in the review jurisdictions exercised by the RRT or SSAT.

9.153. In the RRT, case officers might undertake a fact finding role in order to present relevant evidence surrounding the case, as a supplement to country information developed within the Tribunal. This would relieve the member of the burden of collecting information. Case officers might also have a limited hearing function, presenting adverse evidence to the applicant with the member putting questions based upon the evidence.<sup>3398</sup> This arrangement could appear fairer to the applicant as it differentiates the 'prosecutor' and 'judge' functions which members currently combine. Care is required in establishing such a system to ensure that the case officers are properly trained, and that an appropriate relationship is established between the case officer and the Tribunal.<sup>3399</sup>

9.154. The Commission supports detailed consideration being given to expanding the case officer role and a full evaluation of the workings of the scheme being undertaken, with consideration of its applicability to the RRT and SSAT or the equivalent ART divisions. Such evaluation could be undertaken by the ARC or, with respect to MRT and RRT issues, by the Joint Standing Committee on Migration.

### **Prehearing communication**

9.155. Recent Migration Act amendments are likely to increase prehearing contact between applicants and the MRT and RRT. The recently implemented Code of

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3398. However, some members of the RRT consulted by the Commission stated that members would feel they would have to revisit the work done by the case officer, because the distillation of conclusions from the range of country information available is so much at the heart of refugee review decision making: RRT *Consultation* Sydney 18 October 1999.

3399. Comparisons could be made with the Canadian system, where hearing officers attached to the Refugee Board have been criticised for identifying too closely with the Board rather than adopting a neutral role — but this is operating in a hearing with strong adversarial features: S Kneebone 'The RRT and the assessment of credibility: an inquisitorial role?' (1998) 5 *Australian Journal of Administrative Law* 78, 86.

Practice for the tribunals requires them to give the applicant particulars of any information which the tribunal considers would be part of the reason for affirming the decision under review and invite the applicant to comment on it.<sup>3400</sup>

9.156. Such prehearing contact can be an appropriate substitute for preliminary meetings, but is less likely to be effective if it is limited to communication in writing, rather than contact by telephone or direct contact to better accommodate some applicants' limited language skills and understanding of the review processes. One practitioner and former RRT member has observed that

[t]he issues central to an application are often not defined until the RRT hearing. On occasion they are identified for the first time in the RRT's reasons for a decision. There is seldom full and timely disclosure of all relevant information by the RRT.<sup>3401</sup>

Such practices can delay determination of the case, require repeat hearings or extended written submissions from the applicant after the hearing. This last adds to the applicant's costs unnecessarily if the issues had been identified and might have been addressed at the hearing.

## Streaming

9.157. The RRT appears to have effective case streaming. It profiles the review applications it receives in order to allocate similar cases to the same member or members. This form of streaming is intended to assist with more efficient decision making. Members can use the specialised knowledge they obtain in one case to deal expeditiously with similar issues in other cases. Such streaming also ensures that members receive a comparable balance of cases, of mixed complexity, consistent with their performance indicators.<sup>3402</sup> Streaming decisions in the RRT may be based on quite detailed case criteria so that, for example, a member may be allocated not just review applicants from Sri Lanka, but matters involving male, Tamil applicants who lived in Colombo, whose cases can be expected to present similar factual and legal issues.

9.158. In the MRT, the intention is that members and case teams will specialise in reviewing decisions on a limited range of visa classes before rotating, after a suitable period, into other visa classes. Case allocation mechanisms such as these can secure improvements in case management outcomes. They are not yet fully implemented.

## Case management in the ART

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3400. Migration Act s 359A (MRT); s 424A (RRT).

3401. C Colborne 'The Refugee Review Tribunal: A personal view' (1999) 75 *Reform* 27.

3402. RRT *Consultation* 8 October 1999.

9.159. The prehearing conferences currently used in the AAT provide a useful framework for negotiation and hearing preparation and should remain the framework for case management for most of the present review jurisdictions of the AAT. The income support division, which will take up SSAT jurisdiction, may evolve to have case management combining features of the SSAT and AAT.

9.160. The conference system is effective when both parties participate in the resolution of the dispute. The extent to which this will occur in the immigration and refugee and income support divisions is unclear. However, if these divisions

mirror the procedures of the MRT, RRT and SSAT, the respondent agency will not be a participant and applicant participation will be limited. In such circumstances there is a limited role for conferencing.

9.161. In the context of the new ART, Attorney-General's Department proposals may mean that the use of preliminary meetings will vary between jurisdictions and that flexible arrangements for such meetings will be provided in divisional practice directions. The ART legislation is expected to 'provide the new tribunal with the flexibility and powers necessary to enable it to make best use of ADR'.<sup>3403</sup> Submissions confirmed the need to consider such processes by reference to the review jurisdiction, so that these are arranged flexibly.<sup>3404</sup>

9.162. The National Welfare Rights Network submitted that, because the ART hearing at divisional level will be the final level of external merits review in most income support cases, the opportunity which prehearing processes present to improve case preparation will be important to applicants.<sup>3405</sup>

9.163. The Commission agrees that the ART should utilise a range of practices and procedures adapted to suit its different review jurisdictions. The new ART should utilise within the income support and immigration and refugee divisions, with appropriate adaptation, case management practices which have been proven to be effective in the SSAT, RRT and MRT. As with recommendation 124 directed to the AAT, the ART should focus its case management on case streaming to ensure the processes and practices are appropriate to the case and that member case loads allow for appropriate specialisation and a mix of complex and routine cases as appropriate. There is a real need for flexibility, given the significant diversity in cases for the Tribunal, as well as the high volume, often routine matters in particular jurisdictions. The Commission considers that case conferencing is a useful baseline model, particularly for those jurisdictions where many cases settle and both parties are represented. Where there are no formal prehearing conferences, the practice should enable applicants to be appropriately informed of the matters in issue prior to the hearing, to allow full ventilation and resolution of these issues wherever possible at the hearing.

**Recommendation 127.** The new Administrative Review Tribunal should not operate under a single case management model but should utilise a range of practices and procedures adapted to suit its different review jurisdictions, including those which have been effective and successful in the existing specialist federal review tribunals. Such management processes should allow

3403. S Pidgeon 'Reforming the system: Proposed reform in the federal arena' *Conference paper* The management of disputes involving the Commonwealth. Is litigation always the answer? Canberra 22 April 1999.

3404. SSAT *Submission* 200; DIMA *Submission* 216.

3405. National Welfare Rights Network *Submission* 380.



effective streaming of cases to appropriate management or fast-tracked hearing, allow timely resolution and engender a culture of compliance with directions.

## Compliance with directions

9.164. As stated, a range of concerns were expressed about compliance with directions in AAT proceedings including: the failure of respondents to provide s 37 documents within the time periods required by legislation; failure to provide statements of issues and statements of facts and contentions within the time period provided by practice directions; failure to provide statements of facts and contentions which are specific as to facts and as to law; and failure to serve witness statements and expert evidence prior to the hearing or filing of new evidence late in the course of proceedings. The AAT stated that parties are not getting the material they need to establish positions early enough in the process.<sup>3406</sup>

9.165. The AAT has limited powers to sanction non compliance. Consultations indicated that the lack of sanctions leads to repeat directions hearings. The Tribunal's only formal sanction, available only against non complying applicants, is to call the matter on and determine it on the information available or to dismiss the application without proceeding to review the decision.<sup>3407</sup> Depending on the circumstances of the case, including whether the non compliance was by the applicant or respondent, setting an early hearing could prejudice or reward the non complying party.

9.166. Submissions to the inquiry favoured the AAT and ART being empowered to make disciplinary and case management cost orders.<sup>3408</sup> The ARC also recommended that the AAT should be provided with the discretion to award costs against a party or a party's representative in patents cases where appropriate, having regard to the conduct of the parties.<sup>3409</sup> A contrary view is that costs sanctions would inevitably lead to a formalisation of prehearing procedures and that these processes would lose much of their flexibility and informality.<sup>3410</sup>

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3406. AAT *Consultation* Melbourne 25 August 1999; AAT *Consultation* Brisbane 21 September 1999; AAT *Consultation* Sydney 24 September 1999.

3407. AAT Act s 42A(5).

3408. ASIC *Submission 184*; Comcare *Submission 209*; AAT *Submission 210*. However, the National Welfare Rights Network opposed this proposal. The Network expressed the concern that in the income support jurisdiction the introduction of costs orders may lead to legal service providers undertaking fewer matters in order to reduce risk.

3409. ARC *Administrative review of patents decisions* Commonwealth of Australia Canberra 1998, 15 (ARC-43).

3410. M de Rohan *Submission 175*.

9.167. Federal tribunals effectively may make binding orders against the Commonwealth, but as the tribunals are not courts, the Constitution may constrain tribunals from making costs orders against other parties.<sup>3411</sup> The ARC suggested that to accommodate constitutional constraints, an award of costs by the AAT should not be binding or conclusive. Instead, a party in whose favour an award of costs has been made should be entitled to apply to the Federal Court to seek enforcement of the costs award. The Federal Court would conduct a hearing de novo, but only in relation to whether an order of costs is appropriate.<sup>3412</sup>

9.168. Such mechanisms add to the time and cost of review and such orders are unlikely to be enforced against applicants. Even where courts and tribunals have clear costs penalty powers they are rarely used and are often ineffective.

9.169. There are options other than costs orders which might be used to address problems of non compliance by applicants in review tribunal proceedings. The most effective mechanism to ensure compliance with directions is consistent oversight by the ultimate decision maker. The desire for a favourable outcome in the case provides both parties with real incentive to cooperate with the decision maker's directions. The Commission's recommendation for consistent management of the case by the same registrars or members is directed to ensure improved compliance with directions.

9.170. In cases of non compliance with a direction to disclose evidence, another option would be to legislate that decision makers may infer, similar to the rule in *Jones v Dunkel*, that the evidence would not have assisted the non complying party.<sup>3413</sup>

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3411. *Brandy v HREOC* (1995) 183 CLR 245, as discussed in ALRC *Costs shifting – who pays for litigation* ALRC Sydney 1995 (ALRC 75), para 9.4. In 1995, legislation was introduced which would have conferred on the AAT a discretionary power to award costs against a party, or the party's representative, as a disciplinary measure in certain defined circumstances: Law and Justice Legislation Amendment Bill (No 2) 1995 (Cth). The power to order costs would have been exercisable where the AAT considered that a party, or that party's representative, had engaged in conduct in which he or she ought not to have engaged and another party had incurred costs that he or she would not have incurred if the conduct had not been engaged in. The Bill lapsed with the prorogation of Parliament for the March 1996 federal election, and the enactment of such a costs power has not been pursued by subsequent governments. At the time of drafting the Bill, advice was received by the A-G's Dept to the effect that the power to make costs orders 'could probably not be conferred on a nonjudicial body': AAT *Submission 210*. See also the discussion in ch 1 on the Constitutional constraints on the exercise of the judicial power of the Commonwealth: para1.142–1.143.

3412. ARC 43, 15.

3413. (1959) 101 CLR 298. The rule in *Jones v Dunkel* operates to allow a decision maker to infer that the evidence of an absent witness would not have assisted the party where a witness whom a party normally would be expected to call is not called, and there is no reasonable explanation for the failure to call the witness.

9.171. The Migration Act provides a further model for compliance provisions.<sup>3414</sup> The Act defines procedurally fair arrangements whereby the tribunal can solicit and utilise additional information from the applicant. The Migration Act provisions allow the tribunal to proceed to a decision without offering the applicant a hearing where an applicant has failed to provide additional information within the prescribed or stated timeframe.<sup>3415</sup>

9.172. An alternative model is provided for in customs cases. Following problems with the late provision of new evidence in review proceedings involving tariff concession orders, the *Customs Act 1901* (Cth) was amended to include a provision that parties may not rely on any document not filed and served 28 days before the date set for hearing without the leave of the AAT.<sup>3416</sup> Officers of the Australian Customs Service advised that in their experience the AAT tends to grant leave, defeating the purpose of the provisions.<sup>3417</sup> The AAT currently has power to dismiss an application without proceeding to review the decision where the applicant fails to proceed with the application or to comply with a direction of the tribunal.<sup>3418</sup> A model for AAT jurisdictions could provide the tribunal with a similar discretion to proceed to a decision without giving the applicant an opportunity to appear at a hearing where a party has failed to comply with a direction. The notice requesting the information could state these consequences if the information is not provided within the time prescribed.<sup>3419</sup> The AAT submitted that this would avoid some of the 'inflexibility inherent in the notification requirements and prescribed periods that are a feature of the Migration Act provisions'.<sup>3420</sup> The notification provisions provide some protection for cases involving inadvertent oversight by an applicant.

9.173. The Commission supports tribunals having discretion to decide cases summarily where the applicant is uncooperative but the proper exercise of this discretion requires that applicants have due notice of such an intention. Problems of non disclosure could also be addressed in, for example, the compensation jurisdiction, which has provision for costs orders, by denying the recovery of

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3414. Migration Act s 359B, s 359C (MRT); s 424B, s 424C (RRT). However, when relied on by the tribunals, these provisions may become the subject of judicial review applications, as have the migration provisions concerning time limits for appeals and procedures for notification of decisions and tribunal proceedings to applicants. See *Sook Rye Son v MIMA* (1999) 161 ALR 612; *Li v MIMA* [1999] FCA 1147; *MIMA v Capity* [1999] FCA 193 cited and discussed in J McMillan 'Federal Court v Minister for Immigration' (1999) AIAL Forum (22), 1.

3415. Migration Act s 359B, s 359C, s 360 (MRT); s 424B, s 424C, s 425 (RRT).

3416. *Customs Act 1901* (Cth) s 269SHA(5).

3417. Australian Customs Service *Consultation* 3 September 1999.

3418. AAT Act s 42A(5). The applicant may then apply for reinstatement of the application: AAT Act s 42A(8).

3419. AG's Dept (Cth) *Correspondence* 4 January 2000.

3420. AAT *Submission* 372. The National Welfare Rights Network opposed the establishment in other review jurisdictions of statutory codes of procedure similar to that in the Migration Act: National Welfare Rights Network *Submission* 380.

certain costs incurred by the applicant such as the cost of expert reports or other evidence where this is disclosed late and in breach of a tribunal direction.

9.174. In the ART, agencies are to fund the divisions which review their decisions. The agencies therefore will have a real incentive to ensure that their representatives are cooperative and competent in conducting review proceedings.

If there are delays in case determination due to slow or negligent practices of agency representatives, this issue can be identified in funding negotiations between the tribunal and agency. There may be some symbolic and practical force in enabling the ART to make orders that agencies pay costs to the tribunal commensurate with costs wasted where this is caused by agency default. However, it is inequitable if such orders are only able to be made against respondents. The Commission does not recommend that the ART be awarded such cost power, given the constitutional constraints. The Commission previously recommended that the Attorney-General amend the model litigant rules to include an explicit requirement that agencies and their representatives be required to assist tribunal decision making. Breaches of directions and uncooperative or obstructive behaviour by respondents constitute a breach of model litigant principles and should be notified by the tribunal to the Office of Legal Services Coordination.<sup>3421</sup>

9.175. In the Commission's view, this structure and the funding links between tribunal and agency should engender respondent compliance. Provisions which allow tribunals to make decisions summarily or on the papers if applicants are uncooperative provide an effective incentive for applicant compliance. Decisions to use these provisions should have regard to the skills and resources of applicants and should be taken fairly.

### **Compensation cases and costs**

9.176. In compensation matters, it was suggested to the Commission that current costs arrangements act as a disincentive to settlement at the internal review (reconsideration) stage. Lawyers in the compensation jurisdiction largely have speculative fee arrangements with their clients and depend on a costs order in the AAT for their fees.<sup>3422</sup> There is no inducement for employees to incur medical and legal costs before reaching the AAT or for lawyers to put their clients' case at the reconsideration stage because they would not be paid for their services.

9.177. The Law Council has stated that employees are likely to be advised to economise on lawyers and doctors at the internal review stage, since an altered outcome on internal review will often seem unlikely regardless of their expenditure.

This is because internal review is often perceived as an opportunity where the decision-maker reviews its evidence, but does not impartially reconsider all the evidence. Both primary and internal review decision-makers are usually officers of the employer acting under Comcare delegations or whose employer is also the determining

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3421. See para 3.148–3.168, rec 24.

3422. AAT General Practice Direction 18 May 1998, 6. In proceedings under the SRC Act, the costs payable generally include witness expenses at the prescribed rate; all reasonable and proper disbursements; 75% of all professional costs, including counsel's fees, which would be allowable under the Federal Court scale.

authority. They are often perceived to make decisions which prefer the most recent medical opinion obtained by themselves and ignore all other medical opinion ...

Expensive medical investigations and reports (and the delays in obtaining them) may be wasted at the internal review stage, if prospects of success at that stage seem remote and there is a probability that they will need to be repeated or up-dated at the AAT.<sup>3423</sup>

9.178. The Commission proposed in DP 62 that costs in the compensation jurisdiction should allow for payment by respondent agencies of legal costs on a successful application for reconsideration of a compensation decision but not be added to the legal costs claimed at the conclusion of any subsequent review tribunal proceeding.<sup>3424</sup> The Law Council considered that this proposal carries no incentive for decision makers to change their present approach to internal review, and indeed, may prompt fewer concessions at this level. The Law Council suggests instead that such costs should also be included in any AAT costs award, if the employee's appeal produces a favourable outcome in the AAT.<sup>3425</sup>

9.179. Under the *Compensation (Commonwealth Employees) Act 1971* (Cth), claimants' legal costs at the reconsideration stage were payable by Comcare's predecessor. The SRC Act removed these provisions. Payment of legal costs at the internal review stage was seen as 'adding to the adversarial nature of these matters in an environment where attempts were being made to simplify dispute resolution procedures'.<sup>3426</sup>

9.180. Comcare, Australia Post and the Department of Defence all have indicated that they would not like to see costs reintroduced at the reconsideration stage.<sup>3427</sup> They were concerned that such a move might result in more rather than less attenuated disputes because

- claimants might be less inclined to provide their evidence at the primary decision stage if they were guaranteed to be awarded costs following a 'resolved' reconsideration
- it would encourage legal representation of the majority of claimant who request a reconsideration, increasing formality and the likelihood of more litigation than presently ensues from reconsideration adverse to claimants.<sup>3428</sup>

9.181. The AAT agreed with the proposal to reintroduce costs at the reconsideration stage. The AAT considered, however, that in order to provide parties with an added incentive to prepare their case early, parties should be able

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3423. LCA *Submission 375*.

3424. ALRC DP 62 proposal 12.4.

3425. LCA *Submission 375*.

3426. Comcare *Submission 349*.

3427. Defence took the view that granting costs to a successful applicant at reconsideration stages should be a matter for the claims manager to determine. The views of Defence were conveyed in Comcare *Submission 349*.

3428. Comcare *Submission 349*.

to recover costs incurred at the reconsideration stage for obtaining medical reports that are subsequently relied on in AAT proceedings.<sup>3429</sup>

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<sup>3429</sup>. AAT *Submission 372*.



9.182. Comcare has acknowledged that even under the present arrangements 'claimants increasingly are seeking legal representation at the reconsideration stage'.<sup>3430</sup> The Commission continues to take the view that it makes little sense for lawyers in such cases simply to 'march' their clients through a reconsideration process if proper presentation of the case could resolve the matter.

9.183. While there are good reasons to preserve the informality of a reconsideration process, due regard should be taken of its essential goal, namely early effective resolution of decisions which can and should be varied. To that end it may be sensible to encourage the full disclosure of a case and early medical reports by reviving the practice of paying costs for legal work undertaken at the reconsideration stage.

9.184. These costs should not be added to those expended at the AAT stage if the matter does not resolve at reconsideration, but should be set at a fixed amount which is only paid if the case is finally resolved at this time. However, as suggested by the AAT, the cost of medical reports subsequently relied on at the AAT proceedings should be recoverable.

9.185. Suggestions also have been made that in making costs orders under s 67 of the SRC Act, the AAT be permitted to take into account offers to applicants made by Comcare or licensed authorities.<sup>3431</sup> The Commission agrees that the AAT, and the ART, should be able to take 'Calderbank offers'<sup>3432</sup> into account for the purposes of costs in jurisdictions where costs are able to be ordered.

**Recommendation 128.** Arrangements for costs in the Administrative Appeals Tribunal's compensation jurisdiction, under which respondent agencies pay legal costs of successful applicants, should be reviewed to allow payment on a successful application for reconsideration of a compensation decision. Such costs should be a capped amount to be paid where the lawyer advises and prepares the application for reconsideration. The costs should be paid only if the matter is resolved at this stage. Such sums for legal costs should not be added to the costs claimed at the conclusion of any subsequent review

3430. Comcare *Submission 272*. In February 1998, the government announced that Comcare's claims management business would be opened to private sector competition once the necessary legislative changes were made and a comprehensive regulatory model developed to ensure the provision of effective and efficient claims management services to premium paying agencies. At the time of printing the implementation of this decision had been deferred. The resolution of legislative and costs issues relating to the settlement of Commonwealth workers' compensation claims needs to be considered in this wider reform context.

3431. AGS *Consultation Adelaide* 5 August 1999.

3432. A party making a Calderbank offer reserves the right to bring the offer to the attention of the adjudicator for the purposes of dealing with costs once all other matter have been dealt with. Costs may be ordered against the successful party if this offer was more favourable than the adjudicator's decision: *Calderbank v Calderbank* [1975] 3 All ER 333.

tribunal proceeding, except for the costs of medical reports subsequently relied on.

**Recommendation 129.** Where applicants have failed without good reason to comply with tribunal directions, any additional or wasted sums should be able to be deducted from costs recovered by the successful applicant.

**Recommendation 130.** The Administrative Appeals Tribunal and the new Administrative Review Tribunal should be able to take 'Calderbank offers' into account for the purposes of costs in jurisdictions where costs are able to be ordered by the tribunal in favour of successful applicants.

## Evidential issues

9.186. A range of issues concerning how documents and other information is brought before review tribunals has been raised in the course of the inquiry. The Commission considers the nature of review tribunal proceedings requires that all relevant material is disclosed by the applicant and the respondent in a timely manner to enable the tribunal to determine all the relevant facts in issue.

### Disclosure of relevant documents

9.187. In AAT proceedings the decision maker must provide, within 28 days of receiving notice of an application for review of a decision, copies of documents in the decision maker's possession or control considered to be relevant to the review of the decision by the AAT.<sup>3433</sup> This obligation applies notwithstanding any rule of law relating to privilege or the public interest in relation to the production of documents.<sup>3434</sup>

9.188. However, there is some doubt over whether there is a continuing duty to provide other relevant documents that subsequently come into the decision maker's possession or control.<sup>3435</sup> The AAT has held that s 37(2) of the AAT Act enables the tribunal to require a decision maker to lodge copies of certain documents which were not subject to the initial obligation to provide documents under s37(1), including documents that were not in the possession of the decision maker at that time.<sup>3436</sup> However, the Federal Court has stated that the rationale of s37 is that it is necessary for the tribunal to have all of the material which was before the original decision maker, and this rationale does not extend to material

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3433. AAT Act s 37.

3434. AAT Act s 37(3).

3435. See *Re Velovski and Telstra* (1996) 26 AAR 454; *Australian Postal Corporation v Hayes* (1989) 23 FCR 320.

3436. *Re McMaugh and Australian Telecommunications Commission* (1991) 22 ALD 393, *Re Velovski and Telstra* (1998) 26 AAR 454.

which has since come into existence.<sup>3437</sup> It is clear that the requirement to lodge relevant documents only applies to the decision maker and provides no basis in law for the AAT to require the applicant to produce a document.<sup>3438</sup>

9.189. In the context of party disclosure of relevant documents, the Commission agrees with the observations made by Senior Member Peter Bayne in *Re Velovski & Telstra*.

As soon as an application for review is lodged, the Tribunal has case-management tasks, and in this respect will benefit from knowledge of the ultimate facts in issue and the factual and other material relevant to a decision on the ultimate facts. Full knowledge of this material will also assist the Tribunal to attempt to settle a dispute, and to play what role it thinks desirable in the investigation of the facts . . . Just as fundamental is the status of the Tribunal as an administrative decision-maker. It is in effect a link in the decision-making chain superior to the person who made the reviewable decision. Surely it is sensible that persons who make decisions at one level in a decision-making chain should provide relevant information to another body at a superior level in that chain where the latter reviews the decision of the lower level decision-maker on a full merits basis.<sup>3439</sup>

9.190. It has been further suggested that both respondent and the applicant in review proceedings should be under a continuing obligation to disclose documents relevant to the review. The Commission agrees that such an obligation is consistent with the nature of review proceedings and recommends its enactment in the ART legislation even though, where applicants are unrepresented, compliance with such an obligation may be difficult to achieve. With the exception of expert medical reports, as discussed below, applicants should be able to resist disclosure of such documents on the grounds of client legal and other privileges. Respondents, due to their special position and duties in relation to the conduct of review proceedings, should not be able to claim such privilege.

9.191. The Commission earlier proposed that legislation provide review tribunals with clear power to order prehearing disclosure of video surveillance evidence to the tribunal and the other party. This specific issue arises out of the decision in *Australian Postal Corporation v Hayes*.<sup>3440</sup> The Commission's proposal was not supported by agencies in the compensation jurisdiction most affected. Comcare stated that while surveillance may rarely be used, when it is, it is generally for the purpose of testing the applicant's credibility and that ability may well be

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3437. *Australian Postal Corporation v Hayes* (1989) 23 FCR 320, 328.

3438. *Re Loknar and Secretary, DSS* (1992) 29 ALD 591.

3439. (1998) 26 AAR 454, 458.

3440. (1989) 23 FCR 320 discussed in ALRC DP 62 para 12.172-12.173. The Federal Court set aside a direction of the AAT that the applicant should be shown a video film at the commencement of her evidence before the tribunal, agreeing with the respondent's arguments that the video should not be shown to her until she was under cross-examination on the grounds that it would effectively deny the right to test the credit of the claimant.

diminished under the proposed arrangements. Comcare stated that while, in some cases, there may be value in disclosing video information prior to a hearing this should be done only with the agreement of the respondent.<sup>3441</sup>

9.192. In review proceedings, the basic principle should be that material that is relevant to the determination of issue should be disclosed unless there is a very sound basis for its exclusion. The AAT agreed with the Commission's proposal and considered the proposal should be extended to include all forms of evidence.<sup>3442</sup>

9.193. The recommendation below would provide review tribunals with clear power to order prehearing disclosure to it of all relevant documents, including video surveillance evidence. The recommendation is not intended to prevent the tribunal from then making a direction restricting access to the documents by the other party in exceptional circumstances where disclosure would result in a denial of procedural fairness.

**Recommendation 131.** The new Administrative Review Tribunal legislation should provide a continuing obligation on both applicants and respondents in review proceedings to lodge relevant documents with the tribunal. To encourage frank disclosure between applicants and their lawyers, client legal privilege should be retained, subject to the exception in recommendation 137.

## **Expert evidence**

9.194. Many administrative proceedings in the AAT turn on expert evidence. In particular, review of decisions concerning Commonwealth employees' compensation, veterans' entitlements and some social welfare cases often involve medical evidence. Numbers of medical experts provide reports or give oral evidence before the Tribunal. Migration cases frequently depend on expert evaluations of English language fluency, the evaluation of overseas qualifications or medical evidence concerning the health of visa applicants. Other types of expert evidence may be significant in matters involving customs, tax, securities and therapeutic drugs registration cases.

9.195. The focus of concerns about the use of expert evidence in review tribunal proceedings, as with courts, is not with party selection or use of experts as such, but with particular high volume jurisdictions where there is repeat use by parties or party representatives of the same experts, resulting in inappropriate partisanship. Experts become identified as applicant or respondent experts. Tribunal

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3441. Comcare *Submission 349*.

3442. AAT *Submission 372*.

members noted that when they see the names of particular experts, they know what the reports will say before reading them.<sup>3443</sup> Such evidence can have limited credibility or utility for decision makers. This situation, which is a particular feature within the compensation and veterans' jurisdictions, is obviously unsatisfactory. Government agencies directly or indirectly fund all expert reports in such cases through legal assistance or via costs orders. This is a significant cost, particularly if certain such reports provide little assistance to decision makers because the report is seen simply to serve the partisan position of the applicant or respondent.

9.196. As discussed in chapter 6 (paragraphs 6.74–6.130) there are varied, new initiatives in courts and tribunals to promote the adducing of expert evidence that is impartial, independent and objective. These include developing guidelines for expert witnesses which emphasise a primary obligation to the court or tribunal, encouraging prehearing communication between relevant experts and the use of single experts agreed between the parties. In review tribunal proceedings another focus for reform should be to promote disclosure of expert reports.

### **Mechanisms for obtaining expert opinion**

9.197. There are various means to provide review tribunals with expert evidence. The common method is for one or both parties to commission expert reports and call expert witnesses at the hearing.

9.198. Legislation may also establish panel arrangements for commissioned experts to reduce the need for expert evidence to be adduced by the parties. For example, many state courts and tribunals have expert panels, established under workers compensation legislation.<sup>3444</sup> These panels are intended to provide independent medical review and assessment of injury and impairment, including at the request of courts or tribunals. Reports or certificates from the panels are admissible as evidence in proceedings and, in some cases, constitute conclusive evidence.<sup>3445</sup>

9.199. In the Commonwealth employees' compensation jurisdiction, panel medical practitioners were previously appointed under the *Compensation (Commonwealth Employees) Act 1971* (Cth) to determine, as a conclusive fact, issues including diagnosis, relationship with employment, restrictions on employment capacity, treatment and degree of impairment. Such medical panels were perceived as abrogating the ability of review tribunals and courts to find questions of fact in relation to medical issues and eventually came to be perceived as partisan.<sup>3446</sup>

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3443. AAT *Consultation* Melbourne 25 August 1999; AAT *Consultation* Brisbane 21 September 1999; AAT *Consultation* Sydney 24 September 1999.

3444. eg medical referees and medical panels appointed and constituted under *Compensation Court Act 1984* (NSW) s 14A, s 14B for the purposes of the *Workers Compensation Act 1987* (NSW); medical panels constituted under *Accident Compensation Act 1985* (Vic) s 63.

3445. eg *Workers Compensation Act 1987* (NSW) s 131(5).

3446. Comcare *Submission* 349.

Panels also can be costly and add to the time taken to resolve matters as each case is considered by the panel.

9.200. In veterans' entitlement matters, the Repatriation Medical Authority issues statements of principles to provide the medical-scientific frame of reference for claims made for a pension or allowance for an injury, disease or death connected with service in the armed forces. Statements of principles are disallowable legislative instruments<sup>3447</sup> and binding on the Repatriation Commission, the VRB and the AAT.<sup>3448</sup>

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3447. Veterans' Entitlements Act 1986 s 196D. The Federal Court has confirmed that, because they are legislative in character, the Court lacks jurisdiction under the AD(JR) Act to review statements of principles: *Vietnam Veterans' Affairs Association of Australia New South Wales Branch Inc v Cohen* (1996) 70 FCR 419.

3448. These statements state what factors related to service must exist to establish the necessary reasonable hypothesis connecting particular injuries, diseases or deaths and service. See Veterans' Entitlements Act 1986 s 196B. The legislation introducing statements of principles was aimed at ensuring that medical opinions supported by little or no medical-scientific evidence did not prevail over the carefully developed mass of medical-scientific opinion: Veterans' Affairs (1994-95 Budget Measures) Legislation Amendment Bill, Explanatory Memorandum.

9.201. Similarly, in immigration matters the opinion of Medical Officers of the Commonwealth in determining whether an applicant satisfies health criteria for the grant of a visa must be taken as correct by the Minister and the MRT.<sup>3449</sup> Statutory declarations made by 'competent persons' (including registered psychologists, nurses, social workers or *Family Law Act 1975* (Cth) court counsellors) also may constitute conclusive evidence that a person has suffered domestic violence.<sup>3450</sup>

9.202. There may be some reason to examine whether the use of experts to determine certain issues would be appropriate in the compensation jurisdictions of the AAT, as adopted in a number of state compensation jurisdictions.<sup>3451</sup> However, the procedural reforms proposed below include modification of the application of client legal privilege to expert reports. Increased use of single agreed experts should be the immediate focus for reform.

9.203. Assessors also may be used to obtain expert evidence for the tribunal. Legislation provides that the New South Wales Administrative Decisions Tribunal may appoint 'assessors' to enable it to undertake its own inquiries. ADT assessors may conduct preliminary conferences, inquire into and report to the tribunal on any issue, and have matters delegated to them for determination or sit with, assist and advise the tribunal without participating in the adjudication of the matter.<sup>3452</sup>

9.204. Submissions to the inquiry did not favour the appointment of assessors for federal review tribunals. Given the role of specialist tribunal members and other forms of staff investigative and research assistance,<sup>3453</sup> submissions doubted that these additional non-member tribunal functions would be necessary or desirable.<sup>3454</sup> Concerns were also expressed about maintaining procedural fairness in such circumstances.<sup>3455</sup> The Commission does not recommend against assessors. It is important that tribunals have varied and flexible arrangements for obtaining expert evidence. In appropriate cases, the tribunal may appoint an assessor or commissioned expert who is available to take evidence and report to the tribunal.

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3449. Migration Regulations (SR 268 of 1994) cl 2.25A(3). In *Minister for Immigration & Multicultural Affairs v Seligman* [1999] FCA 117 (1 March 1999) the Full Federal Court found that cl 2.25B of the Migration Regulations, which prescribes the approach to be taken by the Medical Officer, was invalid because, in directing the Medical Officer to consider some things but not others in the formation of his or her opinion, it imposed limitations which meant that the Medical Officer's opinion did not address the relevant criterion and was therefore beyond the power conferred by the Migration Act.

3450. Migration Regulations (SR 268 of 1994) cl 1.23.

3451. AAT *Submission 210*; J Dwyer *Submission 269*.

3452. ADT Act (NSW) s 74, s 33, s 34, s 35.

3453. For example that provided by the Country and Legal Research sections of the RRT.

3454. RRT *Submission 211*; ASIC *Submission 184*.

3455. In particular ensuring that parties have access to all relevant adverse materials obtained by the assessors on which the tribunal relies in making a decision: ASIC *Submission 184*.



9.205. In the present deliberations on arrangements for the ART, the Commission recommends that particular emphasis be directed to a consideration of the arrangements and processes for expert evidence in tribunal proceedings. Some of these arrangements may require legislative backing, others can be dealt with in guidelines or tribunal directions. The AAT, relevant agencies, including LACs, and the Attorney-General's Department should meet to discuss such appropriate, flexible arrangements for the appointment and adducing of expert evidence. There is no easy or simple solution to the problems of inappropriately partisan expert evidence in certain tribunal jurisdictions. It is also an unfortunate feature of personal injury litigation in the state jurisdictions. However, tribunals do have more flexible procedures for obtaining evidence than courts and can more directly deal with this problem.

**Recommendation 132.** Prior to the establishment of the Administrative Review Tribunal, the Attorney-General's Department and the Administrative Appeals Tribunal should convene meetings of relevant agencies and legal aid commissions, to discuss arrangements for the appointment of expert witnesses and adducing of expert evidence in particular review jurisdictions.

### Single or agreed experts

9.206. The Commission supports changes to review tribunal powers and procedures to encourage them to direct parties to agree on a choice of expert. As discussed in chapter 6 (paragraphs 6.102–6.112), single agreed experts, appointed early in proceedings, may help reduce the cost and duration of proceedings.

9.207. As a preliminary step, a list of relevant experts could be compiled jointly by representatives of Commonwealth employers and employees, LACs and expert associations, from which parties to AAT proceedings could choose. The AAT agreed with this proposal but noted that such a list would be required for each state of Australia.

Further, in those jurisdictions with a wide range of applicant and respondent representatives, obtaining agreement on a list of medical experts, even for the more commonly claimed conditions, may be difficult to achieve. At best, agreement might be obtained in relation to some specialties in some states, though the signatories to those agreements may not include all respondent and applicant representatives.<sup>3456</sup>

9.208. Australia Post and the Department of Defence opposed the proposal to require parties to agree to the instruction of a single expert for AAT compensation

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<sup>3456</sup> AAT Submission 372.

cases because it would limit the opportunity for parties to effectively present their case and because of practical difficulties such as disputes between parties over instructions.<sup>3457</sup> Comcare stated that it considered the proposal is 'worth exploring'.

In the current SRC Act jurisdiction where medical evidence is often in issue, with both sides obtaining their own experts, much time can be spent by each party in seeking to refute the evidence of their opponent's experts. An independently appointed medical specialist could therefore have the effect of short-circuiting some of this argument and could provide real savings in both time and money.<sup>3458</sup>

9.209. National Legal Aid also stated that there is value in making more use of single experts, although the applicant should retain the right to require a second expert report from another expert on the agreed panel.<sup>3459</sup>

9.210. In the past it has been common for some agencies to agree with applicants to arrange joint medical opinions for the purposes of AAT proceedings. Department of Veterans' Affairs and applicant representatives used to conference cooperatively to agree to obtain relevant medical reports from an agreed medical practitioner. There was a list of practitioners from whom the Department would accept reports. The Department now waits until medical evidence is served by the applicant's representatives before taking steps to obtain its medical evidence.<sup>3460</sup>

9.211. Some practitioners stated that even where parties initially agree on a single expert, applicants or respondents may still argue for additional expert witnesses, a request the tribunal would find difficult to resist. The exercise of a discretion to require the parties to agree to a single expert may be subject to challenge if it was conferred by practice direction alone.

9.212. The Commission agrees with suggestions that legislation should explicitly provide the AAT (or the ART) with the power to make a direction requiring parties to agree to the instruction of a single expert.<sup>3461</sup> In addition, in those review jurisdictions where successful applicants are able to obtain costs, where the tribunal has directed parties to agree to the instruction of a single expert, the costs of additional experts consulted by the applicant should not be recoverable.

**Recommendation 133.** Administrative Appeals Tribunal practice directions should encourage parties to agree to the instruction of a single expert for the case.

3457. The views of Australia Post and the Department of Defence were conveyed in Comcare *Submission* 349.

3458. Comcare *Submission* 349.

3459. National Legal Aid *Submission* 360.

3460. AAT *Consultation* Sydney 24 September 1999.

3461. AGS *Consultation* Adelaide 5 August 1999; AAT *Submission* 372.

**Recommendation 134.** Legislation should expressly provide federal review tribunals with the power to require parties to agree to the instruction of a single expert for the case, where the tribunal considers this appropriate. In such circumstances, additional expert evidence on the same matter should be permitted only in exceptional circumstances.

**Recommendation 135.** In those review jurisdictions where successful applicants are able to obtain costs, where the tribunal directs parties to agree on a single expert, the costs of additional experts consulted by the applicant should not be recoverable.

### Disclosure of expert reports

9.213. Concerns were expressed to the Commission that respondents do not automatically make available to applicants copies of all the respondents' medical expert reports. The problem is said to be associated with compensation cases. It was suggested that there should be a legislative amendment to make immediate disclosure of medical reports of this nature a statutory requirement.<sup>3462</sup> The Commission agrees with this suggestion.

9.214. The Commission considers that there also should be more general reform relating to the disclosure of expert reports in review tribunal proceedings, applying equally to respondent agencies and to applicants.

9.215. Client legal privilege may be claimed for communications between a client or his or her lawyer and an expert (such as instructions, draft reports or reports) if such communications are made for the dominant purpose of the client being provided with legal services relating to anticipated or pending legal proceedings.<sup>3463</sup> While the AAT has power to order disclosure of expert reports in the possession of the respondent agency, notwithstanding 'any rule of law relating

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3462. J Dwyer *Submission 269*. The AAT's General Practice Direction provides that the applicant must provide the respondent and the Tribunal with all expert reports and the statements of all witnesses at least 14 days before the second conference, at which the statement of facts and contentions must be lodged. The respondent must do likewise at least seven days before the second conference: AAT General Practice Direction 18 May 1998, para 2.2.

3463. *Evidence Act 1995* (Cth) s 119. Following the decisions of the High Court in *Esso Australia Resources Limited v The Commissioner of Taxation* [1999] HCA 67 (21 December 1999) and *Mann v Carnell* [1999] HCA 66 (21 December 1999) the dominant purpose test now also applies to situations where the common law privilege is invoked at a pre-trial stage of litigation, before questions of adducing evidence have arisen. Legal privilege may apply to communications in relation to administrative review proceedings: *Waterford v Department of Treasury* (1987) 71 ALR 673. The AAT has often upheld objections to the production of documents on the basis of legal professional privilege.

to privilege',<sup>3464</sup> the AAT cannot order production of a privileged document that is in the possession of an agency other than the respondent agency,<sup>3465</sup> or in the possession of an applicant.<sup>3466</sup>

9.216. In its 1985 interim report on the law of evidence, the Commission considered the various justifications for the application of legal professional privilege to third party communications in connection with litigation. The Commission noted the view that each of the justifications pointed to privilege being 'integral to the adversary mode of trial'.<sup>3467</sup>

9.217. The Commission considers that, within administrative review proceedings, such claims for legal privilege, at least as these relate to expert reports, have less justification due to the nature of review proceedings (see paragraphs 9.9–9.11 above). Both applicants and respondents should be under a duty to disclose such reports to the tribunal, if requested.

9.218. Submissions have cautioned that client legal privilege should not be lightly interfered with and some practitioners strongly oppose the abolition of privilege for expert reports in cases of a commercial nature.<sup>3468</sup>

9.219. Comcare observed that while applicants will usually be aware of any medical reports that may be obtained by the respondent, and can therefore seek to have that evidence released to them prior to a hearing, the respondent may not be aware of medical reports which have been elicited on behalf of the applicant, particularly where an applicant receives a report that is not favourable. Comcare suggests that there should be a procedure to ensure that all reports obtained by both parties are disclosed and that the complete discovery of all medical reports by both parties should enhance early resolution of a claim.<sup>3469</sup>

9.220. It was suggested to the Commission that one unintended result of the proposed reform may be to entrench the use of clearly partisan experts. Parties will

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3464. AAT Act s 37(2)–(3); *Re McMaugh and Australian Telecommunications Commission* (1991) 22 ALD 393 discussed in J Dwyer 'Fair play the inquisitorial way' (1997) 5 *Australian Journal of Administrative Law* 5, 29.

3465. *Re Lindsey and Australian Postal Commission* (1989) 18 ALD 340.

3466. *Re Loknar and Secretary, DSS* (1992) 20 ALD 591.

3467. ALRC Report 26 (Interim) *Evidence* Sydney 1985 Vol 1 para 877 (ALRC 26) referring to N Williams 'Discovery of civil litigation trial preparation in Canada' (1980) 58 *Canadian Bar Review* 1, 47.

3468. *Freehill Hollingdale & Page Submission* 339. However, the Victorian Bar agreed with the proposal to remove client legal privilege for expert reports in review tribunal proceedings. *Vic Bar Submission* 367.

3469. *Comcare Submission* 349.

not wish to risk receiving an adverse report which will have to be disclosed.<sup>3470</sup> In such circumstances it is important to encourage single agreed experts.

**Recommendation 136.** Legislation governing the Administrative Appeals Tribunal and the new Administrative Review Tribunal specifically should require prompt disclosure to applicants of reports of all the respondents' medical experts.

**Recommendation 137.** Legislation governing the Administrative Appeals Tribunal and the new Administrative Review Tribunal should provide that neither applicants nor respondent agencies can claim client legal privilege for expert medical reports created for the dominant purpose of anticipated or pending review tribunal proceedings in the compensation, veterans' affairs or social welfare review jurisdictions.

**Recommendation 138.** The Administrative Appeals Tribunal, and in due course, the Administrative Review Tribunal should monitor the impact of, and practices in, review proceedings consequent upon changes to the rules and practices for expert evidence.

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<sup>3470</sup>. See the comments of Wood J & MacNamara DP of the Victorian Civil and Administrative Tribunal in *Treverton v Transport Accident Commission* (unreported) 4 November 1998 noting that if respondent agencies could expect to obtain provision of reports subject to legal professional privilege as a matter of course

it is likely that applicant's advisors will avoid the risk of the inconveniently candid expert and direct their clients only to typecast 'applicant's experts' ... [or] resort to tactics such as asking medico-legal experts to provide a preliminary report by telephone and only then seeking a written report if the preliminary report seems satisfactory.



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