

Economic value of legal aid

Analysis in relation to Commonwealth funded matters with a focus on family law

National Legal Aid
2009



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Executive Summary

PricewaterhouseCoopers (PwC) has been engaged by National Legal Aid (NLA) to estimate the economic benefit of legal aid assistance to the Australian community. We have been asked by NLA to focus the scope of this assessment on the legal aid services funded by the Australian Government, (i.e. those that relate to Commonwealth law). These include:

- services provided in relation to family law matters. Family law receives overwhelmingly the largest share of Australian Government funding. In Queensland, which is used as an example throughout this report, family law matters comprise approximately 93 per cent of cases where legal advice and representation is provided
- services provided in relation to Commonwealth civil and criminal matters such as administrative appeals, social security fraud, drug importation and trafficking, people smuggling and fishery offences.,

The economic benefits stemming from the provision of legal aid are, by their very nature, difficult to quantify.

This report aims to quantify only those benefits which accrue to the efficiency of the justice system and to describe the other significant benefits which accrue to the community as a result of the provision of legal aid. These other significant benefits result from legal aid services but were not able to be quantified within the scope of this report.

Why legal aid is funded

Legally enforceable rights and duties underpin a democratic society. Access to justice is essential to make these rights and duties real. Access to justice can be understood as access to legal assistance for all people, regardless of their means, background or capabilities. Australian governments, under various international conventions and treaties, have an obligation to ensure access to justice for all their citizens, as a basic human right. A key delivery mechanism of access to justice in the Australian community is the provision of legal aid services.

The provision of legal aid leads to considerable benefits being:

- provision of a human right
- promotion of the rule of law
- increased confidence in the fairness and accessibility of the justice system
- better outcomes for individuals accessing legal information and the justice system
- avoidance of costs to the community as a result of better justice outcomes

- information and direction to ensure the most appropriate pathway through or away from the justice system
- lower cost alternatives to court for resolution of matters
- increased efficiency of the justice system and the courts

Funding

When considering the economic benefits of legal aid it is important to first consider the funding for legal aid over the past twelve years. This period is important as it represents the last time that the funding model was reviewed and amended, with the Australian Government making significant changes to the funding model for legal aid during this period. Table ES1 sets out the change in legal aid funding from 1996-07 to 2007-08.

Table ES1 Real funding of legal aid 1997 to 2008

	1996-97	2007-08
Total funding (millions)	\$362	\$480
Funding per capita	\$20	\$22
Funding as a percentage of GDP	0.05%	0.04%
Commonwealth funding share	49%	32%
State and Territory funding share	28%	40%
Funding from other sources share	24%	27%

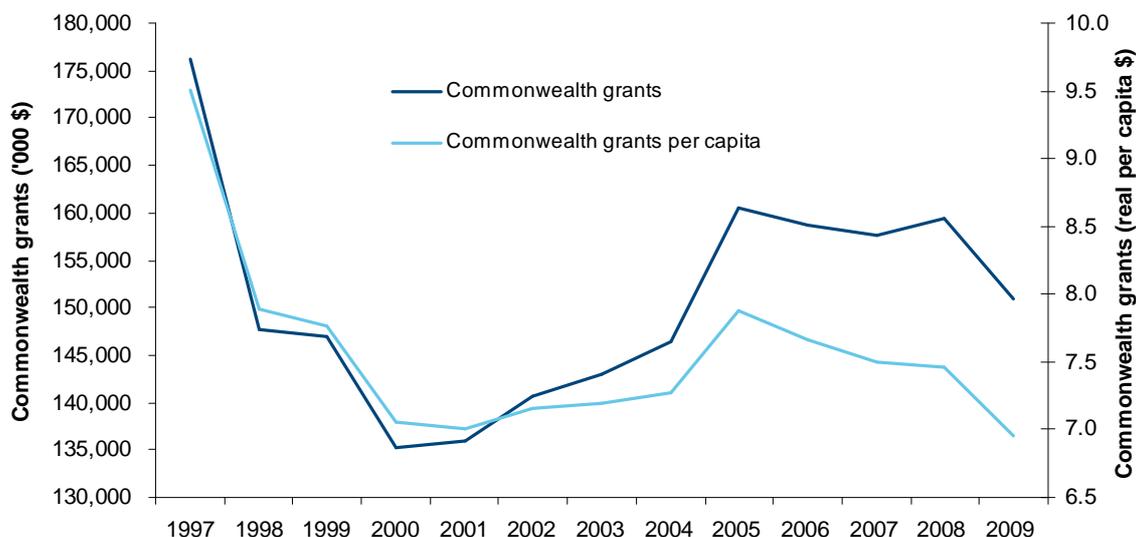
Data sources: National Legal Aid, ABS

Note: Shares may not add to 100% due to rounding

As can be seen in Table ES1, the Australian Government's share of funding has declined considerably between 1996-07 and 2007-08.

Figure ES1 sets out the real decline in Commonwealth funding in both total grants and on a per capita basis.

Figure ES1 Commonwealth grants, total and per capita



Data source: National Legal Aid and ABS

Since 1997 there has been a real reduction in the amount of funding allocated by the Commonwealth for legal aid. This is in large part due to the withdrawal of funding by the then Australian Government. Over this period Commonwealth funding has fallen on the following basis:

- as a share of total funding
- against the population
- as a percentage of gross domestic product (GDP)

At the same time there has been a significant increase in the State and Territory funding for legal aid. Since 2000 the State and Territory Governments' funding of legal aid has increased by 22.2 per cent in real terms (inflation adjusted to 2008).¹ Meanwhile, Commonwealth funding has fallen by 1.5 per cent in real terms.

As the share of Commonwealth funding has declined, some legal aid commissions have relied increasingly on funding from revenue sources other than government, primarily interest on monies held in solicitors' trust accounts. This funding source is diminishing due to changing economic conditions which have led to a reduction in both interest rates and the value of money held in trusts. Legal aid commissions have limited to no ability to address the reduction in this funding, other than by seeking funding from government.

¹ While there has been an increase in funding, this increase has not been uniform across the states and territories.

Unmet demand

The objective of legal aid is to fund the most worthy cases for the neediest applicants. Nevertheless, the constraints on funding of legal aid dictate that many who would otherwise be considered eligible for legal aid are unable to be provided with this assistance. Therefore, legal aid commissions are required to allocate the available funding via strict means and merits tests, reflecting that there is a degree of demand for legal aid services which is currently unmet.

Unmet demand is expected to increase in an environment where the underlying cost of individual cases is increasing, i.e. fewer cases can be funded with the same amount of money. If the number of people who meet the means and merits tests also increases and funding remains unchanged, the same number of cases are funded but there is a further increase in the amount of unmet demand.

The underlying result of any unmet demand for legal aid is a loss of access to justice within the community. Unmet demand for legal aid is expected to grow as a result of:

- increasing demand for services generally
- the growing number of those eligible to receive legal aid under the means test, and an increase in legal needs due to the economic climate

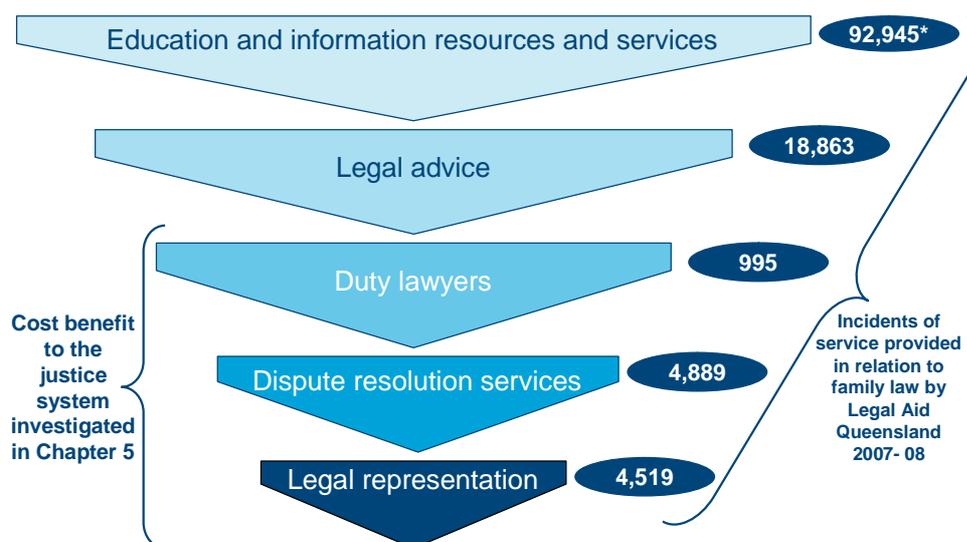
As real Commonwealth funding has declined, and unit costs have faced upward pressure, there is a further constraint on the legal aid commissions' ability to meet any increased demand. The immediate impact of this constraint is that a larger group of people who require legal aid assistance will miss out (i.e. the legal aid commissions' obligations to fund the most serious, complex and generally costly cases will be at the expense of the other services they provide). This results in fewer people being assisted and therefore an increase in the amount of unmet demand.

Legal aid services

Legal aid commissions provide a broad range of services to the Australian community.

Figure ES2 below sets out the type of services that legal aid provides across Commonwealth law areas. The broadest contact with the community can be observed at the top of the figure through information and education resources. These are early intervention and prevention services that assist people to understand their legal rights and responsibilities. The services then funnel down into those with higher intensity that are provided to a smaller number of people. The legal aid commissions' strength is the ability to offer this spectrum of services. This allows for the appropriate resolution or escalation of legal issues through or away from the justice system to reach efficient and effective justice outcomes.

Figure ES2 Legal aid services (Queensland)



* Total incidents of information provided in relation to Commonwealth civil, criminal and family law

The direct efficiency benefits of legal aid

There are a number of areas where legal aid provides efficiency benefits to the justice system including:

- the resolution of legal issues at an early stage and streamlining of matters appropriately through the justice system by the provision of legal advice, information and education
- the diversion of cases away from the courts through the provision of dispute resolution mechanisms, e.g. legal aid commissions' family dispute resolution services
- the increased efficiency of court processes by having duty lawyers on hand to help self-represented litigants (SRLs) address the court and present relevant information
- the increased efficiency of the court associated with otherwise self-representing litigants having legal representation

In relation to increased efficiency, the avoidance of costs to the justice system represents a considerable benefit from legal aid. In order to assess this, a benefit-cost analysis was undertaken which modelled a world with no legal aid. This was done in order to understand the efficiency benefits that legal aid provides in the form of avoided costs to the justice system.

The benefit-cost analysis is limited to the direct impacts of legal aid on the court system and does not include advice or information and education services that legal aid provides. It can be assumed that these services would have significant net benefits to the justice system, particularly because they provide early intervention and prevent matters from being escalated unnecessarily through the system. However the direct nexus between these services and efficiency benefits to the justice system is difficult to isolate and therefore to avoid complexity they have not been included in this analysis.

The benefits assessed also only relate to the efficiency of the court and its processes, and do not include the benefits that flow to individuals and the community from quality justice outcomes and resolutions of disputes. These are explored in various case studies in Chapter 6.

Inputs

The benefit-cost analysis considers the family law related matters assisted by Legal Aid Queensland during 2007-08, using the following data sources

- funding as per Legal Aid Queensland funding for family law matters in 2007-08²
- file numbers as per Legal Aid Queensland³
- cost of matters as per the Attorney General's department's cost per matter outcome in the Family Court in 2007-08⁴

Key assumptions

The assumptions in relation to the impact on the justice system of the absence of legal aid include:

- matters that normally received legal aid representation in court would be self-representing and 20 per cent more inefficient⁵
- parties in matters which are normally resolved with Legal Aid Commission dispute resolution services would go to court as self-representing litigants and be 20 per cent more inefficient
- matters that normally would receive duty lawyer assistance would be 5 per cent more inefficient⁶

Case outcome assumptions

Each potential family law matter outcome has a different court cost attached to it, reflecting the time and resources necessary to reach that determination or resolution. Data is not available to indicate the outcomes of legally aided matters commenced in the court. Therefore to model the costs avoided through the provision of legal aid two combination of case outcomes were employed to allow for a range of avoided costs.

The assumptions set out below are in part based on the split between case outcomes in the Family Court as reported in the Attorney General's Department's *Portfolio Budget Statements 2007 – 2008, Family Court of Australia*. In each assumption 72 per cent of matters are assumed to include

² Legal Aid Queensland, *Annual Report 2007-08*

³ Legal Aid Queensland, *Annual Report 2007-08*

⁴ Attorney General's Department's *Portfolio Budget Statements 2007 – 2008, Family Court of Australia*

⁵ The Hon David K. Malcolm AC, Chief Justice of Western Australia '2004 Annual Review of Western Australian Courts'

⁶ This is based on a reasonableness assumption made in the absence of empirical data

an interim order reflecting the serious nature of the legal aid matters which usually involve children. Consent orders are not included in these case outcome assumptions because legal aid commissions do not fund matters unless there are substantial issues in dispute. The assumptions are as follows:

- case outcome assumption A - 75 per cent of legal aid matters result in mediated agreements and 25 per cent result in final orders
- case outcome assumption B – 50 per cent of legal aid matters result in mediated agreements and 50 per cent result in final orders. This case outcome gives more weight to final order outcomes and is supported by the findings of Dewar et al (2000) that self-representing litigants were less likely to settle and therefore more likely to go to a hearing⁷

Table ES2 Case outcome assumptions

	Interim orders	Mediated agreement	Final orders	Average cost of outcome
Case outcome assumption A	72%	75%	25%	\$10,763
Case outcome assumption B	72%	50%	50%	\$15,106

The use of case outcomes assumptions rather than a simple average cost of a case finalisation in the Family Court⁸ provides a range of results and adds a depth to the benefit-cost analysis because it:

- allows for the inclusion of multiple finalisations for one case (e.g. interim order and a final order)
- provides greater focus on the types of matters that legal aid assists with according to the merits test guidelines
- allows for the modelling of a range of outcomes that reflect the uncertainty of what would occur in a world without legal aid

Results

The efficiency benefits (avoided costs) from the services that legal aid provides in relation to Family Law, including legal representation, dispute resolution and duty lawyers, were modelled for the two case mix assumptions. These were compared to the funding provided for these services to give the net benefit and benefit-cost ratio outcomes presented in the Table ES3.

⁷ Dewar, J., Smith, B. & Banks, C. (2000), Litigants in Person in the Family Court of Australia, Research Report No. 20, Family Court of Australia

⁸ This approach has been used in “Family dispute resolution services in legal aid commissions - Evaluation Report” 2008, Australian Attorney General’s Department

Table ES3 Summary results of cost benefit analysis (million \$)

	Benefits - avoided costs (million \$)	Funding legal aid (millions \$) ⁹	Net benefits (millions \$)	Benefit-cost ratio
Case outcome assumption A	42.24	(26.39)	15.86	1.60
Case outcome assumption B	59.29	(26.39)	32.90	2.25

As can be seen from the above table, case outcome assumptions A and B both result in a net positive benefit. The net efficiency benefits of providing legal aid for Family Court representation, duty lawyers and dispute resolution services range from \$15.86 million to \$32.90 million per annum. This is a range of benefit-cost ratios of 1.60 to 2.25.

The results of this analysis also support the efficiency benefits available from the provision of education, information and legal advice by the legal aid commissions, which have not been quantified. These services are likely to lead to appropriate and efficient pathways taken, from the outset, through or away from the justice system. Therefore the benefits reported in this analysis under represent the full extent of the efficiency benefits available from the services that legal aid commissions provide.

Case Studies

The case studies explored in the report demonstrate how the services that legal aid provides can result in important benefits in the form of costs that are avoided due to increased effectiveness of justice processes and outcomes. Assistance and services from legal aid can ensure that the outcomes of legal matters are fair and that costs are both minimised and correctly distributed amongst the parties and the community.

Table ES4 presents potential outcomes of the case studies and the benefits, or avoided costs and demonstrates how effective justice outcomes play a role in returning significant benefits, many that flow over the course of a number of years. The provision of legal aid should not be considered the only factor that would bring about these results, but it can be understood to play an important role.

⁹ Based on funding for Legal Aid Queensland

Table ES4 Potential costs to individual and society in the absence of legal aid

Case study	Potential outcome without legal aid	Avoided cost type	Avoided cost
1	Underlying issue contributing to family violence not identified and addressed	Continuation of domestic violence over the life of the victim	\$103,559
2	Child taken out of grandmother's care	Child living in out of home care from 1 to 18 years	\$35,195 to \$585,038
3	Family loses home	Housing related costs and children living in poverty for one year	\$63,400

The analysis also identifies that legal aid services return various benefits that are difficult to assign a dollar value, but represent important outcomes from this assistance, therefore the estimates provided in Table ES2 under represent the full extent of the benefits that legal aid provides.

Conclusion

Governments have a responsibility to provide access to justice, including access to legal assistance, as part of the provision of basic human rights.

Beyond this responsibility there is a strong economic justification for the provision of legal aid on multiple levels:

- Direct legal aid assistance in relation to court and dispute resolution services for Family Law matters has a net positive efficiency benefit for the justice system. These benefits outweigh the costs of providing these services, ranging from a return of \$1.60 to \$2.25 for every dollar spent.
- Efficiency benefits can be expected to be observed in a greater magnitude through the provision of education, information and legal advice by legal aid. These services reach a broader group of recipients and are likely to lead to appropriate and efficient pathways taken through or away from the justice system, from the outset.
- Benefits also accrue to individuals and the community from quality and effective justice outcomes and resolutions of matters, reached with the assistance of legal aid services. The case studies presented in this report give some indication of these benefits and when these results are extrapolated out across legal aid recipients they are significant.

Clearly, the benefits quantified in this report are only one part of the economic return that legal aid provides; legal aid demonstrably benefits those receiving legal aid support, those people and businesses they have contact with, the community more broadly and the efficiency of the legal system as a whole. Therefore there is a strong economic case for appropriately and adequately funded legal aid services, based on the magnitude of the quantitative and

qualitative benefits that this funding can return to individuals, society and the government.

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1 Introduction

PricewaterhouseCoopers (PwC) has been engaged by National Legal Aid (NLA) to estimate the economic benefit of legal aid assistance to the Australian community. We have been asked by NLA to focus the scope of this assessment on the legal aid services funded by the Australian Government, (i.e. those that relate to Commonwealth law). These include:

- services provided in relation to family law matters. Family law receives overwhelmingly the largest share Australian Government funding. In Queensland, which is used as an example throughout this report, family law matters comprise approximately 93 per cent of cases where legal advice and representation is provided
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The economic benefits stemming from the provision of legal aid are, by their very nature, difficult to quantify.

This report aims to quantify only those benefits which accrue to the efficiency of the justice system and to describe the other significant benefits which accrue to the community as a result of the provision of legal aid. These other significant benefits result from legal aid services but were not able to be quantified.

1.1 Why legal aid is funded

Legally enforceable rights and duties underpin a democratic society, and access to justice is essential to make these rights and duties real.¹⁰ Access to justice can be understood as access to legal assistance (legal information, advice, dispute resolution and representation in courts and tribunals) for all people, regardless of their means, background or capabilities. Australian governments, under various international instruments, have an obligation to ensure access to justice for all their citizens, as a basic human right¹¹. A key delivery mechanism of access to justice in the Australian community is the provision of legal aid services.

The provision of legal aid leads to considerable direct benefits to the justice system through increasing the efficiency of the system and the courts. Those accessing legal aid assistance do not have the funds and often do not have the information to adequately navigate the justice system. The assistance they receive be it preventative justice measures such as education, information or advice; diversion from the courts through alternative dispute mechanisms; or representation in court ensures that their matter takes the correct and most efficient path through, or away from, the justice system.

¹⁰ Tony Blair as quoted in Hilary Sommerlad 'Some reflections of the relationship between citizenship access to justice and the reform of legal aid,' *Journal of Law and Society*, Volume 31, No. 3, September 2004

¹¹ For example, the Universal Declaration of Human Rights, 1948 and in particular Articles 6,7,8,9,10,11,and 12.

When totalled the savings achieved for the justice system by these measures are considerable.

The provision of legal aid is considered to have a number of positive externalities, i.e. spill over benefits, which justify the investment in legal aid commission services. The outcomes of even minor legal issues have potentially significant consequences and costs for individuals that in turn can result in further costs borne by society. Legal aid assists in providing effective and just outcomes in relation to legal matters. Without legal aid assistance there is a percentage of the community who would not be able to afford legal representation, and therefore would not be able to pursue their legal rights. When legal aid services are available to these people it ensures that the outcomes of legal matters are fair and that costs are minimised.

Legal aid assistance can also be considered a merit good, that is a commodity or service that an individual or society should have based on the concept of need, rather than ability and willingness to pay.¹² Funding legal aid as a merit good reflects the importance that society places on equality and social inclusion.

Legal aid also has impacts beyond contributing to the efficiency and effectiveness of the justice system and the outcomes it provides. These include engendering trust in the legal system and thus upholding the rule of law, and providing peace of mind for those who place an importance on the knowledge that these services exist as a safety net for the community. When these *non-user benefits* are considered across society as a whole they are significant and far outweigh the direct benefits of legal aid to the justice system.

1.2 Assessing the benefits

The quantification of the full economic benefits associated with the provision of legal aid is difficult. Largely, this is due to the vast spectrum of services that the legal aid commissions provide, along with the sheer number of people who derive both direct and indirect benefits from these services. In addition, non-user benefits, including upholding the rule of law that underpins everyday transactions, and the utility that many gain from the knowledge of the existence of legal aid, are extremely difficult to isolate and therefore quantify.

There are, however, a number of economic benefits which can be directly assessed. The first set of benefits considered in this report relate to the impacts on the efficiency of the justice system if legal aid dispute resolution and court related services are removed. The second set of benefits relate to examples of the improvements in justice outcomes achieved when individuals access legal aid to support their interaction with the justice system.

1.3 Project scope

The analysis outlined throughout this report is focussed on some of the legal aid services which are provided in areas which are under the jurisdiction of

¹² W. Ver Eecke 'Adam Smith and Musgrave's concept of merit good Journal of Socio-Economics', *Journal of Socio-Economics*, Volume 31, Issue 6, 2003

Commonwealth legislation. Services provided under Commonwealth legislation can in the main be characterised as:

- services provided in response to family law matters
- services provided in response to Commonwealth crimes such as social security fraud, drug importation and trafficking, people smuggling and fishery offences
- services provided in response to Commonwealth civil law matters such as administrative appeals, veterans' matters, social security appeals and immigration services.

Within these services there a number of matters which are excluded from the analysis despite their inclusion under Commonwealth legislation. These matters include the provision of immigration services and assistance in the Social Security Appeals.

There are other matters which are not under the jurisdiction of Commonwealth legislation, but which we have specifically included because of their close links to areas of Commonwealth responsibility; most importantly the provision of legal aid services for child protection and domestic violence.

In addition the report investigates factors impacting on the demand for legal aid, and the funding arrangements for legal aid, with a particular focus on the impact on solicitor's trust accounts of lower interest rates. These matters have been specifically included in our analysis to ensure that funding interrelationships are appropriately represented.

1.4 Structure of the Report

The remainder of this paper has been structured in the following manner:

- Chapter 2 sets out the funding arrangements for legal aid, comparing the relative changes in State and Territory, and Commonwealth funding over the past 12 years. In addition, it notes that other sources of funding have decreased significantly in some places.
- Chapter 3 sets out the current and potential future unmet demand for legal aid and external constraints that the legal aid commissions are experiencing in delivering services. This includes a discussion of the increasing complexity of laws and matters, the impacts of the current economic climate on demand for legal aid, and the application of the means and merits tests to screen applicants for eligibility.
- Chapter 4 sets out the services that the legal aid commissions provide in areas of Commonwealth law. This includes a description of the services are provided in the areas of Commonwealth law in which funding agreements require services to be provided. In addition, this section identifies some key benefits that accrue from these services.
- Chapter 5 sets out the direct economic benefits which are likely to accrue to the justice system from providing legal aid assistance for family law

matters. This is achieved through an assessment of the costs that are avoided through the provision of legal aid.

- Chapter 6 sets out the economic benefits which accrue as a result of individuals being able to access legal aid, through the analysis of various case studies. These benefits are considered to be additional benefits to those presented in Chapter 5 and accrue to individuals through the effective and just resolution of a particular matter. In addition, these benefits accrue through the avoidance of costs to government and the community as a whole due to effective justice outcomes.

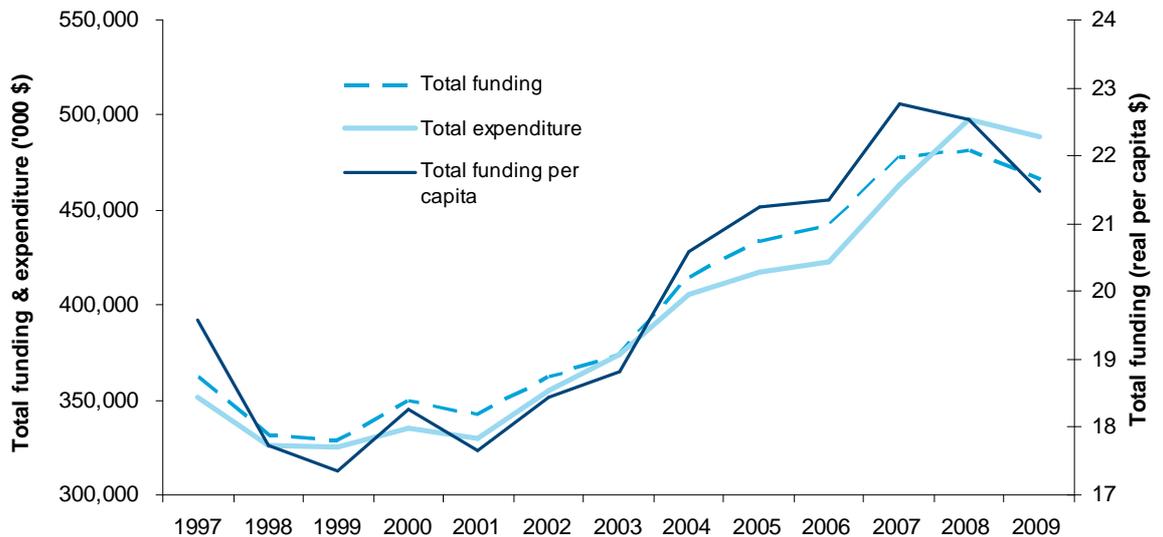
2 Legal aid funding over the past 12 years

2.1 Overview of funding

In this chapter the funding for legal aid commissions over the last 12 years is considered. The beginning of this period, 1997, was the last time that the legal aid funding model was reviewed and amended, and when significant changes were made to the legal aid funding model and legal aid funding responsibilities.

Figure 2.1 sets out the funding over this period in real cost terms, that is in 2008 dollars, and the funding on a per capita basis. The left hand side of the figure sets out the funding in absolute terms. Meanwhile the right hand axis sets out the per capita funding level.

Figure 2.1 Legal aid funding over the past 12 years (real \$2008)



Data source: National Legal Aid and ABS

As can be seen, there has been a considerable increase in the amount of funding available for legal aid over the past 12 years. In the 1997 financial year the figure represented:

- approximately \$362 million per annum
- approximately \$20 per capita
- and 0.05 per cent of gross domestic product (GDP)

Following changes implemented by the Australian Government this funding decreased in absolute and per capita terms and did not return to the inflation-adjusted 1997 level until 2003. The 2008-09 financial year budget figures

available from NLA suggest that the expenditure on legal aid was expected to increase to:

- approximately \$480 million per annum
- approximately \$22 per capita
- and 0.04 per cent of GDP

This represents an increase in the total funding level of \$118 million, and an increase of approximately \$2 per capita, from 1997. However, it represents a real decline in the proportion of GDP spent on legal aid funding, down from 0.05 per cent in 1997 to 0.04 per cent in the 2008-09 year.

While there has been a significant increase, approximately 32.5 per cent, in the total amount spent on legal aid this has largely been driven by an increase in the spending by the State and Territory governments. In addition, there has been an increase in the amount of money available from interest on solicitor's trust accounts and other sources (e.g. co contributions). Table 2.1 sets out the changes in the composition of legal aid funding over this period.

Table 2.1: Composition of funding over time

	1997	2009	% change
Commonwealth grants (million \$)	176,132	155,420	-12%
% of total funding	48.6%	32.4%	
State and Territory government grants (million \$)	100,739	192,962	92%
% of total funding	27.8%	40.2%	
Interests, contributions and fees (million \$)	85,500	131,171	53%
% of total funding	23.6%	27.3%	
Total	362,371	479,609	32%

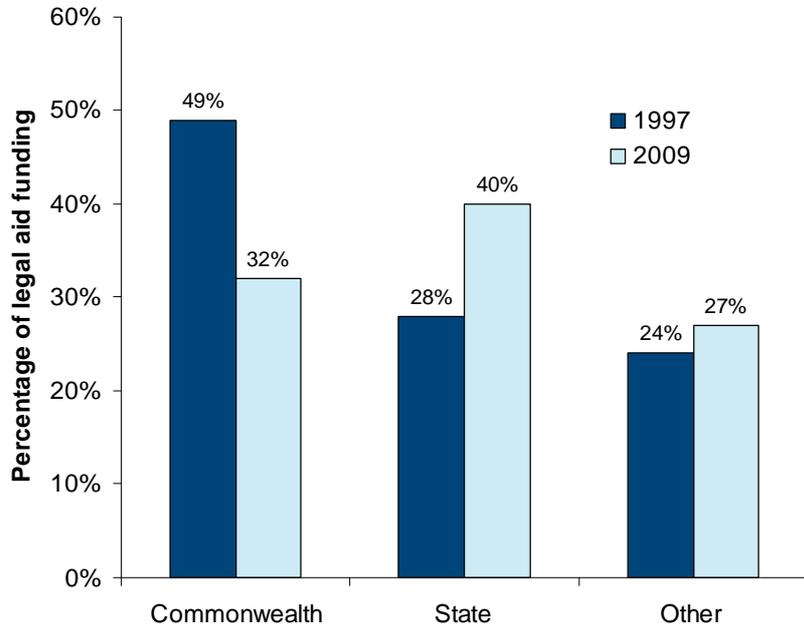
Data source: National Legal Aid

2.2 Commonwealth funding

The Australian Government's share of the financial burden of legal aid has fallen over this period from \$176 million in 1997 to an expected \$155 million in the 2009 financial year. This results in a real reduction of approximately 12 per cent over this period. The resulting reduction in the proportion of Commonwealth funding as a percentage of the overall funding pie has been an effective reduction of one third. Therefore Commonwealth funding now represents two thirds of the proportion that it represented in 1997. At the same time the funding from State and Territory Governments has increased by almost 100 per cent. Economic conditions, ranging from increased transaction flow and higher interest rates have resulted in an increase of over 50 per cent from alternative mechanisms such as earnings on monies held in

solicitor's trust accounts. Figure 2.2 sets out the change in the funding composition between 1997 and 2009.

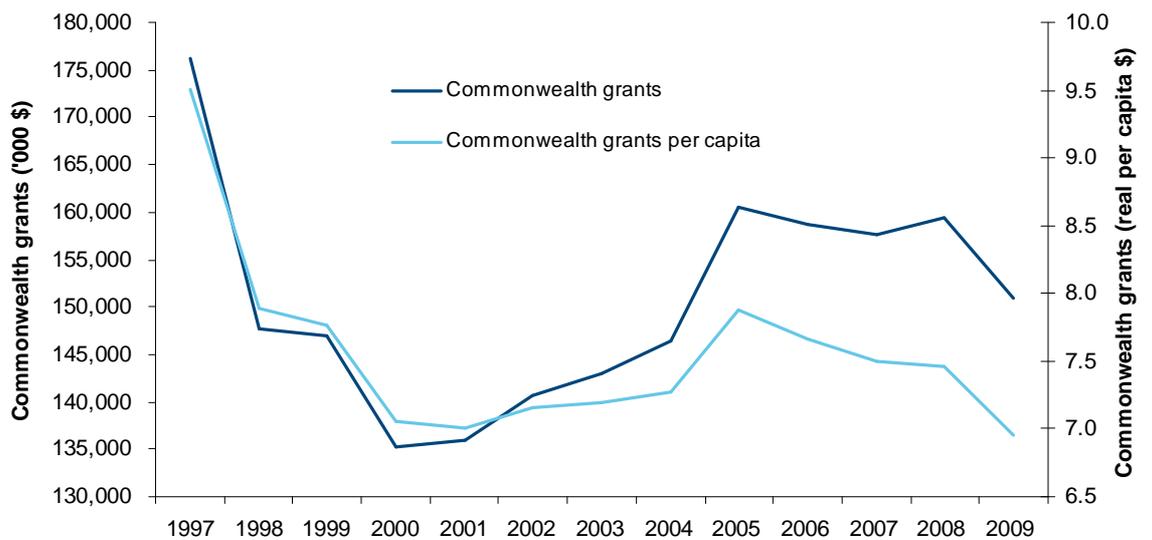
Figure 2.2 Legal aid funding composition between 1997 and 2009



Data source: National Legal Aid

The relative decrease in Commonwealth funding outlined in Figure 2.2 is further exacerbated when compared to the funding relative to population in Figure 2.3.

Figure 2.3 Commonwealth grants, total and per capita



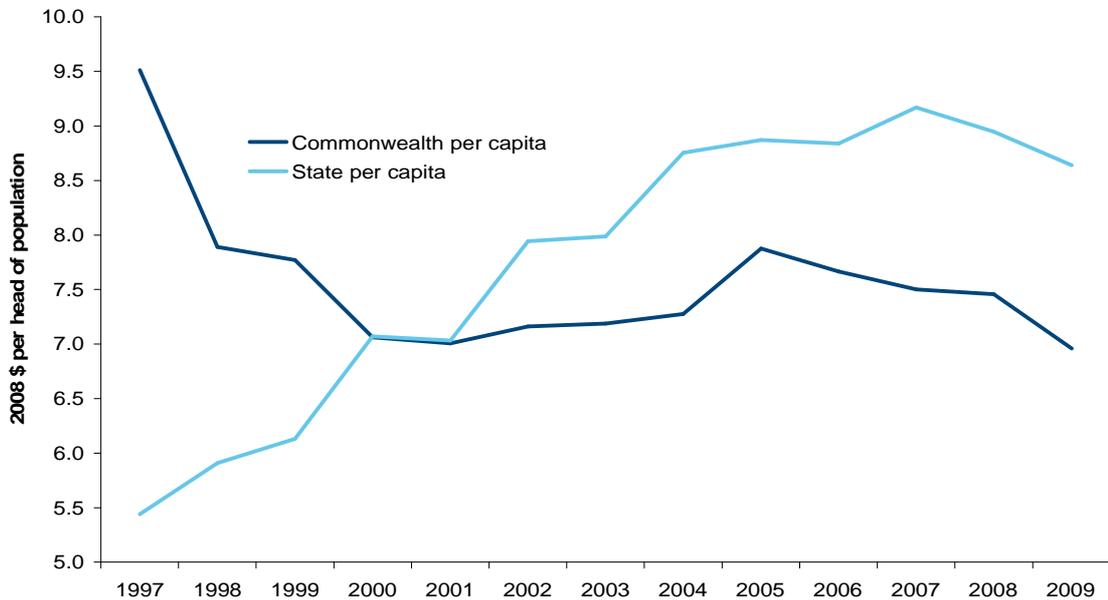
Data source: National Legal Aid and ABS

As noted in Table 2.1 between 1997 and 2009 there has been a real decline in Commonwealth funding of 12 per cent, albeit from a base reduction of approximately 23 per cent in the 2000 financial year. While the situation since 2000 has been increases in the overall spend, the increase has not kept pace with population growth. Consequentially there has been a real reduction in the amount spent on legal aid by the Commonwealth of 27 per cent per capita.

2.3 Commonwealth and State and Territory funding

The Commonwealth funding reductions have been in contrast to the various State and Territory Governments. Figure 2.4 sets out the funding increases in the States and Territories in aggregate, compared to the fall in Commonwealth funding, on a per capita basis.

Figure 2.4 Government funding on a per capita basis

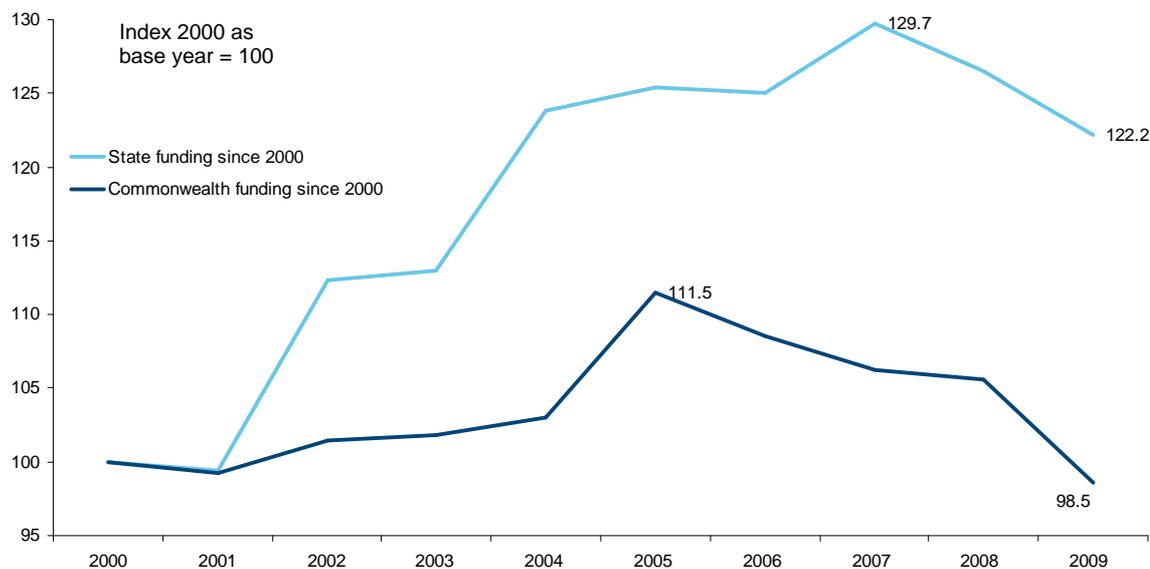


Data source: National Legal Aid and ABS

The reduction in Commonwealth spending which followed 1997 was directly tied to the restrictions the Australian Government placed on the use of funds it provided to legal aid commissions. At the same time the increase in funding from State, Territory and Australian Governments over the year 2000 to 2005 represented a real increase. However, from the peak of 2005, Commonwealth funding on a per capita basis has fallen by approximately 13 per cent.

Importantly, there has been little change in the responsibilities of State, Territory and Australian Governments since the reforms of the late 1990s. As such we have assessed the relative per capita spending of these parties since this time in the index outlined in Figure 2.5. Funding levels at the year 2000 are set as a base year (100) and the chart reflects relative changes in funding since that time. The year 2000 represents a time when the funding mix between the State and Territory and Australian Governments was effectively the same.

Figure 2.5 Commonwealth and State and Territory funding index



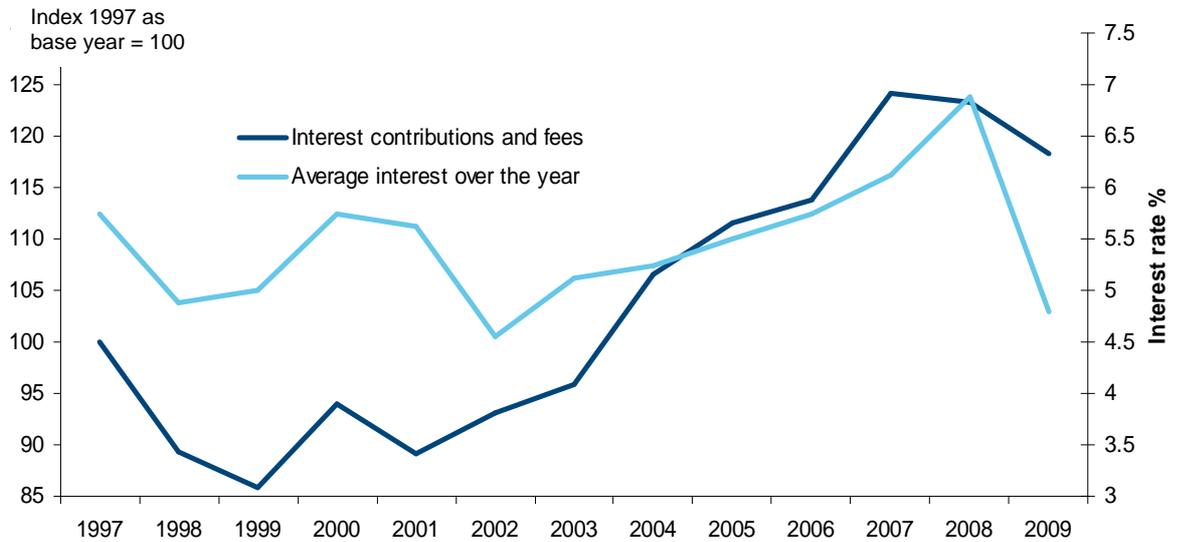
Data source: National Legal Aid

Over the five years since 2000, Commonwealth funding for legal aid increased relative to population by 11.5 per cent. Meanwhile, State and Territory funding did not peak until 2007 at just under 30 per cent. Since 2005, Commonwealth funding has fallen below the level of funding in 2000 by approximately 1.5 per cent which represents a significant reduction in the funding per capita by Commonwealth grants.

2.4 Funding from other sources

In large part, this chapter thus far has looked at the funding arrangements over the past 12 years to assess the changes between State and Territory, and Commonwealth levels of funding. However, just as important has been the increasing share of funding that the special trust, statutory interest and self generated income (classified in Table 2.1 as interest contributions and fees) has provided the legal aid system. Figure 2.6 sets out this increasing percentage growth in the total funding amount.

Figure 2.6 Interest contributions and fees



Data source: *National Legal Aid*

The left hand axis is an index measuring the growth of funding from interest contributions and fees, using 1997 as the base year. The right hand axis looks at the risk free interest rates which are used as a reference for the returns generated by monies held in trust. Comparison of the two lines yields interesting observations, namely that the two move in similar fashion albeit that there is a slight lag. From approximately 2002 both lines grow as the economic conditions improve. This is an intuitive response as the impact of improved economic conditions leads to a positive impact on the number and size of transactions resulting in more money being held by lawyers in trust accounts thereby increasing the interest returns generated from these accounts. At the same time, the interest rate, as set by the Reserve Bank of Australia (RBA), also increases due to the RBA's use of monetary policy (i.e. the use of interest rates to control inflation).

During the second half of 2008 and during 2009 interest rates fell and have remained relatively low, significantly reducing the monies earned on solicitors' trust accounts, which in part fund legal aid. This is in large part due to the impacts which are currently being experienced through the world from the global financial crisis. The downturn in the Australian economy is expected to increase demand for legal aid services in Australia, putting pressure on budgets of legal aid commissions while lower interest rates and government budget deficits will impact on legal aid funding.

Since the advent of the financial crisis, global economic growth has slowed considerably. Equity markets around the world have made substantial losses resulting in a drop in asset prices. Risk free interest rates have dropped as central banks, including the RBA, attempt to moderate the impact of the crisis on aggregate economic demand.

In Australia, the reduced demand for commodities has resulted in a decrease in commodity prices which has in turn resulted in lower profits to mining companies. This has led to a subsequent decrease in tax receipts to the

government and resulted in budget pressures. Also the fall in asset prices has reduced inflows from capital gains tax resulting in further fiscal pressures. This later point has significant implications to the number and size of transactions likely to be held in trust accounts, thereby reducing the overall value of funding derived from these sources.

A recent study of the implications of the financial crisis on funding for legal aid services in Texas was principally driven by the need to understand effects of the current financial crisis on the Interest on Lawyer's Trust Accounts (IOLTA). In 2007 IOLTA revenue in Texas equalled USD20 million. However, due to the subsequent lowering of rates IOLTA revenue dropped to USD12.2 million in 2008, and was projected to be as low as USD1.5 million in 2009, a decrease of about 93 per cent in two years.¹³

In April 2009 the RBA cut interest rates to 3.0 per cent, the lowest level in 45 years (although rates have recently increased slightly they remain historically low). Interest revenue from legal trust accounts and investments as a proportion of total legal aid funding has shown a steady increase (9 per cent in 1997 to 21 per cent in 2008) in Australia. The forecast for revenue flowing into legal trust accounts in Australia is an expected decline. Also the lowering of interest rates by the RBA in response to the financial crisis, even with small recent rate increases, has further impacted adversely on revenue from legal trust accounts.

2.5 Funding in Australia compared to other countries

In assessing the amount of money spent on legal aid, it is illustrative to consider Australia in relation to comparable countries. Table 2.2 presents the per capita spending on legal aid in Australia and a number of other countries. It also presents the per capita funding each country provides for legal aid, as a proportion of Australia's current funding level.

Table 2.2 Jurisdictional comparison of legal aid funding

Funding in other jurisdictions	Per capita expenditure on legal aid (\$A)	Per capita expenditure as a proportion of Australia's funding of legal aid
England and Wales	77.27	3.50
Scotland and Northern Ireland	63.03	2.85
Australia	22.08	1.00
New Zealand and Canada	20.33	0.92
Ireland	14.23	0.64
Germany	8.13	0.37
France	6.10	0.28
Sweden	2.03	0.09

Data source: Jack Straw address to the London School of Economics, all figures converted on the basis of exchange rate of 2.0333 AUD per UK pound sterling.

¹³ Texas Access to Justice Foundation, 'Poor Texans may lose legal aid series due to funding crisis'. Media Release February 2009

Compared to the European nations included in Table 2.2, Australia funds legal aid at a higher amount per capita. However in comparison to the example set by countries in the United Kingdom Australia is considerably lower. It must be noted that variation in funding levels between the countries in part relates to differences in justice systems and processes, and crime levels. Among these countries, the UK, New Zealand and Canada have justice systems that most resemble Australia's. Germany, France and Sweden have civil law systems, in which the roles of judges and legal representation are fundamentally different to those in common law systems such as Australia. As a result, caution should be exercised in any comparison of per capita expenditure with those countries.

2.6 Conclusion

Since 1997 there has been a real reduction in the amount of funding allocated by the Commonwealth for legal aid. This is in large part due to the significant withdrawal of funding and changes in State and Territory, and Commonwealth responsibilities mandated by the then Australian Government Commonwealth funding has fallen on the following basis:

- as a share of total funding
- against population
- as a percentage of GDP

At the same time there has been a significant increase in State and Territory funding to meet their increased responsibilities. Since 2000 the total State and Territory Government real funding of legal aid has increased by 22.2 per cent. Meanwhile Commonwealth funding has fallen by 1.5 per cent in real terms per capita.

Legal aid commissions have also been able to make up some of the shortfall from Australian Government funding from revenue sources other than government, primarily interest on monies held in solicitor's trust accounts. This funding source is likely to further reduce in light of changing economic conditions which have led to a reduction in both the value of money held in trust and a reduction in interest rates used to calculate returns. Legal aid commissions have limited to no ability to address the reduction in this funding, other than by seeking funding from government.

At the same time, as investigated in Chapter 3, demand for services of legal aid is likely to grow over the coming years as the full effects of the economic conditions flow through to users of legal aid services.

3 Demand for legal aid

Recent trends in relation to funding for legal aid have been investigated in Chapter 2. Along with these trends legal aid is being affected by various other external factors that impact on the demand for its services and legal aid commissions' ability to meet legal needs satisfactorily.

3.1 Trends in demand for legal aid

New laws, interpretations, and procedures

Changes in laws, their interpretation and enforcement, along with changes in justice processes all can place upward pressure on the number of people who require assistance from legal aid. Some examples in relation to Commonwealth Law of these trends and changes include:

- consumer credit matters soon to fall under Commonwealth law
- changes in the *Family Law Act 1975* in 1996 and 2006
- the introduction of the Federal Magistrates' Court and the consequential changes in procedures in 2000
- increase in court orders for Independent Children's Lawyers

An illustrative example of recent increases in demand for State law services can be seen in Queensland where there has been a surge in orders made under the *Child Protection Act 1999* in all Queensland Children's Courts. In 2002-03, 3,476 orders were made but by 2006-07 this had increased by approximately 72 per cent to 5,991.

In 2002-03 applications for legal aid assistance were made in relation to 23 per cent (794) of these orders. In 2007 Legal Aid Queensland received applications for legal assistance in relation to 32 per cent (1,911) of the child protection orders. Over all this represents a 141 per cent increase in applications in just four years. Not only over this period has the number of child protection orders increased markedly, but the proportion of the people involved who turned to legal aid for assistance has increased at an even greater rate.¹⁴

Current economic climate and impact on civil legal needs

The current economic climate can be expected to increase demand for the services that legal aid provides and the number of Australians eligible to receive legal aid under the means test.

In periods of economic downturn the legal needs of the community are known to increase, while their ability to fund these privately decreases. Some social issues that are known to worsen in times of recession, and that can be expected to increase society's legal needs include:

¹⁴ Legal Aid Queensland

- family - domestic violence, divorce, relationship breakdown
- financial - debt, employment, housing, welfare benefits
- homelessness - homelessness, rented housing, welfare benefits¹⁵

Many of these legal problems fall under Commonwealth law and the impacts of the global downturn can be expected to present a particular challenge to legal aid commissions and their ability to deliver services to meet the increased needs in these areas.

Table 3.1 presents the findings of a survey of around 10,000 people in England and Wales regarding the 'everyday' legal problems they were facing, not including crime.

Table 3.1 Number of legal problems – results from civil justice survey in England and Wales 2006-2009

	Unemployed	Became unemployed	Sacked or made redundant	None of these groups
Number in group	264	269	139	10,048
Total number with one or more legal problem	54	67	121	35
Percentage of group with one or more legal problem	20.5%	24.9%	87.4%	0.3%

Data source: Legal Aid in Tomorrow's World Developments: Solutions from Research, Pascoe Pleasance, March 2009

As can be observed in Table 3.1 the group who had the greatest amount of civil legal problems were those who had been sacked or made redundant (87 per cent), followed by those who had become unemployed and then those who were already unemployed (20.5 to 24.9 per cent respectively). These percentages are significantly higher than the rest of the population, where only 0.3 per cent had one or more civil legal problem.

The current economic climate can also be expected to affect the number of people eligible for legal aid. Generally people relying on Centrelink payments for their income are eligible for legal aid grants. According to the ANZ Economic Outlook the unemployment rate will jump to 8.0 per cent by mid 2010.¹⁶ As unemployment and other financial pressures increase so will the number of people eligible for Centrelink payments and therefore eligible for legal aid assistance.

¹⁵ The English and Welsh Civil and Social Justice Survey 2006-9, 'The Impact of the Global Downturn on Legal Aid First Findings'

¹⁶ ANZ Economic Outlook - September quarter 2009

Application for legal aid assistance

Whilst the applications for grants of legal aid have increased over the last 10 years, this is only a partial measure of demand for legal aid. Numbers of legal aid applications do not fully represent the demand for legal aid services as they do not include those who are advised not to apply for legal aid on the basis of the presumed ineligibility under the means or merit tests. It also does not include the groups in society who would be eligible for legal aid but do not apply because they are not aware of their eligibility to access the services.

3.2 Costs of matters

While various factors impact on an increase in demand for the services that legal aid provides, the legal aid commissions' ability to respond to this increase is limited by upward pressure on the unit costs of these services.

The legal aid commissions have indicated that costs have been increasing over the past 10 years, over and above general increases in line with the consumer price index. This is supported by statistics from the Family Court, albeit from two years of data 2004 to 2006, which suggested that there had been an annual rate of change in costs of 6 per cent (having adjusted for changes in the type of cases from year to year).¹⁷ Furthermore, research completed for the Victorian Bar also suggests that costs have been increasing.¹⁸

As the costs of cases increase, and the available legal aid funding remains the same, less cases can be funded resulting in an increase in the amount of unmet demand for legal aid services.

3.3 Unmet demand

The increases in demand and costs outlined above put a limit on the legal aid commissions' ability to provide services within their budget constraints, creating growing pockets of unmet demand. A result of increased demand, and in turn adding to *unmet* demand, is the legal aid commissions' stricter application of eligibility tests.

The means test is only one of the tests applied. The funding agreements between legal aid commissions and the Australian Government also require only cases that come within subject matter guidelines to be funded. The agreements require the commissions to impose a merit test including a test that legal aid should only be granted in matters where a prudent self funding litigant would proceed. This means that an applicant may qualify under the means test but not receive a grant of aid if their case does not meet the guidelines and merit test. As recent trends continue it can be expected that eligibility tests will need to become even stricter. According to the Australian

¹⁷ Family Court of Australia – Outcomes and Output map

¹⁸ Victorian Bar and PricewaterhouseCoopers, 'Review of Fees Paid by Victoria Legal Aid to Barristers in Criminal Cases' April 2008,

Community Sector Survey 2008, turn away rates for legal services in Australia are already high at 9.8 per cent.¹⁹

Set out below are some examples of recent changes to the eligibility requirements for Commonwealth law matters made by Legal Aid Western Australia in response to these pressures:²⁰

- minor assistance services have decreased and are usually limited to the following areas:
 - preparation of divorce documents when there are language difficulties
 - pre-action procedures where there are language difficulties, there is a violence restraining order in place or the other party has a solicitor
 - contravention matters
 - passport applications where other parent will not sign the child's passport
- funding for the appointment of the independent children's lawyers (ICL) are restricted to cases involving only two of the 13 factors identified by the Family Court of Australia which would justify the appointment of an ICL
- grants for assistance in matters regarding property are only made in exceptional circumstances
- in parenting matters if referred to primary dispute resolution (PDR) and assessed as inappropriate, the matter may not receive a grant for litigation. In these circumstances the client is referred to other agencies for assistance.
- grants are very limited if a client wishes to reopen an issue due to change of circumstances.

3.4 Conclusion

Many factors contribute to growing unmet demand for legal aid services, representing a loss of access to justice for the community. Unmet demand for legal aid services is expected to grow as a result of the following trends:

- increasing demand for services generally, particularly in relation to civil matters
- growing group of those eligible to receive legal aid under the means test, and an increase in legal needs due to economic climate

¹⁹ Australian Council of Social Services, 'Australian Community Sector Survey Report,' 2008, Volume 1, National

²⁰ Legal Aid Western Australia

As funding is forecasted to decline, and unit costs face upward pressure, this places a constraint on the legal aid commissions' ability to meet increased demand, and a larger group of people who require legal aid assistance will miss out. This has been evidenced in the stricter application of the eligibility tests, which in turn affects a further increase in unmet demand.

Furthermore, a flow on effect of this cost constraint is that more funding will be required to meet legal aid's obligations to fund the most serious, complex and generally costly cases. At current funding levels this would result in a trade-off with funding for the other, more preventative services that legal aid provides, such as education, information and advice. These services reach large sectors of the community and are understood to have significant social and economic benefits, in terms of avoided costs to the justice system and society. The provision of these services and their benefits are explored in more detail in Chapter 4.

4 Legal aid services

4.1 Overview

Legal aid commissions provide a broad range of legal services to the Australian community. These include legal information and community legal education regarding rights and responsibilities.

The amount and complexity of services provided by each Legal Aid Commission differs, with differences around the emphasis placed on particular disadvantaged groups within the state. However, the type of services can be broadly categorised as:

- free telephone legal information advice and referral services
- community information, seminars, workshops and other training sessions provided to members of the public and to other service providers
- information resources including fact sheets, self help guides, DVDs and other knowledge resources delivered on line and through free hard copy publications
- free legal advice in criminal law, family law and some areas of civil and human rights law
- family dispute resolution services
- access to free duty lawyer services in most courts
- grants of legal assistance for legal representation including for in house representation by legal aid commissions and funding private lawyers to provide legal aid services to the public.²¹
- policy and law reform contributions to inform government policy in light of the extensive practice experience of legal aid commissions

The services provided by the legal aid commissions are categorised with the three general law types, civil, criminal and family. Within these three law types there is a divide between the various issues which are covered by State, Territory and Australian Governments. For the purpose of this report we have focused attention on the economic benefits associated with Commonwealth matters. Within this framework, data from Legal Aid Queensland has been analysed.

In the 2008 financial year, Legal Aid Queensland collected the following statistics regarding the mix of advice provided for Commonwealth matters across the three law types.

²¹ In some states Legal aid commissions also provide legal library services

Table 4.1: Breakup of Commonwealth legal advice, advice and representation

	Advice	Representation	Total	Percentage
Civil	925	139	1,064	3.6%
Criminal	577	533	1,110	3.8%
Family	18,863	8,376	27,239	92.6%

Data source: Legal Aid Queensland

As can be observed, the percentage of effort required to address Commonwealth law civil and criminal matters under existing guidelines is relatively low, whereas the vast majority of effort approximately 93 per cent, relates to the issues of family law matters.

Advice and representation is only part of the work completed by the legal aid commissions in relation to Commonwealth law. Figure 4.1 sets out the types of services that legal aid provides across Commonwealth law areas. The broadest contact with the community can be observed at the top of the figure through information and education resources provided. These are early intervention and preventative services that assist people to understand their legal rights and responsibilities. The services then funnel down into those with higher intensity that are provided to a smaller number of people. A key strength of the work that legal aid carries out lies in its ability to offer this spectrum of services. This allows for the appropriate resolution or escalation of legal issues through or away from the justice system to reach efficient and effective justice outcomes.

Figure 4.1 Legal aid services (in Queensland)



* Total incidents of information provided in relation to Commonwealth civil, criminal and family law

Each of the different types of services that the legal aid commissions provide is discussed in turn below.

4.2 Legal information and education services

Legal aid commissions provide free legal information relating to family law and other areas of Commonwealth law. These services play an important preventative role, assisting people to understand their rights and responsibilities, including the legal ramifications of various situations, and resolving minor legal issues before they escalate to more costly matters for individuals and society.

These resources are prepared to ensure that the community is able to become self sufficient in their understanding of the legal system and therefore increase their ability to navigate the appropriate pathway through the justice system.

Information is provided in relation to the following key Commonwealth law areas:

- divorce procedures
- parenting arrangements
- property settlements
- child support
- immigration
- social security and administrative law
- consumer law
- legal rights, legal systems and processes

This information takes various forms targeted at specific groups or legal areas. Some of the methods that legal aid commissions use to provide information include:

- phone
- face-to-face meetings at offices or community access points
- legal information data-bases delivered online
- printed and online materials about rights including posters, brochures and wallet cards
- self help kits for assisting to people to know their rights and resolve their own minor legal issues
- fact sheets for common legal issues
- information for practitioners and service providers

The education and information services provided by the legal aid commissions have potential to provide significant economic benefits as they focus on preventative justice measures. Education and access to information support the community's ability to be self reliant in terms of understanding and protecting their individual rights. The education and information services provided by legal aid commissions also assist people to take the most appropriate path through, or away from the justice system to resolve their issues. This results in potentially large efficiency savings and improved justice outcomes.

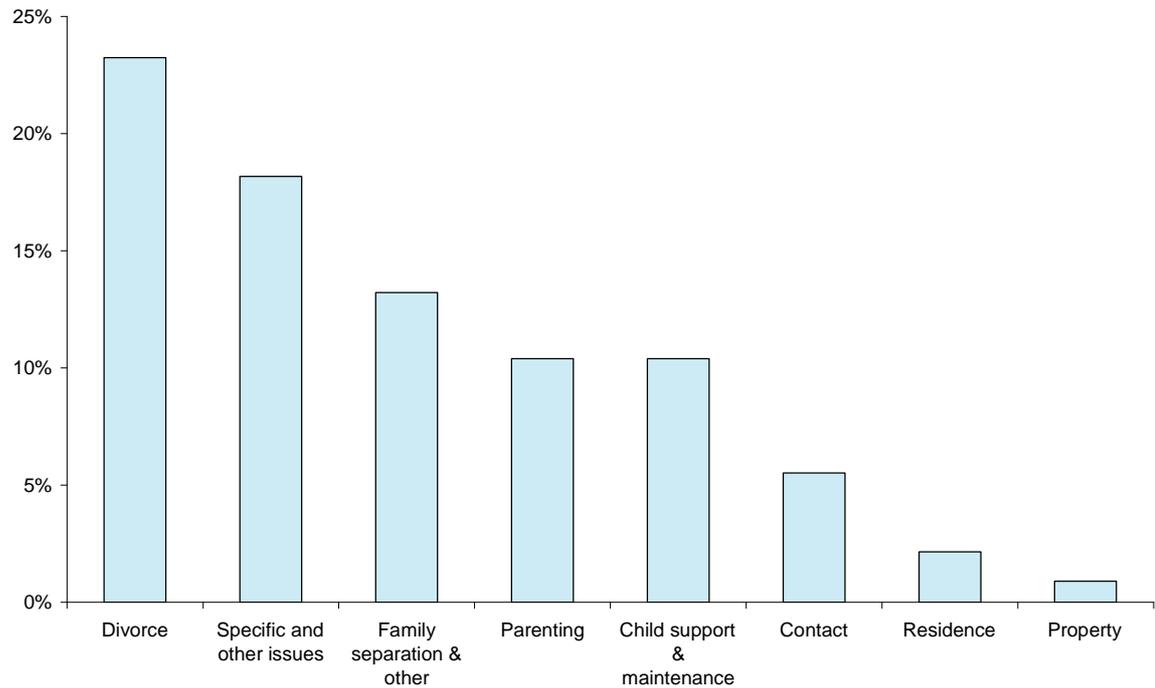
The efficiency benefits from the provision of education and information services impact on a large number of people and are also relatively cost effective; as such the likely returns on investment are potentially significant. However, these benefits are the most difficult to quantify. This is largely due to the difficulty in isolating and quantifying the benefits of the actions taken by the recipient as a result of the education or information they have received.

In addition to these direct benefits, the presence of legal aid information in the community has the potential to support and strengthen the community's trust in the justice system even though they may not access these services. This study has not attempted to quantify these non-use benefits, they are however likely to be considerable.

4.3 Legal advice

Another important service that legal aid commissions provide to the Australian community is the provision of legal advice. Considering family law matters and using Legal Aid Queensland as an indicative state, Figure 4.2 presents the subject matter relating to family law matters.

Figure 4.2 Subjects of advice, family law matters Queensland, 2008



Data source: Legal Aid Queensland

Figure 4.2 shows a breakdown of the various family law issues in which legal aid commissions provide legal advice about Family Law matters. Although the majority of legal advice in Commonwealth law matters is for Family Law matters, there is also some advice is also provided in relation to other civil and criminal Commonwealth law matters.

Like legal information and education, the economic benefits of legal advice are difficult to estimate without a clear consideration of the outcomes that result from the provision of this advice. The provision of legal advice can be expected to improve the efficiency of justice processes and the effectiveness of its outcomes. These efficiency benefits have not been attempted to be quantified in this report, but some understanding of their impact can be observed in the case studies included in Chapter 6.

4.4 Primary Dispute Resolution (PDR)

Primary Dispute Resolution (PDR) services aim to resolve disputes at an early stage. The parties are given the opportunity to negotiate a settlement with legal assistance but without the need to go to court.

In relation to Family Law matters, if a settlement is reached, consent orders are drafted and filed in a family law court. At least one of the parties must have a grant of aid before a PDR Conference can be scheduled.

Legal aid commissions' main PDR service is the Family Dispute Resolution Conferencing Program, which combines mediation and conciliation processes. Legal Aid Family Dispute Resolution Conferences bring opposing parties and their solicitors together before an independent chairperson to reach a mutually acceptable and workable agreement. Conferences are offered for parenting arrangements, and some property division and spousal maintenance issues.

The efficiency benefits that accrue to the justice system as a result of these services are investigated in Chapter 5.

4.5 Family Law duty lawyer

Legal aid commissions provide a free family law duty lawyer service in the Family and Federal Magistrates Courts. Outside the major cities, this service generally coincides with the relevant circuit courts.

The service is provided at court sites and offers basic legal help and free legal advice to people self-representing before the Family and Federal Magistrates Courts. In some circumstances, duty lawyers can represent people in court for adjournments, short procedural mentions or can assist with negotiations about consent orders for children or property matters.

The family law duty lawyers cannot take on contested hearings or represent people at a trial. Duty lawyers do not prepare for cases, nor can they follow matters through to resolution.

The efficiency benefits that accrue to the justice system as a result of these services are investigated in Chapter 5.

4.6 Legal representation

Legal aid commissions provide grants to obtain legal representation for applicants in matters where they:

- are financially eligible under a means test
- have a case which comes within the eligibility guidelines
- have reasonable prospects of succeeding in the legal action
- there are available funds given competing priorities

The eligibility guidelines and merit test for grants of legal aid in Commonwealth law matters are set by the Australian Government. Legal representation can be provided by a private lawyer who does legal aid work or an inhouse lawyer employed by a legal aid commission.

The efficiency benefits that accrue to the justice system as a result of these services are investigated in Chapter 5.

4.7 Conclusion

Legal aid commissions provide a broad range of services to the Australian community. Many economic benefits associated with the provision of these services are difficult to quantify, although they have the potential to be significant.

Nevertheless there are number of areas where there are direct and observable benefits. These include:

- the diversion of cases away from the courts to dispute mechanism, that is through the provision of PDR services
- the increased efficiency of court processes associated with having duty lawyers on hand to help first time litigants address the court and present relevant information
- the increased efficiency of the court associated with having an otherwise self-representing litigant have legal representation

These benefits, in relation to family law matters are assessed in the following chapter.

5 Contribution of legal aid to the efficiency of the justice system

A functional justice system provides quality justice outcomes through the efficient use of resources. These outcomes depend in part on the availability and quality of legal representation for all parties involved.

There is a direct relationship between the efficiency of the court and the provision of legal aid. Efficiency is achieved through the provision of information, advice, legal assistance, dispute resolution, and representation for matters that would otherwise be self-representing. Costs to the justice system are also avoided because cases are diverted from court rather than needing a hearing or decision by the court.

When assessing the benefits which arise from the provision of legal aid, it is important to consider the costs that are avoided due to the provision of legal aid and related services. That is, if the provision of legal aid was withdrawn, the Australian Government would save the amount of money it currently spends on funding the services but the costs to the justice system would increase through an increase in the inefficiency and work load at the court.

In this chapter a benefit-cost analysis is undertaken to quantify such benefits (avoided costs) by modelling counterfactual scenarios to identify the increased cost that the courts, and therefore the community, would face in the absence of legal aid. The modelled benefits only relate to the efficiency of the court and its processes, and do not include the benefits that flow to individuals and the community from quality justice outcomes and resolutions of disputes. These benefits are explored in various case studies in Chapter 6.

5.1 Legal aid services

The benefit-cost analysis in this chapter is limited to the direct impacts of legal aid on the court system. It does not examine information, education or legal advice services that legal aid provides (other than in the duty lawyer context). It can be assumed that these services would have significant net benefits to the justice system, particularly because they provide early intervention and prevent matters from escalating unnecessarily through the justice system. The direct nexus between these services and efficiency benefits to the justice system is often difficult to isolate and therefore to avoid complexity these services have not been included in this analysis.

The services provided by the legal aid commissions throughout Australia improve the efficiency and operations of the court directly. This is achieved by providing:

- representation to parties who would otherwise be unable to afford legal representation
- duty lawyer assistance to parties who are self-representing
- dispute resolution mechanisms for parties to reach agreements outside the court

This analysis considers efficiencies achieved through the provision of legal aid using data from Legal Aid Queensland and the Family Court of Australia. It is acknowledged that in relation to family law a large portion of matters are resolved in the Federal Magistrates Court. However, owing to the complexity of the cases that receive legal aid and the granularity and comprehensive nature of the data available in relation to costs in the Family Court of Australia, this Court was considered an appropriate focus for this analysis.

5.2 Costs avoided due to legal aid

In order to assess the efficiency benefits of legal aid four unique scenarios which consider the costs that are avoided due to the provision of legal aid have been investigated. These scenarios assess the impact on costs to the Family Court of the following:

- Scenario 1 - not providing any legal aid assistance
- Scenario 2 - providing only those services currently provided by duty lawyers
- Scenario 3 - providing duty lawyers and legal representation in the Family Court
- Scenario 4 - providing the full suite of services currently provided by legal aid commissions, including duty lawyers, dispute resolution mechanisms and legal representation

In addressing the avoided costs which can be ascribed to the provision of legal aid it is important to consider these scenarios in turn. More detailed descriptions of these scenarios are included in Section 5.4.

5.3 Assumptions

In the absence of legal aid commission services various costs would be expected to be incurred by the Family Court of Australia. The assumptions underpinning the analysis of these costs are set out below.

Matters going from dispute resolution to litigation

In the absence of legal aid the cases that normally would receive dispute resolution services from legal aid commissions would enter the Family Court of Australia for resolution. This assumption is made on the basis that cases which receive legal aid need help to be resolved. It is therefore assumed that in the absence of the legally assisted dispute resolution conference these matters would go to the court for resolution.²² This would create a cost for the court system in the form of added case load. Furthermore, in the absence of legal aid, these matters are assumed to go unrepresented in the court, adding additional inefficiency costs as set out below.

²² This assumption is supported by the requirement that there be a 'substantial dispute' for legal aid to be provided.

Unrepresented litigants in the absence of legal aid

It is assumed that in the absence of legal aid each of the additional cases that would enter the courts (because of the absence of legal aid commission dispute resolution services) and the litigants, who would normally receive legal representation from a legal aid commission, would go into the court as self-representing litigants.

To qualify for legal aid assistance from a legal aid commission, applicants must have income and assets under the thresholds presented by the means test; most are not able to afford a private lawyer.²³ If legal aid was not available they would enter the court as self-representing litigants.

Inefficiencies related to self-representing litigants

Legal professionals spend years studying, training and gaining the essential experience that allows them to deal with complex legal processes and to present cases for their clients in the required and effective manner. Lawyers also have professional duties: of disclosure to the court; to avoid the abuse of court process; to not corrupt the administration of justice; and to conduct cases efficiently and expeditiously. Self-representing litigants lack this experience and do not have these professional responsibilities. They are therefore generally acknowledged to be less efficient than legally represented parties in the running and presentation of their matter.

Self-representing litigants place more pressure on the court's resources and time as they are generally inexperienced and under-resourced to follow procedures efficiently and present their case effectively. This increases the time and resources that the court requires to explain the court procedures and to wait for self-representing litigants to move through processes or to present their case. This also increases the likelihood of errors and in turn increases delays and the need for costly further hearings and appeals.

A study by Dewar et al in 2000 found that self representation often led to more protracted and more frequent appearances and greater delays, resulting in more days off work and increased legal fees for the represented party who was often unable to recover costs against a self-representing party. Significantly the study found that self-representing parties were less likely to settle and therefore more likely to go to a hearing.²⁴ The inefficiency of self-representing litigants also impacts on other litigants in court by increasing waiting times in court and placing additional stress on court resources.²⁵

Self representing litigants present significant challenges to the court, in large part due to the fine line that judges need to follow when adjudicating cases involving self-representing litigants: judges are obliged to ensure that they do not intervene to an extent that they are no longer neutral in the litigation.²⁶ The

²³ Hunter et al (2003), 'Legal aid and self presentation in the Family Court of Australia', Griffith University, May 2003

²⁴ Dewar, J., Smith, B. & Banks, C. (2000), Litigants in Person in the Family Court of Australia, Research Report No. 20, Family Court of Australia

²⁵ Law Council of Australia, 'Erosion of Legal Representation in the Australian Justice System', February 2004

²⁶ The Hon Justice Pierre Slicer - Supreme Court of Tasmania 'Self Represented Litigants: Paper presented to the Magistrates' Conference Monday 14 June 2004,

Family Court of Australia has set detailed guidelines for dealing with self-representing litigants. These guidelines require numerous acts which ultimately increase the cost of dealing with self-representing litigants. For example judges need to directly consult with the self-representing litigant regarding the manner in which the hearing will proceed. There is an overarching requirement placed on the judge in these cases to:

- draw attention to the law applied by the Court in determining issues before it
- question witnesses
- identify applications or submissions which ought to be put to the Court
- suggest procedural steps that may be taken by a party
- clarify the particulars of the orders sought by a litigant in person or the bases for such orders²⁷

All these additional procedures and requirements create a time and resource cost for court, in both their development and implementation.

The New South Wales Bar has issued guidelines regarding self-representing litigants which give some indication of the added burden on the represented litigant's barristers and more broadly the court's resources:

Generally cases involving self-represented litigants are more difficult and require more inter-personal skills of patience and adaptability on the part of the barrister. Barristers need to retain their objectivity and commitment to their various duties and obligations notwithstanding the frustration experienced, for example, when the motives of a self-represented litigant may be seen to be other than the pursuit of justice.²⁸

A Registrar of the Family Court of Australia has noted that self-representing litigants in Family Court matters are often in a state of emotional and psychological deficit or crisis and therefore are even less able to act rationally and competently represent themselves in their matter. The registrar states that self-representing litigants impact significantly on the time and work load of the registrars, who are the litigants' first point of contact. She notes that regardless of the case specifics, it always takes additional time for them to deal with these parties.²⁹

Those unable to afford legal representation make up a large part of self-representing litigants, and are more likely to include people from disadvantaged groups. In a survey of self-representing litigants it was found that a high number were from lower socio-economic groups with over half not in paid work and one

²⁷ Byrne and Leggat 'Australian experience with self-represented litigants' (2003) 77 ALJ 820 at 823. Litigants in Person, 19 Australian Bar Review 41 1999

²⁸ New South Wales Bar Association Guidelines for Barristers, July 2001

²⁹ Catherine Cashen , 'Legal Aid and Unrepresented Litigants: A Registrar's Perspective', Family Court of Australia, Third National Conference Hotel Sofitel Melbourne, Tuesday 20 - Saturday 24 October 1998

half not educated beyond year 12.³⁰ These litigants could be expected to be less likely to have the experience and resources to navigate complex legal systems and concepts. In a counterfactual world where there is no legal aid, those that normally would receive legal aid assistance are likely to fall into this category.

It is therefore generally acknowledged that self-representing litigants impose a cost on the Family Court, compared to represented cases. Although much research has been undertaken regarding SRLs the extent of the efficiency difference between unrepresented and represented matters has not been quantified.

The 2004 *Annual Review of Western Australian Courts* found that in relation to single judge civil appeals court hearings, that those hearings that involved self-representing litigants would, on average, take 20 per cent more time than hearings involving represented litigants.³¹ While the procedures and requirements of civil law differ from family law, this finding in the absence of any other has been used as a benchmark for the increased court cost affected by self-representing litigants. Therefore it is assumed that unrepresented matters analysed in the benefit-cost model cost the Court 20 per cent more than they would have if they had received legal aid funding. This is considered to be a conservative estimate.

Lawyers have a professional responsibility to conduct cases efficiently and expeditiously, they are specialists in their fields and are employed by litigants accordingly. Generally litigants go unrepresented because they are unable to afford a lawyer and have not obtained legal aid assistance.³² These litigants impose a significant cost on the court in terms of time and resources. To understand the extent of the benefits that legal aid can provide in terms of court efficiency, this cost is included in the benefit-cost analysis.

Inefficiency due to lack of duty lawyers

In the absence of legal aid, court efficiency would decrease due to the lack of legal advice and assistance provided by duty lawyers.

Self-representing litigants can obtain free legal advice from duty lawyers at the court. The advice provided by duty lawyers is valuable as it assists self-representing litigants to approach the court's processes, construct arguments for their matter and make better use of court time and resources. The absence of legal aid for duty lawyers will nullify this benefit and add to the inefficiencies in the court system.

A reasonableness test has been applied that assumes that in the absence of duty lawyers, inefficiency would increase by 5 per cent. This test is undertaken to understand the impact of duty lawyers on the benefit-cost modelling results, because of the absence of any empirical evidence that quantifies the benefits they provide.

³⁰ Dewar, J., Smith, B. & Banks, C. (2000), *Litigants in Person in the Family Court of Australia*, Research Report No. 20, Family Court of Australia

³¹ The Hon David K. Malcolm AC, Chief Justice of Western Australia '2004 Annual Review of Western Australian Courts'

³² There are a small group of people who are self represented by choice.

Duty lawyers are usually stationed at the Court and act as gatekeepers. Assistance from them is usually provided on one occasion during the course of proceedings. Assistance may include legal advice, information, completion of simple documentation, representation for adjournments or procedural mentions, representation of limited negotiations with a view to consent orders, preliminary assessment of eligibility for aid and referral to pursue an application for aid if appropriate.

Funding and file numbers

The cost of legal aid in relation to family law matters includes the cost of court representation, duty lawyer services and dispute resolution services funded from the legal aid budget, it does not include administration costs that relate, or could be attributed to family law matters.

In order to estimate the net benefit of legal aid to the justice system in Australia, actual 2007-08 data from Legal Aid Queensland was used. The legal aid costs for family law services are calculated as shown in Table 5.1 below.

Table 5.1 Family law legal aid costs: 2007-08 – Legal Aid Queensland

	Unit cost per file	Number of files	Total cost (million)
Family law representation costs	\$4,143	4,519	\$18.72
Duty lawyer costs	\$615	995	\$0.61
Dispute resolution service costs	\$1,411	4,998	\$7.05
Total		10,512	\$26.34

Data source: Legal Aid Queensland, Annual Report 2007-08

The number of files refers to the number of grants made to individuals by legal aid. In 2007-08 4,998 individuals received grants in respect of 2,476 separate disputes.³³ This reflects that sometimes two or more parties are funded on each file.

Impact of a range of case outcomes

Table 5.2 shows a break down of the number of matters and their resolution or determination outcome in the Family Court of Australia (Australia wide) for the year 2007-08 as reported in the Attorney General's Department's *Portfolio Budget Statements 2007 – 2008, Family Court of Australia*.

³³ Legal Aid Queensland

Table 5.2 Matter outcome in the Family Court 2007-08

Case outcome	Number of matters in the Family Court 2007-08 (Australia wide)
Consent order	11,058
Divorce	4,197
Interim order	7,814
Mediated agreement	4,458
Final order	3,503
Appeals	340

Data source: Attorney General's Department's *Portfolio Budget Statements 2007 – 2008, Family Court of Australia*

The benefit-cost analysis considers the impact on the Family Court of Australia of matters reaching one or more of the following outcomes:

- *interim orders* – an interim order is an emergency measure granted in court when an immediate action is required
- *mediated agreements* – a mediated agreement is a dispute resolution process where an independent third party mediates to resolve an issue by consent
- *final orders* – a final order is the final decision taken by the court to close a matter

Cases can also result in a consent order, an agreement which has been made between parties and is made into an order by the court. Consent orders are not included in the case outcome assumptions because many of them are a low cost outcome for non complex cases where both parties agree

In addition cases can result in a divorce or an appeal but to simplify the modelling and focus on the core activities of legal aid, these outcomes have been excluded from the analysis. As per Table 5.3 below, in 2007-08 divorce made up only 1 per cent of the files that legal aid made a grant of assistance for. Appeals are not included as they are not a significant number.

Table 5.3. Family law matter type and proportion of total files – Legal Aid Queensland 2007-08

Subject of file	Proportion of approved family law files 2007-08
Contact	45.6%
Residence	27.0%
Child support and maintenance	8.8%
Family sep rep and other	8.2%
Property	5.9%
Enforcement	1.6%
Divorce	1.0%
Specific and other issues	0.9%
Parenting	0.5%
Contempt	0.3%
Spousal maintenance	0.2%

Data source: Data provided by Legal Aid Queensland

The average court costs for the different case outcomes used in the modelling are shown in Table 5.4. These costs are the prices for agency outcomes as presented in the Attorney General's Department's *Portfolio Budget Statements 2007 – 2008, Family Court of Australia*, which sets out the average costs of providing various outcomes in the Family Court. These values represent the cost of matters that result in a particular resolution or determination outcome.

These values are the costs of separate outcomes and do not include the cost of any other resolutions or determinations made in relation to a party's matter, for example the costs of making a final order does not include the costs of an interim order that was made previously in relation to that same matter.³⁴

³⁴ Attorney General's Department's *Portfolio Budget Statements 2007 – 2008, Family Court of Australia*

Table 5.4 Average court costs of case outcomes: 2007-08

Case outcome	Average court cost (\$ 2007-08)
Interim order	\$2,922
Mediated agreement	\$4,658
Final order	\$22,030

Data source: Attorney General's Department's Portfolio Budget Statements 2007 – 2008, Family Court of Australia

It is acknowledged that the average cost of a final order would include some matters with large and complex property considerations, the kind of cases for which legal aid would not be provided. Therefore this average cost may overstate the cost of finalising a legal aid case.

Matter outcome assumptions

While Legal Aid Queensland is able to track individual cases in terms of the provision of duty lawyer support, data is not available to determine how particular cases are resolved in relation to funding of cases for PDR or representation. In addition, in the absence of legal aid services and assistance there is uncertainty as to how cases would be resolved. Therefore two case outcome assumptions, made up of combinations of determination and resolution outcomes of matters have been modelled to determine the likely range of costs which will be imposed on the court in the absence of legal aid.

General assumptions

In all case outcome assumptions, it is assumed that 72 per cent of the cases will initially result in interim orders. This is the proportion of cases that normally receive legal representation, duty lawyer assistance from legal aid and 10 per cent of cases that would otherwise be resolved at PDR.³⁵ These cases, because they normally would be granted legal aid, are assumed to be complex in nature and to involve children, and therefore immediate action would be necessary. The majority (approximately 90 per cent) of matters that are deemed appropriate to be resolved at PDR would be less likely to require an interim order.

In the case outcome assumptions below, matters resolved at the mediated stage include matters that would be resolved at PDR or through other mediation before a final hearing.

Case outcome assumption A

These weightings are based on the split between mediated agreements and final orders that assumes that 75 per cent of the matters will be resolved with mediated agreements, while the remaining 25 per cent will be resolved with a final order.

³⁵ Queensland Legal Aid estimate

Case outcome assumption B

These weightings are based on an assumption that gives equal weighting to the mediated agreements and final order outcomes. Thus, 50 per cent of the cases are expected to be resolved at the mediation stage while those remaining are resolved at the final order stage.

This case outcome assumption is based on the type of cases that legal aid provides assistance for and therefore places more weighting on final order outcomes. This reflects the findings of Dewar et al (2000) that self-representing litigants were less likely to settle and therefore more likely to go to hearing.³⁶ In a world with no legal aid, where complex cases are going to litigation unrepresented, it is possible that fewer matters would be resolved with mediated agreements.

Summary

The benefits modelled are therefore weighted based on these case outcomes assumptions as set out in Table 5.5, to generate a range of weighted average costs of a finalisation.

Table 5.5 Case assumption scenarios

	Interim order	Mediated agreement	Final order	Weighted average cost of finalisation
Case outcome assumption A	72%	75%	25%	\$10,763
Case outcome assumption B	72%	50%	50%	\$15,106

Data sources: Family Court of Australia Annual Report 2007-08 and PwC estimates. Please note that where only duty lawyers are funded no case is allocated to final orders

The use of case outcomes assumptions versus taking the simple average cost of a case finalisation in the Family Court³⁷ provides depth to the benefit-cost analysis because it:

- allows for the inclusion of multiple finalisation for one case (e.g. mediated agreements and a final order)
- provides greater focus on the types of cases that legal aid assists with
- allows for the modelling of a range of outcomes that reflect the uncertainty of what would occur in a world without legal aid

³⁶ Dewar, J., Smith, B. & Banks, C. (2000), Litigants in Person in the Family Court of Australia, Research Report No. 20, Family Court of Australia

³⁷ This approach has been used in "Family dispute resolution services in legal aid commissions - Evaluation Report" 2008 for the Attorney General's Department

5.4 Scenario descriptions and benefit-cost analysis

Scenario 1 - No provision of legal aid

In Scenario 1 no legal aid assistance is provided, and therefore the following would occur:

- 4,519 litigants normally assisted with legal representation in court would now be self-representing litigants and court costs would increase by 20 per cent
- 2,476 matters normally resolved with dispute resolution services would go to litigation and be 20 per cent more costly to the court
- 995 litigants normally receiving duty lawyer assistance would go unassisted and be 5 per cent more costly
- funding saving of \$26.39 million to the government normally spent to provide these services

The efficiency impacts of this scenario on the justice system are set out in case terms in Table 5.6.

Table 5.6 Efficiency implications of Scenario 1 for justice system

	No. of matters	Efficiency cost (percentage of case cost)
Family court representation matters	4,519	20%
Duty lawyer matters	995	5%
Dispute resolution matters	2,476	120%

This efficient cost in case terms is then multiplied by the weighted average case cost under the two case outcome assumptions set out in Table 5.5 and presented along with the funding implication for this scenarios in Table 5.7.

Table 5.7 Scenario 1 benefit-cost analysis

	Benefits - avoided costs (million \$)	Costs - savings from not funding legal aid (million \$)	Net benefits (million \$)	Benefit-cost ratio
Case outcome assumption A	(42.24)	26.39	(15.86)	*
Case outcome assumption B	(59.29)	26.39	(32.90)	*

* results in negative benefit-cost ratio that is not possible

As can be seen from Table 5.7 the net benefits for Scenario 1 (no legal aid) range from negative \$15.86 million to negative \$32.90 million.

Scenario 2 - Legal aid funding of services provided by duty lawyers

In Scenario 2 legal aid funding in relation to the Family Court is only provided for duty lawyers. All the litigants that formerly received legal aid assistance now receive only the assistance of a duty lawyer. The cost to the government is the funding for duty lawyers to provide this assistance.

This has incremental efficiency benefits to the court system, in comparison with Scenario 1. SRLs can now rely on free legal advice provided by duty lawyers to navigate through the initial stage of the proceedings and hence reduce their impact on court time and resources.

In this scenario all litigants who are unrepresented due to the absence of legal aid funding for representation and PDR receive duty lawyer assistance. Therefore the following would occur:

- 4,519 litigants normally assisted with legal representation in court would be self-representing and use duty lawyer services and therefore be 15 per cent more costly to the court (20 per cent efficiency cost of self-representing less 5 per cent efficiency gain from duty lawyer services)
- 4,998 parties, involved in 2,476 matters who normally would have their matter resolved with dispute resolution services would now go to litigation and be 15 per cent more costly to the court (20 per cent efficiency cost of self representation less 5 per cent efficiency gain from duty lawyer services)
- 995 litigants that were formerly receiving duty lawyer assistance still receive that assistance and will be 5 per cent more efficient than if they had not received any assistance
- funding for duty lawyers is \$4.93 million i.e. 7,990 litigants/matters (4,519 + 2,476 + 995) receiving duty lawyer assistance at unit cost of \$615 (per Table 5.1)

In this scenario matters that normally receive duty lawyer assistance, matters resolved by PDR, and those that receive legal representation are now all assumed to only receive the limited assistance that duty lawyers provide.

The gains in efficiency to the justice system are set out in case terms in Table 5.8.

Table 5.8 Efficiency implications of Scenario 2 for justice system

	No. of matters	Efficiency benefit (percentage of case cost)
Family court representation matters	4,519	5%
Duty lawyer matters	995	5%
Dispute resolution services recipients	2,476	5%

This efficiency benefit is then multiplied by the weighted average case cost under the two case outcomes assumptions set out in Table 5.5. The results under different case outcomes are presented in Table 5.9.

Table 5.9 Scenario 2 benefit- cost analysis

	Benefits - avoided costs (million \$)	Costs - savings from not funding legal aid (million \$)	Net benefits (million \$)	Benefit cost ratio
Case outcome assumption A	4.30	(4.91)	(0.61)	0.87
Case outcome assumption B	6.03	(4.91)	1.12	1.23

As can be seen in Table 5.9, only case outcome assumption B results in a net positive benefit. The net benefits for Scenario 2 (only duty lawyers) range from negative \$0.61 million to positive \$1.12 million, with a benefit-cost ratio ranging from 0.87 to 1.23.

Scenario 3 - Legal aid funding of duty lawyer services and court representation

Scenario 3 outlines a situation where legal aid funding is provided for duty lawyers and Family Court legal representation, but no PDR.

Under this scenario, there will be efficiency benefits (as described above) that result from services of duty lawyers and legal representation (rather than self representation). The following would occur:

- 4,519 litigants will receive legal aid funded legal representation in court and their matters will be 20 per cent more efficient than if they had not received this assistance
- 1,702 litigants normally resolving their 851 matters (1,702 / 2) with dispute resolution services would now go to litigation with legal aid funded legal representation and be 20 per cent more efficient than if they were self-representing. (1,702 is the additional number of litigants that can be funded with representation in court once the funding has been apportioned to the group originally receiving legal representation in court and duty lawyer assistance)
- the remaining 1,625 (2,476 – 851) matters that normally are resolved with dispute resolution services now enter the court as self-representing litigants
- 995 litigants receive duty lawyer assistance and their matters will be 5 per cent more efficient than if they had not received any assistance
- funding legal representation and duty lawyers at the current level of \$26.39 million

The gains in efficiency to the justice system are set out in case terms in Table 5.10.

Table 5.10 Efficiency implications of Scenario 3 for justice system

	No. of matters	Efficiency benefit (percentage of case cost)
Family court representation matters	4,519	20%
Duty lawyer matters	995	5%
Dispute resolution matters	851	20%

This efficient cost in case terms is then multiplied by the weighted average case cost under the two case outcome assumptions set out in Table 5.5. Results under the two different case outcome assumptions are provided in Table 5.11.

Table 5.11 Scenario 3 benefit cost analysis

	Benefits - avoided costs (million \$)	Costs - savings from not funding legal aid (million \$)	Net benefits (million \$)	Benefit cost ratio
Case outcome assumption A	12.10	(26.39)	(14.29)	0.46
Case outcome assumption B	16.98	(26.39)	(9.41)	0.64

Neither of the case outcome assumptions result in a positive net benefit. The net benefits for Scenario 3 (only legal representation and duty lawyers) range from negative \$14.29 million to negative \$9.41 million, with a benefit-cost ratio ranging from 0.46 to 0.64.

Scenario 4 - Legal aid funding of the current service mix

This scenario is the current actual situation and includes all the services presently funded by legal aid that directly impact on the court. Under this scenario legal aid funds legal representation and duty lawyer services at the Family Court of Australia, and family dispute resolution services. Therefore the following would occur:

- 4,519 litigants will receive legal aid funded legal representation in court and their matters will be 20 per cent more efficient than if they had not received this assistance
- 2,476 matters are resolved with dispute resolution services and provide an efficient benefit equal to the avoided cost of these parties going to court as self-represented litigants
- 995 litigants who were formerly receiving duty lawyer assistance will continue to be 5 per cent more efficient than if they had not received any assistance
- funding of legal aid is at current level of \$26.39 million

The gains in efficiency to the justice system are set out in case terms in Table 5.12.

Table 5.12 Efficiency implications of Scenario 4 for justice system

	No. of matters	Efficiency benefit (percentage of case cost)
Family court representation matters	4,519	20%
Duty lawyer matters	995	5%
Dispute resolution matters	2,476	120%

The gains in per case efficiency are then presented in terms of the case outcome assumptions set out in Table 5.5; see Table 5.13.

Table 5.13 Scenario 4 benefit-cost analysis

	Benefits - avoided costs (million \$)	Costs - savings from not funding legal aid ³⁸ (million \$)	Net benefits (million \$)	Benefit-cost ratio
Case outcome assumption A	42.24	(26.39)	15.86	1.60
Case outcome assumption B	59.29	(26.39)	32.90	2.25

As can be seen from the above table both the case outcome assumptions result in a net positive benefit. The net benefits for Scenario 4 (legal aid for Family Court representation, duty lawyers and dispute resolution services) range from \$15.86 million to \$32.90 million. This is a range of benefit-cost ratios of 1.60 to 2.25.

³⁸ Based on funding for Legal Aid Queensland

Comparison of the analysis in this review with the *Family dispute resolution services in legal aid commissions – Evaluation report*

Recently the Attorney General's Department engaged KPMG to undertake an evaluation of family dispute resolutions (FDR) services provided by legal aid commissions. This report considered, amongst other things, the costs avoided by deferring matters from litigation to FDR.

As the subject and approach of the two analyses vary, comparison between the KPMG FDR evaluation and the benefit-cost analysis of legal aid in this report must be made with caution. The analysis in this report measures the direct avoided costs (benefits) to the court of various services that legal aid provides, that is legal representation, legal aid provided dispute resolution services and duty lawyers, both in terms of diversion from the court and increased court efficiency resulting from legal representation and assistance. The evaluation of FDR assesses the costs avoided through the diversion of cases from the court into FDR.

Another key point of difference is that the evaluation of commission FDR used an average cost of family law cases finalised in the Family Court derived from data provided by the Productivity Commission. This average cost includes all kinds of matters, including those resolved quickly, in a straight forward manner and at low cost. It also does not allow for multiple finalisations per matter. The various case outcome assumptions, modelled in the benefit-cost analysis in this report, allow for a range of case complexities and costliness. This provides a range of costings for case outcomes that more closely represent the types of cases that legal aid provides assistance for and reflects the uncertainty of the outcomes that could occur in a counterfactual world.³⁹

5.5 Conclusion

A summary of the results of the benefit-cost modelling for the different scenarios and case outcome assumptions is set out in Table 5.14.

³⁹ Attorney General's Department 'Family dispute resolution services in legal aid commission, Evaluation report,' 2008

Table 5.14 Summary results of benefit-cost analysis (million \$)

	Scenario 1 (no legal aid)	Scenario 2 (legal aid for duty lawyers)	Scenario 3 (legal aid for duty lawyers and Family Court representation)	Scenario 4 (current mix of legal aid services)
<i>Case outcome assumption A</i>				
Legal aid funding/ saving on funding	26.39	(4.93)	(26.39)	(26.39)
Benefit (cost) of having (not having) legal aid	(42.24)	4.30	12.10	42.24
Net benefit from legal aid	(15.86)	(0.61)	(14.29)	15.86
Benefit-cost ratio	*	0.87	0.46	1.60
<i>Case outcome assumption B</i>				
Legal aid funding/ saving on funding	26.39	(4.91)	(26.39)	(26.39)
Benefit (cost) of having (not having) legal aid	(59.29)	6.03	16.98	59.29
Net benefit from legal aid	(32.90)	1.12	(9.41)	32.90
Benefit-cost ratio	*	1.23	0.64	2.25

* Results in negative benefit-cost ratio that is not possible

Table 5.14 shows that only Scenario 4, which models the benefits of the current mix of legal aid services, provides a positive net benefit for both of the case outcome assumptions. These results are the direct opposite of Scenario 1 that models a world where no legal aid is funded, and returns the largest negative benefit (cost).

Scenarios 2 and 3 introduce duty lawyers, and duty lawyers and legal aid representation respectively and whilst returning benefits these are not significant enough to make positive returns on the funding invested in all cases, except for the benefits from Scenario 2 (duty lawyers) under case outcome assumption B. The remaining outcomes result in costs (negative benefits).

The four scenarios model the build up of legal aid services, showing the incremental efficiency benefits they provide to the justice system, with net benefits being realised in Scenario 4, where the full mix of legal aid services are provided. It can be observed that while representation and duty lawyers return a

benefit, appropriate divergence from the court through dispute resolution services, as included in Scenario 4, is more cost effective.

The results of this analysis further support the economic benefits available from the provision of education, information and legal advice by the legal aid commissions, which have not be quantified in this section. These services are likely to lead to appropriate and efficient pathways taken, from the outset, through or away from the justice system. Therefore the benefits estimated under represent the full extent of the benefits resulting from the services that legal provides.

Importantly this analysis does not include the benefits that accrue to individuals and the community from quality effective justice outcomes and resolutions of matters. These are explored in more detail in the case studies in the next chapter.

6 Consideration of individual case studies

The net benefits, or avoided costs to the justice system arising from the services that legal aid commissions provide have been investigated in chapter 5. In addition to these benefits there are the incremental benefits which flow to individuals and the community from legal aid services in the form of the costs that are avoided due to increased effectiveness of justice processes and improvements in justice outcomes.

To illustrate this, three case studies have been selected that show the variety of assistance that legal aid commissions provide to Australians, and the quantitative and qualitative benefits that relate to these services, in relation to matters under Commonwealth law. These case studies involve issues dealt with on a day to day basis by legal aid commissions and relate to the following areas:

- family breakdown with issues of family violence, residence arrangements and children's contact with parents
- orders for the care and living arrangements of children, interaction with federal and state jurisdictions and child protection issues
- risk of defaulting on mortgages due to stressed financial conditions

Quantifying the aggregate benefits to the community of legal aid has not been attempted in this analysis. Comprehensive data relating to the circumstances and outcomes of individual matters assisted by legal aid is not available, and there are many uncertainties affecting these outcomes over time. Any estimate of these aggregate benefits would be based mainly on assumptions, rendering a result difficult to justify as accurate in real world terms.

Therefore, the case studies below have been included as illustrative examples that give an indication of the benefits that legal aid provides to individuals and the community. Where possible some indicative quantitative values for these benefits have been modelled. In addition, the sections headed *Other benefits* include a range of other potential factors that represent real benefits but are not as readily quantified.

It should be noted that each case study is to be considered on a stand alone basis. The outcomes of each are not considered over a common time period and therefore are not directly comparable.

6.1 Case study 1 – Family breakdown and children's issues

A couple (the parties) had been together for eight years. They had been separated for over 12 months when an independent children's lawyer (ICL) was appointed in February 2007. An Interim Violence Restraining Order was in place. The parties had two children aged six and four years old, living with the mother and spending some time with the father on weekends. The father identified as having sleep apnoea and epilepsy which the mother identified as adversely impacting on his care of the children. The parties' level of conflict was high and their communication was poor.

Enquiries by the ICL revealed that anger management rather than the father's health issues was the major concern in respect of his care of the children. The father had road rage related convictions. Substance abuse issues were identified by both parents who acknowledged that they had both used illicit drugs when they were together. A Single Expert social worker was appointed and recommended that the father attend anger management courses. The father attended the courses and got excellent reports. The parties reached an interim agreement in relation to the care arrangements for the children in September 2007 which were confirmed as a long term arrangement in March 2008.

The parents now have a good working relationship, live close by to each other and both spend substantial time volunteering at their children's school. They have a week about arrangement with the parent not caring for the children having half a day spending time with them in the off week. Both parties' solicitors have indicated that the ICL provided a 'circuit breaker' for the conflict and that the matter resolved at an earlier stage and on a basis beneficial to both parties, which would otherwise have been unlikely.⁴⁰

Role of legal aid

In this case study the legal aid commission provided the ICL who acted on behalf of the child in the proceedings. The involvement of the ICL also facilitated the appointment of a social worker.

In the high stress and emotionally charged situations of relationship and family breakdown, the parties often take adversarial positions. Communication deteriorates and reaching a working solution in the child's best interest can seem untenable. As the ICL is not aligned to either party they act independently and often can elicit information from the children, which identifies the underlying issues in the conflict that are preventing a resolution from being reached.

Indicative quantitative benefits

Without the assistance of legal aid, the issues affecting the father's ability to care for his children may not have been identified. The ICL identified the pressure points in the parties' conflict and subsequently the father was referred to an anger management course, a social worker and subsequent counselling. Such early intervention, which identifies and addresses the underlying issues affecting people, can seriously reduce the long-term costs to individuals and society arising from related incidents. .

The net present values of the avoided costs to individuals and the community that flow from the behavioural change of one family violence perpetrator over the lifetime of the victim are significant. Table 6.1 sets out some of the indicative benefits that can arise when a perpetrator of family violence makes a behavioural change and does not reoffend.

Some assumptions for the basis of this analysis include:

- One perpetrator of family violence changes behaviour and does not reoffend again in their lifetime

⁴⁰ National Legal Aid

- Costs are over the lifetime of an average victim and perpetrator of family violence

Table 6.1 Indicative benefits - avoided costs due to behavioural change of a family violence offender

Avoided costs from behavioural change of a perpetrator of family violence	\$ 2007
Loss of earnings and absenteeism - victim	
Total loss of salary – average working victim for 1 week	\$401
Loss of earnings and absenteeism - employers	
Total cost for employer of replacement – average worker for 1 week	\$824
Cost of loss of life value - victim	
Physical injury every 2 years up to 45 y/o, every 4 years after that	\$20,510
Anxiety every 2 years up to 45 y/o, every 4 years after that	\$59,288
Cost of crime*	
Cost of family violence incident to community	\$20,003
Cost of property damage	\$521
Second generation costs**	
Cost of services for victim's children	\$2,011
Total benefits	\$103,559

Data sources: PwC and the Victorian Department of Justice: *Economic Evaluation of Family Violence Initiatives - Draft Report of Family Violence Court Division, October 2007*

*Cost of crime based on P. Mayhew *Counting the Costs of Crime in Australia, 2003*

**Second generational costs based on child protection costs from Access Economics' report *Cost of Domestic Violence to the Australian Economy: Part 1*.

Other benefits

In this case study both parties identified the role of the ICL as a 'circuit breaker', facilitating communication that served to dissolve the adversarial positions they had taken. This in turn assisted in identifying the underlying issues in the conflict so that a resolution that was in the best interests of the parties and their children could be reached.

In this case study both parties expressed satisfaction with the outcome, although it was a compromise from their initial stance going into the proceedings. This demonstrates the essential nature of the assistance they have received from legal aid. Efficient and effective outcomes result in justice being served, and involve reaching workable resolutions that are accepted by both parties.

Unlike many other matters before the courts, family law issues often require the parties to have a long-term ongoing functional relationship after the proceedings have concluded. The manner in which the proceedings are undertaken and the workable nature of the resolution impact heavily on the parties and their children's well being, and reduce their need to use legal proceedings to resolve conflicts in the future.

6.2 Case study 2 – Navigating federal and state laws and child protection issues

A 60 year old grandmother had her grandson placed in her care by the state Department for Child Protection (DCP) when he was four months old. The grandson was subject to a time limited protection order due to expire in November 2008. DCP advised the client that if she did not get the 'live with' order (from the Family Court, which falls under Commonwealth law) in place before the limited child protection order expired, then DCP would have to seek a protection order 'until 18'. The order formalises the living arrangement with the grandmother and once in place, DCP would not continue the matter against the child's mother to remove the child into protection. DCP fully supported the child living with the grandmother and provided a letter to this effect. The grandmother had her two other grandchildren living with her and she had 'live with' orders for these children. Under the protection order the child would be removed and placed in the care of DCP until he is 18 years old, generally in foster care.

The grandmother attended the Family Court Duty Law Service provided by the Legal Aid Commission in her state. It was apparent that she was confused about the process and was unable to complete and file her own documents. She was granted aid for Family Court proceedings based on her "special circumstances", and legal aid assisted her to obtain the orders she needed and her grandson remained in her care.⁴¹

Role of legal aid

Legal matters are often intimidating and difficult to understand, particularly for the elderly, non-English speakers, people with disabilities, and other disadvantaged groups. In relation to child protection there are also some areas of overlap between federal and state jurisdictions that contribute to this complexity.

Legal aid played an important role in this case study, assisting the grandmother to understand, complete and file the necessary documents in the correct manner. It can also be assumed that the assistance provided by legal aid would have saved the justice system time and resources by assisting the grandmother to negotiate the proceedings.

Indicative quantitative benefits

It is assumed in this case study that the optimal outcome for all parties is that the child remains in the care of his grandmother. However, without legal assistance for the grandmother there was a risk that this outcome would not have occurred and that the grandson would have been taken out of his grandmother's care and placed in foster care. There are significant social and economic costs to the individuals involved, and to society, from this outcome.

The costs to government of out of home care, including foster care, placements with relatives, and residential care, was investigated in the Access Economics'

⁴¹ National Legal Aid

report *The Cost of Child Abuse in Australia*.⁴² From these findings the average annual cost of out of home care for one child who is under an 'until 18' child protection order can be estimated. The findings are presented in Table 6.2 below.

Table 6.2 Indicative benefits - avoided costs of out of home care

Cost of out of home care	\$
Total annual cost out of home care – Australia 2007*	\$1.056 billion
Number of children in out of home care – Australia 2007-08**	31,116
Average annual cost per child of out of home care – Australia 2007	\$33,938
Average cost per child for one year of care - inflated to 2008	\$35,193
Net present value of average cost per child for out of home care from 2008 to 2026 (from when the child is 0 years old until 18 years old) ^	\$585,038

Data sources:

- **The Cost of Child Abuse in Australia - Access Economics Pty Limited, Australian Childhood Foundation and Child Abuse Prevention Research Australia at Monash University 2008*
- ***Productivity Commission Report on Government Services 2009– Table 15A.16*
- ^Discount rate used 4.69% - 10 Year Commonwealth Bond rate at 1 May 2009

The values presented in Table 6.2 give a range for the benefits, or avoided costs, resulting from the assistance of legal aid. If the child was in out of home care for one year in 2008 this would result in an estimated cost to the state of \$35,193. If he remained in out of home care until he was 18 years old this would result in the net present value of the cost of the care totalling \$585,038.

Whilst the 'live with' order that the grandmother obtained falls under federal law and therefore the assistance that she received came from federal funding to legal aid, child protection and care are state issues and the avoided cost of out of home care would present a cost saving to the state.

These benefits, or avoided costs, can be considered in relation to the 9,510 family law matters that Legal Aid Queensland provided assistance for in 2007-08, assessed in Chapter 5. If approximately 45 matters, that is 0.5 per cent of the total, had a result similar to this case study, and avoided the cost of a child living in out of home care up to the age of 18 years old, then this would provide a return of \$26.4 million. This is equal to the funding provided for the total family law matters that Legal Aid Queensland provided assistance for in that year.

These findings should be interpreted as a proxy for the total benefits or avoided costs that flow from the provision of legal assistance to the grandmother because:

- the costs of avoiding out of home care may be overstated as the payments made to the relatives, like the grandmother, for the care of the children are included in the total cost of out of home care. However, it

⁴² Access Economics Pty Limited, Australian Childhood Foundation and Child Abuse Prevention Research Australia at Monash University, 'The Cost of Child Abuse in Australia', 2008

can be assumed that payments made to relatives will not be as costly to the state as residential or foster care.

- the average cost for out of home care may be underestimated as this has been calculated using the total number of children that have had abuse against them substantiated during the period, where as the number within the group who actually require out of home care would be smaller.
- these costs only represent the costs to the government of out of home care for children in protection and do not include the mental and physical health costs, and other second round benefits that accrue to the child and his family from avoiding out of home care. These are discussed below.

Other benefits

For the grandson to be placed in state care represents a sub-optimal outcome for all parties, the child, the grandmother, their family, the government, and the community. Some other benefits of the child remaining in the grandmother's care, in the form of costs avoided include:

- Social well being from living with family members i.e. grandmother, siblings and/or cousins. It had been identified that contact between children in care and their siblings or extended family increases the likelihood of reunification. Family contact is also thought to have a positive impact on the sense of identity and connection of children in care. Sibling placement has been formally encouraged in legislation in the US and UK.⁴³
- Children in care often have to move to and from state facilities and foster families creating unstable environment for them to grow up in. Education can be disrupted through moving schools and the child may experience a lack of stability and control in their life.
- Studies have found that children in out of home care, as a vulnerable and at-risk group in the population who are likely to have poorer physical, mental and developmental health than their peers.⁴⁴
- There is significant evidence to suggest that children in out of home care do not perform as well at school, which results in many short and long term costs to them and the community, including decreased productivity, and increased reliance on social services. In 2006 the CREATE Foundation released a report which compared the performance of children in care with other children, finding that children in care:
 - complete fewer years of schooling
 - have lower high school completion rates

⁴³ Leah Bromfield and Alexandra Osborn, 'Getting the big picture: A synopsis and critique of Australian out-of-home care research' 2006

⁴⁴ Royal Australian College of Physicians, 'Health of children in "out- of- home" care' Sydney 2006

- are less likely to go on to higher education
- are likely to have frequent episodes of truancy
- are below average in numeracy and literacy
- are more likely to be in special education
- are less likely to attend school at all.⁴⁵

It can be assumed that the number of positions for children who need residential care is finite and that such positions are in high demand. It should therefore be noted that the cost of a child living with foster parents or in residential care, when there is an appropriate relative that they could live with, represents a cost to the community as the child is taking the place of another child that needs this care.

The legal processes and requirements within family law are often confusing to the lay person and there is a risk that people can be adversely and unjustly affected by their lack of information and understanding. This is particularly the case for vulnerable groups. This case study shows the importance of legal assistance for people such as the grandmother carer. Without legal aid there is a risk that this woman could have lost the right to perform the important role as the carer of her grandson, triggering a realm of long-term social and economic costs to be borne by both the individuals involved and society as a whole.

6.3 Case Study 3 - Mortgage stress

A family borrowed a small amount of money from a bank using their home as security. Over time the family struggled to meet the repayments due to the wife developing medical problems. The bank commenced court action to repossess the home. At this point the family sought assistance from the legal aid commission. A solicitor obtained a stay of the court proceedings and successfully assisted the family to obtain a hardship variation to the mortgage contract. the legal aid commission referred the family to a financial counsellor to assist them to manage their budget in order to ensure they could keep up with the reduced loan repayments.⁴⁶

Role of legal aid

Unplanned and uncontrollable circumstances such as injury or illness can affect people's ability to meet their usual financial commitments and their ability to advocate for their rights.

In this case study the legal aid commission assisted the family to access their rights, allowing them more time to put their affairs in order and to obtain a hardship variation to their mortgage which they may have been unable to do without assistance.

⁴⁵ CREATE Foundation, 'Report Card on Education' 2006

⁴⁶ National Legal Aid

The legal aid commission facilitated the referral of the family to a financial counsellor, ensuring that the solution reached in this matter is long-term and sustainable and that the family have less need to draw on the legal aid commission and other government funded services in the future.

It is noted that consumer credit matters, such as in this case study, currently fall under state law. However new laws are to be introduced that transfer consumer credit matters to the federal jurisdiction and therefore legal aid assistance for these matters may well be a federal responsibility.

Indicative quantitative benefits

Some costs that could arise for the family and the community in this case study are set in Table 6.3 below. It is assumed that once the house is sold and creditors paid and expenses covered, the family will have to find another place to live. With the reduced earning power of the mother, owing to her illness, finding a home to rent of equal standard is unlikely. This combined with the current critical shortage in rental stocks and high rents, means that it could be expected to result in the family requiring public housing. The average cost to NSW of a public housing tenant for one year is presented in Table 6.3. This value is a simple average of the expenses of Housing NSW for 2007/08 divided by the number of tenants it assisted at June 2008, and therefore does not fully reflect the cost of a year of public housing for a family.

The costs to the community of children growing up in poverty are well documented. The Centre for American Progress's report *The Economic Costs of Poverty in the United States: subsequent effect on children growing up poor* estimates that in one year childhood poverty in the United States (US):

- reduces productivity and output of 1.3 per cent of GDP
- raises the cost of crime 1.3 per cent of GDP
- raises health expenditure and reduces the value of health 1.2 per cent of GDP⁴⁷

These costs can be translated to Australia to give an understanding of what the economic effects of child poverty could be, based on the assumption that the study's findings hold in Australia. It must be noted that this analysis is indicative rather than accurate, primarily due to the difference in structures of the US economy and income distribution levels. The results are presented in Table 5.3. It is assumed that the family in the case study have two children, the current average fertility of Australian women.⁴⁸

The selling and buying of homes incurs high transactional costs including stamp duty, legal fees, real estate agent's commission, advertising costs and other related transactional costs. A build up of these costs for an average Australian home puts them at around five per cent of the home's value. In this case study, as the family did not want to sell their home, and given that the transactional

⁴⁷ 'The Economic Costs of Poverty in the United States: Subsequent effect on children growing up poor' The Centre for American Progress 2007

⁴⁸ 'Australian Social Trends,' ABS Statistical Report 4102.0, 2008

costs incurred would be recovered by the bank from the proceeds of the sale, there was a dead weight loss to the family of this amount.

Table 6.3 Indicative benefits – avoided costs of housing and children living in poverty

Average annual costs	\$ 2008
Housing related costs	
Public housing — average annual cost of providing assistance per dwelling*	\$24,733
Transactional dead weight loss from sale of property	5%
Average house price in Australia - 2008	\$442,758
Transaction costs on sale of property	\$21,138
Total housing related costs	\$46,870
Annual cost of children living in poverty	
Average cost of child growing up in poverty - % of GDP	3.8%
Total cost of children growing up in poverty in Australia - 2008**	\$41.179 billion
Number of children in Australia - 2008	4.98 million
Annual average cost of a child growing up in poverty	\$8,265
Total annual children growing up in poverty – average cost for two children	\$16,529
Total benefits	\$63,400

Data source: *Housing NSW Annual Report 2008*, *The Economic Costs of Poverty in the United States: Subsequent effect on children growing up poor* The Centre for American Progress 2007, and the *Real Estate Institute of Australia*

*Productivity Commission – Report on Government Services 2009, Table 16.15

** Australia's GDP 2008 per ABS (\$800.5 billion) by child poverty's percent (3.8%)

Other benefits

These indicative costs illustrate the benefits, or costs that could be avoided when the family in this case study did not lose their house. These costs do not capture the full extent of the qualitative benefits that accrue to the family and the community from keeping possession of their house.

New legislation has been introduced in Queensland and New South Wales designed to stop fire-sales of repossessed homes (i.e. sale below market value). The legislation identifies a misaligned incentive between the bank or lending institution and the former home owners, and has been made in response to community concerns in the current economic climate. If this was to occur to the family in this case study they would be losing any principal repaid or capital gain that their house may have realised during their ownership, representing a dead weight loss to them and the economy as whole.

The analysis presented in Table 6.3 assumes that the family moves into public housing. Currently in Australia waiting lists for public housing are long. A report by the Australian Institute of Public Health and Welfare found that a total of 177,652 households were on waiting lists for public rental housing at 30 June

2008. This represents an unmet demand equalling 53 per cent of the 337,866 dwellings that State and Territory housing authorities manage.⁴⁹ Therefore the family in this case study potentially faced a period of housing dislocation and if they were unable to afford or obtain rental accommodation, there is no other alternative but to become homeless. There are significant implications from homelessness in the form of costs to both the individuals affected and the community. Some of these include:

- increase reliance on public services (e.g. crisis accommodation, physical and mental health services, legal aid, etc)
- increased likeliness of family breakdown
- increased criminality
- social stigma
- disruption to lives of children
- more difficult to get and keep employment
- loss of peace of mind; safety, security, the 'Australian dream' of owning your own home

People who are having trouble meeting repayments on their loans and whose home ownership is under threat are in a particularly vulnerable position. In this case study the legal aid commission assists the family to access their rights and helps them to manage their future finances, effectively allowing them to maintain ownership of their home.

The dead weight loss arising from the foreclosure of the loan and selling of the house; the subsequent costs that arise from providing public housing; the cost of children growing up in poverty and risk of homelessness, all indicate the significant benefits to both individuals and the community that are associated with legal aid services.

6.4 Conclusion

Chapter 6 sets out the direct net benefits to the justice system that arise as a consequence of the services that the legal aid commissions provide. The case studies in this section demonstrate how these services result in important second round benefits in the form of costs that are avoided due to increased effectiveness of justice processes and outcomes. If these benefits, both those quantified and qualified, are extrapolated out across all the work the legal aid commissions carry out, these represent a significant net gain to the community.

⁴⁹ Australian Institute for Health and Welfare, 'Public rental housing 2007–08 Commonwealth State Housing Agreement national data report'

The outcomes of even minor legal issues have potentially significant consequences and costs for individuals and the community. These may involve, as illustrated in the case studies, the continuation of family violence, loss of right to provide care for a family member, or the loss of a family's home. Legal aid services can ensure that the outcomes of legal matters are fair and that costs are both minimised and correctly distributed amongst the parties and the community as a whole.

