

2 October 2017

The Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

info@alrc.gov.au

Dear Ms Wynn,

**Inquiry into incarceration rates of Aboriginal and Torres Strait Islander Peoples -
Discussion Paper 84**

About National Legal Aid

National Legal Aid (NLA) represents the Directors of the eight state and territory legal aid commissions (LACs) in Australia. The LACs are independent statutory authorities established under respective state or territory enabling legislation. They are funded by state or territory and Commonwealth governments to provide legal assistance to disadvantaged people.

NLA aims to ensure that the protection or assertion of the legal rights and interests of people are not prejudiced by reason of their inability to:

- obtain access to independent legal advice;
- afford the appropriate cost of legal representation;
- obtain access to the federal and state and territory legal systems; or
- obtain adequate information about access to the law and the legal system.

Introduction

NLA appreciates the consultation by the ALRC with individual State and Territory LACs. Individual LACs have also made submissions to the Inquiry's Discussion Paper (DP). This is because as the DP states "Much of the criminal law that is the subject of this Inquiry falls within state and territory jurisdictions".¹

¹ Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples*, Discussion Paper No 84 (2017) 1.34.

This NLA submission is therefore both overarching and supplementary to individual LAC submissions. It provides a national picture of the usage of LAC services by Aboriginal and Torres Strait Islander peoples, and focusses on the provision of legal services and supports, and national access to justice concerns. It avoids repetition of the content of the LAC consultations and submissions as far as possible.

Usage of LAC services by Aboriginal and Torres Strait Islander Peoples

Data

NLA data shows that in excess of 82,300 more intensive services were provided to Aboriginal and Torres Strait Islander peoples in the 2016-2017 financial year.²

The data reflects that the majority of services provided by LACs to Aboriginal and Torres Strait Islander peoples are in the area of criminal law. Because of limited funding, grants of aid can generally only be provided in criminal law matters where there is a risk of imprisonment, and not all such matters can be funded.

The data further reflects that grants of aid and 'at court' duty lawyer representation services for criminal law matters involving Aboriginal and Torres Strait Islander peoples have risen by 16% over the 2014-2017 financial years. Whilst the vast majority of criminal law service users are men, and the data reflects a 16% rise in LAC representation services delivered to men on a grant of aid over the period, the data reflects a greater rise in LAC criminal law representation services on a grant of aid being delivered to women, i.e. 23% over the period.

Attached please find a breakdown of the NLA data so as to provide a more detailed national picture of some of the more intensive services provided by LACs to Aboriginal and Torres Strait Islander peoples, including:

- grants of aid for legal representation
- duty lawyer services at courts and tribunals
- legal advice
- legal task, such as writing a letter or advocating on someone's behalf.

Many more less intensive services, e.g. LAC hotline information services will also have been provided by LACs to Aboriginal and Torres Strait Islander peoples.

Data qualifications

The NLA data is produced by individual LACs running an agreed extract over respective LAC data and uploading it. It is published on the NLA website and is intended to provide a high level picture of the legal assistance services that LACs

² NTLAC records in data systems whether the same user is Aboriginal or Torres Strait Islander or both.

provide nationally.³ The data does not reflect legal need, only LAC service use, e.g. an application for legal aid for representation may not have been made because it was perceived that it would be unlikely for it to be granted.

For LAC services of less intensity, whether a person is Aboriginal and/or Torres Strait Islander and other demographic data is not collected or recorded uniformly or at all. This is because these services tend to be delivered more quickly and in high volumes. Generally, it is considered that questions about personal information and the recording of that data should be proportionate both to the service to be delivered and also to the likely value and usefulness of the data.⁴

Data about LAC service use by Aboriginal and Torres Strait Islander peoples relies on the service user self-identifying as Aboriginal and/or Torres Strait Islander either on an application form or to the LAC service provider. The data also needs to be captured in systems. The data reported is therefore an undercount with not insignificant numbers of “unknown/not stated” included in the overall count of services and not all data captured in systems.

Improved data collection

The DP notes the need for improved data collection.⁵

The [National Legal Assistance Data Standards Manual](#), August 2016 (DSM), identifies the National Legal Assistance Data Set for collection by legal assistance service providers.

Pursuant to the DSM, data to be collected includes matter type and basic service user data for the services identified above. This data comprises whether the person was Aboriginal and/or Torres Strait Islander, location, gender including for services other than grants of aid, age, and ‘interpreter required’. A report on ‘interpreter required’ does not yield information about whether an interpreter, accredited or otherwise, could be found. For grants of aid for legal representation ‘basic service characteristic’ data is also collected including in relation to ‘family violence indicator’ and disability status. The fact that an applicant has passed the legal aid means test

³ <https://www.nationallegalaid.org/>

⁴ Principle 2 National Legal Assistance Data Standards Manual 2016, “Service Providers will spend more time helping people and less time collecting and recording data. In practice, this will mean collecting fewer data items to reduce the burden on Service Providers and ensuring that the data collected is meaningful and useful.”

⁵ For example, at paragraphs 9.38-9.42 the “lack of reliable and cross-comparable data in relation to offending and incarceration” in relation to women; 9.39 “data collected regularly does not disaggregate Aboriginal and Torres Strait Islander women and men, or Aboriginal and Torres Strait Islander and non-Indigenous women.”; and 9.40 “Even where data is collected in a disaggregated way, it may not be cross-comparable with other jurisdictions because of the way in which the data has been collected, differences in statutory definitions, or differences in the way in which criminal justice processes operate.”

demonstrates financial disadvantage. More detailed reports can be run from these data holdings.⁶

The Australian Government Productivity Commission (PC) reported on its Inquiry into Access to Justice Arrangements in Australia, “that data on the civil justice system are seriously deficient for policy making and evaluation purposes”⁷ and “that policy-relevant data can be best used when they are consistent within and across different types of providers and institutions.”⁸

The PC also noted the effort and cost associated with data collection and recording. In relation to the legal assistance service providers the PC said that “Changing the data collection systems to make them fit for purpose may be a costly exercise, but the benefits to the community mean that it is warranted. Governments should bear the costs associated with transitioning to new data collecting requirements as the public will benefit the most from evidence-based policy made in regards to the civil justice system.”⁹

Whilst the PC’s Inquiry was into civil (including family) access to justice arrangements, the observations about effort, cost and changes to systems apply equally to criminal law data collection and recording.

Chapter 11 – Access to Justice Issues

Provision of legal services and supports

Co-operation of legal service providers

The DP identifies the “four discrete but complementary categories of legal services that provide targeted and culturally appropriate legal assistance to Aboriginal and Torres Strait Islander communities, including Legal Aid Commissions, Community Legal Centres, Indigenous Legal Assistance providers such as the Aboriginal Legal Service (ALS) in each state and territory, and the Family Violence Prevention Legal Services (FVPLS). Commonwealth, state and territory governments provide the bulk of funding for the four legal assistance services.”¹⁰

Representatives of these four legal service providers, and of Law Council of Australia, meet as the Australian Legal Assistance Forum (ALAF) “to consider and address Australian legal assistance issues in a co-operative way and to make recommendations on those issues in a co-ordinated fashion.”¹¹

⁶ Data holdings in relation to interpreters are being collected and will be provided to the ALRC.

⁷ Productivity Commission, *Access to Justice Arrangements – Volume 2* (2014) 879.

⁸ Ibid 894.

⁹ Ibid 896.

¹⁰ Australian Law Reform Commission, above n 11.67.

¹¹ [ALAF Statement of Co-operation](#), June 2015.

NLA supports the provision of legal services to Aboriginal and Torres Strait Islander peoples by the “community controlled Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services as the preferred and most culturally safe providers of legal services to Aboriginal and Torres Strait Islander peoples.”¹²

Much of the work that in-house LAC lawyers and private practitioners on a grant of legal aid undertake for Aboriginal and Torres Strait Islander peoples is done in circumstances where there is, or is the potential for, legal professional conflict, commonly where there are multiple co-accused and the Aboriginal and Torres Strait Islander Legal Service is therefore unable to represent all accused. Other co-operative arrangements also exist to ensure services are stretched as far as possible, e.g. to maximise access to lawyer/s in locations where there is only one legal assistance service provider and/or outreach services are needed including to remote locations.

Funding and legal needs

The DP states that “In 2013-14, the Productivity Commission considered funding of legal services and assistance and thereafter made several findings and recommendations targeting the legal services sector and those organisations servicing the Aboriginal and Torres Strait Islander community. The Productivity Commission estimated at that time that the *additional* cost of adequately supporting this sector would amount to around \$200 million per year.”¹³

It is relevant that:

- The PC’s terms of reference were limited to civil (including family) law issues and accordingly the PC did not inquire into criminal law access to justice arrangements. As a result, the PC did not address funding shortfalls in relation to criminal law, which are relevant to this Inquiry, and which have not been assessed sector wide.
- The Commonwealth has constitutional responsibility for Aboriginal and Torres Strait Islander peoples pursuant to the race power, and accordingly it funds ATSILS and FVPLS directly. The LACs, and the Community Legal Centres, are funded under the National Partnership Agreement on Legal Assistance Services (NPA). NPA funding arrangements are affected by what is known as the “Commonwealth-State divide” which requires that Commonwealth funding be used on Commonwealth law types. By reason of the Commonwealth-State divide, when the LACs provide criminal law services to Aboriginal and Torres

¹² Productivity Commission, above n 767.

¹³ Australian Law Reform Commission, above n 11.71.

Strait Islander peoples, the services are funded not by the Commonwealth but by the respective state/territory government.¹⁴

- Recommendation 21.4 of the PC report is:

“To address the more pressing gaps in services, the Australian, State and Territory Governments should provide additional funding for civil legal assistance services in order to:

- better align the means test used by legal aid commissions with that of other measures of disadvantage
- maintain existing frontline services that have a demonstrated benefit to the community
- allow legal assistance providers to offer a greater number of services in areas of law that have not previously attracted government funding.

The Commission estimates the total annual cost of these measures to the Australian, State and Territory Governments will be around \$200 million. Where funding is directed to civil legal assistance it should not be diverted to criminal legal assistance.”¹⁵

- The Productivity Commission specified how this funding should be applied in *Appendix H, Eligibility for legal aid and the cost of extending it*, of its report as follows:

- “ • \$11.4 million per year to maintain existing frontline services
- around \$57 million per year to relax the means tests for LACs
 - around \$124 million per year to provide additional grants of aid in civil matters.”¹⁶

Appendix H to the report of the PC is attached to this submission, and provides the detail underpinning recommendation 21.4 of the report.

Justice Targets

Question 10–1 Should the Commonwealth Government develop justice targets as part of the review of the Closing the Gap policy? If so, what should these targets encompass?

Increasing rates of incarceration, and further preventable deaths, suggest that targets are necessary to effect change.

¹⁴ Although, in the less likely event that an Aboriginal and/or Torres Strait Islander person was to be charged with Commonwealth law crime/s such as terrorism or drugs importation, such a case would be funded using Commonwealth funds.

¹⁵ Productivity Commission, above n 63.

¹⁶ Productivity Commission, above n Appendix H p 1026. An additional amount (\$8M) was identified for addressing sensitivities around the methodology employed.

[Change The Record](#), in its [Blueprint for Change](#), addressed targets as follows:

- “b) Set the following justice targets, which are aimed at promoting community safety and reducing the rates at which Aboriginal and Torres Strait Islander people come into contact with the criminal justice system:
- i. Close the gap in the rates of imprisonment between Aboriginal and Torres Strait Islander people by 2040;
 - ii. Cut the disproportionate rates of violence against Aboriginal and Torres Strait Islander people to at least close the gap by 2040; with priority strategies for women and children.

In addition, these targets should be accompanied by a National Agreement which includes a reporting mechanism, as well as measurable sub-targets⁴ and a commitment to halve the gap in the above over-arching goals by no later than 2030.

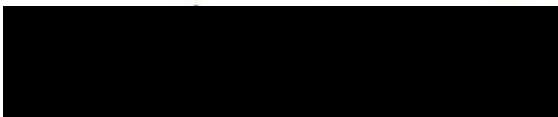
⁴ These sub-targets will operate as indicators to track progress against the primary goals and include, for example, child removal numbers, recidivism, and poverty and disadvantage indicators.”¹⁷

NLA supports the Blueprint for Change.

Conclusion

Thank you for the opportunity to make this submission. Please do not hesitate to contact us if you require any further information.

Yours sincerely,

A black rectangular box redacting the signature of Graham Hill.

Graham Hill
Chair

¹⁷ Change the Record Coalition, *Blueprint for Change*, 5.

As at 2/10/2017

National Legal Aid

Aboriginal & Torres Strait Islander Peoples - approved applications - 2014-15 to 2016-17

Note: 1st column of each year is the total grants of aid approved for all people. 2nd column is the total grants of aid approved for people who have identified as Aboriginal &/or Torres Strait Islander* and is split to show female/male/total. 3rd column is the percentage of Aboriginal &/or Torres Strait Islander grants of aid approved.

		2014-15					2015-16					2016-17				
LAC	law type	total approved	Aboriginal & Torres Strait Islander			% of approved	total approved	Aboriginal & Torres Strait Islander			% of approved	total approved	Aboriginal & Torres Strait Islander			% of approved
			female	male	total			female	male	total			female	male	total	
LAACT	Civil	89	8	4	12	8.99%	181	13	3	16	7.18%	141	2	9	11	1.42%
	Crime	855	30	70	100	3.51%	1,119	28	81	109	2.50%	1,130	46	81	127	4.07%
	Family	1,228	72	29	101	5.86%	1,365	61	23	84	4.47%	1,020	36	29	65	3.53%
			110	103	213			102	107	209			84	119	203	
	total	2,172	213			9.81%	2,665	209			7.84%	2,291	203			8.86%
LANSW	Civil	1,323	80	114	194	6.05%	1,206	100	83	183	8.29%	1,190	98	105	203	8.24%
	Crime	20,800	714	2,448	3,162	3.43%	22,028	730	2,764	3,494	3.31%	23,695	868	2,940	3,808	3.66%
	Family	13,247	1,162	729	1,891	8.77%	14,103	1,336	907	2,243	9.47%	12,137	1,200	800	2,000	9.89%
			1,956	3,291	5,247			2,166	3,754	5,920			2,166	3,845	6,011	
	total	35,370	5,247			14.83%	37,337	5,920			15.86%	37,022	6,011			16.24%
NTLAC*	Civil A		6	6	12			7	3	10			2	6	8	
	Civil B		0	0	0			0	0	0			0	0	0	
	Civil T		0	0	0			0	0	0			0	0	0	
	Civil total	118	6	6	12	5.08%	115	7	3	10	6.09%	29	2	6	8	6.90%
	Crime A		185	497	682			167	511	678			247	636	883	
	Crime B		0	1	1			1	8	9			2	15	17	
	Crime T		1	2	3			3	1	4			5	1	6	
	Crime total	1,738	186	500	686	10.70%	1,733	171	520	691	9.87%	2,014	254	652	906	12.61%
	Family A		75	69	144			83	65	148			111	62	173	
	Family B		4	0	4			3	0	3			2	1	3	
	Family T		0	0	0			4	0	4			1	3	4	
	Family total	744	79	69	148	10.62%	700	90	65	155	12.86%	782	114	66	180	14.58%
			271	575	846			268	588	856			370	724	1,094	
	total	2,600	846			32.54%	2,548	856			33.59%	2,825	1,094			38.73%
LAQ	Civil	402	9	46	55	2.24%	399	18	54	72	4.51%	342	9	44	53	2.63%
	Crime	18,093	792	2,516	3,308	4.38%	20,403	766	2,618	3,384	3.75%	22,564	777	2,776	3,553	3.44%
	Family	9,302	489	256	745	5.26%	8,385	505	255	760	6.02%	7,967	472	260	732	5.92%
			1,290	2,818	4,108			1,289	2,927	4,216			1,258	3,080	4,338	
	total	27,797	4,108			14.78%	29,187	4,216			14.44%	30,873	4,338			14.05%
LSCSA	Civil	19	0	1	1	0.00%	19	0	0	0	0.00%	14	0	0	0	0.00%
	Crime	12,521	418	1,680	2,098	3.34%	12,894	489	1,681	2,170	3.79%	12,865	542	1,656	2,198	4.21%
	Family	3,522	150	79	229	4.26%	3,622	233	136	369	6.43%	4,139	264	187	451	6.38%
			568	1,760	2,328			722	1,817	2,539			806	1,843	2,649	
	total	16,062	2,328			14.49%	16,535	2,539			15.36%	17,018	2,649			15.57%
LACTas	Civil	196	1	5	6	0.51%	163	4	1	5	2.45%	206	5	2	7	2.43%
	Crime	3,049	56	161	217	1.84%	2,942	57	240	297	1.94%	2,624	74	182	256	2.82%
	Family	1,668	76	37	113	4.56%	1,787	82	50	132	4.59%	1,724	94	63	157	5.45%
			133	203	336			143	291	434			173	247	420	
	total	4,913	336			6.84%	4,892	434			8.87%	4,554	420			9.22%
VLA	Civil	1,445	31	29	60	2.15%	1,206	18	22	40	1.49%	1,143	24	23	47	2.10%
	Crime	19,958	301	1,154	1,455	1.51%	22,634	388	1,377	1,765	1.71%	25,163	519	1,736	2,255	2.06%
	Family	12,972	529	353	882	4.08%	14,233	665	378	1,043	4.67%	15,046	738	499	1,237	4.90%
			861	1,536	2,397			1,071	1,777	2,848			1,281	2,258	3,539	
	total	34,375	2,397			6.97%	38,073	2,848			7.48%	41,352	3,539			8.56%
LAWA	Civil	298	87	43	130	29.19%	307	109	49	158	35.50%	318	104	48	152	32.70%
	Crime	5,107	288	1,261	1,549	5.64%	5,371	371	1,346	1,717	6.91%	5,540	353	1,360	1,713	6.37%
	Family	3,227	285	161	446	8.83%	4,261	376	203	579	8.82%	4,305	357	196	553	8.29%
			660	1,465	2,125			856	1,598	2,454			814	1,604	2,418	
	total	8,632	2,125			24.62%	9,939	2,454			24.69%	10,163	2,418			23.79%
total Civil		3,890	222	248	470	5.71%	3,596	269	215	484	7.48%	3,383	244	237	481	7.21%
total Crime		82,121	2,785	9,790	12,575	3.39%	89,124	3,000	10,627	13,627	3.37%	95,595	3,433	11,383	14,816	3.59%
total Family		45,910	2,842	1,713	4,555	6.19%	48,456	3,348	2,017	5,365	6.91%	47,120	3,275	2,100	5,375	6.95%
total female/male			5,849	11,751	17,600			6,617	12,859	19,476			6,952	13,720	20,672	
Total all law types		131,921	17,600			13.34%	141,176	19,476			13.80%	146,098	20,672			14.15%

Source - National Legal Aid statistics

Family includes state family law child care & protection and apprehended domestic/family violence matters, although matters of this type might also be reflected in civil law data.

*NTLAC - Aboriginal/Torres Strait Islander data split by Aboriginal (A), both (B) and Torres Strait Islander (T).

National Legal Aid Aboriginal & Torres Strait Islander Peoples - duty lawyer

for financial years 2014-15 to 2016-17 (as at 2 Oct 2017)

Note: 1st column of each year is the total duty lawyer services for all people. 2nd column is the total duty lawyer services for people who have identified as Aboriginal &/or Torres Strait Islander. 3rd column is the percentage of Aboriginal &/or Torres Strait Islander duty lawyer services.

		2014-15			2015-16			2016-17		
LAC	law type	total duty lawyer	Aboriginal & Torres Strait Islander	% of duty lawyer services	total duty lawyer	Aboriginal & Torres Strait Islander	% of duty lawyer services	total duty lawyer	Aboriginal & Torres Strait Islander	% of duty lawyer services
LAACT	Civil	7	0	0.00%	46	4	8.70%	270	13	4.81%
	Crime	1,577	126	7.99%	1,849	171	9.25%	2,154	165	7.66%
	Family	1,176	34	2.89%	1,163	29	2.49%	1,291	42	3.25%
	total	2,760	160	5.80%	3,058	204	6.67%	3,715	220	5.92%
LANSW	Civil	15,337	147	0.96%	15,224	137	0.90%	14,808	100	0.68%
	Crime	150,082	11,422	7.61%	171,681	13,182	7.68%	164,733	13,959	8.47%
	Family	9,843	475	4.83%	10,618	574	5.41%	10,710	632	5.90%
	total	175,262	12,044	6.87%	197,523	13,893	7.03%	190,251	14,691	7.72%
NTLAC	Civil	121	4	3.31%	196	75	38.27%	311	127	40.84%
	Crime	3,143	852	27.11%	3,377	960	28.43%	3,523	1,191	33.81%
	Family	243	83	34.16%	218	77	35.32%	328	116	35.37%
	total	3,507	939	26.78%	3,791	1,112	29.33%	4,162	1,434	34.45%
LAQ#	Civil	6	0	0.00%	1,698	86	5.06%	3,825	214	5.59%
	Crime	81,049	0	0.00%	85,928	0	0.00%	86,642	0	0.00%
	Family	2,000	86	4.30%	2,064	113	5.47%	2,505	147	5.87%
	total	83,055	86	0.10%	89,690	199	0.22%	92,972	361	0.39%
LSCSA	Civil	255	49	19.22%	168	36	21.43%	209	66	31.58%
	Crime	14,943	1,878	12.57%	14,627	1,929	13.19%	11,952	1,680	14.06%
	Family	1,638	43	2.63%	1,932	82	4.24%	2,137	164	7.67%
	total	16,836	1,970	11.70%	16,727	2,047	12.24%	14,298	1,910	13.36%
LACTas	Civil	13	0	0.00%	11	0	0.00%	5	0	0.00%
	Crime	2,634	150	5.69%	3,306	280	8.47%	3,336	255	7.64%
	Family	318	6	1.89%	425	14	3.29%	616	16	2.60%
	total	2,965	156	5.26%	3,742	294	7.86%	3,957	271	6.85%
VLA*	Civil	6,108	145	2.37%	5,934	149	2.51%	5,685	131	2.30%
	Crime	54,932	2,110	3.84%	56,238	2,304	4.10%	60,863	2,774	4.56%
	Family	16,241	544	3.35%	17,139	558	3.26%	17,454	679	3.89%
	total	77,281	2,799	3.62%	79,311	3,011	3.80%	84,002	3,584	4.27%
LAWA	Civil	113	37	32.74%	62	22	35.48%	93	41	44.09%
	Crime	50,855	11,051	21.73%	51,447	11,688	22.72%	52,139	11,607	22.26%
	Family	2,314	464	20.05%	2,298	431	18.76%	2,427	399	16.44%
	total	53,282	11,552	21.68%	53,807	12,141	22.56%	54,659	12,047	22.04%
Total		414,948	29,706	7.16%	447,649	32,901	7.35%	448,016	34,518	7.70%

Source - National Legal Aid statistics

Family includes state family law child care & protection and apprehended domestic/family violence matters, although matters of this type might also be reflected in civil law data.

#LAQ duty lawyer data is captured on a sessional basis and total numbers include Aboriginal and Torres Strait Islander peoples who are service recipients, although these cannot be identified separately.

*VLA provided data (separate to NLA website) 21/9/2017. This data does not include duty lawyer services assigned by VLA to private practitioners.

National Legal Aid
Aboriginal & Torres Strait Islander Peoples - advice
for financial years 2014-15 to 2016-17 (as at 2 Oct 2017)

Note: 1st column of each year is the total legal advice services for all people. 2nd column is the total legal advice services for people who have identified as Aboriginal &/or Torres Strait Islander. 3rd column is the percentage of Aboriginal &/or Torres Strait Islander legal advice services.

		2014-15			2015-16			2016-17		
LAC	law type	total legal advice	Aboriginal & Torres Strait Islander	% of legal advice services	total legal advice	Aboriginal & Torres Strait Islander	% of legal advice services	total legal advice	Aboriginal & Torres Strait Islander	% of legal advice services
LAACT^	Civil	3,627	85	2.34%	3,531	80	2.27%	3,403	48	1.41%
	Crime	922	29	3.15%	941	21	2.23%	1,651	68	4.12%
	Family	1,559	74	4.75%	2,237	81	3.62%	2,251	64	2.84%
	total	6,108	188	3.08%	6,709	182	2.71%	7,305	180	2.46%
LANSW	Civil	40,751	4,287	10.52%	41,775	5,180	12.40%	35,208	4,954	14.07%
	Crime	27,006	1,343	4.97%	29,488	1,776	6.02%	26,820	1,977	7.37%
	Family	27,842	1,735	6.23%	28,935	2,071	7.16%	27,110	2,488	9.18%
	total	95,599	7,365	7.70%	100,198	9,027	9.01%	89,138	9,419	10.57%
NTLAC	Civil	2,052	523	25.49%	2,172	642	29.56%	2,472	839	33.94%
	Crime	1,392	336	24.14%	1,473	342	23.22%	1,557	469	30.12%
	Family	1,799	368	20.46%	1,932	427	22.10%	2,199	526	23.92%
	total	5,243	1,227	23.40%	5,577	1,411	25.30%	6,228	1,834	29.45%
LAQ#	Civil	6,703	307	4.58%	6,977	368	5.27%	6,397	354	5.53%
	Crime	14,892	946	6.35%	13,559	986	7.27%	11,255	898	7.98%
	Family	20,828	1,067	5.12%	22,656	1,220	5.38%	19,641	1,043	5.31%
	total	42,423	2,320	5.47%	43,192	2,574	5.96%	37,293	2,295	6.15%
LSCSA*	Civil	8,186	74	0.90%	7,469	81	1.08%	7,925	170	2.15%
	Crime	2,872	133	4.63%	2,466	100	4.06%	2,283	103	4.51%
	Family	4,659	239	5.13%	4,009	208	5.19%	4,124	204	4.95%
	total	15,717	446	2.84%	13,944	389	2.79%	14,332	477	3.33%
LACTas	Civil	10,575	18	0.17%	10,227	21	0.21%	9,174	45	0.49%
	Crime	3,930	88	2.24%	3,817	91	2.38%	3,904	137	3.51%
	Family	7,319	71	0.97%	7,498	100	1.33%	6,189	144	2.33%
	total	21,824	177	0.81%	21,542	212	0.98%	19,267	326	1.69%
VLA*	Civil	16,135	387	2.40%	14,395	299	2.08%	14,228	440	3.09%
	Crime	14,395	472	3.28%	11,815	496	4.20%	12,313	582	4.73%
	Family	13,606	367	2.70%	10,719	333	3.11%	10,910	335	3.07%
	total	44,136	1,226	2.78%	36,929	1,128	3.05%	37,451	1,357	3.62%
LAWA	Civil	3,293	396	12.03%	2,411	323	13.40%	3,113	297	9.54%
	Crime	5,690	1,497	26.31%	4,071	1,182	29.03%	3,888	1,144	29.42%
	Family	7,890	704	8.92%	7,259	673	9.27%	7,459	576	7.72%
	total	16,873	2,597	15.39%	13,741	2,178	15.85%	14,460	2,017	13.95%
Total		247,923	15,546	6.27%	241,832	17,101	7.07%	225,474	17,905	7.94%

Source - National Legal Aid statistics

Family includes state family law child care & protection and apprehended domestic/family violence matters, although matters of this type might also be reflected in civil law data.

^LAACT counts advice and legal task under legal advice.

#LAQ legal task services are principally recorded under legal advice.

*LSCSA (separate to the NLA website) 22/9/2017.

*VLA provided data (separate to NLA website) 21/9/2017.

National Legal Aid
Aboriginal & Torres Strait Islander Peoples - legal task
for financial years 2014-15 to 2016-17 (as at 2 Oct 2017)

Note: 1st column of each year is the total legal task services for all people. 2nd column is the total legal task services for people who have identified as Aboriginal &/or Torres Strait Islander. 3rd column is the percentage of Aboriginal &/or Torres Strait Islander legal task services.

		2014-15			2015-16			2016-17		
LAC	law type	total legal task	Aboriginal & Torres Strait Islander	% of legal task services	total legal task	Aboriginal & Torres Strait Islander	% of legal task services	total legal task	Aboriginal & Torres Strait Islander	% of legal task services
LAACT [^]	Civil	0	0	0.00%	0	0	0.00%	0	0	0.00%
	Crime	0	0	0.00%	0	0	0.00%	0	0	0.00%
	Family	0	0	0.00%	0	0	0.00%	0	0	0.00%
	total	0	0	0.00%	0	0	0.00%	0	0	0.00%
LANSW	Civil	28,402	5,071	17.85%	25,335	5,611	22.15%	18,582	4,579	24.64%
	Crime	1,043	145	13.90%	2,863	390	13.62%	3,394	485	14.29%
	Family	20,979	1,629	7.76%	11,149	1,019	9.14%	7,807	966	12.37%
	total	50,424	6,845	13.57%	39,347	7,020	17.84%	29,783	6,030	20.25%
NTLAC	Civil	364	30	8.24%	302	109	36.09%	527	231	43.83%
	Crime	18	10	55.56%	53	9	16.98%	36	19	52.78%
	Family	5	4	80.00%	36	8	22.22%	46	16	34.78%
	total	387	44	11.37%	391	126	32.23%	609	266	43.68%
LAQ [#]	Civil	1	0	0.00%	0	0	0.00%	7	0	0.00%
	Crime	3	0	0.00%	2	0	0.00%	2	0	0.00%
	Family	2	0	0.00%	0	0	0.00%	1	0	0.00%
	total	6	0	0.00%	2	0	0.00%	10	0	0.00%
LSCSA	Civil	4,772	75	1.57%	4,219	59	1.40%	3,742	41	1.10%
	Crime	952	54	5.67%	593	16	2.70%	473	25	5.29%
	Family	3,681	186	5.05%	2,710	196	7.23%	2,217	113	5.10%
	total	9,405	315	3.35%	7,522	271	3.60%	6,432	179	2.78%
LACTas	Civil	7	0	0.00%	15	0	0.00%	1	0	0.00%
	Crime	148	9	6.08%	166	8	4.82%	139	17	12.23%
	Family	106	2	1.89%	78	4	5.13%	275	21	7.64%
	total	261	11	4.21%	259	12	4.63%	415	38	9.16%
VLA [*]	Civil	1,322	43	3.25%	1,073	27	2.52%	1,185	38	3.21%
	Crime	3,111	149	4.79%	2,722	101	3.71%	2,902	136	4.69%
	Family	482	22	4.56%	401	23	5.74%	354	25	7.06%
	total	4,915	214	4.35%	4,196	151	3.60%	4,441	199	4.48%
LAWA	Civil	958	292	30.48%	911	292	32.05%	809	253	31.27%
	Crime	6,914	2,295	33.19%	6,191	2,034	32.85%	6,757	1,897	28.07%
	Family	3,591	558	15.54%	3,376	554	16.41%	2,521	386	15.31%
	total	11,463	3,145	27.44%	10,478	2,880	27.49%	10,087	2,536	25.14%
Total		76,861	10,574	13.76%	62,195	10,460	16.82%	51,777	9,248	17.86%

Source - National Legal Aid statistics

Family includes state family law child care & protection and apprehended domestic/family violence matters, although matters of this type might also be reflected in civil law data.

[^]LAACT counts advice and legal task under legal advice.

[#]LAQ legal task services are principally recorded under legal advice.

^{*}VLA provided data (separate to NLA website) 21/9/2017.

H Eligibility for legal aid and the cost of extending it

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

H.1 Who is eligible for legal aid?

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

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

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

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

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

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

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

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

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

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

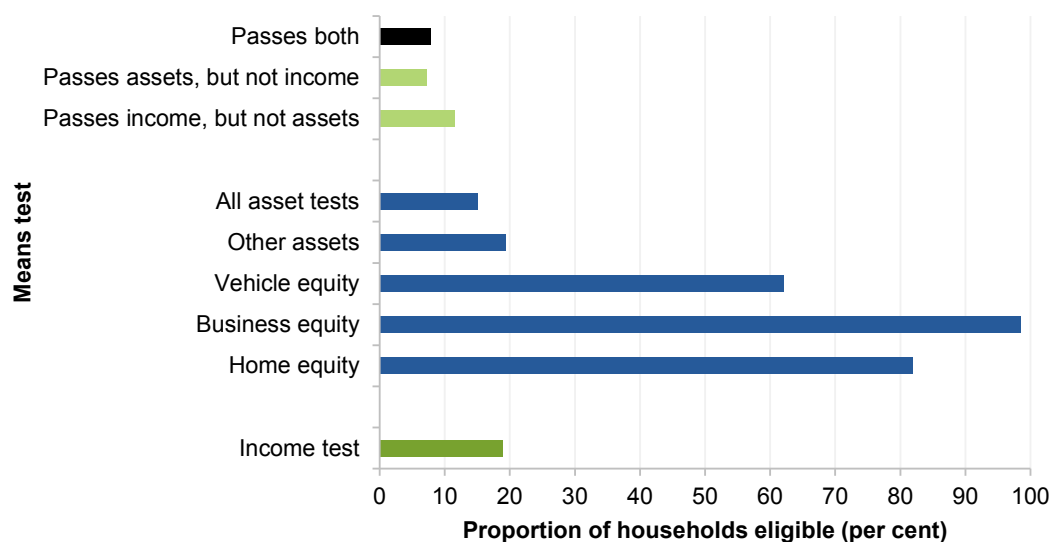
Source: As per table H.1.

Few are eligible for legal aid

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

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

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



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

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

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

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

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

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

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

Providing funding to maintain existing frontline services

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

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

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

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

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

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

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

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

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

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

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

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

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

Providing additional funding to the LACs to relax their means tests

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

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

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

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

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

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

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

Choosing a ‘baseline’ set of eligibility requirements

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

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

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

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

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

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

Box H.1 Equivalised disposable household income

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

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

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

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

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

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

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

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

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

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

Box H.2 Measures of relative poverty

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

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

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

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

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

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

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

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

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

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

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

Sensitivity testing the relaxing of the means test

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

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

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

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

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

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

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

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

Providing additional funding for grants of aid in civil matters

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

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

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

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

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

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

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

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

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

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

Sensitivity testing the provision of additional grants of civil aid

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

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

Summary

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

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

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

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

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

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