

# Terms of reference

## Review of the adversarial system of litigation

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

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

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

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

The Commission shall consider, among other matters:

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

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

- (i) consult widely among the Australian community and with relevant bodies, and particularly with
  - the High Court of Australia, the Federal Court of Australia, the Family Court of Australia and other courts and tribunals exercising federal jurisdiction;
  - the Law Council of Australia, law societies, bar associations, legal aid commissions, community legal centres and national groups representing business and consumers; and

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- (ii) in recognition of work already undertaken, have regard to relevant reports, and any steps taken by governments and courts to implement their recommendations.

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

THE COMMISSION IS REQUIRED to make

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

Dated 29 November 1995

Michael Lavarch  
Attorney-General

## Altered terms of reference

### Review of the Adversarial System of Litigation

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

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

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

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

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

The Commission shall consider, among other matters:

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

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

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

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

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

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

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

THE COMMISSION IS REQUIRED to

- issue a discussion paper not later than 31 August 1998
- a final report on the conduct of civil, administration review and family law proceedings not later than 30 April 1999.

Dated 2 September 1997

Daryl Williams  
Attorney-General

# 1. Introduction

## The terms of reference

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

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

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

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

The terms required the Commission to consider, among other matters

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

These terms of reference focus the inquiry on civil practice and procedure in federal courts and tribunals exercising federal jurisdiction.

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<sup>1</sup>The terms of reference are set out at p 5-6.

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

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

The amended terms of reference also exclude consideration of changes of a kind that would or might require amendment of the Constitution and required the Commission to focus its attention on the causes of excessive costs and delay (including economic factors), case management, alternative dispute resolution, pleadings and other court processes, expert evidence and expert witnesses, and unrepresented litigants.

1.3 The Commission has focussed its inquiry on the workings of the Federal Court,<sup>4</sup> the Family Court of Australia (the Family Court),<sup>5</sup> the Administrative Appeals Tribunal (AAT)<sup>6</sup> and where appropriate, the Migration Review Tribunal (MRT which was formerly the Immigration Review Tribunal), the Refugee Review Tribunal (RRT) and the Social Security Appeals Tribunal (SSAT) – the review tribunals set for amalgamation in a new Administrative Review Tribunal (ART).

1.4 While the inquiry focusses on federal courts and tribunals, it also concerns community alternative dispute resolution (ADR) schemes. The Commission uses the term ‘federal civil justice system’ to refer to the full array of judicial, administrative review and ADR processes in federal civil jurisdiction, including the use of ADR by

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<sup>2</sup>Under the *Australian Law Reform Commission Act 1996* (Cth) s 20.

<sup>3</sup>The amended terms of reference are set out at p 7-8.

<sup>4</sup>The Federal Court is a superior federal court of record and a court of law and equity, created by the *Federal Court of Australia Act 1976* (Cth) and derives its original jurisdiction from more than 100 Commonwealth statutes. Also see ch 10.

<sup>5</sup>The Family Court of Australia is a superior federal court exercising family law jurisdiction dealing with matrimonial and divorce cases which has a statutory jurisdiction arising principally from the *Family Law Act 1975* (Cth). See also ch 11.

<sup>6</sup>The AAT was established under the *Administrative Appeals Tribunal Act 1975* (Cth) and has jurisdiction to review decisions conferred by a broad range of individual enactments. In exercising its jurisdiction, the tribunal reviews a range of administrative decisions made by Ministers and government officers as well as decisions already reviewed by the SSAT and the Veterans’ Review Board. See ch 12 for discussion on the AAT, MRT, RRT and the SSAT.

industry ombudsmen which deal with complaints in areas relevant to federal matters, such as banking and telecommunications.<sup>7</sup>

## Other studies

1.5 There is considerable interest in, and several excellent Australian and overseas studies, on civil justice reform. Professor Ted Wright has suggested that the strands of civil justice reform are drawn from influences such as

- a legal profession facing increased competitive pressures on its conventional markets and on pricing
- strong government pressures to reduce public sector spending on courts and legal aid
- a sense of crisis in the justice system, perhaps generally about access, but, most importantly, within the judiciary about caseloads.<sup>8</sup>

1.6 The Commission has drawn on a wide range of Australian civil justice reviews, research and policy documents including the following.<sup>9</sup>

- The Senate Standing Committee on Legal and Constitutional Affairs review of the cost of legal services and litigation<sup>10</sup>
- The Senate Legal and Constitutional References Committee inquiry into the legal aid system in Australia.<sup>11</sup>

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<sup>7</sup>.The term federal civil justice system is not without its difficulties. For example, on its face, such a term could also refer to federal administrative regulation, but the Commission uses the term with a more limited meaning.

<sup>8</sup>.T Wright 'Civil justice system in Australia' *Background Paper* Paths to Civil Justice Reform Conference Bellagio 17-21 March 1997, 8.

<sup>9</sup>.A number of the Commission's own earlier reports are also relevant to this inquiry. ALRC *Costs shifting – who pays for litigation* ALRC Sydney 1995 (ALRC 75); ALRC *For the sake of the kids: Complex contact cases and the Family Court* ALRC Sydney 1995 (ALRC 73); ALRC & HREOC *Seen and heard: Priority for children in the legal process* ALRC Sydney 1997 (ALRC 84); ALRC *Beyond the door-keeper: Standing to sue for public remedies* ALRC Sydney 1996 (ALRC 78); ALRC *Equality before the law: Justice for women* ALRC Sydney 1994 (ALRC 69); ALRC *Equality before the law: Women's equality* ALRC Sydney 1994 (ALRC 69); ALRC *Grouped proceedings in the Federal Court* AGPS Canberra 1988 (ALRC46); ALRC *Evidence* AGPS Canberra 1987 (ALRC 38).

<sup>10</sup>.Senate Standing Committee on Legal and Constitutional Affairs *Background Paper Cost of legal services and litigation: Access to legal services: The role of market forces* AGPS Canberra 1992; *Background Paper Cost of legal services and litigation: A survey of reforms to the English legal profession* AGPS Canberra 1991; *Discussion Paper No 1 Cost of legal services and litigation: Introduction to the issues* AGPS Canberra 1991; *Discussion Paper No 3 Cost of legal services and litigation: Contingency fees* AGPS Canberra 1991; *Discussion Paper No 4 Cost of legal services and litigation: Methods of dispute resolution* AGPS Canberra 1991; *Discussion Paper No 6 Cost of legal services and litigation: The courts and the conduct of litigation* AGPS Canberra 1992; *Discussion Paper No 7 Cost of legal services and litigation: Legal aid: 'for richer for poorer'* AGPS Canberra 1992; *Discussion Paper No 8 Cost of legal services and litigation: The legal profession: a case for microeconomic reform* AGPS Canberra 1992; *The cost of justice: first report – foundations for reform* AGPS Canberra 1993; *The cost of justice: second report – checks and imbalances* AGPS Canberra 1993.



- The Administrative Review Council (ARC) report on its review of Commonwealth merits review tribunals.<sup>12</sup>
- The Access to Justice Advisory Committee's report on ways in which the legal system could be reformed in order to enhance access to justice and make the legal system fairer, more efficient and more effective, and the Justice Statement responding to that report.<sup>13</sup>
- The federal Attorney-General's Department's task force to survey and report on small business attitudes to and experiences with dispute resolution<sup>14</sup> and the report by Professor Williams on the review of federal court costs scales.<sup>15</sup>
- The Council of Chief Justices' report on its electronic appeals project.<sup>16</sup>
- The Queensland Department of Justice's consultation draft on uniform civil procedure rules for the Supreme Court, District Court and Magistrates Court.<sup>17</sup>
- The Victorian Civil Justice Review Project examining civil dispute resolution in Victoria.<sup>18</sup>

<sup>11</sup> Senate Legal and Constitutional References Committee *Inquiry into the Australian legal aid system – First report* Senate Printing Unit Canberra March 1997; Senate Legal and Constitutional References Committee *Inquiry into the Australian legal aid system – Second report* Senate Printing Unit Canberra June 1997; Senate Legal and Constitutional References Committee *Inquiry into the Australian legal aid system – Third report* Senate Printing Unit Canberra June 1998.

<sup>12</sup> Administrative Review Council *Better decisions: Review of Commonwealth merits review tribunals* AGPS Canberra 1995 (ARC 39).

<sup>13</sup> Access to Justice Advisory Committee *Access to Justice – an action plan* AGPS Canberra 1994 (AJAC Report). The report considered wide ranging proposals for reform covering equality before the law, the legal services market and the regulation of legal costs, legal aid reforms, dispute resolution outside of courts, court reforms and the accessibility and harmonisation of legislation. Many elements of the report are directly relevant to the Commission's inquiry and are canvassed where appropriate. See also *Justice statement* A-G's Dept (Cth) Canberra 1995.

<sup>14</sup> Marsden Jacob Associates et al *Survey of small business attitudes and experience in disputes and their resolution – Results, implications and directions* A-G's Dept (Cth) Canberra 1999 & Marsden Jacob Associates et al *Survey of small business attitudes and experience in disputes and their resolution – Report* A-G's Dept (Cth) Canberra 1999.

<sup>15</sup> P Williams et al *Report of the review of scales of legal professional fees in federal jurisdictions* A-G's Dept (Cth) Canberra 1998 (Williams Report).

<sup>16</sup> The Council of Chief Justices of Australia and New Zealand *Electronic appeals project – Final report* May 1998 <<http://www.ccj.org/reports/Final%20Report.htm>> (27 July 1999).

<sup>17</sup> Uniform civil procedure rules commenced on 1 July 1999: *Uniform Civil Procedure Rules 1999* (Qld). See also Dept of Justice (Qld) *Uniform civil procedure rules for the Supreme Court, District Court & Magistrates Court – Consultation draft* Dept of Justice Brisbane 1997 and the work of the Queensland Litigation Reform Commission.

<sup>18</sup> Recommendations have been forwarded to the Victorian Attorney-General: *Civil Justice Review Project Consultation* Sydney 26 August 1997. The Commission consulted with the project director and researchers.

- The Law Reform Commission of Western Australia's consultation papers on its reference to review the WA criminal and civil justice systems to improve the accessibility and simplicity of proceedings and to reduce the level of costs and delays.<sup>19</sup>
- The New South Wales Law Reform Commission's report on the legal profession which resulted in the establishment of the Office of the Legal Services Commissioner.<sup>20</sup>
- The Victorian Law Reform Committee report on technology and the law.<sup>21</sup>

1.7 The work of the Justice Research Centre (JRC) has been particularly valuable. The JRC, a project of the Law Foundation of New South Wales, produced much research relevant to this inquiry,<sup>22</sup> including a detailed analysis of legal aid applicants in the Family Court<sup>23</sup> and conducted research on case file survey data collected by the Commission.<sup>24</sup> The Commission has greatly benefited from the JRC's assistance.

1.8 The Australian Institute of Judicial Administration (AIJA) has conducted research into various aspects of judicial administration and many of its reports are

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<sup>19</sup>.Law Reform Commission of Western Australia *Review of the civil and criminal justice system* Consultation drafts LRCWA Perth 1998. Copies of the individual consultation drafts are available from the LRCWA website at <<http://www.wa.gov.au/lrc>> (1 August 1999). There have been a number of consultation papers on civil proceedings on the advantages and disadvantages of adversarial proceedings; costs; pleadings; the role of the legal profession; ADR; and expert evidence.

<sup>20</sup>.NSWLRC *Scrutiny of the legal profession: Complaints against lawyers* NSWLRC Sydney 1993 (NSWLRC-70).

<sup>21</sup>.Victorian Law Reform Committee Report *Technology and the Law* Government Printer Melbourne 1999. The Committee reported on the opportunities available in the use of new technologies to streamline the administration of courts and tribunals and to improve access to courts and tribunals by members of the public in Victoria.

<sup>22</sup>.Justice Research Centre *Rolling lists in the Family Court – Sydney registry* JRC Briefing Note Sydney 1996; M Delaney & T Wright *Plaintiff's satisfaction with dispute resolution processes: Trial arbitration, pre-trial conference and mediation* JRC Sydney 1997; C Guest & T Murphy *Economic evaluation of differential case management* JRC Sydney 1995; T Matruglio & J Baker *An implementation evaluation of differential case management: A report on the DCM program in the Common Law Division of the Supreme Court of New South Wales* JRC Sydney 1995; T Matruglio *Plaintiffs and the process of litigation: An analysis of the perceptions of plaintiffs following their experience of litigation* JRC Sydney 1994; J Baker *Who settles and why? A study of the factors associated with the stage of case disposition* JRC Sydney 1994; T Matruglio *So who does use the courts?* JRC Sydney 1993; D Worthington & J Baker *The cost of civil litigation: Current charging practices in New South Wales and Victoria* JRC Sydney 1993; T Matruglio *Researching alternative dispute resolution* JRC Sydney 1992.

<sup>23</sup>.R Hunter *Family law case profiles* JRC Sydney 1999.

<sup>24</sup>.Justice Research Centre *Family Court research part one: Empirical information about the Family Court of Australia* ALRC Sydney June 1999; Justice Research Centre *Family Court research part two: The costs of litigation in the Family Court of Australia* ALRC Sydney June 1999; Justice Research Centre *Family Court research part three: Comparison with the report on "The review of scales of legal professional fees in federal jurisdictions" by Professor Philip Williams et al* ALRC Sydney June 1999.

also relevant to this inquiry.<sup>25</sup> Of particular importance to the inquiry have been reports for AIJA by Professor Stephen Parker on courts and the public<sup>26</sup> and by Ian Freckelton, Prasuna Reddy and Hugh Selby on judicial perspectives on expert evidence.<sup>27</sup>

1.9 The Commission has also drawn on the work of federal government policy and advisory bodies such as the ARC,<sup>28</sup> the Family Law Council (FLC)<sup>29</sup> and the National Alternative Dispute Resolution Advisory Council (NADRAC).<sup>30</sup> Legal professional bodies, such as the Law Council of Australia<sup>31</sup> and the Law Society of New South Wales<sup>32</sup> have produced a range of useful reports and papers on issues relevant not just to the legal profession but to the operation of the justice system generally.

1.10 This list is some indication of the information being generated relevant to civil justice reform. It is more than matched by reviews and research conducted overseas. The Commission has had regard to relevant overseas studies including the progress and implementation of proposals generated by Lord Woolf's inquiry into

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<sup>25</sup>.eg R Cranston et al *Delays and efficiency in civil litigation* AIJA Melbourne 1985; H Powles et al *The litigant in person – A discussion paper* AIJA Melbourne 1993; P Williams et al *The cost of civil litigation before the intermediate courts of Australia* AIJA Melbourne 1992; T Church & P Sallman *Governing Australia's courts* AIJA Melbourne 1991. AIJA monitors the development of case management systems in Australia and holds annual conferences that focus on case management, delay reduction and broader issues relating to courts and tribunals.

<sup>26</sup>.S Parker *Courts and the public* AIJA Melbourne 1998.

<sup>27</sup>.I Freckelton et al *Australian judicial perspectives on expert evidence: An empirical study* AIJA Melbourne 1999, 21–22. The response rate to the survey was 51%. Federal judges comprised about 20% of the respondents. The respondent judges indicated that their main areas of practice as judges were criminal trials (27%); appellate cases (7%); family law hearings (14%); personal injury/workers' compensation hearings (8%); commercial/equity hearings (12%), other, including intellectual property, bankruptcy, taxation, judicial review and administrative appeals (13%). The remaining respondents reported more than one main area of practice.

<sup>28</sup>.The ARC conducts research and policy work on administrative review. The *Better decisions* report (ARC39) has been of particular importance to the inquiry .

<sup>29</sup>.The FLC undertakes policy advice and research in relation to family law. FLC publications relevant to the inquiry include: Family Law Council *Family Mediation* AGPS Canberra 1992; *Involving and representing children in family law* AGPS Canberra 1996; *Family law appeals and reviews* AGPS Canberra 1996; *Child contact orders: Enforcement and penalties* AGPS Canberra 1998.

<sup>30</sup>.NADRAC was established in 1995 and acts as an advisory body to the federal Attorney-General on issues relating to the regulation and evaluation of ADR processes and procedures. Relevant reports include: NADRAC *Primary dispute resolution in family law: A report to the Attorney-General on Part 5 of the Family Law Regulations* NADRAC Canberra March 1997; NADRAC *Alternative dispute resolution definitions* NADRAC Canberra March 1997; NADRAC Discussion Paper *Issues of fairness and justice in alternative dispute resolution* NADRAC Canberra November 1997.

<sup>31</sup>.eg Law Council of Australia *Blueprint for the structure of the legal profession – A national market for legal services* LCA Canberra 1994.

<sup>32</sup>.The Law Society of New South Wales established an Access to Justice Task Force which produced a report in 1998: Law Society of NSW *Access to Justice: Final Report* Law Society of NSW Sydney 1998.

the civil justice system in England and Wales.<sup>33</sup> The reports of the Woolf inquiry provided a broad agenda for change to address problems of cost, delay and complexity in civil litigation in England and Wales and resulted in the new *Civil Procedure Rules 1999* (UK).<sup>34</sup> Lord Bowman's review of the operation of the Court of Appeal (Civil Division) was also relevant to issues before the Commission.<sup>35</sup>

1.11 The Commission found Canadian material of particular interest and relevance, including the work of the Ontario Civil Justice Review,<sup>36</sup> the Canadian Bar Association Systems of Civil Justice Taskforce,<sup>37</sup> and the Ontario Legal Aid Review.<sup>38</sup>

1.12 The United States provides a significant body of empirical and analytical research on dispute resolution processes, notably through studies by the RAND Institute for Civil Justice, the State Justice Institute, the Federal Judicial Center and the National Center for State Courts. The Commission has also considered reports of the Brookings Institution,<sup>39</sup> the President's Council on Competitiveness<sup>40</sup> and the American Bar Association.<sup>41</sup>

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<sup>33</sup> Lord Woolf concluded that these problems arise from the uncontrolled nature of the litigation process and lack of clear judicial responsibility for managing cases. The reports focus on modifying the existing system through judicial case management and simplification of procedural rules. They also highlight the need for a cultural and philosophical shift away from an 'adversarial' culture and focus upon ADR processes. Lord Woolf *Access to justice: Interim report to the Lord Chancellor on the civil justice system in England and Wales* Lord Chancellor's Dept London 1995; Lord Woolf *Access to justice: Final report to the Lord Chancellor on the civil justice system in England and Wales* HMSO London 1996; Lord Woolf *Access to justice draft civil proceedings rules* HMSO London 1996.

<sup>34</sup> See also Sir Peter Middleton's review of civil justice and legal aid which reviewed the Woolf proposals and various consultation papers issued by the Lord Chancellor's Department in the context of, and following, the Woolf inquiry: P Middleton *Report to the Lord Chancellor by Sir Peter Middleton GCB* Lord Chancellor's Dept London 1997. Lord Chancellor's Dept consultation papers are available at <<http://www.open.gov.uk/lcd/consult/civ-just>>.

<sup>35</sup> G Bowman *Review of the Court of Appeal (Civil Division) – Report to the Lord Chancellor* Lord Chancellor's Dept London 1997 (Bowman report).

<sup>36</sup> Ontario Civil Justice Review *Civil justice review: First report* Court of Justice and Ministry of the Attorney-General Toronto 1995; Ontario Law Reform Commission *Study paper on prospects for civil justice* Ontario Law Reform Commission Toronto 1995; Ontario Law Reform Commission *Rethinking civil justice: Research studies for the civil justice review* Vols 1 & 2 Ontario Law Reform Commission Toronto 1996.

<sup>37</sup> Canadian Bar Association *Systems of civil justice task force report* CBA Toronto August 1996 & Canadian Bar Association *Systems of civil justice task force – Civil justice: Reform for the 21st century* Canadian Bar Association Systems of Civil Justice Task Force Conference Toronto February 1996.

<sup>38</sup> Ontario Legal Aid Review *Report of the Ontario Legal Aid Review: A blueprint for publicly funded legal services* Queen's Printer Ontario 1998  
<<http://www.attorneygeneral.jus.gov.on.ca/olar/olarcvr.htm>> (27 July 1999).

<sup>39</sup> Brookings Institution Task Force *Justice for all: Reducing costs and delay in civil litigation: Report of Task Force* Brookings Institution Washington DC 1989.

<sup>40</sup> President's Council on Competitiveness *Agenda for civil justice reform in America* The Council Washington DC 1991.

<sup>41</sup> American Bar Association *ABA Blueprint for improving the civil justice system: Report of the American Bar Association Working Group on Civil Justice System Proposals* ABA Chicago February 1992; American

1.13 There are a number of important American academic writers on legal systems and legal profession reform. The Commission invited Professor Marc Galanter (University of Wisconsin) and Professor David Luban (University of Maryland) to participate a conference co-sponsored with the National Institute for Law, Ethics and Public Affairs<sup>42</sup> and has subsequently drawn on their and other relevant academic works.

## Consultations

1.14 The Commission has consulted widely with the judiciary, tribunal members, court and tribunal administrators, the legal profession, ADR practitioners, litigants and others involved in or affected by the legal system or ADR processes. To ensure that it obtained a range of views, information and experience, the Commission used a number of separate consultative and advisory processes.

### *Advisory and working groups*

1.15 The Commission arranged for an Advisory Group comprising eminent judges, lawyers, and others to assist it on this reference. A list of the Advisory Group members appears at appendix A. The Commission was also assisted by a Consultative Group, comprising the Chief Justices of the Federal Court, Family Court and the President of the Administrative Appeals Tribunal. A list of the Consultative Group members appears at appendix A. Both these groups assisted the Commission to focus its review and advised on policy issues and proposals for change.

1.16 The Commission also established a number of expert working groups to advise it on Federal Court, Family Court and federal tribunal proceedings and processes, on costs issues, ADR processes, and on training and education. The working groups gave detailed advice and assistance to the Commission on matters relevant to their expertise. A list of the working groups and their members appears at appendix A.<sup>43</sup>

1.17 Mr Julian Disney, a member of the Advisory Group, also acted as a special consultant and adviser in the preparation of this discussion paper.

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Bar Association *Just solutions: Seeking innovation and change in the American justice system* ABA Chicago 1994.

<sup>42</sup>. Australian Law Reform Commission and National Institute for Law, Ethics and Public Affairs (NILEPA) *Beyond the adversarial system: Changing roles and skills for courts, tribunals and practitioners* Griffith University Brisbane 10–11 July 1997.

<sup>43</sup>. The ADR working group was also assisted by expert advisors. Additional expert advisors were Geri Ettinger, Senior Member, AAT; Paul Lewis, ADRA; Laurence Boulle, Bond University and Michael Redfern, solicitor. Draft copies of the Issues Paper were also commented upon by professional organisations such as the Victorian Bar and by Federal Court, Family Court of Australia and federal tribunal representatives.

1.18 Members of the advisory and working groups were frequently deluged with draft chapters and reports on the Commission's empirical work and gave generously of their time. In addition, some members had to travel extensively to attend meetings. The Commission derived considerable assistance from the advisory and working groups and extends particular gratitude to their members.

#### *Conferences*

1.19 The Commission co-sponsored two conferences. One conference, entitled *Beyond the adversarial system: Changing roles and skills for courts, tribunals and practitioners*, considered common law and civil code processes in relation to education and training.<sup>44</sup> The other concerned dispute avoidance, management and litigation involving Commonwealth departments and agencies.<sup>45</sup> The Commission also co-sponsored an education and training workshop.<sup>46</sup>

#### *Other consultations and submissions*

1.20 The Commission consulted with many organisations and individuals with particular interest or expertise in different areas of federal civil litigation and review. A large numbers of meetings were held with groups of individual judges, tribunal members, court and tribunal administrators, practitioners and others. A list of consultations appears at appendix B. Such consultations are particularly helpful in obtaining the views and experiences of those people involved in court and tribunal proceedings.

1.21 The Commission also received assistance from a wide variety of individuals and organisations who provided submissions<sup>47</sup> and administrative and technical assistance with our research.

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

1.23 The Commission could not have undertaken its research or the inquiry without ongoing and extensive assistance from federal courts and tribunals. In particular, the Federal Court, the Family Court and the AAT permitted the Commission to conduct empirical research, collected and transported more than 3-

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<sup>44</sup>.ALRC & NILEPA *Beyond the adversarial system: Changing roles and skills for courts, tribunals and practitioners* Griffith University Brisbane 10–11 July 1997.

<sup>45</sup>.ALRC, Australian Competition and Consumer Commission and the Commonwealth Ombudsman *The management of disputes involving the Commonwealth. Is litigation always the answer?* Canberra 22 April 1999.

<sup>46</sup>.ALRC & NILEPA *Education workshop* Sydney 19 November 1998.

<sup>47</sup>.As at 1 August 1999, the Commission had received more than 280 written submissions.

000 case files, and responded to repeated requests for information and comment. The Commission thanks the judges, tribunal members and court and tribunal administrators and staff who provided this assistance.

1.24 There are a number of people who provided their expertise and assistance on many occasions and in a variety of circumstances. The Commission expresses special thanks to Mr Warwick Soden and Mr John Mathieson of the Federal Court; Ms Margaret Harrison and Ms Angela Filippello of the Family Court; Ms Kay Ransome, Ms Rhonda Evans and Mr Chris Matthies of the AAT; Mr Christian Klettner of the Productivity Commission; Associate Professor Rosemary Hunter of the Justice Research Centre; Professor Stephen Parker of Monash University; Ms Christine Harvey of the Law Council of Australia; Mr Steve Mark the NSW Legal Services Commissioner; Mr Richard Coates of National Legal Aid; Ms Judith Ryan and Mr Ben Slade of Legal Aid New South Wales; costs consultants Ms Susan Pattison and Ms Deborah Vine-Hall; Ms Gabriel Fleming; Mr Ian Freckelton; Mr-Hugh Selby and Mr Andras Markus.

## Empirical work

1.25 At the beginning of the reference, the Commission recognised the need for, and initiated, empirical research on the working of the federal civil justice system. The Commission surveyed courts, federal review tribunals and legal professional bodies to concerning their educational initiatives.<sup>48</sup> The Commission also engaged consultants to assess data collection and evaluation research in the Federal Court, Family Court and the AAT and to provide background information on the data and technology needs of courts and tribunals. This work was incorporated in two research papers prepared in 1998.<sup>49</sup>

1.26 The major empirical work conducted by the Commission involved national surveys of samples of cases finalised in the Federal Court, the Family Court and the AAT. The results of this work are discussed throughout this paper and are reported in a series of empirical reports prepared by the ALRC, its research consultants Ms Tania Matruglio and Ms Gillian McAllister and by the JRC.<sup>50</sup> The Commission expresses special thanks to its research consultants for their efforts.

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<sup>48</sup>.The results of that survey were reported in the issues paper on legal education and training: ALRC Issues Paper 21 *Review of the adversarial system of litigation: Rethinking legal education and training* ALRC Sydney 1997 (ALRC IP 21).

<sup>49</sup>.T Matruglio & G McAllister *Part one: The status of data collection and evaluation research in the Federal Court, the Family Court and the Administrative Appeals Tribunal* ALRC Sydney January 1998; T-Matruglio & G McAllister *Part two: Data and technology needs of courts and tribunals: Background information* ALRC Sydney February 1998.

<sup>50</sup>.ALRC *Part one: Empirical information about the Administrative Appeals Tribunal* ALRC Sydney June 1999; ALRC *Part two: Empirical information about the Administrative Appeals Tribunal* ALRC Sydney June 1999; T Matruglio & G McAllister *Part one: Empirical information about the Family Court of Australia* ALRC Sydney February 1999; T Matruglio *Part two: The costs of litigation in the Family Court of Australia* ALRC Sydney June 1999; T Matruglio & G McAllister *Part one: Empirical information about the Federal Court of Australia* ALRC Sydney June 1999; T Matruglio *Part two: The costs of litigation in*

1.27 Details on the methodology of the surveys, the sampling techniques and data collection instruments used are contained in the empirical reports which will be published in electronic form on the Commission's internet homepage. Briefly, the samples for the case file surveys were as follows.

- In the Federal Court: information was collected from 682 cases identified by the Court as finalised during February, March and April 1998.
- In the Family Court: information was collected from 1 288 cases removed from the Court's Active Pending Cases List during May and June 1998.
- In the AAT: information was collected from 1 665 cases defined by the AAT as finalised during August, September and October 1997.

1.28 Information was collected from case files or from court or tribunal computerised case management systems (the case file information) and from responses to self-administered questionnaires sent to party representatives or to unrepresented parties (the questionnaire information). The case file information provided the Commission with comprehensive data relating to the types of parties and cases, how and at what stage cases were resolved, the duration to resolution, the outcomes achieved, the number of represented parties and the effect representation had on case processing and case outcomes, and differences between registries. The questionnaire information included details about the cost of proceedings, how these costs were funded and the charging arrangements associated with them. Information was also solicited about other issues including the use of representation or other assistance, the dispute resolution processes used, the factors working for and against settlement, and prehearing case management by the courts and tribunal.

## Issues and background papers

1.29 During the inquiry the Commission released a number of consultative and background papers. These papers formed the focus of the Commission's consultation with interested persons and organisations. The issues papers that have been released are

- *Rethinking the federal civil litigation system*<sup>51</sup>
- *Rethinking legal education and training*<sup>52</sup>

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

<sup>51</sup>.ALRC Issues Paper 20 *Review of the adversarial system of litigation – Rethinking the federal civil litigation system* ALRC Sydney April 1997 (ALRC IP 20).



- *Rethinking family law proceedings*<sup>53</sup>
- *Technology – what it means for federal dispute resolution*<sup>54</sup>
- *Federal tribunal proceedings*<sup>55</sup>
- *ADR – its role in federal dispute resolution*<sup>56</sup>

1.30 A series of background information papers were also prepared as part of the Commission's initial research and consultation.<sup>57</sup>

1.31 The Commission will provide a final report on the inquiry to the Attorney-General in November 1999.

## How you can help

1.32 Responses to this discussion paper will assist the Commission in preparing its recommendations. The Commission welcomes the views and comments of any person or organisations interested in the issues raised in this paper and on any other relevant issues. The deadline for submissions and comments is 15 October 1999. The Commission would appreciate, if possible, if written submissions are also provided on computer disk.<sup>58</sup>

1.33 Prior to presenting its final report, the Commission will continue its extensive consultations with courts, tribunals, the legal profession and others who are involved in the federal civil justice system.

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<sup>52</sup>.ALRC Issues Paper 21 *Review of the adversarial system of litigation: Rethinking legal education and training* ALRC Sydney August 1997 (ALRC IP 21).

<sup>53</sup>.ALRC Issues Paper 22 *Review of the adversarial system of litigation: Rethinking family law proceedings* ALRC Sydney November 1997 (ALRC IP 22).

<sup>54</sup>.ALRC Issues Paper 23 *Technology – What it means for federal dispute resolution* ALRC Sydney March 1998 (ALRC IP 23).

<sup>55</sup>.ALRC Issues Paper 24 *Review of the adversarial system of litigation: Federal tribunal proceedings* ALRC Sydney 1998 (ALRC IP 24).

<sup>56</sup>.ALRC Issues Paper 25 *Review of the adversarial system of litigation: ADR – Its role in federal dispute resolution* Sydney June 1998 (ALRC IP 25).

<sup>57</sup>.ALRC Background Paper 1 *Federal jurisdiction* ALRC Sydney 1996 (ALRC BP 1); ALRC Background Paper 2 *Alternative or assisted dispute resolution* ALRC Sydney 1996 (ALRC BP 2); ALRC Background Paper 3 *Judicial and case management* ALRC Sydney 1996 (ALRC BP 3); ALRC Background Paper 4 *The unrepresented party* ALRC Sydney 1996 (ALRC BP 4); ALRC Background Paper 5 *Civil litigation practice and procedure* ALRC Sydney 1996 (ALRC BP 5); ALRC Background Paper 6 *Experts* ALRC Sydney 1999 (ALRC BP 6).

<sup>58</sup>.If possible in ASCII-American Standard Character. Alternatively, you may email a copy of your submission to [adver@alrc.gov.au](mailto:adver@alrc.gov.au).

## 2. Change and continuity in the federal civil justice system

### Introduction

2.1 This chapter discusses the approach to reform taken by the Commission in this inquiry.

### Considering access to justice

2.2 The Commission's terms of reference are directed to a consideration of the cost, timeliness, efficiency and accessibility of the federal civil justice system.<sup>59</sup> These are complex and interrelated issues. Accessibility implies that dispute resolution processes are available, explicable and affordable. Yet even if slow, complicated or costly legal processes could be remedied, litigants may still lack confidence in or harbour anxiety about the way the justice system might treat their claim or afford them a remedy. For many, such subjective factors are the key barriers to access to justice.<sup>60</sup>

2.3 It is now well accepted that access to justice need not necessarily involve enhanced access to the formal processes of civil courts. There are a range of informal dispute resolution options available for federal civil disputes. However, merely improving 'access to dispute settlement institutions will not of itself, improve access to justice'.<sup>61</sup> 'Justice' resists easy definition but is taken to be equated with fair, open, dignified, careful and serious processes. A justice system that over emphasises the need to be affordable, efficient and timely may not succeed in delivering such justice.

It may be that the public is more concerned with the substance of justice than with the specific procedures put in place to achieve it . . . Yet, there are many studies suggesting the opposite. The outcome of a trial, even in cases where one or both parties feel that 'true justice' has not prevailed, is seen as less important than the

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<sup>59</sup>.As stated in chapter 1, while this inquiry focusses on federal courts and tribunals, it also concerns community ADR schemes. The Commission uses the term 'federal civil justice system' to refer to the full array of judicial, administrative review and ADR processes in the federal civil jurisdiction, including the use of ADR by industry ombudsmen which deal with complaints in areas relevant to federal matters, such as banking and telecommunications. The term federal civil justice system is not without its difficulties. For example, on its face, such a term could also refer to federal administrative regulation, but the Commission uses the term with a more limited meaning.

<sup>60</sup>.E Lind et al 'In the eyes of the beholder: Tort litigants' evaluation of their experience in the civil justice system' (1990) 24 *Law and Society Review* 953; R Macdonald 'Study paper — Prospects for civil justice' in Ontario Law Reform Commission *Study paper on prospects for civil justice* Ontario Law Reform Commission Ontario 1995, 93.

<sup>61</sup>.R Macdonald 'Study paper — Prospects for civil justice' in Ontario Law Reform Commission *Study paper on prospects for civil justice* Ontario Law Reform Commission Ontario 1995, 89.

fairness of the process. Indeed, to feel that one has been listened to impartially and conscientiously, even if this imposes significant additional costs and delays, is a central litigant value. In other words, it is important not to . . . assum[e] that all things being equal, the best solution to problems with the civil justice system would be to ensure an efficient, timely, and inexpensive judicial process.<sup>62</sup>

2.4 Legal system reform is frequently characterised as a policy choice between individualised ‘Rolls Royce’ justice, on the one hand, and affordable, robust, high volume social justice, on the other.<sup>63</sup> The choice may well be a false one. If, as research suggests, parties accord a primary value to fair processes and considered attention, individualised justice may be the indispensable characteristic of dispute resolution systems.

2.5 The demand for individualised justice is said to have ‘placed an immense strain’ upon the justice system.<sup>64</sup> In this context, there is some comfort in the truism that cases vary in the individual attention and assistance they require from courts and tribunals. Some cases require detailed, extended disclosure of information and determination by a judge.<sup>65</sup> In others, the parties simply require assistance to define the issues in dispute or opportunities for negotiation or mediation and certainty of outcome. Individualised justice is not premised upon adjudication. It is not necessarily delivered directly by judges or tribunal members but can derive from the design, atmosphere and facilities provided by the court or tribunal, from responsive and engaged registry staff and registrars, and the dispute resolution processes within and outside court and tribunal systems.<sup>66</sup> This important point was made repeatedly in the Commission’s consultations.

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<sup>62</sup>.*ibid.*, 15–16. See also on litigant values: R Macdonald ‘Access to justice and law reform’ (1995) 10 *Windsor Yearbook of Access to Justice* 287; Alberta Law Reform Institute Research Paper 19 *Dispute resolution: A directory of methods, projects and resources* ALRI Edmonton 1990, 40; T Matruglio *Plaintiffs and the process of litigation* Civil Justice Research Centre Sydney 1994; Ontario Law Reform Commission *Rethinking civil justice: Research studies for the civil justice review* Toronto 1996 vol 1, 5; National Consumer Council *Seeking civil justice: A survey of people’s needs and experiences* National Consumer Council London 1995; M Winfield *Far from wanting their day in court: Civil disputants in England and Wales* National Consumer Council London 1996.

<sup>63</sup>. Note for example the following comment

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

<sup>64</sup>. A Gleeson ‘Individualised justice – The holy grail’ (1995) 69 *Australian Law Journal* 421, 430.

<sup>65</sup>. *ibid.*; GGibson *The cancer in litigation* Blake Dawson Waldron Melbourne 1997.

<sup>66</sup>. On the importance of court design and court facilities, see: M Black *Speech* Representing justice conference Wollongong 22 June 1998. On the values and perceptions of family law litigants, see Family Court of Australia *Draft survey of family client perceptions of service quality* Family Court of Australia Canberra March 1999.

2.6 Lawyer and litigant preferences for individualised justice related to the Commission were often framed by reference to the need for consistent oversight of individual cases by the same judge or registrar, to ensure cases were appropriately managed, streamed or allocated to dispute resolution processes. Individualised justice was not equated with extensive or repeat court or tribunal intervention. Lawyers and litigants complained that undifferentiated case management wasted court, tribunal and party resources in repeat and often ineffective hearings, or inappropriate dispute resolution processes. These matters are dealt with more fully in chapters 10–12.

## Considering reform to federal civil justice

2.7 The Commission was asked to evaluate the workings of courts and tribunals exercising federal jurisdiction. The scope of such evaluation requires clarification.

2.8 The establishment of the Commonwealth created a federal jurisdiction.<sup>67</sup> Federal jurisdiction is a national jurisdiction within the Australian legal system which operates directly or indirectly, or otherwise has influence, in almost all areas of Australian law.<sup>68</sup> In the most part, federal jurisdiction is shared, being exercised by more than one federal or State court.<sup>69</sup> The terms of reference therefore directed the Commission to a wide ranging investigation across federal and State courts. This was a daunting project, having regard to the breadth and complexity of the task and the need to conduct empirical research to support evaluation and reform of the federal justice system. For these reasons the Commission has focussed this paper on

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<sup>67</sup>.The nature, constitutional source, scope and development of federal jurisdiction is discussed in Australian Law Reform Commission Background Paper 1 *Federal Jurisdiction* ALRC Sydney 1996 (ALRC BP 1). Under the Constitution, federal jurisdiction was vested in the High Court and could be vested in such other federal courts as the Commonwealth parliament created as well as in State courts. The *Judiciary Act 1903* (Cth) effected a conferral of general federal jurisdiction on all State courts. The concept of ‘federal jurisdiction’ refers to the exercise of the judicial power of the Commonwealth. Viewed in that sense, neither Commonwealth nor State tribunals exercise federal jurisdiction, because they are not courts for the purposes of chapter III of the Constitution. In relation to tribunals, the Commission understands the terms of reference to refer to the exercise of executive power granted to federal tribunals under Commonwealth legislation.

<sup>68</sup>.Perhaps the only areas in which State jurisdiction has a largely unfettered remit are criminal law and (State) administrative law, though even in these areas the supervisory impact of the High Court cannot be overlooked. See, for example, *Dietrich v R* (1993) 177 CLR 292. On the influence of federal administrative law principles on the various systems of administrative law in the States and Territories see the Access to Justice Advisory Committee *Access to justice – an action plan* AGPS Canberra 1994, ch 13 (AJAC Report).

<sup>69</sup>.This sharing of jurisdiction is effected in accordance with the terms of the conferral or investiture of jurisdiction (accrued jurisdiction), through operation of the cross-vesting scheme and uniform, customised, legislative schemes, such as the Corporations Law and its mirror State legislation. The High Court recently held the cross-vesting scheme and the Corporations Law scheme were constitutionally invalid in so far as they purported to give the Federal Court jurisdiction to exercise State judicial power: *Re Wakim; Ex parte McNally; Re Wakim; Ex parte Darvall; Re Brown; Ex parte Amann; Spinks v Prentice* (1999) 163 ALR 270; [1999] HCA 27 (17 June 1999).

the workings of the Federal Court,<sup>70</sup> the Family Court of Australia (Family Court),<sup>71</sup> the Administrative Appeals Tribunal (AAT)<sup>72</sup> and where appropriate, the Migration Review Tribunal (MRT), the Refugee Review Tribunal (RRT) and the Social Security Appeals Tribunal (SSAT) as tribunals set for amalgamation in a new Administrative Review Tribunal (ART). The paper also makes reference as appropriate to State courts exercising federal jurisdiction in relation to family law proceedings. Comments in this paper concerning the Family Court refer to the Family Court of Australia, not the Family Court of Western Australia or local courts exercising federal jurisdiction, unless explicitly stated. The Commission has not reviewed the Australian Industrial Relations Commission (AIRC) or the National Native Title Tribunal (NNTT) and deals with those agencies only in relation to Federal Court industrial relations and native title claims.

2.9 Although the jurisdictional scope of this inquiry was broad, the reform agenda was directed to issues of costs, accessibility and efficiency. Evaluations of such matters can vary depending upon the particular vantage point one adopts to view the litigation and review system. To take the example of costs, do we measure the cost of the litigation and administrative review system to the government or the parties? A reduction in public costs frequently displaces such costs to private parties. The 'user pays' principle, now so well accepted as public policy, mandates such cost shifting.

2.10 Further, even if we take the vantage point of private users to evaluate the working justice system, the question is which type of user? Parties to federal civil proceedings are diverse, and include individuals of varied means, backgrounds and with different expectations of the justice system. Federal litigation is also conducted by large and small businesses, government agencies and regulators, families and interest groups. Such groups value and criticise different features of the justice system.<sup>73</sup>

2.11 In family jurisdiction, applicants and respondents may be divided as to the relative merits of adjudication and alternative dispute resolution.<sup>74</sup> Small business groups often complain of the cost and formality of the litigation system and indicate

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<sup>70</sup>The Federal Court is a superior federal court of record and a court of law and equity, created by the *Federal Court of Australia Act 1976* (Cth) and derives its original jurisdiction from more than 100-Commonwealth statutes: also see ch 10.

<sup>71</sup>The Family Court is a superior federal court exercising family law jurisdiction dealing with matrimonial and divorce cases which has a statutory jurisdiction arising principally from the *Family Law Act 1975* (Cth): also see ch 11.

<sup>72</sup>The AAT was established under the *Administrative Appeals Tribunal Act 1975* (Cth) and has jurisdiction to review decisions conferred by a broad range of individual enactments. In exercising its jurisdiction, the tribunal reviews a range of administrative decisions made by Ministers and government officers as well as decisions already reviewed by the SSAT and the VRB. See ch 12 for discussion on the AAT, MRT, RRT and the SSAT.

<sup>73</sup>For further information on litigants in the federal civil justice system see ch 10-12.

<sup>74</sup>See, for example, Family Court of Australia *Draft survey of family client perceptions of service quality* Family Court of Australia Canberra March 1999.

a preference for ADR processes<sup>75</sup>, while lawyers representing larger corporations have spoken to the Commission of the need for exacting and enforced litigation processes.<sup>76</sup>

2.12 Apart from the difficulty of choosing the appropriate or the varied vantage points for evaluation, there is also consideration of the litigation or review functions to be analysed. Courts have a number of functions. They determine and facilitate the resolution of disputes, and also provide 'norms and procedures',<sup>77</sup> the rules that govern adjudication of disputes. Court rulings provide statements of 'social purpose . . . the proper meaning to our public values.'<sup>78</sup> The legal system affords a mechanism by which society monitors and regulates its incessant change. Basic elements of fair decision making as determined by courts have resonated far outside the courtroom.<sup>79</sup> Sir Gerard Brennan has commented

It is for the service of the people that the courts are created and perform their functions. The courts sit in public, think and write in private, then publish to all the world their decisions and reasons. No other branch of government responds so unfailingly to every application within its jurisdiction nor gives so adequate an explanation of the reasons for its decisions.<sup>80</sup>

2.13 Reform to the litigation system cannot discount the role of the courts beyond adjudication. It should likewise facilitate the normative impact of tribunal decision making.

2.14 Further, courts and tribunals not only determine or decide matters or set social norms, they also produce settlements. Much of the time and expense of litigation or review is associated with interlocutory, adjudicatory and facilitative processes. Galanter has noted

Settlement is not an 'alternative' process, separate from adjudication, but is intimately and inseparably entwined with it. Both may be thought of as aspects of a

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<sup>75</sup>.Marsden Jacob Associates et al *Survey of small business attitudes and experience in disputes and their resolution – Report* Attorney-General's Dept (Cth) Canberra 1999; Marsden Jacob Associates et al *Survey of small business attitudes and experience in disputes and their resolution – Results, implications and directions* Attorney-General's Dept (Cth) Canberra 1999.

<sup>76</sup>.See for example, G Gibson *The cancer in litigation* Blake Dawson Waldron Melbourne 1997; Arthur Robinson *Submission 189*; Allen Consulting Group *Trends in the Australian legal system – Avoiding a more litigious society* Allen Consulting Group Melbourne 1998.

<sup>77</sup>.M Galanter 'The radiating effects of courts' in K Boyum and L Matheu (eds) *Empirical theories about courts* Longman New York 1983, 121.

<sup>78</sup>.O Fiss 'Foreword: The forms of justice' (1979) 93 *Harvard Law Review* 1, 30.

<sup>79</sup>.T Cromwell *Dispute resolution in the twenty-first century* Canadian Bar Association – Systems of Civil Justice Task Force Ottawa January 1996, 80.

<sup>80</sup>.G Brennan 'Farewell to the Honourable Sir Gerard Brennan AC, KBE' (1998) 5 *Australian Bar Gazette* 1, 7. Similarly Chief Justice Spigelman has stated

We must never lose sight of the fact that the legal system is the exercise of a governmental function, not the provision of a service to litigants as consumers.: J Spigelman 'Opening of the law term dinner' *Speech* 1 February 1999 <[http://www.agd.nsw.gov.au/sc/sc.nsf/pages/sp\\_002](http://www.agd.nsw.gov.au/sc/sc.nsf/pages/sp_002)> (28 July 1999).

single process of strategic maneuver and bargaining in the (actual or threatened) presence of courts.<sup>81</sup>

2.15 Settlements are case outcomes which lessen demands on courts and tribunals. The system seeks to facilitate settlements through a variety of alternative dispute resolution (ADR) processes<sup>82</sup>, and devices such as summary and single issue determinations. These devices signal or identify 'points of convergence within the broad and opaque settlement ranges created by higher transactions costs'.<sup>83</sup> In evaluating the workings of courts and tribunals settlements are typically counted as measures of success, and to ascribe settlement rates to particular facilitative processes but there are few indicators of the quality or the efficacy of settlements. Jolowicz noted of civil procedure reform that

a great deal of effort has been directed to the reduction of costs and delay, but little, if any, to an understanding of what it is that should be done more cheaply and more expeditiously.<sup>84</sup>

2.16 In its empirical work and consultative process the Commission sought to focus on what federal courts and tribunals actually do. It has documented and analysed the different types of cases, parties, processes and outcomes for cases in the Federal Court, Family Court and the AAT. The findings concerning this evaluation are set out in the chapters that follow.

## A sense of crisis

2.17 The Commission's terms of reference intimate that the Commission is to consider options for radical change. The Commission is asked to review the advantages and disadvantages of the present adversarial civil jurisdiction and consider civil litigation and administrative law procedures in civil code countries. The definition of the terms of inquiry are important. The assumptions implicit in such terms can determine how problems are identified and solutions formulated. In particular, calls for radical change to our legal system frequently derive from a sense that the system is in crisis.<sup>85</sup> Comments to this effect are commonly made of the litigation system. Justice Sackville noted that the perception that problems are so

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<sup>81</sup>.M Galanter 'The federal rules and the quality of settlements: A comment on Rosenberg's, "The Federal Rules of Civil Procedure in action"' (1989) 137 *University of Pennsylvania Law Review* 2231, 2232-3.

<sup>82</sup>.These are alternative to adjudication but are statistically the norm.

<sup>83</sup>.M Galanter 'The federal rules and the quality of settlements: A comment on Rosenberg's, "The Federal Rules of Civil Procedure in action"' (1989) 137 *University of Pennsylvania Law Review* 2231, 2232.

<sup>84</sup>.J Jolowicz 'General ideas and the reform of civil procedure' (1983) 3 *Legal Studies* 295, 298.

<sup>85</sup>.eg G Brennan 'Key issues in judicial administration' *Paper Fifteenth Annual Conference Australian Institute of Judicial Administration* Wellington 20-22 September 1996

The courts are overburdened, litigation is financially beyond the reach of practically everybody but the affluent, the corporate or the legally aided litigant; governments are anxious to restrict expenditure on legal aid and the administration of justice. It is not an overstatement to say that the system of administering justice is in crisis.

deep seated and intractable that urgent and far reaching remedies are required carries certain 'dangers', including

- . . . the strengths of the current system will be overlooked or at least given insufficient attention. This carries with it with the further danger that unrealistic expectations will be created, specifically, that the courts (as distinct from other elements in the civil justice system) can continue to perform their traditional functions, yet comply with heightened community expectations that justice should be speedy, cheap and effective.
- . . . in the pursuit of drastic remedies for problems perceived to be deep-seated but curable, solutions will be imported from other jurisdictions without a full analysis of the legal and social culture of which they form part and without a full appreciation of the difficulties of transplanting the solutions to a different environment.
- . . . the advantages of a process of continuous adaption and reform will be underestimated, in favour of far reaching reforms, the effectiveness of which may rest on untested and untestable assumptions . . .
- . . . because the problem is perceived as so urgent, solutions will be proposed that are responsive to a particular difficulty, but fail to address other components of the perceived problem.<sup>86</sup>

2.18 The Commission agrees with this analysis.<sup>87</sup> Litigation reform, of itself, does not always bring improvements. Resnik observed on this issue

The history of procedure is a series of attempts to solve the problems created by the preceding generation's procedural reforms.<sup>88</sup>

This reflects the conclusions of Canada's Professor Cromwell that '[t]here are probably no quick fixes or sudden insights that will ensure great improvement' to the justice system.<sup>89</sup>

2.19 In any event, insofar as the Commission's terms of reference were directed to 'fix' a crisis, the Commission's investigation of the workings of federal courts and

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<sup>86</sup>R Sackville 'The civil justice system — the process of change' *Paper Beyond the Adversarial System* Conference Brisbane 10-11 July 1997, 8.

<sup>87</sup>Also supported by the LCA *Submission* 126.

<sup>88</sup>J Resnik 'Precluding appeals' (1985) 70(4) *Cornell Law Review* 603, 624. The example cited to support this is 'discovery', a process imported to deal with adversarial tactics which has itself become a litigation tactic. See also E Sward 'Values, ideology and the evolution of the adversary system' (1989) 64 *Indiana Law Journal* 301, 328; R Millar 'The mechanism of fact-discovery: A study in comparative civil procedure' (1937) 32 *Illinois Law Review* 261, 261-76.

<sup>89</sup>T Cromwell *Dispute resolution in the twenty-first century* Canadian Bar Association — Systems of Civil Justice Task Force Ottawa January 1996, 2.



tribunals does not support the crisis theory. There is no litigation explosion.<sup>90</sup> There was no systemic, intractable delay in case processing or resolution in the federal courts and tribunals reviewed by the Commission.<sup>91</sup> Litigation and review can be expensive, but the Commission's research refutes, for federal civil matters, the well recited adage that the justice system is open only to the very rich and very poor.<sup>92</sup> The Commission found a range of litigants utilising federal courts and tribunals. Speculative and delayed fee charging arrangements can assist to make particular federal civil processes accessible to people of varied means.<sup>93</sup> Within federal jurisdiction, there are also private and publicly funded informal dispute resolution options providing broader access to justice.<sup>94</sup>

2.20 This paper details many proposals directed to improving the system, to enhancing access to justice and improving efficiency and effectiveness. The Commission's proposals for change derive from close research and consultations about working practices. There are problems within and improvements to that should be made to the federal system. The Commission simply counsels against reform driven by anecdote or calls of crisis.

## The adversarial–non adversarial debate

2.21 One further aspect of the Commission's inquiry deserves consideration. This review was directed to considering change to the adversarial character of the system. These premises call for consideration of adversarial and non adversarial processes and of the pace and approach to change in the federal civil justice system.

2.22 The call for change to the adversarial system can oversimplify the problems in our litigation system and solutions to those problems, at least as far as this debate concerns civil matters. (The Commission has no reference to consider criminal proceedings.) Such calls assume that the problems associated with say, the costs, delay or unfairness in the system, are attributable to the adversarial character of the system and that these problems can be 'cured' by transplanting or borrowing from the civil code systems. Relevant in this regard is Lord Woolf's diagnosis that litigation problems in England and Wales derive to a large extent from the

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<sup>90</sup>Steering Committee for the Review of Commonwealth/State Service Provision *Report on government services 1999 – Vol 1: Education, health, justice* AusInfo Canberra 1999, table 7A.1, which shows that for the years 1993–94 to 1997–98 the number of lodgments in civil proceedings in State and Territory Supreme Courts and in the Federal Court, have been relatively stable, except for the Supreme Court of the Northern Territory, where there has been a significant increase over that time.

<sup>91</sup>See ch 10–12.

<sup>92</sup>See H Gibbs *Sydney Morning Herald* 10 April 1984, 6, quoted in D Weisbrot *Australian lawyers* Longman Cheshire Melbourne 1990, 245; Senate Standing Committee on Legal and Constitutional Affairs Discussion Paper No 6 *The cost of legal services and litigation: the courts and the conduct of litigation* AGPS Canberra 1992, para 1.1; *The cost of justice: Foundations for reform* AGPS Canberra 1993, 4 in AJAC Report, para 1.3; A Gleeson 'Access to justice' (1992) 66 *Australian Law Journal* 270, 274. See also para 4.55.

<sup>93</sup>See para 6.47–6.57.

<sup>94</sup>See ch 4 & ch 6.

unrestrained adversarial culture of their legal system.<sup>95</sup> His solution, discussed in chapter 9 of this paper, is to put judges in charge 'to run the show'.<sup>96</sup> Australia has had managerial judging for some years. This paper critiques the case management 'solution'.<sup>97</sup>

2.23 The debate on changing adversarial culture or processes also can be clouded by definitional questions as protagonists debate core values and practices in prototype legal models, sometimes comparing the perceived shortcomings of one system with an idealised version of the other. The term 'adversarial' connotes a competitive battle between foes or contestants<sup>98</sup> and is popularly associated with partisan and unfair litigation tactics. Battle and sporting imagery are commonly used in reference to our legal system.<sup>99</sup> These different meanings associated with an adversarial system have confused the debate concerning legal system reform.<sup>100</sup>

2.24 The terms 'adversarial' and 'inquisitorial' have no precise or simple meaning<sup>101</sup> and to a significant extent reflect particular historical developments rather than the practices of modern legal systems.<sup>102</sup> No country now operates

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<sup>95</sup>.Lord Woolf *Access to justice: Interim report to the Lord Chancellor on the civil justice system in England and Wales* Lord Chancellor's Dept London 1995, 7

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

<sup>96</sup>.G Watson 'From an adversarial to a managed system of litigation: A comparative critique of Lord Woolf's interim report' in RSmith (ed) *Achieving civil justice: Appropriate dispute resolution for the 1990s* Legal Action Group London 1996, 65; Lord Woolf *Access to justice: Interim report to the Lord Chancellor on the civil justice system in England and Wales* Lord Chancellor's Dept London 1995, 26: 'in order to achieve both the overall aim and the specific objectives, there is no alternative to a fundamental shift in the responsibility for the management of civil litigation in this country from litigants and their legal advisers to the courts.'

<sup>97</sup>.See ch 9.

<sup>98</sup>.The Macquarie Concise Dictionary 2nd ed defines 'adversary' as an 'unfriendly opponent; an opponent in a contest; a contestant'; R Eggleston 'What is wrong with the adversary system?' (1975) 49 *Australian Law Journal* 428, 429.

<sup>99</sup>.R Eggleston 'What is wrong with the adversary system?' (1975) 49 *Australian Law Journal* 428, 429; Denning LJ in *Jones v National Coal Board* [1957] 2 QB 55, 63; J Hunter & K Cronin *Evidence, advocacy and ethical practice* Butterworths Sydney 1995, 50; ACrouch 'The way, the truth and the right to interpreters in court' (1985) 59 *Law Institute Journal* 687, 690.

<sup>100</sup>.The Commission received a number of submissions concerned with 'adversarial' conduct. As discussed later in this paper, particularly in ch 5, the Commission supports eliminating the excesses of partisan practice.

<sup>101</sup>.For a critical analysis of the use of these terms see M Damaska 'Structures of authority and comparative criminal procedure' (1975) 84 *Yale Law Journal* 480. See also ALRC Issues Paper 20 *Review of the adversarial system of litigation: rethinking the federal civil litigation system* ALRC Sydney 1997, ch 2, which summarises the features taken to be general characteristics of adversarial and non adversarial models.

<sup>102</sup>.In England the common law, 'adversarial' system developed in the Middle Ages and was exported to countries such as Australia, Canada, New Zealand and the United States through colonisation. In Europe, civil law inquisitorial systems had their basis in Roman law. The Napoleonic Codes (1804–1811) in the French civil law system; the German Civil Code (1896) in Germany. Civil law

strictly within the prototype models of an adversarial or inquisitorial system. The originators of those systems, England, France and Germany have modified their own, and exported different versions of their respective systems.

2.25 In broad terms, an adversarial system refers to the common law system of conducting proceedings in which the parties, and not the judge, have the primary responsibility for defining the issues in dispute and for investigating and advancing the dispute.<sup>103</sup> The term 'inquisitorial' refers to civil code systems in which the judge has such primary responsibility. 'Inquisitorial' also connotes an inquiry where the decision maker investigates a matter. Civil code proceedings represent, in procedural theory, 'judicial prosecution' of the parties' dispute, as opposed to 'party prosecution' of the dispute under the common law system.<sup>104</sup>

2.26 Notwithstanding variation between these models, in civil matters at least, there is a significant degree of convergence of the practices in common law and civil code countries.<sup>105</sup> German civil procedure, in particular, has many of the characteristics of civil process in adversarial systems,<sup>106</sup> and is generally described as an adversarial or party system. Parties present the facts to the court and their

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systems in Europe and Asia have generally styled themselves on either the French or German model.

<sup>103</sup>. 'In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries': *Jones v National Coal Board* [1957] 2QB55, 63 (Denning LJ).

<sup>104</sup>. LCA Submission 126.

<sup>105</sup>. The European Union is contributing to convergence of the common law and civil code procedures. An indication of convergence in Australia is seen in the adoption of case management and managerial judging (see ch 9). This convergence will not necessarily conclude with the same, integrated systems; it is more an indication of the adoption by one system of the principles and procedure used in another. Some important differences remain. These may be so entrenched that there is never complete convergence. See the work of the American Law Institute *Transnational rules of civil procedure* Discussion draft American Law Institute Philadelphia 1 April 1999, which aims to establish a single system of civil procedure across national boundaries.

[T]he reader [should be] in no doubt that convergence is taking place . . . There is thus a convergence of solutions in the area of private law as the problems faced by courts and legislators acquire a common and international flavour; there is a convergence in the sources of our law since nowadays case law *de facto* if not *de jure* forms a major source of law in both common and civil law countries; there is a slow convergence in procedural matters as the oral and written types of trials borrow from each other and are slowly moving to occupy a middle position; there may be a greater convergence in drafting techniques than has commonly been appreciated . . . there is a growing rapprochement in judicial views: BMarkesinis 'Learning from Europe and learning in Europe' in B Markesinis *The gradual convergence: Foreign ideas, foreign influences, and English law on the eve of the 21st century* Oxford University Press Oxford 1994, 30. See further for example R David and J Brierley *Major legal systems in the world today* 3rd ed Stevens & Sons London 1985, parts 1 and 3.

<sup>106</sup>. G Wittuhn & R Stucken 'Germany' ch 7 in C Campbell (ed) *International civil procedures* Center for International Legal Studies and Lloyd's of London Press Ltd London 1996, 297.

lawyers have comparable roles to those in common law countries.<sup>107</sup> The court may only consider those facts brought before it; it may not investigate on its own.<sup>108</sup>

2.27 In private civil disputes in both legal models, the involvement of the parties in the presentation of the case extends to: initiating proceedings, determining the issues to be decided, investigating the case facts, selecting and presenting witnesses and other evidence. In common law systems, involvement of the parties also covers selecting and presenting experts (in civil code systems experts are appointed by the court), and presentation of oral evidence, argument and submissions by counsel at the hearing.<sup>109</sup>

2.28 In the Australian litigation and review system, processes such as case management,<sup>110</sup> court or tribunal connected ADR processes and discretionary rules of evidence and procedure have modified adversarial features of the system. The federal review tribunal system also has borrowed from civil code systems.<sup>111</sup>

2.29 A conference examining comparative legal systems, co-sponsored by the Commission, described the high costs and delays likewise afflicting the French and German systems (the systems discussed at the conference).<sup>112</sup> Lowenfeld, reviewing common law and civil code systems in the 1997 *American Journal of Comparative Law* symposium on civil procedure, commented that

one result of listening to and reading about each other's problem was the realization that none of the observers and commentators was satisfied with the system he or she knew best.<sup>113</sup>

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<sup>107</sup>J Langbein 'The German advantage in civil procedure' (1985) 52(4) *University of Chicago Law Review* 823, 824.

<sup>108</sup>G Wittuhn & R Stucken 'Germany' ch 7 in C Campbell (ed) *International civil procedures* Center for International Legal Studies and Lloyd's of London Press Ltd London 1996, 297.

<sup>109</sup>ibid; C Lécuyer-Thieffry 'France', ch 6 in C Campbell (ed) *International civil procedures* Center for International Legal Studies and Lloyd's of London Press Ltd London 1996, 258; R David and J-Brierley *Major legal systems in the world today* 3rd ed Stevens & Sons London 1985, parts 1 and 3.

<sup>110</sup>J Jolowicz 'The Woolf report and the adversary system' (1996) 15 *Civil Justice Quarterly* 198, 200.

<sup>111</sup>T Thawley 'Adversarial and inquisitorial procedures in the Administrative Appeals Tribunal' (1997) 4 *Australian Journal of Administrative Law* 61; J Dwyer 'Fair play the inquisitorial way: A review of the Administrative Appeals Tribunal's use of inquisitorial procedures' (1997) 5 *Australian Journal of Administrative Law* 5, 19; L Certoma 'The non-adversarial administrative process and the Immigration Review Tribunal' (1993) 4(1) *Public Law Review* 4.

<sup>112</sup>K Glomb 'Roles and skills of a German judge' *Paper Beyond the Adversarial System Conference* Brisbane 10-11 July 1997; W van Caenegem 'Changing roles and skills of practitioners in civil litigation: A comparative perspective' *Paper Beyond the Adversarial System Conference* Brisbane 10-11 July 1997; M Lemonde 'Educating French legal professionals' *Paper Beyond the Adversarial System Conference* Brisbane 10-11 July 1997; J Staats 'Educating German legal professionals' *Paper Beyond the Adversarial System Conference* Brisbane 10-11 July 1997.

<sup>113</sup>A Lowenfeld 'Introduction: The elements of procedure: Are they separately portable?' (1997) 45-*American Journal of Comparative Law* 649, 651.

2.30 In the Commission's view there is limited utility in simply elaborating and comparing the advantages and disadvantages of the present adversarial system of conducting civil administrative review and civil law proceedings in federal jurisdiction.<sup>114</sup> The relative merits and demerits of adversarial systems have been extensively debated. There is a variety of texts dealing with judicial impartiality,<sup>115</sup> independence, consistency, flexibility and the democratic character of adversarial processes,<sup>116</sup> or with the disadvantages of the tactical manoeuvring,<sup>117</sup> partisanship and unreliability of witnesses,<sup>118</sup> the obscured focus of many adversarial

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<sup>114</sup>.A view confirmed by the Law Reform Commission of Western Australia *Review of the civil and criminal justice system – Consultation draft: The advantages and disadvantages of the adversarial system in civil proceedings* LRCWA Perth November 1998, 1.

<sup>115</sup>.The common law imperative is 'that justice should not only be done, but should manifestly and undoubtedly be seen to be done': *Rv Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256, 259; [1923] All ER 233, 234 (Lord Hewart CJ). See also A Amerasinghe 'Judicial independence – Some core issues' (1997) 7 *Journal of Judicial Administration* 75. Judge Glomb of the German District Court has commented on German civil procedures: 'It will be apparent that the judge virtually knows the result of the case before the hearing': K Glomb 'Roles and skills of a German judge' *Paper Beyond the adversarial system* Conference Brisbane 10–11 July 1997, 3. On impartiality issues in civil code systems, see: C Lécuyer-Thieffry 'France', ch 6 in C Campbell (ed) *International civil procedures* Center for International Legal Studies and Lloyd's of London Press Ltd London 1996, 261.

<sup>116</sup>.The adversarial nature of litigation is said to be democratic by allowing the parties to define and control the dispute – litigation is essentially a participatory process where competing versions of the dispute are publicly aired and debated. One of the advantages of the common law system of party control is that the parties may pursue all avenues of inquiry perceived to be to their advantage. Adversaries 'sometimes do bring into court evidence which, in a dispassionate inquiry, might be overlooked': J Frank *Courts on trial: Myth and reality in American justice* Princeton University Press Princeton 1949, 80.

<sup>117</sup>.R Eggleston 'What is wrong with the adversary system' (1975) 49 *Australian Law Journal* 428, 430, S-Parker 'Islands of civic virtue? Lawyer and civil justice reform' (1997) 6 *Griffith Law Review* 1; E-Whitton *Trial by voodoo* Random House Sydney 1994; EWhitton *The cartel: Lawyers and their nine magic tricks* Herwick Sydney 1998.

<sup>118</sup>. '[T]he partisan nature of trials tends to make partisans of the witnesses', including experts: J Frank *Courts on trial: Myth and reality in American justice* Princeton University Press Princeton 1949, 86. See ch 13.

hearings,<sup>119</sup> and the unfairness that can result in such hearings when parties are unrepresented or there is inequality of legal representation.<sup>120</sup>

2.31 Reviewing the pros and cons of the United States adversary system, Luban justified retention of the current system on pragmatic grounds.

[F]irst the adversary system, despite its imperfections, irrationalities, loopholes and perversities, seems to do as good a job as any at finding truth and protecting legal rights . . . Second, some adjudicatory system is necessary. Third, it's the way we have always done things. These things constitute a pragmatic argument: if a social institution does a reasonable enough job of its sort that the costs of replacing it outweigh the benefits, and if we need that sort of job done, we should stay with what we have.<sup>121</sup>

2.32 The Commission considers that the adversarial–non adversarial construct is too elusive to base analysis of the problems or to formulate change to the system. Such debate assumes that borrowing from different political and cultural systems will work in similar ways in our legal system, that such change can be engineered and that it will improve the system.<sup>122</sup> The Commission does not advocate change to implement a non adversarial federal civil litigation system; we do advocate change to judicial and administrative processes and informal dispute resolution schemes. The Commission's analysis focusses upon judicial, administrative and alternative dispute resolution processes because these are the distinctive, interrelated processes which comprise federal civil justice. These are well

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<sup>119</sup>.For example, the debate over whether it is an objective of a common law hearing to discover the truth. In civil law countries the responsibilities of the judge to discover the truth go beyond the determination of the dispute between the parties: J Jolowicz 'The Woolf report and the adversary system' (1996) 15 *Civil Justice Quarterly* 198, 208. 'Within the adversarial system, despite some statements to the contrary, the function of the courts is not to pursue the truth but to decide on the cases presented by the parties': A Mason 'The future of adversarial justice' *Paper 17th Annual AIJA Conference Adelaide 7 August 1999*, 13 – draft. However, others believe that 'truth is best discovered by powerful statements on both sides of the question' Lord Eldon LC quoted with favour by Denning LJ in *Jones v National Coal Board* [1957] 2 QB 55, 63, or that '[s]uccessful cross examination is the most effective means of discovering the truth': G Downes 'Changing roles and skills for advocates' *Paper Beyond the adversarial system Conference Brisbane 10–11 July 1997*, 5. See also R Gerber 'Victory vs trust: The adversary system and its ethics' (1987) 19(3) *Arizona State Law Journal* 3. It remains a moot point which system offers the best method for ascertaining the truth. Critics familiar with both systems do not agree: 'The argument as to whether the truth is best obtained by the adversary system or by something more closely approximating to the civil procedure adopted on the Continent is of course incapable of being resolved': R Eggleston 'What is wrong with the adversary system?' (1975) 49 *Australian Law Journal* 428, 433.

<sup>120</sup>.The adversarial system has proceeded on the assumption that the fairest and most effective method of determining the truth of a matter is to allow the parties to put their respective cases in their own way. This assumption depends upon the parties being able to identify their own interests and fight their own battles. The extent to which a party can do that will depend upon their own qualities and resources and those of their legal representatives and experts: *Dietrich v R* (1992) 177 CLR 292, 335 (Deane J); *Giannarelli v Wraith* (1988) 165 CLR 543, 556 (Mason CJ).

<sup>121</sup>.D Luban *Lawyers and justice: An ethical study* Princeton University Press Princeton 1988, 92.

<sup>122</sup>.W Pizzi & L Marafioti 'The new Italian Code of Civil Procedure: The difficulties of building an adversarial trial system on a civil law foundation' (1992) 17 *Yale Journal of International Law* 1, 22–3; M Hooker *Legal pluralism* Clarendon Press Oxford 1975.

understood concepts and provide an explicable basis for change. The adversarial–non adversarial debate simply obscures effective reform. Sir Anthony Mason commented that a wholesale change by Australia to an inquisitorial system of civil justice would be

an extraordinary act of faith. It would be contrary to our traditions and culture; it would generate massive opposition; and it would call for expertise that we do not presently possess. And at the end of the day we would have a new system without a demonstrated certainty that it is superior to our own.<sup>123</sup>

## Continuity

2.33 The natural and effective mode of change within the justice system is an important factor to consider.

2.34 The key principles of the Australian civil justice system are constants, notably: the rule of law and the constitutional doctrines concerning the separation of powers, judicial independence, the exercise of judicial power and judicial process<sup>124</sup> and principles concerning the role of lawyers as partisan advocates and advisers of their clients, subject to their overriding duties as officers of the court and to relevant practice rules.<sup>125</sup>

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

A lawyer from Dickens' time, walking out of *Bleak House* into a modern Australian court on an ordinary day, would see relatively few changes. Same wigs and robes. Same elevated Bench and sitting times. Very similar basic procedures of calling evidence and presenting argument. Longer judgments: but still the same structure of facts, law and conclusion.<sup>126</sup>

2.36 There are legal, practical, cultural and costs constraints limiting reform of our legal system. A significant limitation derives from the Constitution.

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<sup>123</sup>.A Mason 'The future of adversarial justice' *Paper* 17th Annual AIJA Conference Adelaide 7 August 1999, 16 – draft.

<sup>124</sup>.For a discussion of the role of courts see eg J Doyle 'Administrative law and the rule of law: Still part of the same package?' *Paper* 1998 Administrative Law Forum Melbourne 18–19 June 1998, 1; J Raz 'The rule of law and its virtue' (1977) 93 *Law Quarterly Review* 195, 198–201. J Doyle 'The well-tuned cymbal' in *Fragile Bastion: Judicial Independence in the nineties and beyond* Judicial Commission of NSW Sydney 1997, 40–41.

<sup>125</sup>.See further ch 5.

<sup>126</sup>.M Kirby 'The future of courts – Do they have one?' 1999 8(4) *Journal of Judicial Administration* 185, 186.

2.37 In Australia the adoption of inquisitorial procedures in federal courts may be restricted by the Constitution.<sup>127</sup> Chapter III of the Constitution vests the 'judicial power of the Commonwealth' in the High Court and other federal courts created by parliament. Judicial power is exercised in accordance with the judicial process.<sup>128</sup>

Judicial power involves the application of the relevant law to facts as found in proceedings conducted in accordance with the judicial process. And that requires that the parties be given an opportunity to present their evidence and to challenge the evidence led against them.<sup>129</sup>

2.38 Judicial process includes an open and public inquiry, the application of the rules of natural justice and a determination of the law and the facts and the application of the law to those facts.<sup>130</sup> In *Leeth v Commonwealth*, Chief Justice Mason and Justices Dawson and McHugh agreed that

... any attempt on the part of the legislature to cause a court to act in a manner contrary to natural justice would impose a non-judicial requirement inconsistent with the exercise of judicial power.<sup>131</sup>

2.39 While 'due process', 'natural justice', and the judicial process are not inherently adversarial concepts, they are characteristics of an adversarial system. The adoption of some inquisitorial features into the Australian legal system may interfere with accepted notions of natural justice. In terms of the Constitution the question is not so much: is an adversarial system required by the Constitution? but rather: are those elements of the judicial process required by the Constitution, such as natural justice and procedural fairness, features best protected in an adversarial system?

2.40 A duty to act fairly is also part of non adversarial procedures. A judge who conducts the investigation, who assists the parties to clarify the issues and pleadings and who calls or questions witnesses is not acting unfairly. However, in an adversarial system, for proceedings to be fair, a judge must be independent of the state and seen to be impartial.<sup>132</sup> Procedural fairness is also preserved through

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<sup>127</sup> However, in relation to tribunal proceedings, inquisitorial procedures do not offend the Constitution. A dual system operates in Australia of courts, emphasising more traditional adversarial proceedings, and tribunals, which provide a mix of adversarial and inquisitorial procedures. Federal tribunals currently use a blend of adversarial and non adversarial processes. The High Court acknowledged the inquisitorial nature of procedures in the AAT in *Bushell v Repatriation Commission* (1992) 175 CLR 408, 424–5.

<sup>128</sup> *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 703 (Gaudron J).

<sup>129</sup> *Bass v Permanent Trustee Co Ltd* [1999] 161 ALR 399, 417 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

<sup>130</sup> *Harris v Caladine* (1991) 172 CLR 84, 150. This is reiterated in *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 496 and *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 703–4.

<sup>131</sup> *Leeth v Commonwealth* (1992) 174 CLR 455, 470 (Mason CJ, Dawson and McHugh JJ).

<sup>132</sup> J Thibaut & L Walker *The social psychology of procedural justice* Plenum Press New York 1988.



party control of investigation and proceedings.<sup>133</sup> There are clear limitations to a judge's participation, investigation and management of a matter. Procedural fairness is 'the line in the sand' circumscribing the judicial role and entrenching facets of the adversarial model.

2.41 In Australia judges generally do not investigate matters outside the evidence presented by the parties.<sup>134</sup> They may facilitate settlement but do not participate in settlement discussions in matters they are to determine.<sup>135</sup> They must comply with procedural fairness.

No court can adopt procedures, however well intentioned and whatever the wishes of the parties, if those procedures are incompatible with the Constitution. Nor is it for the parties to litigation or a federal court (or a court exercising federal jurisdiction) to agree on a course of action which contradicts the requirements of ChIII of the Constitution governing the exercise of the judicial power of the Commonwealth.<sup>136</sup>

2.42 The clear indication from High Court dicta is that any radical shift to adopt inquisitorial features inconsistent with procedural fairness would be unconstitutional. This is the singular limitation to any reform agenda deriving from the Commission's terms of reference on the adversarial system.

## Change

2.43 Notwithstanding the continuities of our legal system, there have been major changes to the federal civil justice system in the past 20 years, notably

- an increase in the complexity, volume and range of federal legislation

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<sup>133</sup> *ibid.*

<sup>134</sup> *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, 569 (Latham CJ); 575 (Starke); 588-9 (Dixon and Evatt JJ).

<sup>135</sup> In the US, judicial involvement in the settlement process is more common than in Australia: JResnik 'Whose judgment? Vacating judgments, preferences for settlement, and the role of adjudication at the close of the twentieth century' (1994) 41 *UCLA Law Review* 1471 and 'Managerial judges' (1982) 96 *Harvard Law Review* 374; A Rogers 'Judges in search of justice' (1987) 10 *University of New South Wales Law Journal* 93, 104; M Galanter 'The emergence of the judge as a mediator in civil cases' (1996) 69(5) *Judicature* 257; ALRC IP 25, para 3.83. In Germany also a 'further aim of the judge's preparation is to work out a compromise': K Glomb 'Roles and skills of a German judge' *Paper Beyond the Adversarial System Conference Brisbane 10-11 July 1997*. In Australia judges involved in a matter as mediators have no further involvement in adjudicating the dispute: ALRC IP 25, para 3.88-3.91.

<sup>136</sup> *Bass v Permanent Trustee Co Ltd* [1999] 161 ALR 399, 425 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), discussing the procedure used by the trial judge to answer formulated questions without making factual findings. See also *State of Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146; A Mason 'The courts as community institutions' (1998) 9 *Public Law Review* 83, 85

It is vital to build up and maintain public confidence in the court system. Accordingly, there is a risk that, if we put too much emphasis on speedy disposition of cases, we shall prejudice the just disposition of cases. This is just what we cannot afford to do.

- the establishment, abolition and restructuring of specialised federal courts and tribunals
- an increase in complex litigation, with more organisations and individuals now capable of sustained, strategic use of litigation
- the implementation of, and modifications to case management practices
- the expansion and contraction of legal aid
- changes in the number of unrepresented parties in court and tribunal proceedings
- the use of ADR within and outside court and tribunal systems
- changes in the modes of court and tribunal governance with federal courts and the AAT given individual control of and responsibility for their own administration<sup>137</sup>
- the development of enhanced public accountability models for the justice system, including benchmarking, performance standards, corporate planning and accrual accounting
- the continuing work by the Productivity Commission to measure the efficiency of courts and tribunals
- the technological revolution – increasing the information which parties can retrieve, manipulate and deploy; the conversion of legal publishing and court process to electronic medium and the modification of the forms of communication in litigation, legal advice and dispute resolution practices
- the privatisation and contracting out of government services affecting administrative review rights and the provision of legal services to federal government agencies
- the globalisation of legal practice and litigation
- changes in the size, composition, work practices, competitiveness and ethos of the legal profession
- the impact of competition policy on the legal profession and legal practice.

2.44 The federal civil justice system is responsive to funding imperatives and social economic and technological change. Successful, and sometimes varied changes have been brokered by close consultation among the various participants within and outside courts and tribunals.<sup>138</sup> Case management reforms, for example, not only have changed the rules and procedures of litigation but the legal culture, as represented in the working patterns of judges and lawyers. Case management which provides consistent, informed oversight of interlocutory processes is generally credited with improving litigation practices.<sup>139</sup>

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<sup>137</sup>.S Skehill 'Comment on court governance' (1994) 4 *Journal of Judicial Administration* 28; P Sallmann 'Where are we heading with court governance?' (1994) 4 *Journal of Judicial Administration* 5; G Green 'Comment on court governance papers' (1994) 4 *Journal of Judicial Administration* 18; J Fitzgerald 'Comment on court and court-system governance' (1994) 4 *Journal of Judicial Administration* 22; R Nicholson 'Judicial governance and the planning of court space and facilities' (1994) 3 *Journal of Judicial Administration* 181.

<sup>138</sup>.See ch 10 & ch 12.

<sup>139</sup>.See ch 10-12.

2.45 The Federal Court, Family Court and AAT have initiated significant reforms to their practices and procedures and have ongoing reform programs. Federal Court reforms include the establishment of the individual docket case management system,<sup>140</sup> changes to the rules and procedures for expert evidence and particular practices suited for native title cases. The court is planning for electronic filing of process and documents, and enhanced management of appeals.

2.46 The Family Court has likewise reviewed and modified its case management, initiating and evidentiary procedures. The court has introduced information and counselling sessions for disputants, simplified procedures, the Integrated Client Services project at the Parramatta registry and the Magellan project on the management of child abuse cases. The court is continuing to review case and hearing management and its simplified procedures.<sup>141</sup>

2.47 Reforms in the AAT include case conferences, conciliation conferences for compensation cases<sup>142</sup> and the tribunal's ongoing professional development program. The AAT is set for further significant change, notably the amalgamation with three major review tribunals into the single tribunal, the ART.<sup>143</sup>

## Reform goals

2.48 In this paper the Commission makes a number of proposals to improve the federal civil justice system. These proposals are directed to particular courts or tribunals or agencies, to particular processes, to the profession or particular litigants. The Commission seeks comment on these proposals.

2.49 All successful reform endeavours require adequate empirical information. Data on the justice system however is often 'thin and spotty'.<sup>144</sup> Analysing this problem in the United States, Galanter notes that lawyers 'are dogged in challenging and dissecting evidence' but less effective in analysing large social aggregates or employing 'the most severe critical standards',<sup>145</sup> legal scholarship has 'remained diffident toward the investigative, empirical side of the legal realist legacy'<sup>146</sup> and

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<sup>140</sup>.See ch 10.

<sup>141</sup>.See ch 11.

<sup>142</sup>.AAT *Conciliation Conference Direction* 18 May 1998.

<sup>143</sup>.D Williams 'Reform of merits tribunal' *News release* 20 March 1997  
<<http://law.gov.au/aghome/agnews/1997newsag/23920.htm>> (28 July 1999).

<sup>144</sup>.M Galanter 'News from nowhere: The debased debate on civil justice' (1993) 71(1) *Denver University Law Review* 77, 99.

<sup>145</sup>.id 100.

<sup>146</sup>.id 100; MChesterman and D Weisbrot 'Legal scholarship in Australia' (1987) 50 *Modern Law Review* 709, 723.

legal institutions and governments have invested little in litigation research and development.<sup>147</sup>

2.50 The same is true of the Australian federal system,<sup>148</sup> although this is slowly being remedied. As noted in chapter 1, academic and professional studies on litigation practice are accumulating. The Steering Committee for the Review of Commonwealth/State Service Provision operating under the auspices of the Council of Australian Governments (COAG) now collects and presents performance data on court services and is seeking to develop its civil justice data collection and analysis.<sup>149</sup> The Commission endorses such initiatives.

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

- integral to the operations of the court, so that it is developed by judicial officers, managers and court users who understand its purpose and can use it for further organisational development
- relevant to the core values of courts, so that it makes available information about the most important of the court's activities
- capable of collecting data whose relevance to court goals and values is explicit and unambiguous
- feasibly developed and applied without detracting from the court's availability to achieve its central goals through siphoning off resources.<sup>150</sup>

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

2.53 Such data is critical if reform is to be effective. Much legal system reform derives from anecdote and assumption, particularly assumptions about cheaper, informal alternatives to litigation. These assumptions were evidenced in the 1970s push for 'cheaper' tribunals. Government data presently shows that expenditure on tribunals is little different from spending on courts. The Commission's data on costs shows private costs for certain tribunal matters little different from the costs of judicial review matters in the Federal Court.<sup>151</sup>

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<sup>147</sup> M Galanter 'News from nowhere: The debased debate on civil justice' (1993) 71(1) *Denver University Law Review* 77, 101.

<sup>148</sup> AJAC report, para 17.49-17.68, Action 17.2.

<sup>149</sup> Steering Committee for the Review of Commonwealth/State Service Provision *Report on government services 1999 – Vol 1: Education, health, justice* AusInfo Canberra 1999.

<sup>150</sup> R Mohr et al 'Performance measures for Australian courts' (1997) 6(3) *Journal of Judicial Administration* 156, 158-9.

<sup>151</sup> See para 4.58-4.59.

2.54 The Commission undertook to collect information on litigants and parties, case processing, outcomes, representation, settlement and costs. For the most part such data has been instructive, but it is necessarily limited in time and to particular case samples. There are few comparative figures. This deficit is most stark on issues relating to costs. There are no reliable estimates of the cost of federal justice. The Commission has collected the available data and has had to supplement this with some 'guesstimates' of the system costs. Private costs are even more difficult to collect, calculate and analyse. The data provided by the Commission is necessarily dependant on survey responses from solicitors and parties, relates to particular cases and has limited general or predictive application. Again, this problem derives not merely from the data itself but from the limited comparative data.

2.55 This deficit could be addressed in part if the Australian Research Council was to specify legal profession and civil justice research as a priority area for funding.<sup>152</sup> Empirical research into litigation and review practices can begin to accumulate comparative data sets. This measure can provide an impetus to the development of research in this area. Australia has limited academic interest and activity in this area to date compared with overseas countries.<sup>153</sup>

2.56 Data and evaluation supports reform. Additionally, reform should be directed towards and evaluated against appropriate goals. The Commission also identifies primary reform goals directed to the entire federal civil system. They also may apply to the State civil systems but the Commission has not crafted them to have wider significance. Such goals are important. While it is appropriate to fine-tune or modify detailed workings of the system, there needs to be broad consensus about the direction of change, the long term goals and the type of federal justice system we are seeking to maintain. Such goals are particularly important where, as in the federal system, there is and has been significant change and concerned debate about the scope and implications of change.<sup>154</sup> The Commission shares some of these concerns. Certainly the Commission's reform goals are formulated to ensure that the quality of justice provided in the federal system is enhanced. The reform goals comprise the following

- emphasise dispute avoidance and prevention
- encourage appropriate, effective and timely settlements
- ensure cost effective case preparation and case management
- ensure time effective and cost effective hearings
- prevent excessive legal fees

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<sup>152</sup> Citizenship was listed as a priority area in recent years.

<sup>153</sup> See M Chesterman and D Weisbrot 'Legal scholarship in Australia' (1987) 50 *Modern Law Review* 709; D Pearce, E Campbell and D Harding *Australian Law Schools: A Discipline Assessment* Commonwealth Tertiary Education Commission 1987 Vol 2, para 9.180-9.185.

<sup>154</sup> eg concerns at the implications of judicial management: NSW Bar Assoc *Submission 88*; J Resnik 'Failing faith: Adjudicatory procedure in decline' (1986) 53 *University of Chicago Law Review* 494; L-Street 'The courts and mediation: A warning' (1991) 2 *Australian Dispute Resolution Journal* 203; L-Street 'Mediation and the judicial institution' (1997) 71 *Australian Law Journal* 791.

- ensure fair and effective use of public subsidies for legal advice and litigation.

2.57 The goals are measurable and achievable. They focus on the causes of litigation, and dispute prevention, management and resolution. The goals do not promise 'cheaper' justice but cost effective processes and fair and effective support for the disadvantaged. The Commission seeks comment on whether they are sufficient and appropriate. The government has a central role in securing such goals. It is a lawmaker and architect of the federal justice system, paymaster and a significant litigant and party in federal proceedings. The government's approach to disputes, dispute prevention, resolution and litigation is highly influential. The Commission gave particular consideration to the government's role as a litigant and party to disputes. It has also proposed that the Attorney-General establish and facilitate a consultative forum to oversight the provision of legal services. These issues are dealt with in chapter 8. The Commission seeks comment on whether the reform goals listed are appropriate and sufficient.

## 3. Education, training and accountability

### Introduction

3.1 The terms of reference ask the Commission to consider ‘the significance of legal education and professional training to the legal process’ as well as the ‘training, functions, duties and role of judicial officers as managers of the litigation process’.<sup>155</sup>

3.2 In this chapter, the Commission looks separately at the education and training needs of lawyers, federal judicial officers and members of federal review tribunals. Consideration is given to establishing a mechanism to ensure judicial accountability, both as an aspect of improving the performance of the federal justice system and increasing public confidence in its operations.

3.3 In this chapter, the Commission proposes the establishment of four bodies for these purposes – with some trepidation, it must be said, because we are alive to community and government concerns about the proliferation of public agencies and attendant problems of cost, inefficiency, and over regulation. However, the Commission’s research and consultation to date clearly suggest the need for greater structure, coordination and quality assurance in the provision of legal and judicial education in Australia, as well as confirming a major gap in the judicial accountability mechanisms available at the federal level. Wherever possible, the Commission suggests that already existing public or private institutions be adapted to meet these various needs, rather than inventing wholly new entities for these purposes.

### Education for the legal profession

3.4 The requirement of higher educational qualifications is classically one of the defining features of a profession. Carr-Saunders and Wilson have stated that the ‘application of an intellectual technique to the ordinary business of life, acquired as a result of prolonged and specialised training, is the chief distinguishing characteristic of the professions’.<sup>156</sup>

3.5 Professional education also serves to facilitate communication within and between organisations and to accommodate and manage individual and systemic change. The theme of education as communication is developed in several of the

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<sup>155</sup> Australian Law Reform Commission Issues Paper 21 *Review of the adversarial system of litigation: Rethinking legal education and training* Sydney 1997 (ALRC IP 21) canvassed education and training for decision makers in courts and tribunals, for lawyers, and for non lawyer participants in the litigation system (such as expert witnesses and unrepresented litigants).

<sup>156</sup> A M Carr-Saunders & P A Wilson *The professions* 1933, 28 cited in D Weisbrot *Australian Lawyers* Longman Cheshire Melbourne 1990, 4–6.

recent reports and reviews into the practices and processes of common law, civil justice and administrative review systems.<sup>157</sup> The Ontario Civil Justice Review, for example, noted that problems within the civil justice system are exacerbated by poor communication and limited cooperation between the 'stakeholders' – government administrators, the judiciary and Bar, whom the Review dubbed 'the solitudes'

[I]n each of these constituent groups ... there are individuals who are working hard to build bridges and to devise co-operative methods of addressing and finding solutions to the problems which have beset the system. In general, however, the Judiciary, the Administration and the Bar have maintained an individuality in their approach to the system which has precluded a sense of collaboration, co-ownership or co-responsibility for these problems. There is a tendency to view the system from the perspective of one's own constituency and to view the failings of the system in terms of the needs of that constituency. Along with this tendency goes a reluctance to admit to being part of the problems.<sup>158</sup>

3.6 Given the size and complexity of the legal system and need for continuous interaction among a large number of individuals and institutions, enhanced communication and cooperation is an obvious requirement if solutions are to be found to problems of practice. In the courts this requires exchanges among judges, registry staff, lawyers, litigant groups and others. In the administrative review system, it means better communication among policy makers, departmental or agency decision makers, administrative agencies and tribunals, and the parties affected individually or collectively by administrative decisions or recommendations.<sup>159</sup>

3.7 Professor Stephen Parker's report *Courts and the public* noted that training and professional development activities tend to facilitate such communication. For example, Parker cites training manuals such as the Queensland Department of Justice's *Courts, clients and you*, which provide exercises 'to unlock the insights and knowledge which court [administrative] staff acquire through their contact with clients but which might not otherwise be passed on within the organization.'<sup>160</sup>

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<sup>157</sup> See eg Lord Woolf *Access to justice: Final report to the Lord Chancellor on the civil justice system in England and Wales* HMSO London 1996; Ontario Court of Justice and Ministry of the Attorney General *Civil justice review* Toronto 1995; Ontario Law Reform Commission *Study paper on prospects for civil justice* OLRC Toronto 1995; Canadian Bar Association *Systems of civil justice task force report* CBA Toronto 1996; Law Reform Commission of Nova Scotia *Reform of the administrative justice system in Nova Scotia* 1997; Agenda for Civil Justice Reform in America *A report from the President's Council on Competitiveness* 1991; American Bar Association Working Group on Civil Justice System Proposals *Blueprint for improving the civil justice system* 1992; Report on the America Bar Association's 'Just Solutions' Conference and Initiative *Just solutions: Seeking innovation and change in the American justice system* 1994.

<sup>158</sup> Ontario Court of Justice and Ministry of the Attorney-General *Civil justice review* Toronto 1995, 103.

<sup>159</sup> Law Reform Commission of Nova Scotia *Final report: Reform of the administrative justice system in Nova Scotia* 1997, 13.

<sup>160</sup> S Parker *Courts and the public* Australian Institute of Judicial Administration Inc Carlton South 1998, 58.



### *Patterns of legal education*

3.8 Education for legal professionals is a staged and extended process. Although legal education in England was for many years grounded in the traditions of apprenticeship (as opposed to the university based pattern in most of Western Europe), for some decades now legal education in English speaking countries typically has been

divided into three relatively discrete stages, involving (1) academic training at a university; (2) subsequent practical training with both institutional and in-service components; and (3) continuing education.<sup>161</sup>

3.9 By and large, first phase legal education in Australia is provided at the undergraduate level by universities.<sup>162</sup> Practical legal training has largely been the preserve of the professions, although some programs also have a university affiliation. Again, this is in marked contrast with civil code jurisdictions, in which governments control the professional accreditation of lawyers and direct the form and content of judicial education.<sup>163</sup>

3.10 There have always been some variations to this general pattern in Australia, and if anything the degree of diversity has increased in recent years. For example, in New South Wales, it is still possible to substitute for the university component the successful completion of a non award course of study and examinations administered by the Legal Practitioners' Admission Board.<sup>164</sup> Several law schools (such as Murdoch University, Monash University, and the University of New South Wales) operate 'live client' legal clinics through community legal centres, which students may elect to participate in under supervision for academic credit.

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<sup>161</sup> See D Weisbrot *Australian Lawyers* Longman Cheshire Melbourne 1990, 124 et seq.

<sup>162</sup> 'Undergraduate' here refers to courses leading to the award of a Bachelor of Laws degree, which is the degree generally recognised for admission purposes. In practice, many students who commence LLB programs already hold one or more degrees in other disciplines, and there are programs tailored especially for such 'graduate law' students. Because of the prevalence of combined/joint/double degree programs, most law students have already been awarded another degree by the time they complete their law studies. This places the Australian pattern somewhere between the UK model, which is still predominantly undergraduate, and the US model, which is entirely graduate.

<sup>163</sup> See eg J Brunne 'The reform of legal education in Germany: the never-ending story and European integration' (1992) 42 *Journal of Legal Education* 399, 402-4; and J Merryman 'How others do it: The French and German judiciaries' (1988) 61 *Southern California Law Review* 1865, 1874. In comparing the American judiciary with the French or German judiciary Merryman comments that [t]heir judges start young; ours tend to become judges after careers in private or government practice. They start at the bottom and work up, moving from post to post in a bureaucracy; our judges tend to be appointed or elected to one court and, normally, to stay there. Their legal profession is segmented into the separate, more or less autonomous, careers of advocate, notary, judge, public prosecutor, government lawyer, company attorney, professor/scholar; ours is unified: people move from one job to another with relative ease and think of themselves in any capacity as part of one legal profession.

<sup>164</sup> In association with the University of Sydney's Law Extension Committee.

3.11 The federal government has also recognised the important role that clinical legal education programs play in the provision of legal services to the public by increasing funding to community legal services in the last budget. One of the components of the increase was to develop more and better clinical legal education to maximise service delivery to disadvantaged clients and cooperation with universities. Murdoch University law school's pilot clinical legal education project in the Kwinana-Rockingham region of Western Australia, funded by the federal government in April 1997, is a good example of the emerging integrated approach. The stated objectives of the project are to

- offer experience to senior law students in the practical context of the law
- increase the awareness and sensitivity of law students to the social policy context of the law, and thereby
- change attitudes and priorities within the legal profession so as to increase access to justice in the broader community.<sup>165</sup>

3.12 One highly innovative program at the University of Newcastle *completely* integrates classroom and clinical training at the undergraduate level, effectively merging the first two stages of traditional education and obviating the need for subsequent practical legal training. A number of universities (including the University of Wollongong, the University of Technology Sydney, Bond University and Queensland University of Technology) operate second stage practical legal training courses as an add on to the basic law degree.<sup>166</sup>

3.13 As this suggests, legal education in Australia has undergone significant change in recent times. The number of university law schools has more than doubled to 28 since the Pearce Report on legal education in 1987,<sup>167</sup> which concluded that *no* new law schools should be added to the dozen then in existence. This remarkable development was made possible by the relinquishing of control over new award programs (except for some in medicine) by the federal bureaucracy. Law faculties are attractive propositions for universities, bring prestige, professionals and excellent students, at a modest cost compared with comparable professional programs such as medicine, dentistry, veterinary science, architecture or engineering. As has been noted

The central message of the Pearce Report on Australian Law Schools was that legal education in Australia is being run on the cheap, and this is a Bad Thing. The moral for Vice Chancellors, University Councils and Governments, however, is that legal

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<sup>165</sup>Attorney-General D Williams *News release* 'Law students benefit from legal education pilot program' 21 April 1997. See also Attorney-General's Department *Submission 105*.

<sup>166</sup>Available to their own graduates and, usually, to others.

<sup>167</sup>D Pearce et al *Australian law schools: A discipline assessment for the Commonwealth Tertiary Education Commission* AGPS Canberra 1987 (Pearce Report).

education in Australia can be run on the cheap, and this is an Absolutely Splendid Thing.<sup>168</sup>

3.14 This phenomenon has not been replicated elsewhere. Over the same period, only two new (ABA-accredited) law schools were established in the United States, one in New Zealand,<sup>169</sup> and none in Canada. The United States now has 176 ABA-accredited law schools, which is nearly six times the number in Australia — but with about 14 times the population base. Canada has 21 university law schools,<sup>170</sup> with a population of more than 30 million.

3.15 With the rise in the number of institutions (and substantial growth within some law schools) there has been an attendant increase in the number of law students and legal academics in Australia.<sup>171</sup> Less clear is whether the growth in numbers has spurred the desirable level of innovation and diversity in the nature and organisation of legal education, and whether quality can be maintained and assured across all programs.

3.16 Although there are a number of exceptions, most universities now require students to undertake a combined (or double) degree program, combining LLB studies with another discipline, most commonly arts, commerce or science. To some extent, law is coming to be seen as a prestigious generalist degree that can prepare students for a variety of occupations. At the same time, law schools recognise their responsibility to provide the training necessary to prepare future legal practitioners, and there is a trend towards increasing the proportion of time and resources devoted to ‘professional skills training’, whether through clinical or classroom based methods.

#### *The trend toward teaching ‘professional skills’*

3.17 A Law Society of New South Wales survey of lawyers applying for 1998-99 practising certificates indicated that the four most frequently identified areas of practice were conveyancing/real property (34%), commercial law (31%), civil litigation (29%) and personal injury (20%). A further 9% of respondents identified advocacy as a main area of practice (the 10th most common of 21 categories of legal

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<sup>168</sup>See D Weisbrot ‘Recent statistical trends in Australian higher education’ (1990-91) 2 *Legal Education Review* 219, 219-222. Two of the new law schools are found in small private universities established after the Pearce Report: Bond University on the Gold Coast, and the University of Notre Dame in Fremantle.

<sup>169</sup>Waikato University, which has a special responsibility for Maori education.

<sup>170</sup>Counting separately the University of Ottawa’s faculties of Common Law and Civil Law, which have long had separate Deans and curriculum.

<sup>171</sup>Concerns have been expressed, especially within the profession, about there now being more law students than lawyers, with the risk of the practising profession being swamped by new lawyers. However, some context and perspective is necessary. According to census statistics, the ratio of law students to practising lawyers has remained a relatively constant 0.6:1 since at least 1965. The total number of law students is spread over 3-6 years of university study, and many do not proceed into the profession (nor even into the practical legal training stage).

work).<sup>172</sup> Thus, the major litigation areas (civil litigation, personal injury and advocacy) comprised the largest single area of legal practice.<sup>173</sup>

3.18 However, some commentators argue with force that pre admission legal education continues to be based too much around the paradigm of lawyers as litigators, the 'false norm'<sup>174</sup> of legal practice. Changing styles of practice are said to require that undergraduate law courses present court based advocacy as one of a number of services which a lawyer may provide to clients, depending upon the circumstances, rather than as the essence of legal practice. According to this view, legal education should focus on the development of skills other than advocacy and the analysis of appellate judgments, to include training in fact finding, negotiation and facilitation skills, as well as the discrete skills, functions and ethics associated with decision making.<sup>175</sup>

3.19 In the United States, the major 1992 review of legal education (the MacCrate report) sought to narrow the gap which existed, in the view of the review committee, between what was taught in law schools and the day to day skills (and ethical understandings) required of legal practitioners.<sup>176</sup> The centrepiece of the MacCrate report was the 'Statement of Skills and Values' (SSV), which seeks to enumerate core skills for lawyers which law schools are meant to address.

3.20 According to the MacCrate Report, the 10 fundamental lawyering skills are

- problem solving
- legal analysis and reasoning
- legal research
- factual investigation
- communication (oral and written)
- counselling clients
- negotiation
- understanding litigation and alternative dispute resolution processes and consequences
- organisation and management of legal work, and
- recognising and resolving ethical dilemmas.<sup>177</sup>

The 'fundamental values of the profession' according to MacCrate report, are

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<sup>172</sup>.K Young *Practising certificate survey 1998-99* Law Society of NSW Sydney 21.

<sup>173</sup>.See further ch 5.

<sup>174</sup>.K Mack 'Teaching procedure: new ideas and new skills for new dispute resolution processes' *Paper Beyond the Adversarial System Conference* Brisbane 10-11 July 1997.

<sup>175</sup>.See also Lord Chancellor's Advisory Committee on Legal Education and Conduct *First report on legal education and training* HMSO London 1996, 15.

<sup>176</sup>.American Bar Association *Legal education and professional development – An educational continuum (Report of the task force on law schools and the profession: Narrowing the gap)* ABA Chicago 1992 (MacCrate Report).

<sup>177</sup>.id 139-140.

- the provision of competent representation
- striving to promote justice, fairness and morality
- striving to improve the profession, and
- professional self development.<sup>178</sup>

3.21 The MacCrate Report touched off widespread debate in the United States about, among other things, the particular vision or image of a 'lawyer' which informed the report; what is desirable and practical to be included in (and, therefore, what is to be excluded from) the core curriculum of law schools; and the relative roles of the universities and the profession in contributing to the complete education of lawyers.<sup>179</sup> The American Association of Law Schools (AALS), for example, has suggested that the statement of skills should be viewed as 'a work in progress' to be 'discussed, critically analyzed and progressively refined', but not yet used as a benchmark in determining accreditation. As the AALS wrote in its formal response to the MacCrate Report

The education of lawyers must not merely involve the acquisition of knowledge and skills; it must include the cultivation of creative thinking and imagination, an appreciation of the commonality of the human condition, and the development of a sense of judgment and responsibility.<sup>180</sup>

3.22 In Australia, there was some discussion about legal education in the period leading up to the Pearce Report, and in its immediate aftermath.<sup>181</sup> However, in recent times there has been little to parallel the energy and passion of the American debate. This is explicable in terms of the time and resources devoted to the rapid expansion of the legal education system at a time of strained resources; however, it means that there has been too little reflection about where the system is going, and why, at a time when the delivery of legal professional services is also undergoing dynamic change.

3.23 It is notable that where the MacCrate Report focusses on providing law graduates with the high level professional skills and values they will need to operate in a dynamic work environment, and assumes that lawyers will keep abreast of the substantive law as an aspect of professional self development, the equivalent Australian list – the 'Priestley 11' – focusses entirely on specifying areas of substantive law.<sup>182</sup> In other words, MacCrate would orient legal education

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<sup>178</sup> *ibid.*

<sup>179</sup> See eg Symposium on the 21st century lawyer (1994) 69(3) *Washington Law Review* 505.

<sup>180</sup> American Association of Law Schools *Statement of the American Association of Law Schools on the MacCrate Report* May 1993.

<sup>181</sup> See C McInnis & S Marginson *Australian law schools after the 1987 Pearce Report* Centre for the Study of Higher Education University of Melbourne 1994.

<sup>182</sup> The Consultative Committee of State and Territorial Admitting Authorities, headed by Justice Priestley of NSW, compiled a list of compulsory subject areas for academic legal study, colloquially known as the 'Priestley 11', which individuals must complete in order to fulfil admission requirements – and this includes 'Professional Conduct'. Although this does not directly affect law

around *what lawyers need to be able to do*, while the Australian position is still anchored around outmoded notions of *what lawyers need to know*.

3.24 In saying this, the Commission does not wish to perpetuate a false polarity between substantive knowledge and professional skills. It is obviously important to provide law students with a basic grounding in the major areas of substantive law, especially 'building block' areas such as contracts and public law, and to acquaint them with how these areas developed over time — that is, to provide an appreciation of the common law method. Nor is it possible to teach legal professional skills effectively in a substantive vacuum, or in manner which does not promote intellectual analysis and reflection on law as an art and a social science as well as a technical or professional service.

3.25 In the absence of an ongoing debate, it is worthwhile to set out briefly some of the specific issues and initiatives with respect to the current state of skills teaching in Australia.

### *Teaching ethics and professional responsibility*

3.26 As a general matter, the movement towards national, uniform standards for admission to practice has had a limited effect on law schools to date. Perhaps to the extent that there have been changes this has involved ensuring the availability (if not necessarily the compulsory status) of subjects which are required for admission purposes, such as legal ethics and professional responsibility.

3.27 In its 1993 report *Complaints against lawyers*, the New South Wales Law Reform Commission (NSWLRC) affirmed its strong belief (and recommended accordingly) that

the study of legal ethics and professional responsibility should be an integral part of any law school program, whether this involves mounting a discrete, compulsory subject or dealing with these questions as a significant part of a larger subject. It is only during this formative period in a lawyer's education that there is an opportunity for sustained study, discussion and reflection.<sup>183</sup>

The NSWLRC also made clear its view that

it is inadequate to teach legal ethics and professional responsibility as if these are matters of etiquette which must simply be transmitted, committed to memory and recalled on the appropriate occasions (such as at the examination). Rather, these are matters which are bound up in the fundamental nature and essence of lawyering and legal professional *practice*, which necessitates a *process* or *problem-solving* approach to the subject. Ideally this involves a clinical approach, and certainly the

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school curricula, universities are under pressure to provide those subjects to graduates in order to satisfy academic requirements to practise law. The availability and content of professional responsibility courses do vary from law school to law school, however.

<sup>183</sup>New South Wales Law Reform Commission Report 70 *Scrutiny of the legal profession: Complaints against lawyers* NSWLRC Sydney 1993, para 5.21 (NSWLRC 70).

opportunity for reflection and discussion, but in any event we regard the 'large lecture' as an unsuitable pedagogical technique (and the large lecture hall an unsuitable venue) for creating a professional sensibility and developing a thoughtful and lasting commitment to ethical conduct.<sup>184</sup>

3.28 In a submission to the Commission, the Kingsford Legal Centre stated that ethical concerns are remote and not of high priority to students until they are faced with real clients and real issues.<sup>185</sup> There is a growing support for clinical legal education programs, which provide opportunities to take a contextualised 'ethics in practice' approach in the course of university studies. In the absence of the availability of a clinical program, undergraduates should be taught general theory and critical perspectives of professional ethics, with additional study of the detail of the rules and their application during vocational training.<sup>186</sup>

3.29 Many law schools already have made considerable changes to their curricula and course content in these directions. These areas of education and training also need to be built upon in pre admission practical legal training and continuing legal education courses.

### *Communication skills*

3.30 A survey of Australian lawyers who graduated in 1991 and 1995 reported that the skills they most frequently used were oral communication and report or letter writing. Some 'legal skills', such as solving legal problems, legal analysis and reasoning, and providing legal advice, were among the most frequently used skills, but were nonetheless utilised less frequently than the 'generic skills'.<sup>187</sup>

3.31 Many of the formal complaints about lawyers made by clients concern problems with communication, such as delays in responding to client requests, a failure to communicate matters relevant to the case, or rudeness and discourtesy.<sup>188</sup>

3.32 Some law school programs incorporate subjects such as communication skills into the early part of the course and then build on the introductory material in later

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<sup>184</sup>.id para 5.24.

<sup>185</sup>.Kingsford Legal Centre *Submission* 99.

<sup>186</sup>.eg S Parker *Cost of legal services and litigation Discussion Paper No 5: Legal Ethics* Senate Standing Committee on Legal and Constitutional Affairs Canberra 6, 100-104; see C Menkel-Meadow 'Can a law teacher avoid teaching legal ethics?' (1991) 41 *Journal of Legal Education* 3, 9.

<sup>187</sup>.S Vignaendra Centre for Legal Education *Australian law graduates career destinations* Department of Employment Education Training and Youth Affairs Canberra May 1998.

<sup>188</sup>.eg the most significant areas of complaint reported by the Legal Services Commissioner of New South Wales in the period July 1996 to June 1997 were costs/bills (46.5%); ethics (37.4%), and communication (31.6%). The Office of the Legal Services Commissioner (NSW) *Annual report 1996-97*, 8-9. The NSWLRC's inquiry into complaints against lawyers (which led to the establishment of the statutory office of the Legal Services Commissioner) also found that poor (or no) communications with clients was one of the major and continuing sources of complaints against lawyers. See New South Wales Law Reform Commission Discussion Paper 26 *Scrutiny of the legal profession: Complaints against lawyers* 1992 para 2.29-2.30.

stages.<sup>189</sup> Others approach the issue of skills training at undergraduate level by incorporating a practice or office unit within the program.<sup>190</sup> However, many law schools provide little or no serious training in this area, whether from lack of resources, expertise or commitment to this form of skills development within a law course.

3.33 Skills introduced and developed during undergraduate law school can be enhanced and expanded at the practical legal training and/or the practical experience stage prior to admission. The Commission considers that there is merit in all law schools incorporating communication skills as a compulsory aspect of training in the early part of the undergraduate degree.

### *Advocacy skills*

3.34 As discussed above, a significant proportion of lawyers are involved in litigation work, and litigation forms the core of practice for many professionals. Law is said to be practised 'in the shadow of the litigation system' – even those lawyers not actively or directly engaged in litigation still require an understanding of trial practice, procedures and dynamics. Advocacy skills practice is an important and developing aspect of training for lawyers at law school, in practical legal training and within the profession (through continuing education programs).

3.35 Poor advocacy can prolong proceedings, reduce the quality of decision making and increase costs for clients and the courts and tribunals. One leading proponent of advocacy training has asked

[w]hy should the profession and public put up with repeated blundering by young advocates? The profession as a whole should consider the need to ensure that all advocates are basically qualified. Basic competence can be assessed over a period of training.<sup>191</sup>

3.36 Such training might be expected to begin in law schools, but until recently was marginal or an 'add on'; a situation said to be attributable, at least in part, to an 'historic reluctance to embrace skills training in the law school curriculum'.<sup>192</sup> At least as important a factor is that such courses are expensive to run and most

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<sup>189</sup>For example, the University of Wollongong has a compulsory subject called 'Communication skills' in the first year of the degree. Other universities such as the University of Newcastle offer a practical training course which is integrated into the academic program and also satisfies the requirements for admission.

<sup>190</sup>eg Griffith University client centred legal practice unit which aims to examine and develop the concept of client centred legal practice; Deakin University teaches practical legal skills through the use of fictional law firms; Bond University requires students to complete compulsory subjects in communication skills, information technology, cultural and ethical values and management.

<sup>191</sup>Hampel J quoted in Australian Law News 'Training advocates to basic standards' (1991) 26(2) *Australian Law News* 12–14.

<sup>192</sup>W Westling 'The case for trial advocacy training within the law school' (1993) 67(4) *Australian Law Journal* 258.



academics do not have extensive advocacy experience. Some advocacy training courses tend to focus on 'appellate' style advocacy (mooting) rather than on trial advocacy. The latter is much to be preferred, in that it exposes students to trial 'dynamics' and helps to develop their working understanding of the rules of evidence, strategic decision making, and trial based ethical constraints.

3.37 The bulk of advocacy training occurs outside of the academy. Within professional pre admission education and training, traditional bar reader's courses provide advocacy training<sup>193</sup> and there are trial practice exercises within solicitor admission courses. Broader advocacy training has gained momentum and recognition, notably through the activities of the Australian Advocacy Institute (AAI), established in 1991.

3.38 The AAI conducts workshops for members of the legal profession and other organisations, such as government departments. The workshops include those focussing on general advocacy skills and on training advocacy teachers, as well as specialist workshops on appellate advocacy and family law advocacy, and inhouse training workshops for law firms.<sup>194</sup> The AAI is currently assisting the Law Society of NSW to develop and implement a specialist accreditation program in advocacy. With solicitors now enjoying rights of audience in all courts, and the increased blurring of the traditional distinction between solicitors and barristers, advocacy training as an aspect of continuing education has been especially important for solicitors.

3.39 Justice Hampel has suggested that the Australian legal profession should not allow its members to hold themselves out as specialist advocates without assessment of their basic skills or ability to represent clients in court.<sup>195</sup> In 1991, Justice Hampel and Melbourne barrister Felicity Hampel argued for the involvement of the Law Council of Australia in the development of advocacy training on a national basis.<sup>196</sup>

### *Dispute resolution*

3.40 As the empirical data elsewhere in this paper confirms, the vast majority of civil disputes commenced within the federal court and tribunal system are concluded by means other than formal adjudication.<sup>197</sup> They are settled by

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<sup>193</sup>.eg Victorian Bar Readers' Course provides a significant component of advocacy training.

<sup>194</sup>.See F Hampel & T Artemi 'Australian advocacy teaching goes international' (Autumn 1994) 88 *Victorian Bar News* 88-92; 'New service offered by Institute' (February 1995) 30(1) *Australian Lawyer* 24-26; G Hampel & N Mushin 'Australian Advocacy Institute: Family law workshops' (1996) 11 (1) *Australian Family Lawyer* 31.

<sup>195</sup>.Hampel J 'Teaching advocacy: Past, present and future' *Paper Australasian Professional Legal Education Council Skills Development for Tomorrow's Lawyers Conference College of Law Sydney* 4-8 September 1996.

<sup>196</sup>. 'Training advocates to basic standards' (1991) 26(2) *Australian Law News* 12, 13-14.

<sup>197</sup>.See para 10.66, 10.109-10.111, 12.40-12.41.

negotiation or through other dispute resolution mechanisms (such as mediation, conciliation or arbitration) or discontinued by the initiating party.

3.41 Many, if not most, university law schools offer dispute resolutions subjects (and sometimes whole postgraduate diplomas or degrees in dispute resolution), although few offer a compulsory 'stand alone' subject for undergraduates in this area.<sup>198</sup> The Commission considers that there is merit in all law schools incorporating some consideration of dispute resolution as a practice requirement into LLB degree programs. This would develop in students an early understanding of the extent of non adjudicatory dispute resolution practice, the range of dispute resolution options available and their theoretical underpinnings, as well as providing students with an appreciation of the relative strengths and weaknesses of different types of dispute resolution.

3.42 If law teaching placed greater emphasis on the role of lawyers as dispute managers and resolvers, as facilitators of harmonious legal relations, and as legal communicators who presented clients with an array of methods by which disputes could be resolved, this could address perceived problems in the adversarial system of litigation.

3.43 The University of Ottawa, for example, has a first year program which trains students in mediation case analysis, effective client representation and developing specialised strategies to solve disputes creatively. The teaching method involves the use of case mediation exercises and student interaction with local members of the bar. Dispute resolution is also integrated into the substantive materials of the first year contracts and property classes. In the second and third year of the undergraduate degree at Ottawa, students must also complete a mandatory skills unit in mooting, trial advocacy, or interviewing, counselling and negotiation. Such courses could usefully be adapted in Australia.

#### *Practical Legal Training (PLT)*

3.44 The trend in Australia since the 1970s has been away from the system of 'articled clerkships' as the main method of providing post university practical legal training, in favour of a model recommended by reports here and in the United Kingdom: that is, six to nine months of second stage professional education in an institutional setting followed by a period of in service training, under supervision,

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<sup>198</sup> Those that do include Deakin University and Newcastle University. Almost all of the other law schools in Australia introduce an ADR component into their compulsory first year courses such as Australian Legal System (Bond University), Introduction to Law (Flinders University), Legal Studies (James Cook University). Other law schools offer ADR courses as electives such as Dispute Resolution (Sydney University), Dispute Resolution and Legal Ethics (University of Melbourne), Alternative Dispute Resolution (Murdoch University), Negotiation and Mediation (Northern Territory University) and Dispute Resolution Law (ANU).

with a restricted practising certificate.<sup>199</sup> While the theory behind articles, as with other apprenticeship training, was that intending lawyers would best learn skills, practices and procedures on the job, the reality often involved poor supervision, menial tasks, and limited exposure to a range of different types of work. The shift 'had as much to do with concern over the inadequacy of the articles system as it did with the belief in the efficacy of formal, institutional training'.<sup>200</sup>

3.45 However, PLT courses also have been subject to strong criticism from academics and the profession, and have generally received poor ratings from students.<sup>201</sup> This area of legal education also has been in considerable ferment in recent years. Course content and formats are changing. As mentioned above, a number of universities have moved to establish their own PLT programs. At the same time, the largest PLT program in New South Wales, the College of Law, has moved away from its former affiliation with the University of Technology, Sydney, and has re-established itself as a stand alone institution (with close links to the Law Society).<sup>202</sup>

3.46 The Australasian Professional Legal Education Council (APLEC), comprised of PLT providers, recently prepared 'Standards for the Vocational Preparation of Australian Legal Practitioners', setting down nine fields of prescribed training.<sup>203</sup> These standards are not enforceable but represent a step towards uniform national standards and practices.

3.47 In April 1998, the Standing Committee of Attorneys-General (SCAG) released a discussion paper reviewing the basis upon which admission to legal practice should be granted in Australia. One issue concerned the post graduation PLT training requirements. The discussion paper also proposed a model for dealing with legal education, training and admission.<sup>204</sup> The SCAG approach was concerned

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<sup>199</sup> See Committee of Inquiry on the Future of Tertiary Education in Australia *Report 1964* vol 2, para-52-56 (Martin report); and the Committee on Legal Education *Report 1971* para 100 (Ormrod Report). The Martin report recommended two years of practical legal training.

<sup>200</sup> D Weisbrot *Australian lawyers* Longman Cheshire Melbourne 1990, 149.

<sup>201</sup> *id.*, 150-151.

<sup>202</sup> The College of Law has moved to a program involving a shorter period of formal instruction and a period of in-service professional practice. The college's professional program for 2000 is to be delivered in two stages which can be completed in either order. Stage I is the institutional component and students can undertake it by traditional full-time print based course or a full-time electronic course which uses multimedia. Both courses can be completed within 15 weeks. Subject to demand there will also be part-time courses in both print and electronic modes. Stage II is the practical experience program and includes 15 weeks in a workplace approved by the Practical Experience Committee appointed by the Board Directors of the College of Law. See College of Law *2000 Program outline* College of Law St Leonards Sydney 1999.

<sup>203</sup> These are criminal practice; family practice; civil litigation; wills and estate practice; business law and practice; property practice; professional skills; work management and business skills and ethics and professional responsibility.

<sup>204</sup> Briefly: completion of a law degree (which meets the 'Priestley 11' areas of knowledge); completion of other pre admission training in preliminary professional responsibility and ethics; entitlement to admission to legal practice with practice rights restricted for 3 years after commencing practice

primarily with what is required for admission, while APLEC has emphasised the skills and knowledge required for practice.

3.48 The Commission's view is that an Australian Council on Legal Education, proposed below, would be the appropriate body to consult with the relevant stakeholders (including employers) to develop further a set of national standards in this area. In this process, consideration should be given to the articulation of clinical and skills training programs at the undergraduate level with subsequent PLT programs – and, indeed, whether an expansion of the role of university PLT courses might obviate the need for a separate PLT stage. It is worth noting in this connection that there are no PLT programs or requirements in the United States. Law graduates in the United States who pass a written bar examination are eligible for admission to practise without any further educational requirements. The Commission is unaware of any research that suggests the Australian system provides a better grounding for new lawyers or any greater measure of quality assurance and consumer protection.

#### *Continuing legal education (CLE)*

3.49 Continuing legal education programs are said to contribute to professional competence by allowing lawyers to keep up to date in their own and related fields, by refreshing and expanding substantive knowledge and professional skills, and by aiding specialisation.<sup>205</sup>

3.50 In the United States, most states have introduced mandatory continuing legal education (MCLE) programs. Minnesota was the first to do so in 1975. Typically, MCLE requirements specify that a practitioner must spend a certain number of hours (generally 8-12) each year undertaking approved courses to retain practice rights.<sup>206</sup>

3.51 In Australia, the Law Society of New South Wales adopted the concept of MCLE in principle in 1985, and formalised this in 1986. Solicitors in New South Wales must now complete 10 hours of accredited CLE training per annum in order to maintain a current practising certificate. While participation in CLE activities is encouraged by other legal professional associations in Australia, no other State or

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during which time the practitioner is able only to practise as an employee under supervision; within 5 years of commencing practice the lawyer must also complete structured training courses in 8 primary skill based subjects, and complete at least 3 months' practical legal work experience in each of 4 separate areas of legal practice.

<sup>205</sup> Committee of Inquiry into Legal Education in New South Wales *Report* 1979, 209 (Bowen report). See also C Houle *Continuing learning in the profession* Josey-Bass San Francisco 1980, 34.

<sup>206</sup> For example, California now requires 36 hours over a three year period. However, retired judges, law professors and elected officials are exempted. The California Supreme Court is currently considering a challenge to the constitutional validity of these requirements, in large part on the basis that these exemptions violate the equal protection clause.

Territory has followed the New South Wales lead in making this mandatory.<sup>207</sup> Thus, New South Wales solicitors and Commonwealth accredited migration agents<sup>208</sup> are the only Australian legal practitioners subject to MCLE requirements.

3.52 The earliest CLE providers in Australia tended to be university law schools.<sup>209</sup> This is now a very crowded field. Other CLE course providers include law societies and bar associations, PLT institutions, government departments and agencies, specialist legal interest groups, and private companies. Particularly since the advent of MCLE requirements in New South Wales, large law firms have begun to operate their own 'inhouse' programs<sup>210</sup> – a practice which has attracted special scrutiny in the US, but has not excited particular concern in Australia.<sup>211</sup>

3.53 In IP 21,<sup>212</sup> the Commission noted that the common criticisms of MCLE programs included that they

- focus on delivery and attendance as a means of upgrading or maintaining credentials without assessment of whether CLE delivers actual learning outcomes
- are often poorly designed and do not reflect the principles of adult learning
- encourage or allow lawyers to abdicate their personal responsibility to maintain currency of knowledge and skills, resulting in reduced professionalism and commitment to lifelong learning
- impose a 'laggard' model across the entire professional group, assuming that educational structures designed to capture those who are disinclined to upgrade their skills are appropriate for all members of the group
- do not articulate supportable educational objectives and therefore make it impossible to determine the effectiveness of programs.

3.54 While surveys of lawyers who have taken CLE programs indicate widespread support for this scheme and the belief that such programs do improve competence, there has yet to be a study which provides clear evidence that this is the case.<sup>213</sup>

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<sup>207</sup>.See ALRC IP 21 *Review of the adversarial system of litigation: Rethinking legal education and training* ALRC Sydney 1997, para 7.7.

<sup>208</sup>*Migration Act 1958* (Cth) s 290A and Migration Agents Regulations 1998 Sch 1. Not all migration agents are lawyers, but all migration lawyers, legal and non legal, must complete the CLE.

<sup>209</sup>Such as the Committee for Postgraduate Legal Education at the University of Sydney. For many years, graduates of other law schools were permitted to join the Sydney University Law Graduates Association in order to enrol in Sydney's CLE courses, which were often the only ones available.

<sup>210</sup>ALRC IP 21 *Review of the adversarial system of litigation: Rethinking legal education and training* ALRC Sydney 1997, para 7.15–7.16.

<sup>211</sup>D Weisbrot *Australian lawyers* Longman Cheshire Melbourne 1990, 152.

<sup>212</sup>ALRC IP 21, para 7.9. See also C Roper 'Mandatory continuing legal education for professionals, particularly lawyers: A literature review' (1985) 2 *Journal of Professional Legal Education* 76.

<sup>213</sup>D Weisbrot *Australian lawyers* Longman Cheshire 1990, 152.

3.55 Much of the criticism of CLE has been directed more at the manner in which it is carried out — the design and quality of programs, the absence of testing, the attachment to programs which are focussed more on recreation than education — than on the basic concept. One of the strongest supporters of MCLE, Canadian Professor Neil Gold, has nevertheless also been one of the strongest critics of the present lack of structure and regulation, stating that

It is odd ... that only in continuing legal education do we equate education with attendance, that is to say, attendance with results. We seem to be satisfied that attendees will acquire knowledge and skill without the proof or incentive that testing provides. There is more that is odd. I know of no regulations in any jurisdiction which set minimum standards for continuing legal education course materials, the qualifications of instructors, or the instructional methods used by them. ... There are no rules which prescribe basic criteria concerning participant-instructor ratios or of the physical environments in which learning is supposed to take place. No provider of which I have heard tests the results of instruction (learning) and few assure the constant evaluation of their curriculum, materials, manuals or other efforts through systematic programs.<sup>214</sup>

3.56 Gold's powerful, but constructive criticism, points to the way to make CLE programs more effective in future. A national body setting standards for all aspects of legal education, such as the one we propose below, would be ideally placed to provide some rationality and integrity to CLE programs.

3.57 In the Commission's view, properly conceived and implemented CLE programs should play an important role in maintaining high professional standards and assuring public confidence in the competence of the legal profession and the efficacy of the justice system. For this reason, we suggest that all States and Territories adopt mandatory CLE (MCLE) requirements for all practising lawyers.

3.58 The Commission also believes strongly that CLE programs should be more firmly embedded within the regulatory system and more widely utilised by disciplinary authorities as a sanction, with the aim of remedying poor professional practice.

3.59 For example, in New South Wales, since 1993, if the Legal Services Tribunal is satisfied that a legal practitioner is guilty of professional misconduct or unsatisfactory professional conduct, the Tribunal may 'order that the legal practitioner undertake and complete a course of further legal education specified in the order'.<sup>215</sup> Similar provisions exist in Victoria,<sup>216</sup> Tasmania,<sup>217</sup> Queensland,<sup>218</sup>

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<sup>214</sup>N Gold 'Beyond competence: The case for mandatory continuing learning in law' (1986) 4 *Journal of Professional Legal Education* 17, 20.

<sup>215</sup>*Legal Profession Act 1987* (NSW) s 171C(1)(f).

<sup>216</sup>*Legal Practice Act 1996* (Vic) s 159(1)(e).

<sup>217</sup>*Legal Profession Act 1993* (Tas) s 61(2)(g).

<sup>218</sup>*Queensland Law Society Act 1952* (Qld) s 6R(1)(i)(iii).

and South Australia,<sup>219</sup> but it is not clear that tribunals have seized this initiative in practice.

3.60 Chapter 5 deals with the form and content of legal professional standards. However, the Commission's research and consultations suggest that there are particular education and training issues which arise from the development of such standards.

3.61 Compliance with legal practice standards requires that practitioners are sensitive to ethical dilemmas, can apply the rules to particular situations in practice,<sup>220</sup> and can recognise the interrelationship between the underlying values of the legal system and their own personal and moral values.<sup>221</sup> Although it is highly likely that all practitioners are aware of the existence of rules setting out professional standards, it is much less likely that all practitioners are aware of the substance of these rules, can identify possible practice problems and modify their conduct accordingly.

3.62 In a recent report commissioned by the Law Society of New Zealand, consultations with New Zealand practitioners suggested that

- lawyers do not know the rules of professional responsibility, and/or
- lawyers know the rules but when confronted with a situation they are unable to recognise the ethical issues involved, and/or
- lawyers know the rules and can recognise issues but they do not have the ability to analyse the issues and come up with a satisfactory solution, and/or
- lawyers can do all of these things but they *choose* not to follow the ethical rules, because of external or internal pressures.<sup>222</sup>

3.63 In an environment in which market forces now impact upon the conduct of the legal profession to a much greater extent, the teaching and study of professional ethics becomes more important.<sup>223</sup> As is the case with most other common law jurisdictions, under the emerging rules for uniform admission to practice in Australia,<sup>224</sup> education in legal ethics is a prerequisite for admission.

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<sup>219</sup> *Legal Practitioners Act 1981 (SA)* s 77AB(1)(d)(ii).

<sup>220</sup> B Brooks 'Ethics and legal education' (1998) 28(1) *Victoria University of Wellington Law Review* 157, 162.

<sup>221</sup> J Dickson & M Noone 'The challenge of teaching professional ethics' *Paper Skills Development for Tomorrow's Lawyers Australasian Professional Legal Education Council Conference College of Law Sydney 4-8 September 1996*, 848. See also M Tzannes 'Legal ethics teaching and practice: Are there missing elements?' *Paper Australasian Professional Legal Education Council Skills Development for Tomorrow's Lawyers Conference College of Law Sydney 4-8 September 1996*, 873.

<sup>222</sup> B Brooks 'Ethics and legal education' (1998) 28(1) *Victoria University of Wellington Law Review* 157, 162.

<sup>223</sup> A Paterson 'Legal ethics: Its nature and place in the curriculum' in R Cranston (ed) *Legal ethics and professional responsibility* Clarendon Press Oxford 1996, 181.

<sup>224</sup> The United States in 1974 made it compulsory to include professional responsibility courses in undergraduate degrees. In Canada a report has recommended that aspects of professional responsibility should be taught in all stages of legal education: A Paterson 'Legal ethics: Its nature

3.64 A number of submissions to the Commission stated that many of the practice values held by practitioners are developed in the first few years of ‘on the job’ training within the profession, rather than at university.<sup>225</sup>

3.65 Most State and Territory law societies and bar associations provide continuing legal education programs for practitioners, which are supplemented by a variety of conferences, lectures, workshops, and information sessions provided by other organisations such as university law schools, PLT providers, government agencies, commercial operators, and groups such as Lawyers Engaged in Alternative Dispute Resolution (LEADR), the AAI, and the Australian Institute of Judicial Administration (AIJA). Continuing legal education provides a forum for addressing general or specific issues relating to professional conduct.

#### *A coordinating national body*

3.66 All of the foregoing suggests that legal education and training in Australia, after a period of rapid growth and change, requires a body to provide a degree of oversight and coordination to ensure that standards are developed and maintained, and a measure of quality assurance provided.

3.67 This is not to suggest that there should be a monolithic body engaged in central planning and enforcing a single vision of what is required for the education and training of the Australian legal profession. Rather, the institution is to ensure the regular exchange of information, dialogue, coordination and collaboration in this area. This process should also include the development of coherent national standards and objectives in relation to all aspects of legal education and training.

3.68 In England and New Zealand, a statutory Council of Legal Education now oversees and coordinates all of the major facets of legal education and training. Models for developing a national policy and strategy on admission and accreditation have emerged in Australia in recent years. The Law Council and the Priestley Committee have proposed the establishment of a ‘National Appraisal Council’, while the National Advisory Committee on Legal Education and Professional Admission similarly has proposed a ‘National Standards Council’. Both models would involve representatives of the major stakeholders overseeing legal education and training (which could extend to community legal education and dispute resolution training).

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and place in the curriculum’ in R Cranston (ed) *Legal ethics and professional responsibility* Clarendon Press Oxford 1996, 182. The New Zealand Council of Legal Education has recently adopted a policy that all law graduates after 31 July 2000 must pass an approved course in ethics and professional responsibility if they wish to practice law: B Brooks ‘Ethics and legal education’ (1998) 28(1) *Victoria University of Wellington Law Review* 157, 157.

<sup>225</sup> NRMA Submission 81; A Kenos Submission 80.



3.69 The Commission favours the establishment of a standing Australian Council on Legal Education. Such a council should be a statutory body, reporting to the SCAG through the federal Attorney-General.

3.70 Membership in such a body should be broadly constituted and drawn from the major interest groups, such as legal educators, practising lawyers, consumer groups, judicial officers, officials of legal professional associations, students and so on. The Commission believes very strongly that this council should not be a representative body, comprised of nominees from peak organisations or appointees from a specified set of categories (for example, one law dean, one judge, one law society president). Locking members into fixed positions based on the positions of their home organisations would severely inhibit the ability of the council to operate as a genuinely deliberative body and would impair the quality of the advice provided to the Attorneys-General.

3.71 The council should have responsibility for considering as aspects of undergraduate legal education (LLB degree programs and the equivalent), PLT, CLE, the educational requirements for admission to practise and for specialist accreditation, and education and training issues for non lawyer participants in the justice system (such as ADR practitioners).

3.72 Given that the setting of educational requirements for admission purposes (and the associated accreditation of educational programs) is currently a State and Territory matter, and there is no suggestion that State and Territory admitting authorities will readily relinquish this power (even with the development of portable practising certificates), the work of the proposed council will of necessity be advisory. Thus, the national standards it would promulgate would serve as benchmarks rather than rules. Similarly, any regime the council might establish to accredit education providers (whether this involved law schools, or PLT providers, or CLE programs) – if indeed it moved in this direction – would carry considerable weight, but not the force of law, unless adopted by an admitting authority.

3.73 Given the dynamic state of legal education in this country, and increased blending and merging of the stages of legal education, the Commission questions whether the proposed council should be organised formally into committees or divisions based on the traditional three phases approach. While the council will, of course, determine its own processes and working groups, it should be careful not to structure itself in such a way as to constrain debate about the most effective means of delivering high quality legal education, nor to discourage innovation and experimentation in practice.

**Proposal 3.1.** The federal Attorney-General, in consultation with the Standing Committee of Attorneys-General (SCAG), should establish a broadly constituted advisory body known as the Australian Council on Legal Education. This council would be charged with developing model

standards for legal education and training for lawyers and other key participants in the justice system.

## Education for judges and magistrates

3.74 Until the 1980s there was virtually no formal judicial education in Australia. Judges were presumed to possess the necessary skills and experience for judicial functions because the vast majority of them had been selected from among the ranks of the (mid career to senior) bar, and thus familiar with evidence, practice and procedure, advocacy and courtroom dynamics.

3.75 The Access to Justice Advisory Committee (AJAC) has noted that

As important as any issue affecting access to justice is the quality of consideration provided by the judiciary during the hearing and determination of a matter. While it is generally accepted that the quality of judicial decision making in Australia is of a very high standard, there is, no doubt, still room for improvement in this area. Given the inherent costs of litigation, not only to individuals but to the community at large, the fewer first instance decisions that need to be corrected on appeal the cheaper and more efficient the court system will be. There is clearly a nexus between the quality of decision making and the total cost of the court system, and hence access to justice.<sup>226</sup>

3.76 In recent years there has been a belated recognition that transforming a skilled lawyer into a skilled jurist can be 'a tricky manoeuvre', that 'going from adversary to adjudicator means changing one's attitude, learning and using new skills, and in some cases severing old ties.'<sup>227</sup> As practitioners, judges previously may have specialised in one or a few areas of law, whereas on the bench they may be required to adjudicate in areas in which they have limited experience. Some may lack expertise about other dispute resolution options available, and many will have little experience when it comes to case and trial management, or the use of information technology, or in writing judgments. Most basically, there is the need for senior practitioners to re-orient themselves from their role as partisan advocates to dispassionate judges.

3.77 Recognition of a need for, and a commitment to provide, more formal and structured education for judges has come relatively late to the Australian justice system.<sup>228</sup> By comparison with other common law jurisdictions, the development of

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<sup>226</sup>.Access to Justice Advisory Committee *Access to justice – an action plan* AGPS Canberra 1994, para-15.80 (AJAC report).

<sup>227</sup>.D Catlin 'Michigan's magic touch in educating judges' (1986) 25 *The Judges Journal* 32.

<sup>228</sup>.Although the civil code systems set up elaborate induction training for judicial aspirants, they too have implemented formal continuing judicial education programs only relatively recently. See eg J Staats German Ministry of Justice 'The education and further training of German judges for their duties in civil proceedings' *Paper Beyond the Adversarial System Conference Brisbane 10–11 July 1997* and M Lemonde 'Training of judicial officers and attorneys in France' *Paper Beyond the Adversarial System Conference Brisbane 10–11 July 1997*. French judges are guaranteed the right to

judicial education here is 'patchy' and we are said to be 'still in the judicial education starting blocks or perhaps even on the warm up track'.<sup>229</sup>

3.78 Similarly, AJAC found that the provision of judicial education in the United States, the United Kingdom and Canada is 'to varying degrees, an advanced institution', in contrast to 'the rather ad hoc' position in Australia.<sup>230</sup>

3.79 In the United States, continuing judicial education – taken to be an 'integral and essential part' of the judicial system – is said to be necessitated by workload pressures, the size and changing jurisdictions of courts, the complexity of modern judicial programming and case management, and the adaptation of new technologies within the justice system.<sup>231</sup> Some form of structured judicial education is mandatory for newly appointed (or often elected) judges in many American states.<sup>232</sup> Thus, judicial education has become a 'big business' in the United States,<sup>233</sup> and a range of judicial colleges and centres provide orientation and continuing education to judges and all court and justice system employees.

3.80 AJAC noted<sup>234</sup> that in the United States, there are 65 national and state bodies actively engaged in judicial education, involving 57000 participants annually, in courses designed for orientation of new judicial officers, continuing education, and 'judicial career development, which emphasises judicial skills such as judgment writing, computer literacy, case flow management etc'. Key providers include the Federal Judicial Center (Washington DC), the National Judicial College (University of Nevada-Reno), the Californian Center for Judicial Education and Research, and the Michigan Judicial Institute. Some organisations such as the Federal Judicial Center are also involved in research and may provide educational programs for all court employees and other related actors, such as mediators and arbitrators.

3.81 In the United Kingdom, a Judicial Studies Board was established in 1979. Initially focussing mainly on sentencing, the role of the Board was expanded in 1985 to cover judicial education in the civil law and family areas, as well as to supervise the training of magistrates and tribunal members. The provision of training programs for the judiciary is now widely accepted. In the words of a recent member

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continuous training in the Institutional Act of 25 February 1992 (loi organique) set at five days training annually throughout their judicial career. However, demand exceeds the supply of courses from the *Ecole Nationale de Magistrature* (ENM).

<sup>229</sup>P Sallmann 'Comparative judicial education in a nutshell: A cursory exposition' (1993) 2 *Journal of Judicial Administration* 245, 245, 252. Note this comment was directed to the situation as at 1993, but is still apposite today.

<sup>230</sup>AJAC report, para 15.89.

<sup>231</sup>J Hudzik 'The continuing education of judges and court personnel' (1989) *Judicial Education Network* 5.

<sup>232</sup>A Riches 'Continuing judicial education in New South Wales' (1988) 6 *Journal of Professional Legal Education* 150.

<sup>233</sup>id, 154.

<sup>234</sup>AJAC Report, para 15.90.

of the Board, 'Twenty years ago, a majority of judges would have denied there was any need for judicial training. Today, only a minority would share that view.'<sup>235</sup>

3.82 Canada also has gone for the centralised model, establishing a national judicial college in 1988 – the National Judicial Institute (formerly the Canadian Judicial Centre). The National Judicial Institute provides much the same array of continuing education and skills development courses as other similar bodies, but is also known for the quality of its innovative programs on issues of gender bias, judicial ethics and cross cultural (especially indigenous peoples) perspectives.

3.83 Judicial training institutions have also been established in New Zealand and Singapore,<sup>236</sup> and each of these jurisdictions has active judicial education projects and courses.

3.84 In Europe, and in several countries in the Asia Pacific region where the selection, promotion and judicial appointment processes has been based upon a career judiciary, there are well established, integrated education systems which train judges in matters relating directly to their judicial office early in their legal careers.<sup>237</sup> In such jurisdictions, the government also tends to play an active and extensive role in the provision of judicial education and training.

3.85 Professional education is expensive. The time taken for education is time away from active case management or decision making. There are significant costs associated with developing and producing materials and paying the salaries of education support staff.<sup>238</sup> In federal courts and tribunals, in particular, the travel costs alone associated with bringing judges and members together for education and training programs can be substantial. In the event, courts and tribunals endeavour to utilise varied media and forums for educational purposes. Many education initiatives are local ones and particular judges, members and staff are sponsored as appropriate to relevant conferences, courses and seminars. Integrated educational servicing allows resources, expertise, programs and facilities to be shared.

3.86 In Australia, such judicial education as exists is voluntary and judge led. Judicial education comprises orientation – the induction into new responsibilities, and continuing education – refreshing, updating and maintaining knowledge and skills. The goals and standards for continuing judicial education are well accepted.

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<sup>235</sup> See M Partington 'Training the judges in England and Wales: The work of the Judicial Studies Board' (1994) 13 *Civil Justice Quarterly* 319, 322.

<sup>236</sup> In 1996 an executive director was appointed to oversee the establishment of the New Zealand Institute of Judicial Studies. The Singapore Centre for Judicial Education and Learning, established in 1996, provides education for subordinate courts.

<sup>237</sup> In many civil code countries the judiciary are trained specifically for the task and as such constitute a career judiciary. See eg A Marfording 'The need for a balanced judiciary: The German approach' (1997) 7 *Journal of Judicial Administration* 33.

<sup>238</sup> The AAT has a professional development unit.

The general purpose of judicial education is 'to maintain and improve the professional competency of all persons performing judicial functions, thereby enhancing the performance of the judicial system'.<sup>239</sup>

3.87 In the United States, research has indicated that judges give the following reasons for participating in education programs

- judicial competence – maintaining competence, developing new skills and keeping up to date
- collegial interaction – interacting and exchanging information and ideas and
- professional perspective – for example, the opportunity to examine the professional role of the judge and the direction and future of the justice system.<sup>240</sup>

3.88 Australian research confirms the importance of those three factors.<sup>241</sup> In addition to these general objectives, judges have identified particular educational needs deriving from their individual experience as well as from their particular levels and functions (eg, as judges in superior courts, lower specialist courts, generalist courts, or appellate courts).

3.89 Much of the impetus to secure formal judicial education has come from judges and magistrates themselves. The spur to implement such courses and programs has come in response to the changing roles and responsibilities of judges and decision makers, and the increased public demands, expectations and scrutiny of the justice system.

#### *The design and implementation of judicial education programs*

3.90 As a general matter, the Commission's submissions and consultations overwhelmingly support voluntary judicial education and its continuing development. There is less support for mandatory judicial education, except perhaps for intake/orientation programs. Voluntary participation is consistent with judicial independence and the self directed mode of learning characteristic of judicial officers.

3.91 The Commission's submissions and consultations have strongly supported significant judicial involvement in the design and delivery of educational services. Armytage has suggested that this reflects the judges' deeply held view that they are the best arbiters of their own learning needs and should operate free from any

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<sup>239</sup>.The principles and standards of the US National Association of States Judicial Educators, cited by L-Armytage 'Educating judges: Lessons from common and civil law approaches' *Paper Beyond the Adversarial System Conference Brisbane 10-11 July 1997*.

<sup>240</sup>.See L Armytage *Educating judges: Towards a new model of continuing judicial learning* Kluwer Law International The Hague 1996, 80.

<sup>241</sup>.id 97.

external prescription.<sup>242</sup> The Commission agrees that this feature of judicial education planning and delivery should continue. However, care also must be taken to ensure that judicial education does not become overly cautious or a closed shop, divorcing judges from exposure to bodies of expertise and community experiences and perspectives from which they could benefit.

3.92 Educational strategies and programs need to identify and respond to individual and collegiate needs. Factors to be considered include: whether a court or tribunal is specialist or generalist; its level in the judicial hierarchy; its geographic location; the nature of the judge's or magistrate's functions or duties; the professional background and level of judicial experience of participants; and the extent of other continuing education experiences.<sup>243</sup>

3.93 There are certain core skills desirable for judges, magistrates and tribunal members. Education and training planning and programs should recognise such common features. Collegial interaction is enhanced by judges, magistrates and tribunal members sharing experiences and discussing common problems and successful (or sometimes unsuccessful) outcomes. Integrated programs are also consistent with the trend towards national practices and procedures, the interrelationships between federal courts and tribunals and their shared jurisdiction in areas of public law and family law.

3.94 The content of judicial education and training is essentially a matter for the relevant institutions and individual judges. Armytage suggests that because judicial education has tended to be ad hoc and eclectic, there is a need for curriculum development in judicial education.<sup>244</sup> He argues that such curriculum development should be planned and implemented within the paradigm of career development as a means of bringing coherence to the acquisition of knowledge and skills.

3.95 The Commission's submissions and consultations have suggested a number of topics for continuing judicial education, including

- managerial skills for judging
- ADR – including the range of dispute resolution methods available and their suitability
- communication skills
- judicial ethics
- gender bias and cross cultural awareness<sup>245</sup> and
- training in information technology and associated issues such as discovery of electronic records.<sup>246</sup>

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<sup>242</sup>.id 172.

<sup>243</sup>.id 97-98.

<sup>244</sup>.id 82.

<sup>245</sup>K Mahoney 'Gender bias in judicial decisions' (1993) 1 *The Judicial Review* 197.

<sup>246</sup>Judicial Commission of New South Wales *Annual report 1996*, 22-23.

3.96 The Commission's research and consultations also confirm the need to provide education and training programs for other court and tribunal staff to promote the efficiency of those institutions.<sup>247</sup> Other decision makers within the litigation system include registrars and arbitrators. Training opportunities for these participants in the litigation system varies. The AIJA organises national conferences for court administrators that are widely attended. The Administrative Review Council (ARC) also hosts conferences and undertakes research relevant to tribunals.

3.97 Training for tribunal members and court and tribunal administrators may also include 'inhouse' courses and annual conferences. The University of Wollongong and Edith Cowan University have developed postgraduate courses for court administrators.<sup>248</sup> It is also common for registrars and others to have attended some form of dispute resolution skills training. Key professional competencies for registrars include communication skills, analytical skills, decision making (and writing), knowledge of substantive law and procedure, and management and dispute resolution skills.<sup>249</sup>

3.98 Each court should have formal education and training available to all key personnel, including registrars, court managers, ADR practitioners and others. This should include skills training, and updating or upgrading knowledge of substantive law, practice and procedure. Court managers should be able to receive training in matters such as case management, dispute resolution techniques, and information technology.

3.99 In 1993, the Judicial Commission of New South Wales (JCNSW) conducted an informal educational needs assessment for the registrars of the Supreme Court of New South Wales. The data collected was correlated with feedback from the legal profession and the assessment of the staff of the JCNSW. Not surprisingly, the main findings were that the key professional competencies were communication skills, analysis, decision making, substantive legal knowledge, management and dispute resolution. Ranked highest in terms of priority were decision making and decision writing, and evidentiary and procedural issues in relation to conducting hearings.<sup>250</sup>

3.100 A national judicial education institute could play a significant role in assisting in the design and provision of education and training for court and tribunal administrators and personnel. It would also be desirable if academic institutions, professional legal training programs and continuing legal education courses could offer more education and training opportunities for these groups.

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<sup>247</sup> See ALRC IP 21, para 3.96-3.100

<sup>248</sup> For example, the University of Wollongong has offered a Graduate Diploma in Court Management since 1991 and a Masters of Law course on court policy since 1995.

<sup>249</sup> L. Armytage *Educating judges: towards a new model of continuing judicial learning* Kluwer Law International The Hague 1996, 96.

<sup>250</sup> *ibid.*

Given their extensive caseloads, there is likely to be continuing interest in further courses and programs designed specifically for these groups.

*A national judicial education and training body*

3.101 Currently, the availability of education for judges and magistrates<sup>251</sup> varies according to jurisdiction. Within Australia, there are specific judicial education programs, such as those provided by JCNSW and AIJA providing specialist and generalist courses including adjudication and communication skills. In some States and Territories there is a growing emphasis upon planned judicial education programs while in others it still remains essentially an ad hoc activity.

3.102 Certain courts and tribunals provide inhouse seminars, workshops and conferences for judges and court administrators, as well as options for judges, members and court staff to attend outside courses and conferences. In other courts and tribunals, however, the educational offerings are slim.<sup>252</sup>

3.103 AJAC proposed that the Commonwealth and States explore the possibility of establishing an independent national judicial education centre to provide courses and other educational material for judges, magistrates, members of dispute resolution tribunals and any other person performing judicial or quasi judicial functions.<sup>253</sup> The Council of Chief Justices of Australia and New Zealand encouraged an initiative on the part of AIJA to establish a National Judicial College. However, the project was abandoned for want of funding.<sup>254</sup>

3.104 As mentioned above, some notable efforts at mounting induction and continuing education programs for judges and court administrators (mainly registrars) have been made in Australia. In New South Wales, the Judicial Commission and the University of Wollongong's Centre for Court Policy and Administration have been important contributors to this enterprise, as has been AIJA nationally.

3.105 The particular deficit in Australian judicial and court education offerings is the lack of a specialist judicial or justice education centre. This is in no way a criticism of the courses and educational material provided by AIJA, JCNSW, the University of Wollongong, or through inhouse programs developed by the courts and tribunals themselves. Indeed, those programs generally have received high

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<sup>251</sup> New South Wales and Victoria have extensive induction, continuing education and mentoring programs available for magistrates. Other States and Territories do not provide formal training for magistrates but provide information and guidance to them through bench books, updating bulletins, circulars and other publications. The AIJA training for magistrates emphasises areas such as Aboriginal cultural awareness, and there is an annual five day magistrates course covering topics such as family law, the role of expert witnesses and evidentiary law: see ALRC IP 21. para3.56-3.68.

<sup>252</sup> ALRC IP 21, 24-38.

<sup>253</sup> AJAC Report, 379.

<sup>254</sup> G Brennan 'The state of the judiciary' (1998) 72 *Australian Law Journal* 33, 37.



commendation. However, as the AJAC report noted, the Judicial Commission's functions relate to New South Wales, AIJA's focus is primarily on judicial administration, and no single court or tribunal is of sufficient size to provide an adequate range of courses for the orientation and continuing needs of all of its judicial officers.<sup>255</sup>

3.106 A specialist centre could provide a range of services to meet the differing requirements of the various jurisdictions and areas of specialisation. One survey of judicial educational needs suggested, for example, that higher court judges sought courses with a consistently broader intellectual preoccupation, while district court judges and magistrates wanted education reflecting more pragmatic, practical issues.<sup>256</sup> There were similar differences in the services preferred by experienced and less experienced judicial officers – with the more experienced valuing judicial skills, 'the art of judging', judicial conduct and ethics and juristic dilemmas courses, as compared with the case management and computer training favoured by those with less than three years experience.<sup>257</sup> The survey also provided some insights into the level and causes of stress for judges and court officers and the onset and severity of 'burn-out'<sup>258</sup> for decision makers, as well as the types of programs which might help to alleviate such problems.

3.107 A specialist judicial institute also would allow appropriate provision of 'social context education', the gender and cultural awareness courses that can be controversial if perceived as amounting to external interference with judicial independence.<sup>259</sup>

3.108 The Commission considers that the proposed institute could prepare and present pre appointment judicial orientation programs available to suitable candidates. Such a course would not be a prerequisite for judicial appointment, but would provide training on core competencies for intending and newly appointed judicial officers. The course should have two objectives: first, to provide information on substantive and practical topics such as judicial ethics, case management, knowledge of ADR services, judgment writing and the use of technology; and

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<sup>255</sup>.AJAC Report, 377.

<sup>256</sup>.L. Armytage *Educating judges: Towards a new model of continuing judicial learning* Kluwer Law International The Hague 1996, 80. Armytage distilled from the JCNSW's comprehensive 1991 educational needs analysis of judicial officers in New South Wales, amongst other matters, the following significant differences between members of particular courts on the usefulness of services: substantive law was regarded as less useful by Supreme Court judges; personal skills and developmental courses were more highly valued by magistrates and least valued by Supreme Court judges; and juristic dilemmas were more highly valued by Supreme Court judges and less by District and Local Court judges.

<sup>257</sup>.id 87.

<sup>258</sup>.id 88. On these matters: 80.5% of respondents reported stress, indicating that they worry about the consequences of decisions and making mistakes and that (86%) they find the job lonely. Some 85.1% of respondents reported burn-out – mainly after 11+years, but also to a lesser extent between 6–10 years.

<sup>259</sup>.G Brennan 'The state of the judiciary' (1998) 72 *Australian Law Journal* 33, 36–7.

second, to provide a transition to judicial office for newly appointed judges through the development of skills and attitudes required for effective judging. A model for such a course can be found in the National Judicial Orientation Program offered by AIJA in conjunction with the JCNSW.

3.109 In summary, the Commission supports the establishment of a national judicial education institute since it would

- confirm the nexus between judicial education and judicial independence
- be the most effective means of developing and maintaining national standards
- be generally consistent with self directed, judge led, educational approaches
- take advantage of economies of scale
- have advantages over a system of inhouse education insofar as it could utilise a variety of external inputs and programs to suit new or more experienced judges
- permit development of integrated curricula for judges, magistrates and tribunal members
- enhance collegiality between judges, magistrates and tribunal members and
- provide an opportunity to develop partnerships with, for example, university law schools and legal professional organisations, to design and present programs which may complement or supplement inhouse efforts.

3.110 The Commission's submissions and consultations have expressed some support for the establishment of such a national, independent, judicial education centre.<sup>260</sup>

3.111 The Commission does not envisage that the national judicial education institute would provide each and every course or program with which it is involved. Rather, the primary roles of the institute would lie in setting standards and monitoring and overseeing courses and programs, as well as collaborating with courts and tribunals. The institute should be involved in organising and supervising a scheme for the continuing education of judicial officers and tribunal members, essentially through committee representation by the courts and tribunals and in conjunction with the professional development programs set up by each court and tribunal. The institute should determine any demarcations between programs for the judiciary and tribunal members. It should consider whether separate divisions within its organisation are desirable with liaison and collaboration between divisions.

3.112 The institute would have links with other bodies involved in education and professional development in Australia and overseas, and arrange consultants and external experts to assist in providing seminars and programs. The institute could also sell its expertise and services in the market place (both locally and overseas), but consistent with its commitment to judicial independence and the public interest

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<sup>260</sup> See for example LCA *Submission 196*.

in providing high quality educational opportunities for legal and judicial decision makers.

3.113 The Commission considers that the organisation, structure and functions of the JCNSW<sup>261</sup> constitute a suitable basic model for the proposed National Judicial Education Institute.

**Proposal 3.2.** The federal Attorney-General should facilitate a process to establish a national institute for judicial education and administration, with formal responsibility for meeting the education and training needs of all federal judges, magistrates and review tribunal members. This could be achieved by reconstituting the Australian Institute for Judicial Administration (AIJA) for this purpose, in consultation with the Judicial Conference of Australia.

The institute should be sufficiently resourced by the Commonwealth to carry out its mission, and also should receive contributions from the States and Territories on the basis of usage. The institute would regularly utilise partnerships with other entities (such as academic institutions and professional associations) to conduct its education, training and research programs.

The major functions of the institute would be to

- promote and facilitate the education of judges, magistrates and review tribunal members
- establish and provide orientation courses for new appointees
- organise and/or supervise continuing education programs for judges, magistrates and review tribunal members
- liaise and collaborate with other relevant bodies, such as the Judicial Commission of New South Wales
- consult with professional groups and the community as necessary in relation to judicial training and education and
- undertake and commission relevant research.

## Education and training for tribunal members and staff

3.114 As is the case with judicial officers, there is no general set of educational or experiential pre requisites for appointment to a federal tribunal. In the case of some tribunals, such as the Administrative Appeals Tribunal (AAT), some criteria for appointment of members are laid down in legislation. However, for most tribunals, qualifications for appointment are fixed from time to time by individual ministers who are responsible for making appointments and recommending them to the Executive Council.<sup>262</sup> Tribunal members are appointed from a broad range of

<sup>261</sup> See para 3.140 -3.147.

<sup>262</sup> See ALRC IP 21 para 3.72-3.74.

occupational groups. Legal skills are relevant, although tribunals have sought a diverse, multi skilled membership.<sup>263</sup>

3.115 The ARC has suggested that the following skills are essential or desirable for administrative merits review tribunal members

- understanding of merits review and its place in public administration
- knowledge of administrative review principles
- analytical skills
- personal skills and attributes and
- communication skills.<sup>264</sup>

3.116 The Commission endorses the recommendation of the ARC that tribunals cooperate to develop a 'minimum set of core skills and abilities required of effective tribunal members, for use in organising professional development of members and in the process of developing selection criteria'.<sup>265</sup>

3.117 Given the diverse range of backgrounds of tribunal members, and their differing needs, the Commission believes that basic education and training programs generally should be separate from those of judicial officers.

3.118 In its *Better decisions* report, the ARC recommended that

- review tribunals should ensure that all new members have acquired a minimum level of knowledge and skills before they commence reviewing decisions
- the skills and experience of review tribunal members should be developed through their participation on multi member panels where appropriate and through training and development programs and
- all review tribunals should cooperate with each other and where appropriate with courts and the AIJA to provide professional development programs for members.<sup>266</sup>

3.119 Generally, individual federal tribunals provide induction training for new appointees and varied, ongoing professional development training programs for members. This includes seminars, members' conferences, and training in decision making, mediation, case management and cultural and gender issues. Members also are encouraged and assisted to attend external seminars and conferences of particular relevance, such as those organised by the ARC, the AIJA. Manuals and publications on procedural and substantive matters and relevant recent decisions are available to members.

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<sup>263</sup>.Administrative Review Council Report 39 *Better decisions: Review of the Commonwealth merits review tribunals* AGPS Canberra 1995 para 4.10 (ARC 39).

<sup>264</sup>.id para4.17.

<sup>265</sup>.id rec31.

<sup>266</sup>.id para4.84-4.92.

3.120 In this context, consultations have identified the need for tribunal members to receive additional training in dealing with unrepresented applicants. This should include training in questioning witnesses, using appropriate language and short, focussed questions. Such training is particularly important in those jurisdictions in which decision making frequently turns on matters of credit. Training in investigative skills should be another priority – again, particularly in cases in which applicants are unrepresented. A variety of studies have made clear the difficulties faced by unrepresented applicants in identifying legally relevant information and issues and in preparing and presenting such evidence. Training should feature the practice and limits of investigation and the need for members to evaluate dispassionately evidence secured through their own investigations.<sup>267</sup>

3.121 Administrative decision makers generally appreciate the benefits of education and training programs. In the education needs analysis commissioned by the AAT in 1992, members rated a variety of benefits which they hoped to derive from professional development, including, ‘confirming that you have missed nothing’, ‘a sense of public responsibility’, ‘exchanging experience with peers and socialising with colleagues’ as well as the acquisition of skills in hearing and caseload management and knowledge of principles of ethical conduct.<sup>268</sup> Members’ assessments of their educational needs varied, depending on their particular skills and experiences.<sup>269</sup>

3.122 Each review tribunal should have an effective professional development program with stated goals and objectives. The program should include induction and orientation programs, mentoring programs, and continuing training and education programs. Legal training in areas relevant to decision making should be available to non legal members of tribunals. The AAT professional development program is a useful model to consider for wider application.

3.123 In 1992, Justice Deirdre O’Connor highlighted the importance of ongoing professional development of AAT members

Members of the Administrative Appeals Tribunal [like judges] have on going developmental needs, although the nature of these needs will obviously be

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<sup>267</sup>.eg that it should have no higher value than the information presented by the parties. The scope, ambit and limits of tribunal investigation have been canvassed in a number of migration and refugee cases before the Federal Court. For detailed discussion of the issues raised by the presence of unrepresented applicants in review tribunal proceedings and the investigative role of review tribunals see ch 12.

<sup>268</sup>.L. Armytage ‘AAT continuing professional development needs analysis: Final report and recommendations’ *Unpublished* December 1992, 15–18.

<sup>269</sup>.id 16–17. For example, members rated the benefits they ought to get from training and education differently, depending on whether they were new or established members, legal or non legal, full-time or part time. Part time members rated the exchange of experiences with peers as significantly more important than did fulltime members. Legally trained members rated ‘confirming that you have missed nothing, keeping abreast of recent developments and enhancing professional competence’ as significantly more important than did non legal members.

different to those of judges. ... Much has been said and written about the legalism in the Tribunal ... It has to be acknowledged that when members are appointed from the legal profession and other areas of the law, they are likely to bring with them a lawyer's way of doing things. ... Professional development can be a useful means of equipping members with different, non legal techniques which they can use in conducting matters in the Tribunal. Without knowledge of such techniques, the culture of legalism cannot be changed.<sup>270</sup>

3.124 Legislation and practice regarding review tribunals should emphasise that tribunal processes are essentially administrative, and not judicial, in character.<sup>271</sup> As the AAT stated in the report of its 1991 review

The Tribunal must carve out its own place in the Australian system of government. In short it must become a first class tribunal rather than a second class court ... having defined the environment within which it operates, and in keeping with its proper role and function, the Tribunal must develop its own ethos. The Tribunal is not simply an administrative institution, nor is it simply a legal institution. It is in fact both and as such occupies a unique place in the Australian system of government and law.<sup>272</sup>

3.125 The education and training of tribunal members should be examined in the wider context of developing an 'administrative justice system', which involves not only tribunal members but also has links to case officers and registrars, federal and State departmental officers, investigators and regulators. Administrative justice is advanced by mechanisms that allow agencies and review tribunal decision makers to work together to identify problems and solutions regarding the governing legislation, process or structure of administrative decision making.<sup>273</sup>

3.126 There has been some recognition in Australia of the need for peak bodies in administrative review to liaise more closely, exchange information and ideas, and secure common training and education for tribunal members and staff. The ARC recommended the establishment of a Tribunals Executive, comprising at least the principal members of each federal merits review tribunal, to undertake these varied functions.<sup>274</sup> The Commission sees considerable merit in such a proposal —

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<sup>270</sup>.D O'Connor 'Future directions in Australian administrative law: the Administrative Appeals Tribunal' in P Bayne (ed) *AAT essays 1976-1996* AAT Sydney 1996, 13, 16.

<sup>271</sup>.This conclusion informs the detailed discussion of federal review tribunal proceedings contained in ch 12. This discussion emphasises the duties of tribunals to initiate investigations or inquiries to supplement the evidence provided by parties, the importance of a 'bridge' between review tribunals and the agencies whose decisions are subject to review and the distinct role of representatives in review tribunal proceedings.

<sup>272</sup>.AAT *Report of the review of the Administrative Appeals Tribunal* AAT Sydney 1991, 26.

<sup>273</sup>.M Priest 'Fundamental reforms to the Ontario administrative justice system' *Rethinking civil justice: Research studies for the civil justice review* Ontario Law Reform Commission Toronto 1996 vol 2, 562-565.

<sup>274</sup>.ARC 39 *Better decisions: Review of the Commonwealth merits review tribunals* AGPS Canberra 1995 rec85. The Tribunal Executive would have the function of identifying areas appropriate for cooperation between the tribunals, planning that cooperation and where appropriate arranging for the

especially now that principal members explicitly undertake responsibility to ensure the quality of members' work through performance standards and performance evaluations, or exercise express authority to give directions to apply 'efficient processing practices'.<sup>275</sup> Such an executive council should include as a member the President of the ARC. The council could operate much as the Council of Chief Justices does,<sup>276</sup> as a forum to consider and secure research on matters of common interest. The council could also include the heads of the large general Victorian and NSW review tribunals and other similar State tribunals if such are created. However, the Commission sees the council as a collective drawn from review tribunals, not from tribunals determining private disputes. Review tribunals have developed in a different context, have close, but sometimes tense, dealings with portfolio ministers or departments and are reviewing decisions set down in complex, often changing legislation. This context and the move to amalgamated, generalist tribunals underlines the need for such a council and defines it particularly as a council drawn from review tribunals.

3.127 There are strong arguments for a body that would not only facilitate the education and training for tribunal members and staff but also assist in facilitating communication between tribunals and primary decision makers.

3.128 The federal government has proposed that the ARC be given new functions to

- facilitate the training of members of authorities of the Commonwealth and other persons in making administrative decisions and
- promote knowledge about the Commonwealth administrative law system.<sup>277</sup>

3.129 The representation on the proposed tribunals council of the President of the ARC would ensure the council's links with the ARC.

3.130 Another model, which exists in Ontario, is a broad 'society' of tribunal members and primary decision makers established with the overall aim of improving the administrative justice system. The Society of Ontario Adjudicators and Regulators (SOAR) is an organisation of individuals (institutions do not qualify) drawn from all agencies involved in the administrative justice system, including those that make decisions at first instance, merits review tribunals and tribunals that act as industry regulators.<sup>278</sup> The work of SOAR illustrates the kind of contribution

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providers of services common to all tribunals: ARC 39 *Better decisions: Review of the Commonwealth merits tribunals* AGPS Canberra 1995, para 7.49.

<sup>275</sup>.eg *Migration Act 1958* (Cth) s 353A(2).

<sup>276</sup>.See further ch 12.

<sup>277</sup>.Law and Justice Legislation Amendment Bill 1998 (Cth) Sch 1.

<sup>278</sup>.SOAR was incorporated to facilitate: the sharing of professional information and experience amongst its members; to assist in the education and training of agency members and executive staff, to be a reliable source of information and consultation for government concerning the administration, development and improvement of the administrative justice system; to develop codes of ethics and conflict of interest guidelines for agencies, members and executive staff; to cooperate with, and

such body might make to augment that of governmental policy advisers such as the ARC.<sup>279</sup> The Commission does not see the proposed council as a society of members, as in the Ontario model. There are difficulties of scale in establishing such a model within the federal system.

3.131 The Commission also considers that there would be merit in the development of a pre appointment tribunal orientation program available to suitable candidates. The course would not be a prerequisite for tribunal appointment, but rather would provide training and assessment on core competencies for newly appointed tribunal members. The tribunals council and the ARC could develop and provide such a program.

**Proposal 3.3.** Every federal review tribunal should have an effective professional development program with stated goals and objectives. This should include access to induction and orientation programs, mentoring programs, and continuing education and training programs. In particular, legal training in areas relevant to decision making should be made available to members of tribunals who do not have legal qualifications.

**Proposal 3.4.** The federal review tribunals should establish a Tribunals Council to promote and facilitate the sharing of professional information and experience amongst tribunal members, as well as assisting in education and training for administrative decision makers. This initiative would also have the beneficial effect of providing a reliable source of practical information and advice for government concerning the operation and development of the administrative justice system.

**Question 3.1.** Should there be a non mandatory pre appointment tribunal orientation program available to suitable candidates to provide training and assessment on core competencies for newly appointed tribunal members? If so, who could develop and provide such a program, for example, the Administrative Review Council and the proposed Tribunals Council or the universities through a graduate program?

## Judicial accountability – complaints and disciplinary processes

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facilitate the collaboration between other agency members and staff in other Canadian provinces and related agencies with relevant fields of interest. M Priest ' Fundamental reforms to the Ontario administrative justice system' in Ontario Law Reform Commission *Rethinking civil justice: research studies for the civil justice review* 1996 vol 2, 561-569.

<sup>279</sup>SOAR has prepared a range of interesting papers including a statement of principles of administrative justice; a code of professional conduct; a service equity policy a performance management paper and sample rules of practice. It has an education advisory committee, and an education coordinator appointed to establish training programs for agencies. <<http://www.instantweb/~soar>> (21 April 1999).



3.132 Judicial independence is a cornerstone of our justice system and is the 'primary source of the assurance of judicial impartiality'.<sup>280</sup> Traditionally, judicial accountability is seen to be fully provided for by judges functioning in public, hearing both sides of the question, and providing reasons for their decisions (that in many cases may also be reviewed by other courts).<sup>281</sup> Informal means of accountability have also existed within the judicial system, such as peer pressure and the moral and administrative authority of the chief judge of each jurisdiction. Professor Shimon Shetreet has noted the mechanisms used formally and informally for 'checking' judges, including the parliament, the media, appellate courts and the legal profession.<sup>282</sup> There had been no formal, transparent process for lodging or investigating complaints against judicial officers for poor performance, nor a code of conduct against which behaviour may be measured, nor have there been sanctions available short of removal from office by a vote of both houses of parliament.

3.133 In recent years, courts have come under much the same pressure as other public institutions to operate with a greater degree of efficiency, transparency and accountability. The Chief Justice of the High Court of Australia, Murray Gleeson, has acknowledged that

The public is entitled to expect that courts, as institutions, and judges as individuals, will conduct their business with reasonable efficiency. Courts, within the limits of budgetary and other constraints, should be effectively administered. Judges should handle cases before them, so far as it is within their power to do so, in such manner as to promote economy and efficiency. They should produce their judgments reasonably promptly, having regard to their other judicial commitments.<sup>283</sup>

3.134 In the United Kingdom, the 1993 Royal Commission on Criminal Justice expressed concern at the absence of any satisfactory monitoring of judges' work to ensure that standards are maintained, and recommended the institution of 'an effective formal system of performance appraisal'.<sup>284</sup> The Woolf Report on the civil justice system<sup>285</sup> made similar recommendations, arguing that appraisal would help promote performance standards and consistency of decision making.<sup>286</sup>

3.135 The balancing act for courts may be more difficult than for most other public institutions. Great weight must be accorded to maintaining judicial independence,

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<sup>280</sup> M Gleeson 'Who do judges think they are?' (1998) 22 *Criminal Law Journal* 10, 10.

<sup>281</sup> *id.* 13.

<sup>282</sup> S Shetreet *Judges on trial: A study of the appointment and accountability of the English judiciary* North-Holland Publishing Company Amsterdam 1976.

<sup>283</sup> M Gleeson 'Who do judges think they are?' (1998) 22 *Criminal Law Journal* 10, 13.

<sup>284</sup> Royal Commission on Criminal Justice *Report Cmnd Paper 2263* HMSO London 1993, ch 8, para 99.

<sup>285</sup> Lord Woolf *Access to justice – Final report to the Lord Chancellor on the civil justice system in England and Wales* HMSO London 1996 ch 8, para 1.

<sup>286</sup> K Maleson 'Judicial training and performance appraisal: The problem of judicial independence' (1997) 60 *Modern Law Review* 655, 656.

while at the same time moving the judiciary to accept an increased level of scrutiny and an increased premium placed on efficiency. The experience in other jurisdictions suggests that this balance can be achieved.<sup>287</sup>

*The experience in the United States and Canada*

3.136 All jurisdictions in the United States now have judicial codes of conduct.<sup>288</sup> Many of these codes are based upon the American Bar Association's Model Code of Judicial Conduct.<sup>289</sup> There is also a code of conduct established by the Judicial Conference of the United States which applies to all federal judges.<sup>290</sup> Areas covered include integrity and independence, impartiality and diligence, avoiding impropriety or the appearance of impropriety, and extra judicial activities, particularly avoiding conflicts of interest with judicial duties and refraining from inappropriate partisan political activity.

3.137 All 50 states and the District of Columbia have commissions or councils to investigate and determine complaints about judicial conduct.<sup>291</sup> Judicial councils in each circuit play the same role for the federal judiciary. California developed the first judicial conduct body in 1960. The California Judicial Council is established under the Constitution of California and is empowered to improve the administration of justice in that state.<sup>292</sup> The Council has adopted the California Rules of Court, which have the force of law, and has published standards of judicial administration, which do not have the force of law but provide goals for courts and guidelines with respect to practice and procedure. California also has adopted a Judicial Code of Ethics, in the form of canons consisting of broad declarations and commentaries, which applies to all conduct on and off the bench.<sup>293</sup>

3.138 Some Canadian jurisdictions also have developed judicial codes of conduct.<sup>294</sup> A Canadian Judicial Council now operates federally, and there are also

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<sup>287</sup>.id 656-657.

<sup>288</sup>.Canadian Judicial Council *A place apart: Judicial independence and accountability in Canada* Canada Communication Group – Publishing Ottawa 1995, 143.

<sup>289</sup>.For a discussion of the US Model Code see V Morabito 'Time for an Australian code of judicial conduct' (1993) 67(7) *Law Institute Journal* 615. See also Canadian Judicial Council *A place apart: Judicial independence and accountability in Canada* Canada Communication Group – Publishing Ottawa 1995, 126.

<sup>290</sup>.Canadian Judicial Council *A place apart: Judicial independence and accountability in Canada* Canada Communication Group – Publishing Ottawa 1995, 149.

<sup>291</sup>.id 123.

<sup>292</sup>.See California Court Rules Appendix: Division II California Code of Judicial Ethics March 1999.

<sup>293</sup>.ibid. Another example of a US system is the Arizona Code of Judicial Conduct and its Commission on Judicial Conduct, an independent agency that investigates complaints against state and local judges involving alleged violations of the code of judicial conduct: Arizona Commission on Judicial Conduct <<http://www.supreme.state.az.us/cjc/default.htm>>

<sup>294</sup>.Canadian Judicial Council *A place apart: Judicial independence and accountability in Canada* Canada Communication Group – Publishing Ottawa 1995, 143.

some provincial judicial councils.<sup>295</sup> For example, British Columbia has established a statutory Judicial Council, with its object to improve the quality of judicial services and to

- prepare and revise, in consultation with the judges, a code of ethics for the judiciary
- consider proposals for improving the judicial services of the court
- provide for the continuing education of judges
- consider proposed appointments of judges
- conduct inquiries in respect of allegations of judicial misconduct and
- report to the Attorney-General on matters of importance.<sup>296</sup>

3.139 Under the British Columbia legislation, a formal complaints process is established, with the chief judge required to conduct an investigation respecting the fitness of a judge where the chief judge considers that an investigation is required, or where he or she is directed to do so by the Attorney-General. Upon completion of the investigation, the chief judge may take any corrective action considered necessary using the powers provided under the legislation, or may order that an inquiry be held regarding a judge's fitness. If a complaint is of a serious nature, the legislation provides for an inquiry before a tribunal, which may be the Judicial Council or a Supreme Court judge.

*The Judicial Commission of New South Wales (JCNSW)*

3.140 The JCNSW is an independent, statutory corporation established in 1986 under the *Judicial Officers Act 1986* (NSW).<sup>297</sup> The JCNSW has the following main functions

- to assist the courts to achieve consistency in imposing sentences
- to organise and supervise an appropriate scheme for continuing education and training of judicial officers
- to examine complaints against judicial officers and
- to give advice to the Attorney-General on such matters as the JCNSW thinks appropriate.<sup>298</sup>

3.141 In relation to education and training the JCNSW

- provides judicial officers with bench books and other legal research material

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<sup>295</sup> *ibid.*

<sup>296</sup> See Judicial Council of British Columbia *Annual report 1995*, 1 and *Provincial Court Act 1979* (RSBC) c-341.

<sup>297</sup> The JCNSW has a staff of 28 headed by a Chief Executive and an annual budget of \$2.5 million. Judges and magistrates have a significant input into the continuing judicial education program and through various education committees determine the content of the program. There is a Standing Advisory Committee on Judicial Education and education committees of each of the State's six courts: Judicial Commission of New South Wales *Annual report 1997-1998*.

<sup>298</sup> *ibid.*

- publishes a monthly information bulletin
- conducts seminars and annual conferences
- conducts a residential orientation course for newly appointed magistrates
- provides, in conjunction with AIJA, an orientation course for newly appointed judges and
- provides training in technology.

3.142 In order to carry out its dual functions of education and discipline, the JCNSW has established separate education and conduct divisions.

3.143 A complaint may be made by any member of the public (including another judicial officer) or referred by the NSW Attorney-General. On receiving a complaint in an appropriate form the JCNSW is required to conduct a preliminary investigation. On the basis of this, the JCNSW may summarily dismiss the complaint; classify the complaint as 'minor'; or classify it as 'serious'. The JCNSW considers a complaint 'serious' where, if substantiated, the grounds would justify parliamentary consideration of the removal from office of the judicial officer in question. Where a complaint is considered 'minor' it may be referred to the appropriate head of jurisdiction or to the Conduct Division.<sup>299</sup>

3.144 All serious complaints are referred to the Conduct Division, which comprises a panel of three judicial officers, or two judicial officers and a retired judicial officer. The Conduct Division must prepare a report to the Governor after investigating the complaint, setting out the Division's conclusions. In cases where a complaint is wholly or partly substantiated, and the Conduct Division is of the view that the matter may justify parliamentary consideration of the removal of the judge or magistrate from office, the Attorney-General must lay the report before both Houses of Parliament.

3.145 The JCNSW ordinarily does not consider allegations of criminal conduct (for example, corruption), which are left to prosecuting authorities or the Independent Commission Against Corruption.

3.146 The JCNSW investigates complaints but has no power to impose penalties or otherwise discipline judicial officers. Serious complaints may result in parliamentary action. Less serious matters may result in action by the head of the relevant jurisdiction, such as counselling or making new administrative arrangements to deal with the source of the problem. There is no provision for a judicial officer found to be performing unsatisfactorily — but perhaps not so poorly as to warrant outright dismissal — to be required to undertake a program of judicial education.

3.147 During the reporting year 1997-98, a total of 127 complaints were made to the JCNSW: 114 were examined and dismissed; seven minor complaints were disposed

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<sup>299</sup>The description of the JCNSW's complaints process is derived from the Judicial Commission of New South Wales *Annual report 1997-1998*, 37-44.

of; five serious complaints were disposed of and one complaint was withdrawn. The most common causes for complaint involved apprehension of bias, failure to give a fair hearing, or conduct which was said to be hostile or discourteous to the complainant. The serious complaints concerned a magistrate's partiality and improper use of his office and a Supreme Court judge for excessive delay in the delivery of judgments. After investigation and reporting to parliament the magistrate resigned; the Legislative Council voted against removal of the judge who had been suffering from depression. The judge subsequently resigned.

### *Current position of federal courts and tribunals*

3.148 Section 72 of the Australian Constitution provides that

The Justices of the High Court and of the other courts created by the Parliament –  
(ii) Shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity.

3.149 This provision applies to federal courts such as the Federal Court and the Family Court. There are no other formal complaints procedures provided for in the legislation establishing these federal courts. The federal courts have established their own informal complaints mechanisms with usually the head of the jurisdiction ultimately responsible for deciding the response to a complaint and any subsequent action.<sup>300</sup>

### *The need for a federal judicial commission*

3.150 The Commission's research and consultations point to the need to establish a federal version of the JCNSW to receive and investigate complaints against judicial officers.

3.151 In the Commission's view, the New South Wales model works well in providing a formal process for dealing with complaints against judicial officers, and thus enhancing standards and promoting public confidence in the system, without impermissibly intruding upon the independence of the judiciary. At this stage, the Commission leans towards the New South Wales model of housing within a single overarching structure the body (division) charged with judicial education and training and the body (division) charged with complaints handling and conduct.

3.152 Some refinements of the New South Wales model should be considered in the context of the federal system. For example, in the interests of transparency, where the federal judicial commission has referred a matter to the chief justice or chief magistrate, the chief justice or chief magistrate should be required to report to the Governor-General regarding any action taken. Use could be made of directions

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<sup>300</sup>For a discussion of the complaints handling procedure of the Family Court of Australia see Family Court of Australia *Annual report 1997-98*, 54-55.

for further education and training for judges who are the subject of a substantiated complaint. A federal judicial commission which combined education and conduct functions would be in a good position to develop programs tailored for this purpose.

3.153 A standing federal judicial commission also would be in a good position to assist in the development of a code of judicial conduct and a performance appraisal system, no doubt in consultation with the Judicial Conference of Australia, if it is decided to move in this direction. AIJA has commissioned a paper on the establishment of a code of judicial conduct which has not yet been released.

**Proposal 3.5.** The Commonwealth should establish an independent judicial commission, modelled on the Judicial Commission of New South Wales, to receive and investigate complaints against federal judges and magistrates. The commission would report to the Governor-General. The commission could be established as a stand alone body or, preferably, as a conduct division of the proposed national institute for judicial education (again, following the model of the Judicial Commission of New South Wales). Consideration should be given as to whether the legislation establishing such a commission should include a range of options to make directions to deal with poor performance short of removal.

## 4. Litigants, dispute resolution and cost in the federal civil justice system

### Introduction

4.1 The Commission's terms of reference refer to the need for a simpler, cheaper and more accessible legal system. The altered terms of reference specifically ask the Commission to focus on excessive costs for legal services.<sup>301</sup>

4.2 This chapter attempts to quantify the overall financial costs of providing and using the federal civil justice system. The major components comprise: the cost of operating federal courts and tribunals including premises, administration, equipment and the personnel of courts; the cost of government and industry dispute resolution services such as the Human Rights and Equal Opportunity Commission (HREOC), the Commonwealth Ombudsman, of private industry ombudsmen and mediation organisations; and the private costs to users.

4.3 The information presented in this chapter has come from government reports, annual reports and court and tribunal information, and on users' costs, from empirical research conducted by the Commission. The Commission's data is qualified by the data itself. The Commission generally cites median costs figures and the cost range. Data collection is dependent on the responses received and may be skewed towards particular registries and case types. There are significant differences in costs between case types. The Commission's data collection did not include qualitative details on the individual cases and the data does not therefore allow assessment of whether the costs charged were reasonable.<sup>302</sup>

4.4 Notwithstanding the qualifications associated with costs data, there are some interesting observations to be made on costs.

- From the figures available the public cost of providing federal courts, tribunals, the Australian Industrial Relations Commission (AIRC) and related organisations such as commissions and ombudsmen, can be estimated at \$349 million in 1997-98.<sup>303</sup> When the federal government's funding of legal

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<sup>301</sup>For the altered terms of reference see p 7-8.

<sup>302</sup>Note, H Genn 'Survey of litigation costs: Summary of main findings' Annexure III to Lord Woolf *Access to justice – Final report to the Lord Chancellor on the civil justice system in England and Wales* HMSO London 1996 analyses whether costs are proportionate to the sum of money in dispute. This assessment is difficult in federal jurisdiction where there are few clear money claims. The Commission's data therefore does not allow assessment of whether costs are proportionate to the claim.

<sup>303</sup>,\$327 million for 1996-97: See tables 4.3, 4.6, 4.12.

aid commissions and community legal centres is included,<sup>304</sup> the total expenditure comes to \$470 million.<sup>305</sup>

- Government spending on the federal civil justice system is relatively small compared with other areas of government funding.
- Tribunals, which were established as an economical alternative to courts, now cost the federal government almost as much as the federal courts.<sup>306</sup>
- The median legal fees paid by applicants in the AAT, for example, for workers' compensation cases, are little different than the median costs to, say, litigation in the Family Court of Australia, a superior court of record.<sup>307</sup> One should heed this evolution over 20 years in considering the new cheaper alternatives to courts, namely private and government conciliation and mediation bodies.
- There is a diversity of parties using the federal courts and tribunals. Parties are not limited to the very poor and the very wealthy.<sup>308</sup>
- There is a need for indicative information on costs to litigants. The Commission's data shows that median fees charged using scales were significantly lower than those negotiated under costs agreements between lawyers and their clients. Fee scales are said to provide an artificially high floor on the costs charged. They may in fact provide a useful bottom floor.<sup>309</sup>

## **The cost of providing federal courts, tribunals and other bodies**

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<sup>304</sup>Legal Aid NSW *Annual report 1998*, 60, 68, 69; Legal Aid Victoria *Annual report 1997/98* <<http://home.vicnet.au/~viclegal/aboutvla/annual/>> (April 22 1999); Legal Aid Qld *Annual report 1997/98*, 6, 39, 46; Legal Services Commission SA *20th Annual report 1997-98*, 27, 32, 33; Legal Aid Tasmania *Annual report 1998*, 30, 34; Legal Aid WA *1997/98 Annual report*, 50, 61, 62; Legal Aid ACT *21st Annual report 1997/98*, 36, 41, 46; NT Legal Aid *Annual report 1997-98*, 44, 60.

<sup>305</sup> \$466 million for 1996-97.

<sup>306</sup> The net costs to the federal government of federal courts in 1997-98 was \$144 million; of federal review tribunals and the AIRC \$109 million, which does not include the National Native Title Tribunal (NNTT), which cost a further \$20 million: see tables 4.3 and 4.4. In terms of caseload, federal courts finalised 47390 matters in 1997-98; federal merits review tribunals and the AIRC finalised 57 049 matters: table 4.7; Immigration Review Tribunal (IRT) *Annual report 1997-98*, 8; Refugee Review Tribunal (RRT) *Annual report 1997-98*, 14; Social Security Appeals Tribunal (SSAT) *Annual report 1997-98*, 16; Veterans' Review Board (VRB) *Annual report 1997-98*, 25. Note, however, the differences in counting between federal courts and tribunals. For example, the IRT counts cases finalised, while the VRB and the SSAT count applications finalised.

<sup>307</sup> See para 4.59.

<sup>308</sup> See para 4.55.

<sup>309</sup> See para 4.94-4.108.



4.5 This section attempts to set out the total costs to government of funding the major determinative bodies in the federal civil justice system. The courts are the High Court, Federal Court and the Family Court of Australia.<sup>310</sup> The tribunals include the Administrative Appeals Tribunal (AAT), the Immigration Review Tribunal (IRT),<sup>311</sup> the Refugee Review Tribunal (RRT), the Social Security Appeals Tribunal (SSAT), the Veterans' Review Board (VRB) and others.<sup>312</sup> The AIRC is also considered.

### Courts

4.6 The following three tables show the public expenditure by the federal government on courts, including expenditure on premises, equipment and personnel. The total overall cost is in the vicinity of \$170 million of which about two-thirds is spent on the Family Court (which includes federal expenditure on family law proceedings in State and Territory local courts and for the Family Court of Western Australia).

**Table 4.1 Courts: gross public expenditure (\$ million)**<sup>313</sup>

	1996-97	1997-98
High Court	8.8	9.3
Federal Court <sup>a</sup>	43.8	49.0
Family Court <sup>b</sup>	111.0	108.2
Total <sup>c</sup>	167.5	169.4

- a The total expenses for the Federal Court in 1997-98 were \$67 966 000. The figure here has been recalculated to take account of expenditure on tribunals and for one off items such as the library holdings revaluation decrement.
- b Includes Family Court of Australia, Family Court of Western Australia and federal payments to State and Territory governments for family law services provided by State and Territory local/magistrates courts.
- c Includes courts building services and Law Courts Limited – operating expenses.

<sup>310</sup> Figures for the Family Court include the Family Court of Australia, the Family Court of Western Australia, and payments to State and Territory governments for family law services provided by State and Territory local/magistrates courts.

<sup>311</sup> This body has now been subsumed, with the Migration Internal Review Office (MIRO), into the Migration Review Tribunal (MRT).

<sup>312</sup> Other tribunals included in this assessment are the Australian Competition Tribunal, the Copyright Tribunal, the Defence Force Discipline Appeal Tribunal, the Federal Police Disciplinary Tribunal, and the Superannuation Complaints Tribunal. The Commission has not included policy oriented federal tribunals such as the Australian Broadcasting Tribunal.

<sup>313</sup> Total expenses under net cost of services item in the financial statements of the courts' annual reports: High Court *Annual report 1997-98*, 36; Federal Court *Annual report 1997-98*, 64, 66, 74; Family Court of Australia *Annual report 1997-98*, 99. Figures on courts building services, Law Courts Limited – operating expenses, payments to the States under the *Family Law Act 1975* (Commonwealth) and child support scheme legislation and to the Family Court of Western Australia from the Attorney-General's Dept *Annual report 1997-98*, 102.

4.7 The courts attract some revenue which offsets the gross cost to the government.<sup>314</sup> The main source of revenue is court fees which, as shown in table 4.2, comprise about 90% of total revenue. Other sources of court revenue include charges on the use of court resources such as venue hire and gains from sales of assets and interest. Not all of this revenue is returned directly to the courts for their use. Revenue from fees, which represents about 15% of gross expenditure, is credited to the general funds of the federal government.

**Table 4.2 Courts: revenue generated from fees and other sources (\$ million)**<sup>315</sup>

	1996-97		1997-98	
	Fees	Total	Fees	Total
High Court	0.7	0.8	0.5	0.7
Federal Court	10.5	11.6	8.1	8.9
Family Court	14.6	17.2	14.6	15.9
Total	25.8	29.6	23.2	25.5

4.8 The following table subtracts the revenue generated by the courts as in table 4.2 from the gross public expenditure in table 4.1 to illustrate the net cost to the government for providing federal courts infrastructure.

**Table 4.3 Courts: net public cost (\$ million)**

	1996-97	1997-98
High Court	8.1	8.7
Federal Court	33.2	40.9
Family Court	96.6	94.3
Total	137.9	143.9

4.9 The federal government therefore spends a net amount of approximately \$144million each year on federal courts.

#### *Tribunals and the Australian Industrial Relations Commission*

4.10 This section summarises the public expense and revenue from the operation of federal review tribunals and the AIRC. Table 4.4 sets down federal government expenditure on federal review tribunal buildings, equipment and personnel at around \$65 million, of which about 40% is for the AAT. The AIRC costs about \$40 million each year.

**Table 4.4 Tribunals and the AIRC: gross public expenditure (\$ million)**<sup>316</sup>

<sup>314</sup>High Court *Annual report 1997-98*, 36, 48; Federal Court *Annual report 1997-98*, 64; Family Court of Australia *Annual report 1997-98*, 99, 100.

<sup>315</sup>Total revenues from independent sources plus total revenues from administered revenues and expenses in the financial statements of the courts' annual reports: High Court *Annual report 1997-98*, 36, 48; Federal Court *Annual report 1997-98*, 64; Family Court of Australia *Annual report 1997-98*, 99-100.

	1996-97	1997-98
AAT	25.5	25.6
IRT and RRT	20.0	21.5
SSAT	9.4	9.1
VRB	6.9	6.5
Other review tribunals <sup>a</sup>	2.5	2.7
AIRC	41.2	43.4
Total	105.5	108.8

- a The Australian Competition Tribunal, the Copyright Tribunal, the Defence Force Discipline Appeal Tribunal, the Federal Police Disciplinary Tribunal and the Superannuation Complaints Tribunal.

4.11 The main sources of revenue for review tribunals derive from the sales of goods and services. These include charges for the use of tribunal resources such as venue hire. Revenue from fees represents about one-third of the total revenue generated by tribunals. In the AIRC, in 1997-98 revenue from fees was \$0.4million, and total revenue was \$0.5 million.<sup>317</sup> Only the AAT, IRT, RRT and AIRC generate fees and other revenue. In 1996-97 total fees were \$0.6 million, and total revenue was \$1.5 million. In 1997-98, total fees were \$0.9 million, and total revenue was \$1.8-million.<sup>318</sup> As with federal courts, the fees component of revenue generated is credited to general funds not reserved for the tribunal or commission in question.

4.12 The following table subtracts the revenue generated by merits review tribunals and the AIRC from the federal government expenditure in table 4.4 to illustrate the net cost to the government of providing these tribunals and the AIRC.

**Table 4.5 Tribunals and the AIRC: net public cost (\$ million)**

<sup>316</sup>.Total expenses under net cost of services item in the financial statements of the tribunals' and the AIRC annual reports: AAT *Annual report 1997-98*, 60; Department of Immigration and Multicultural Affairs *Annual report 1997-98*, 141, for financial statements of the IRT and the RRT; Department of Social Security *Annual report 1997-98*, 288 for financial statements of the SSAT; Veterans' Review Board *Annual report 1997-98*, 48; Federal Court *Annual report 1997-98*, 66 for financial statements of the Australian Competition Tribunal, Copyright Tribunal, Defence Force Discipline Appeal Tribunal and the Federal Police Disciplinary Tribunal; Superannuation Complaints Tribunal *Annual report 1997-98*, 87; Superannuation Complaints Tribunal *Annual report 1996-97*, 103; Australian Industrial Relations Commission and Australian Industrial Registry *Annual report 1997-1998*, 90.

<sup>317</sup>.1996-97 fees were \$0.2 million and total revenue \$0.3 million: total revenues from independent sources plus total revenues from administered revenues and expenses: Australian Industrial Relations Commission and Australian Industrial Registry *Annual report 1997-1998*, 90-91, 104.

<sup>318</sup>.Total revenues from independent sources plus total revenues from administered revenues and expenses in the financial statements of the tribunals: AAT *Annual report 1997-98*, 60; Department of Immigration and Multicultural Affairs *Annual report 1997-98*, 141, for financial statements of the IRT and the RRT; Department of Social Security *Annual report 1997-98*, 288, for financial statements on the SSAT; Veterans' Review Board *Annual report 1997-98*, 48; Federal Court *Annual report 1997-98*, 66, for financial statements of the Australian Competition Tribunal, Copyright Tribunal, Defence Force Discipline Appeal Tribunal and the Federal Police Disciplinary Tribunal; Superannuation Complaints Tribunal *Annual report 1997-98*, 87; Superannuation Complaints Tribunal *Annual report 1996-97*, 103.

	1996-97	1997-98
AAT	24.6	24.5
IRT and RRT	19.7	21.3
SSAT	9.4	9.1
VRB	6.9	6.5
Other review tribunals <sup>a</sup>	2.5	2.7
AIRC	41.0	43.0
Total	104.1	107.1

- a The Australian Competition Tribunal, the Copyright Tribunal, the Defence Force Discipline Appeal Tribunal, the Federal Police Disciplinary Tribunal and the Superannuation Complaints Tribunal.

### *The caseload of federal courts and tribunals*

4.13 The following tables show the number of cases finalised in the Federal Court, Family Court and Family Court of Western Australia, the AAT and the AIRC in 1996-97 and 1997-98.

**Table 4.6 Cases finalised in federal courts and tribunals<sup>319</sup>**

Federal court or tribunal	1996-97	1997-98
High Court <sup>a</sup>	245	251
Federal Court <sup>b</sup>	4 883	7 357
Family Court of Australia and Family Court of Western Australia <sup>c</sup>	72 273	65 104
AAT	6 643	7 122
AIRC	18 745	19 358

- a Civil cases finalised only.  
b Matters finalised excluding bankruptcy are 1996-97, 3996; 1997-98, 4085.  
c The number of files opened. A better figure may be the number of forms 7 and 12A filed as these represent contested cases and applications for consent orders, that is, the area of disputes in the Court. The figures for 1996-97 were 38344, and 1997-98, 39782. The number of files opened is higher as many of these include straightforward, uncontested divorces. The Court does not record the number of matters finalised.

### *Costs per case*

4.14 The figures appearing above invite consideration of the costs per case in federal courts and tribunals, as shown in the following table. The Steering Committee for the Review of Commonwealth/State Service Provision (the

<sup>319</sup>High Court *Annual report 1997-98*, 62; Federal Court *Annual report 1997-98*, 99; Family Court of Australia *Annual report 1997-98*, 67, 69; AAT *Annual report 1997-98*, 109; National Native Title Tribunal *Annual report 1997-98*, 10; Australian Industrial Relations Commission and Australian Industrial Registry *Annual report 1997-98*, 30.

Steering Committee)<sup>320</sup> uses such data as a measure of the relative efficiency of the courts and tribunals.<sup>321</sup>

**Table 4.7 Gross and net cost per case (\$)<sup>322</sup>**

Court, tribunal or commission		1996-97	1997-98
High Court of Australia <sup>a</sup>	gross	27 052	26 554
	net	24 620	24 576
Federal Court of Australia	gross	9 175	6 769
	net	6 799	5 546
Family Court of Australia and Family Court of Western Australia <sup>b</sup>	gross	1 575	1 693
	net	1 337	1 448
Administrative Appeals Tribunal	gross	3 839	3 594
	net	3 703	3 440
Australian Industrial Relations Commission	gross	2 198	2 242
	net	2 187	2 221

- a The cost per case figure is based on both civil and criminal cases (total 1996-97: 329, 1997-98: 354).
- b Cost per case figures based on number of forms 7 and 12A filed – see table 4.6 above – are: 1996-97 \$2698 gross, \$2519 net; 1997-98 \$2842 gross, \$2432 net.

4.15 As a comparison, the Steering Committee found the costs per case in the Federal Court in 1997-98 to be \$7393 and in the Family Court \$843.<sup>323</sup> The discrepancy with the Family Court figures above is explained by the Steering Committee's use of high numbers of lodgments in that court.<sup>324</sup> Although used as a measure of efficiency, the figures are better explained by reference to the mode of dispute resolution. Some 95% of Family Court cases finalised are resolved by consent. Parties proceed through case management and primary dispute resolution

<sup>320</sup>The Productivity Commission provides the secretariat for the Steering Committee.

<sup>321</sup>Costs per case is an efficiency indicator when assessing the performance of court administration: Steering Committee for the Review of Commonwealth/State Service Provision *Report on government services 1999 – Volume 1: Education, health, justice* AusInfo Canberra 1999, 479, figure 7.6; 489-92 (Steering Committee report on government services 1999).

<sup>322</sup>The costs per case was arrived at as follows: Cost per case (gross) = gross expenditure (taken from table 4.1) ÷ number of finalised cases (taken from respective annual reports). Cost per case (net) = net expenditure (taken from table 4.3) ÷ number of finalised cases (taken from respective annual reports): High Court *Annual report 1997-98*, 62; Federal Court *Annual report 1997-98*, 99; Family Court of Australia *Annual report 1997-98*, 67,69; AAT *Annual report 1997-98*, 109; National Native Title Tribunal *Annual report 1997-98*, 10; Australian Industrial Relations Commission and Australian Industrial Registry *Annual report 1997-98*, 30.

<sup>323</sup>Steering Committee report on government services 1999, table 7A.16.

<sup>324</sup>The Steering Committee figures found lodgments to be 120 004 in 1996-97 and 121 599 in 1997-98: Steering Committee report on government services 1999, table 7A.1. Consideration of the Australian Bureau of Statistics *Court administration data collection manual* reveals that the Court double counted lodgments in the figures provided to the Steering Committee. For example, both forms 7 (application for final orders) and 7A (response to an application for final orders) were counted, giving two, not one lodgment. The Steering Committee has rectified such duplications. The Family Court does not keep statistics on the number of matters finalised.

processes but judicial determination accounts for around 5% of the caseload. In 1997–98 the AAT conducted hearings in 26% of its cases and the Federal Court delivered judgments in 24% of its cases.<sup>325</sup> The Federal Court delivered 1754-judgments in 1997–98;<sup>326</sup> the Family Court of Australia 1099;<sup>327</sup> and the AAT, 1750-decisions.<sup>328</sup>

#### *Numbers of judges, registrars and AAT members*

4.16 The numbers of judges and registrars in the Federal Court, Family Court of Australia and the numbers of members and conference registrars in the AAT are set out in the following tables.

**Table 4.8 Federal Court and Family Court of Australia judges and judicial registrars (as at 30 June 1998)**<sup>329</sup>

	Federal Court	Family Court
Judges	48	52
Judicial registrars	13	8

**Table 4.9 AAT members and conference registrars (as at 30 June 1998)**<sup>330</sup>

AAT	n
Presidential members	24
Other members (full-time)	10
Other members (part-time)	65
Conference registrars	7

4.17 The different nature and complexity of proceedings within each of these forums does not allow direct comparisons related to the overall caseload or caseload per judge or tribunal member.

#### *Other federal dispute resolution mechanisms*

4.18 The federal civil justice system has varied dispute resolution arrangements, both public and private. This section provides information about the cost of the non-determinative functions of federal courts and tribunals and the cost of other bodies which make recommendations, conduct mediations, review decisions on the

<sup>325</sup> AAT: total number of hearings divided by total number of finalised matters: AAT *Annual report 1997–98*, 105. Federal Court: total number of delivered judgments divided by total number of finalised matters: Federal Court *Annual report 1997–98*, 37, 99.

<sup>326</sup> Federal Court *Annual report 1997–98*, 37.

<sup>327</sup> Family Court of Australia *Correspondence* 26 July 1999, defended hearing statistics for 1997–98.

<sup>328</sup> AAT *Annual report 1997–98*, 111–1, tables 5.6 and 5.7.

<sup>329</sup> Federal Court *Annual report 1997–98*, 2, 89–91; Family Court of Australia *Annual report 1997–98*, 6.

<sup>330</sup> AAT *Annual report 1997–98*, 8, 83–6. Presidential members include the President of the AAT. Other members can also be divided into senior members (21) and members (54).

merits, and undertake investigations. These bodies also provide information and advice to clients and to people making general enquiries.

4.19 This information focusses on those bodies which are concerned principally with matters which have, or could give rise to, disputes under federal law. The purpose is to indicate the work undertaken and the cost of providing these varied dispute resolution mechanisms and offer an additional perspective for evaluating the cost of the federal civil justice system.

4.20 *Federal courts, tribunals and commissions.* Federal courts, tribunals and commissions refer matters to mediation or conciliation. The expenditure of courts and tribunal on inhouse mediation services, as distinct from general expenditure, is not available because these services often involve registrars and registry staff who also undertake other functions. The Commission has attempted to approximate the proportion of the work of the court or tribunal that would be spent on these processes.

4.21 In 1997–98 in the Federal Court, 7357 matters were finalised by the Court.<sup>331</sup> 212 mediations were conducted, in which some 55%–68% of the matter were resolved.<sup>332</sup> Mediation processes are estimated to take up about 2% of the work of the Court.<sup>333</sup>

4.22 While only a small number of mediations were held in the Family Court in 1997–98,<sup>334</sup> the counselling and conciliation services offered by that court represent a significant part of its activities.<sup>335</sup> The Court opened 10 190 voluntary counselling cases in the 1997–98 financial year,<sup>336</sup> many of which were opened before proceedings were commenced. It is difficult to estimate from figures published by the Court the proportion of its work spent on these services. The Commission estimates that these other processes take up more than 50% of the work of the Court.<sup>337</sup>

4.23 In the AAT the conference process is the primary method of promoting settlement and case management and staff and members who conduct these meetings have mediation skills.<sup>338</sup> Formal mediations are also used.<sup>339</sup> The

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<sup>331</sup> Federal Court *Annual report 1997–98*, 43.

<sup>332</sup> *ibid.* 99.

<sup>333</sup> Calculation: 212 (number of mediations in 1997–98) ÷ 7357 (number of matters finalised in 1997–98) x 68% = 2%

<sup>334</sup> 818: Family Court of Australia *Annual report 1997–98*, 84–5.

<sup>335</sup> *ibid.* 19–20.

<sup>336</sup> *ibid.* 30, figure 3.1.

<sup>337</sup> 27 825 (new interventions) + 6812 (conciliation conferences held) + 818 (mediations) = 35 455. This is 54% of files opened in 1997–98 (65 104).

<sup>338</sup> AAT *Annual report 1997–98*, 25.

<sup>339</sup> *ibid.*

Tribunal reports that 71% of matters in the general and veterans' division and 65% of matters in the taxation division are resolved by consent,<sup>340</sup> and attributes even higher figures based on the number of matters finalised without a hearing to the effectiveness of the conferencing process.<sup>341</sup>

4.24 The primary function of the National Native Title Tribunal (NNTT) is the mediation of native title applications,<sup>342</sup> with its other functions aimed at assisting parties in the negotiation and mediation of their claims.<sup>343</sup> On this basis it could be said that the total cost of the NNTT, \$20.1 million net in 1997-98, could be attributed to mediation and facilitative processes.<sup>344</sup>

4.25 A significant part of the work of the AIRC involves the conciliation of disputes. In 1997-98, 56% of all termination of employment matters finalised in the year were settled through conciliation;<sup>345</sup> 21% of all matters lodged with the AIRC.<sup>346</sup> Conciliation is also used in the formulation of agreements and other work of the AIRC.

4.26 Allegations of infringements of anti-discrimination and privacy legislation are resolved by the Human Rights and Equal Opportunity Commission (HREOC) through investigation and conciliation. Matters not resolved by conciliation are referred for hearing, during which there is further discussion, and if still unresolved, a determination is made.<sup>347</sup> Only a small number of matters are referred to hearing,<sup>348</sup> of which 49% are resolved by conciliation.<sup>349</sup> The Human Rights Legislative Amendment Bill 1997 (Commonwealth) will remove HREOC's hearing function and the ability to make determinations on complaints which are not conciliated.<sup>350</sup>

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<sup>340</sup> *id* 111 table 5.6, 112 table 5.7.

<sup>341</sup> 77% in the General and Veterans' Divisions and 86% in the Taxation Division: *id* 25, 111 table 5.5.

<sup>342</sup> National Native Title Tribunal *Annual report 1997-98*, 23-24.

<sup>343</sup> *id* 23; Australian Law Reform Commission Issues Paper 25 *ADR – its role in federal dispute resolution* ALRC Sydney 1998 (ALRC IP 25), ch 4.

<sup>344</sup> Net cost of services item: National Native Title Tribunal *Annual report 1997-98*, 160.

<sup>345</sup> Australian Industrial Relations Commission and Australian Industrial Registry *Annual report 1997-1998*, 10.

<sup>346</sup> *ibid*.

<sup>347</sup> HREOC also has a role in inquiring into human rights practices, generating public discussion, research and education and reviewing legislation and international instruments: Human Rights and Equal Opportunity Commission *Annual report 1997-98*, 9-10.

<sup>348</sup> 169 matters were referred for hearing in 1997-98. In comparison 1 522 complaints were received and 2 150 complaints were finalised. 7 463 telephone enquiries were received, 163 in person, and 547-written. Of the written enquiries, 386 had no grounds: Human Rights and Equal Opportunity Commission *Annual report 1997-98*, 22, 41, 46-7.

<sup>349</sup> That is, 97 of 198 matters finalised in 1997-98: Human Rights and Equal Opportunity Commission *Annual report 1997-98*, 46-7.

<sup>350</sup> These powers have been curtailed as a result of the decision of the High Court in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 127 ALR 1: see HREOC *Annual report 1997-98*, 12.



4.27 The work of the Australian Competition and Consumer Commission (ACCC) involves identification and enforcement of breaches of the *Trade Practices Act 1974* (Commonwealth).<sup>351</sup> The ACCC has a determinative power in relation to authorising exemptions from compliance with the Trade Practices Act which is exercised after an extensive investigation and consultation process.<sup>352</sup> The ACCC also has an educative role in providing information and advice to businesses and consumers on trade practices issues.<sup>353</sup>

4.28 **Ombudsmen.** Since 1990 industry, in conjunction with the federal government, has set up various dispute resolution schemes to resolve complaints about the products or services provided by an industry.<sup>354</sup> Such schemes endeavour to emphasise the early resolution of disputes by consensus.<sup>355</sup> The industry schemes relevant to federal jurisdiction include the Australian Banking Industry Ombudsman (ABIO) the Telecommunications Industry Ombudsman (TIO) and the Private Health Insurance Ombudsman (PHIO).<sup>356</sup>

4.29 The bulk of the work of the Commonwealth Ombudsman and industry ombudsmen involves resolving complaints over the telephone between service providers and their customers.<sup>357</sup> More serious matters (disputes)<sup>358</sup> are generally dealt with through mediation and negotiation.<sup>359</sup> A significant area of work of the

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<sup>351</sup> ACCC *Annual report 1997–98*, 9.

<sup>352</sup> This compliance work had a net cost of \$13.5 million in 1997–98: ACCC *Annual report 1997–98*, 168.

<sup>353</sup> ACCC *Annual report 1997–98*, 132. In 1997–98 the information and advice work of the ACCC was provided at a net cost to the government of \$2.1 million: ACCC *Annual report 1997–98*, 169.

<sup>354</sup> C Ellison *Benchmarks for industry-based customer dispute resolution schemes* Department of Industry, Science & Tourism Canberra August 1997, 1. The Wallis inquiry recommended the creation of a new agency, the Australian Corporations and Financial Services Commission (CFSC), to provide federal regulation of the finance sector including consumer protection and facilitate the creation of a central complaints referral service for all consumers of retail financial products and services, funded by service providers on a cost recovery basis. The Australian Corporations and Financial Services Commission as recommended, would combine roles currently performed by the Australian Securities Commission, the Insurance and Superannuation Commission and the Australian Payments System Council. See also B Slade & C Mikula 'How to use industry funded consumer dispute resolution schemes and why' (1998) 36(1) *Law Society Journal* 58.

<sup>355</sup> C Ellison *Benchmarks for industry-based customer dispute resolution schemes* Department of Industry, Science & Tourism Canberra August 1997, 2.

<sup>356</sup> Other industry dispute resolution bodies include Insurance Enquiries & Complaints Limited (IECL): IECL *Annual review 1998*; the Financial Services Complaints Resolution Scheme (FSCRS): FSCRS *Annual report 1997/8*; the Life Insurance Complaints Service Limited (LICSL): LICSL *Annual report 1997* and the Insurance Brokers Disputes Facility (IBDF): IBDF *Annual report January 1, 1998 – December 23, 1998*.

<sup>357</sup> The ABIO finalised 4 720 matters in 1997–98, 32 by recommendation and award: ABIO *Annual report 1997–98*, 30.

<sup>358</sup> What each organisation defines as a 'complaint' or 'dispute' differs. In general, complaints are relatively minor matters that can be resolved over the telephone and disputes require more intervention from the organisation.

<sup>359</sup> Commonwealth Ombudsman *Annual report 1997–98*, 25–34.

Commonwealth Ombudsman is the investigation of disputes.<sup>360</sup> The Commonwealth Ombudsman also provides information and advice to government agencies to assist in the development of their complaints handling strategies.<sup>361</sup>

4.30 Recommendations are made to the parties if negotiated settlements cannot be reached. In the PHIO, recommendation is the final level of resolution.<sup>362</sup> In the ABIO, if the recommendation is rejected by the bank, an award is made by the Ombudsman which, if accepted by the customer, is binding on the bank.<sup>363</sup> The final level of dispute resolution is a determination by the Ombudsman that is binding through agreements with members.<sup>364</sup> In the TIO, following investigation, disputes are mediated. Where no agreement is reached a determination or direction is made by the Ombudsman.<sup>365</sup> Industry ombudsmen also have investigative functions in following up complaints with the service providers concerned.

4.31 Of these bodies only the Commonwealth Ombudsman and the PHIO are government funded.<sup>366</sup> The TIO is funded through member contributions and interest payments which amounted to \$2.4 million in 1997-98.<sup>367</sup> The ABIO is funded from members' contributions and other miscellaneous income, which amounted to \$2.7 million in 1997-98.<sup>368</sup>

4.32 *Internal review.* Reconsideration of decisions made by government agencies is a means of dispute resolution and complaints handling between the agencies and the public, and may precede an external review, for example, by the Commonwealth Ombudsman. The two organisations mentioned here are examples of extended funding by government agencies for internal review, such as, Centrelink and the Department of Veterans' Affairs.

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<sup>360</sup> Commonwealth Ombudsman *Annual report 1997-98*.

<sup>361</sup> For example, the Commonwealth Ombudsman has published and disseminated to the public sector a 'Good practice guide to effective complaint handling': Commonwealth Ombudsman *Annual report 1997-98*, 1.

<sup>362</sup> Private Health Insurance Ombudsman *Annual report 1997-98*, 9.

<sup>363</sup> Australian Banking Industry Ombudsman *Annual report 1997-98*, 11-13.

<sup>364</sup> The ABIO may make binding awards due to the commercial agreement with members comprised by the terms of reference. In joining the ABIO scheme a bank agrees to be contractually bound by an award of the Ombudsman: SMAundrell 'The Australian Banking Industry Ombudsman scheme' *Seminar paper* 3 September 1998 <<http://www.corrs.com.au/ccwl.nsf>> (21 April 1999).

<sup>365</sup> Telecommunications Industry Ombudsman *Annual report 1997-98*, 16. Membership of the TIO is determined by legislation, and members are required to comply with decisions of the Ombudsman: *Telecommunications Act 1997* (Commonwealth) s 250.

<sup>366</sup> Commonwealth Ombudsman: \$7.7 million: total expenses less revenues from independent sources and administered revenues: Commonwealth Ombudsman *Annual report 1997-98*, 158. PHIO: \$815-000: total expenses less revenues from independent sources and administered revenues: Private Health Insurance Ombudsman *Annual report 1997-98*, 52.

<sup>367</sup> Telecommunications Industry Ombudsman *Annual report 1997-98*, 45.

<sup>368</sup> Australian Banking Industry Ombudsman *Annual report 1997-98*, 36.

4.33 Until 31 May 1999 the Department of Immigration and Multicultural Affairs (DIMA) provided internal administrative review through the Migration Internal Review Office (MIRO) for applicants seeking review of visa refusals and other adverse decisions made by the Department.<sup>369</sup> In 1997–98 this sub-program cost the department \$3.4 million,<sup>370</sup> less than 1% of total department expenditure.<sup>371</sup>

4.34 The Australian Taxation Office conducts internal review through its Problem Resolution Service (PRS). Complaints about the ATO are directed to this service for investigation by a case manager. In 1997–98 the PRS cost the federal government \$2.4 million, and a similar budget is expected in 1998–99.<sup>372</sup>

4.35 *Private mediation organisations.* Private mediation organisations are a significant source of mediation and other ADR services. Some ADR professional associations are Lawyers Engaged in Alternative Dispute Resolution (LEADR), the Australian Commercial Disputes Centre (ACDC), Australian Dispute Resolution Association (ADRA), the Institute of Arbitrators and Mediators Australia (IAMA) and community justice centres (CJCs). Apart from CJCs, these private organisations do not receive any government funding. Many law societies and bar associations also operate ADR schemes.<sup>373</sup>

4.36 *Family relationship support organisations.* In family law, community based mediation programs assist in resolving family disputes. The Department of Family and Community Services funds family relationship support organisations<sup>374</sup> that provide counselling, relationship education, skills development, mediation and children's contact services.<sup>375</sup> Over 80 non-government organisations share Commonwealth government funding of around \$33 million each year.<sup>376</sup>

4.37 *Public cost of other dispute resolution mechanisms.* The following table shows that these non litigious federal dispute resolution mechanisms cost the federal government approximately \$100 million each year. This does not include mediation and other dispute resolution processes in the courts and tribunals. The

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<sup>369</sup>.DIMA *Annual report 1997–98*, 103. This internal review office ceased in June 1999 with the creation of the Migration Review Tribunal.

<sup>370</sup>.*ibid.* The 1996–97 figures are not comparable due to program restructures in 1996–97 and 1997–98.

<sup>371</sup>.*id.* 106. MIRO has now been combined with IRT to form the Migration Review Tribunal (MRT) which subsumes these functions. The MRT commenced on 1 June 1999.

<sup>372</sup>.Australian Taxation Office *Consultation* 7 May 1999.

<sup>373</sup>.eg Law Society of NSW, Law Institute of Victoria and the Bar Association of Queensland.

<sup>374</sup>.This funding was previously provided by the Attorney-General's Department. The Attorney-General retains responsibility for policy aspects of family law related services within the Family Relationships Services Program. The Attorney-General's Department and the Department of Family and Community Services are working in partnership to deliver relevant services through the Family Relationship Services Program: Attorney-General's Dept *Correspondence* 22 July 1999.

<sup>375</sup>.<<http://www.softlaw.com.au/famqis/famnetsofar.htm>> (30 April 1999).

<sup>376</sup>.*id.*; Attorney-General's Dept *Annual report 1997–98*, 85.

figure necessarily underestimates the full costs because few departments itemise the costs of their internal review processes.

**Table 4.10 Net government funding of related systems (\$million)<sup>377</sup>**

Organisation	1996-97	1997-98
National Native Title Tribunal	16.7	20.1
Human Rights and Equal Opportunity Commission	20.4	14.6
Australian Competition and Consumer Commission	9.1	15.6
Commonwealth Ombudsman	7.5	7.7
Australian Banking Industry Ombudsman	Nil	Nil
Private Health Insurance Ombudsman	0.8 <sup>a</sup>	0.8
Telecommunications Industry Ombudsman	Nil	Nil
Migration Internal Review Office – DIMA	— <sup>b</sup>	3.4
Problem Resolution Service – ATO	— <sup>c</sup>	2.4
Private mediation organisations	Nil	Nil
Family relationship support organisations <sup>d</sup>	30.8	33.0
Total	85.3	97.6

a Until 1 July 1997 the PHIO was the Private Health Insurance Complaints Commissioner.

b Figures for 1996-97 are not comparable due to a program restructure within the Department of Immigration and Multicultural Affairs. This organisation was subsumed into a new Migration Review Tribunal with the IRT from 1 July 1999.

c The first year of operation of the PRS was 1997-98. It is expected that expenditure in 1998-99 will be similar to 1997-98.<sup>378</sup>

d As stated above, these services include components that are not dispute resolution mechanisms.

## The cost of using the federal civil justice system

4.38 Empirical information on users' costs is important but it is difficult to obtain reliable and comprehensive data. The particular deficit in data concerns what users pay for legal services.<sup>379</sup> The Australian Bureau of Statistics (ABS) gives a broad picture of spending by users on advice and litigation, but this cannot accurately be broken down to quantify federal civil work. Other data focusses on what individual

<sup>377</sup> Figures taken from net cost of services item in the financial statements of each respective annual report: NNTT *Annual report 1997-98*, 160; HREOC *Annual report 1997-98*, 171; Commonwealth Ombudsman *Annual report 1997-98*, 158; PHIO *Annual report 1998*, 52; ABIO *Annual report 1997-98*; TIO *Annual report 1997-98*; Department of Immigration and Multicultural Affairs *Annual report 1997-98*, 103. Figures for the ACCC were arrived at as follows: for both Compliance with TPA and Education and Information, subtract net contribution to government in administered revenue and expenses heading from total expenses in net cost of services heading, and then add the respective figures together: ACCC *Annual report 1997-98*. The Family relationship support organisations figure is derived from Attorney General's Department *Annual report 1997-98*, 85.

<sup>378</sup> Australian Taxation Office *Consultation* 7 May 1999.

<sup>379</sup> It is the consensus view of the legal profession that obtaining reliable empirical data is very difficult and from the Commission's research it has been often difficult to provide information other than indicative or 'range' figures for different case types.

users pay for litigation or administrative review. This information comes from empirical research undertaken by the Commission, the Justice Research Centre and the Williams report on cost scales.<sup>380</sup> Despite these collective efforts there are many gaps in the data.

### *Income generated by legal fees*

4.39 The ABS estimated that in 1995–96 the income from legal services of all legal practitioners in private practice was \$5255.8 million.<sup>381</sup> To obtain a figure that relates to federal civil dispute resolution, the income from legal services excluding conveyancing is a better starting point: \$4 569.5 million.

4.40 To approximate a figure for federal civil work, we can consider the income from different categories as found by the ABS.<sup>382</sup> The ABS does not categorise work in relation to whether it is based on State or federal legislation, but of these categories, family (6% of all non-conveyancing income) and industrial relations (2%) involve federal civil work. The commercial, financial and business category (32%)<sup>383</sup> would include State and federal work. An important area of federal civil work not represented in the ABS statistics is administrative law. Other areas of federal law practice include environmental law and workers compensation. Discounting the 32% for commercial, financial and business and including the other areas mentioned above, one can estimate that around one-third (\$1508million) of the non-conveyancing income of lawyers is earned doing federal civil work. This assessment is necessarily an approximation of the proportion of income generated from federal civil work.

4.41 *Individuals.* Individuals and non-profit organisations were the source of \$1-348.6 million of non-conveyancing income for lawyers in 1995–96<sup>384</sup> (30% of total non-conveyancing income). Of this \$1129.8 million was privately financed,<sup>385</sup> and \$218.8 million was financed by legal aid.<sup>386</sup>

4.42 As stated, these figures relate to total spending on legal professionals, not just work on federal civil matters. Taking the above estimate that one-third of work by legal professionals is federal civil work, we can estimate that as much as \$445-million of non-conveyancing income was made through federal civil work for

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<sup>380</sup> P Williams et al *Report of the review of scales of legal professional fees in federal jurisdiction* Attorney-General's Dept Canberra 1998 (Williams report).

<sup>381</sup> ABS 1995–96 *Legal and accounting services* ABS Catalogue No 8678.0 1997, 11.

<sup>382</sup> The ABS categories are: property conveyancing; other property work; wills, probate and estate activities; commercial, finance and business; family; criminal; environmental; industrial relations; motor vehicle injury; workers' compensation; other personal injury; other fields: Australian Bureau of Statistics 1995–96 *Legal and accounting services* ABS Catalogue No 8678.0 1997, 10.

<sup>383</sup> *ibid.*

<sup>384</sup> *id.* 11.

<sup>385</sup> 25% of non-conveyancing income: *ibid.*

<sup>386</sup> 5% of non-conveyancing income: *ibid.*

individuals and non-profit organisations. The real figure is likely to be less than one-third as most federal civil work was commercial or business related.

4.43 **Businesses.** Businesses<sup>387</sup> spent \$2904.7 on non-conveyancing legal services in 1995–96<sup>388</sup> (64% of non-conveyancing income). Again assuming that one-third is federal civil work, and deducting the 6% of work on family law, around one-quarter or \$726 million of non-conveyancing income was made through federal civil work for businesses.

4.44 These figures do not include the inhouse legal expenses of corporations. In 1998 in New South Wales, 11% of practising lawyers were employed by corporations, providing legal services inhouse,<sup>389</sup> which would include some federal civil work.

4.45 **Governments.** It is difficult to obtain information on government expenditure on legal services and litigation.<sup>390</sup> The sources available for such calculations comprise statistics compiled by the ABS, the Logan report,<sup>391</sup> the Commonwealth budget papers<sup>392</sup> and annual reports of government departments and agencies.

4.46 From the ABS figures, local, State and federal governments spent \$316.3-million on non-conveyancing legal services in 1995–96<sup>393</sup> (7% of total non-conveyancing income). Of this the Commonwealth government spent \$75.1 million on non-conveyancing external legal services<sup>394</sup> (2% of total non-conveyancing income).<sup>395</sup> These figures also do not include the expenses to government agencies of inhouse legal advisors. In 1998 in New South Wales 10% of lawyers were employed by State and Commonwealth government agencies.<sup>396</sup>

4.47 The Logan report estimated spending by the federal government on legal services in 1997 at \$198 million, most of which (\$93.1 million) was spent on services

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<sup>387</sup>.Businesses include solicitor proprietors, partnerships, trusts, financial institutions and other companies: Australian Bureau of Statistics 1995–96 *Legal and accounting services* ABS Catalogue No-8678.0 1997, 11.

<sup>388</sup>.ibid.

<sup>389</sup>.Law Society of NSW *Profile of the solicitors of New South Wales 1998* Law Society of NSW Sydney October 1998, 15.

<sup>390</sup>.A spokesman for the Attorney-General has been quoted as saying that it is difficult to estimate spending on legal matters because of the large number of departments and agencies: see J Clout 'Law firms eager to compete with AGS' *Australian Financial Review* 20 March 1999, 54.

<sup>391</sup>.B Logan et al *Report of the review of the Attorney-General's legal practice* AGPS Canberra March 1997 (Logan report).

<sup>392</sup>.The Commonwealth Public Account 1998–99 *Budget paper No. 4* AGPS Canberra 1998.

<sup>393</sup>.Australian Bureau of Statistics 1995–96 *Legal and accounting services* ABS Catalogue No 8678.0 1997, 11.

<sup>394</sup>.ibid.

<sup>395</sup>.ibid.

<sup>396</sup>.Law Society of NSW *Profile of the solicitors of New South Wales 1998* Law Society of NSW Sydney October 1998, 15.

provided by the Government Legal Practice (now the Australian Government Solicitor (AGS)).<sup>397</sup> The rest was spent on inhouse lawyers (\$65.3 million) private lawyers (19.8 million) and private counsel (\$19.8 million).<sup>398</sup> \$79million of this was spent on advice services; \$52 million on litigation services in courts and tribunals; and \$34 million on services involving agreements.<sup>399</sup>

4.48 These estimates were derived from figures from the Attorney-General's Department's annual report valuing the services performed by the Government Legal Practice and private counsel briefed by the Legal Practice, a survey of 101-agencies to produce figures for the value of work performed by the private sector and considered the number of inhouse government lawyers.

4.49 It has been suggested that the Logan report's estimate undervalued expenditure on inhouse legal services and the opportunity cost, that is, fees saved as against a notional external service provider supplying the same services. The alternative figure is suggested to be around \$130-\$160 million, or more than half of the total value of services delivered.<sup>400</sup>

4.50 Portfolio budgets include a category of appropriation known as 'Compensation and legal expenses'. In the Commonwealth Budget Papers, the appropriation for each department for 'compensation and legal services' amounted to \$176million for 1997-98.<sup>401</sup> The two items 'compensation' and 'legal services' could not be disaggregated from one another,<sup>402</sup> although discussions with some departments revealed the proportion of spending on legal services. In some cases, compensation costs made up a significant proportion of the amount. A further difficulty with these figures is the inclusion of spending on AGS services in the 'running costs' appropriation component for departments. For example, the Department of Defence in 1997-98 spent \$121.8 million on 'Compensation and legal services'.<sup>403</sup> Of this \$5.8 million was spent on non-AGS legal fees. A further \$3.1 million was spent on AGS services from 'running costs'.<sup>404</sup> Another example is Customs, where \$1.3 million of the \$2.1 million in the 'Compensation and legal

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<sup>397</sup>.Logan report, para 4.27. The difficulty of obtaining information on the spending of government on legal services was acknowledged in the report at 60, and recently by the Attorney-General: JClout 'Law firms eager to compete with AGS' *Australian Financial Review* 20 March 1999, 54.

<sup>398</sup>.Logan report, para 4.27.

<sup>399</sup>.id para 4.26-4.28.

<sup>400</sup>.S Gath 'Managing the in-house legal function in an environment of contestability' (1999) 91*Canberra Bulletin of Public Administration* 23, 24.

<sup>401</sup>.The Commonwealth Public Account 1998-99 *Budget paper No. 4* AGPS Canberra 1998. For figures for each Commonwealth government department see Appendix E.

<sup>402</sup>.Annual reports of departments and agencies rarely provide more detailed, disaggregated information. While expenditure on certain programs and sub-programs is often shown, legal services or litigation services are usually combined with other functions under a sub-program heading.

<sup>403</sup>.Department of Defence *Annual report 1997-98*, 139. See also Appendix E.

<sup>404</sup>.Department of Defence *Correspondence* 30 April 1999.

services' category was spent on legal services.<sup>405</sup> A further \$1.9 million each year is spent on AGS services, which is subsumed in the 'running costs' appropriation component.<sup>406</sup>

4.51 *Reconciling the figures.* It is difficult to reconcile the ABS and Logan report figures for work done for the Commonwealth government. The ABS did not include the work of the AGS or government inhouse lawyers. The Logan report figures appear to understate the work by private lawyers for the government at \$39.6 million; not \$75.1 million as found by the ABS.<sup>407</sup> Figures from the budget papers give \$176 million as the figure for government spending on legal services. If the spending by the Defence Department alone on compensation is subtracted, the figure for expenditure on legal services by government in 1997–98 was closer to \$60 million.<sup>408</sup>

### *The cost of litigation*

4.52 The popular perception is that the cost of litigation is so high that litigants are either the very wealthy, often corporations or governments, or the very poor, who receive assistance through legal aid.<sup>409</sup> As stated, the Commission's research also challenges that popular assumption.

4.53 Corporate entities and the government are major litigants in the Federal Court. In addition, a small proportion of Family Court litigation involves extensive property and commercial interests. While the AAT's high volume work derives from social security, veterans' affairs, and compensation for Commonwealth employees, some AAT case types commonly involve corporations seeking review of government decisions in areas such as taxation, customs and excise and business regulation.

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<sup>405</sup> Legal Services, Australian Customs Services *Correspondence* 27 May 1999.

<sup>406</sup> Australian Customs Services *Consultation* Canberra 26 May 1999.

<sup>407</sup> ABS 1995–96 *Legal and accounting services* ABS Catalogue No 8678.0 1997, 11.

<sup>408</sup> \$176 million (Compensation and legal services – total) – (\$121.8 million – \$5.8 million) = \$60 million.

<sup>409</sup> H Gibbs *Sydney Morning Herald* 10 April 1984, 6, quoted in D Weisbrot *Australian lawyers* Longman Cheshire Melbourne 1990, 245; Senate Standing Committee on Legal and Constitutional Affairs *The cost of legal services and litigation: the courts and the conduct of litigation* Discussion Paper No 6 AGPS Canberra 1992, para 1.1; *The cost of justice: foundations for reform* AGPS Canberra 1993, 4 in AJAC *Access to justice – an action plan* AGPS Canberra 1994, para 1.3; A Gleeson 'Access to justice' (1992) 66 *Australian Law Journal* 270, 274; A Gleeson 'Commentary on paper by Lord Browne-Wilkinson' *Conference paper* Supreme Court of New South Wales Judges' Conference 11 September 1998, <<http://www.hcourt.gov.au/cj2.htm>> (23 April 1999), referring to TMatruglio *So who does use the court?* Civil Justice Research Centre Sydney December 1993. One estimate is that 50% of District and Supreme Court litigation in New South Wales relates to personal injury or property damage claims: Australian Law Reform Commission Report 75 *Costs shifting – who pays for litigation* AGPS Canberra 1995, para 3.20 (ALRC 75).



4.54 The presence of 'the poor' is evidenced, among other things, by court fee waivers and exemptions on the grounds of financial hardship, and grants of legal aid which are subject to means tests.

- In the Federal Court 9% of fees are waived. The Commission's case file survey data showed that Federal Court filing fees were waived or the applicant was exempt in 17% of the sampled cases which involved review under the Migration Act.<sup>410</sup> Only a small number of Federal Court litigants receive legal aid funding.<sup>411</sup>
- In the Family Court, 48% of fees are waived or the parties are exempted from payment. Many litigants in the Family Court receive some legal aid funding.<sup>412</sup>
- In the AAT, 53% of fees are waived or the parties are exempted from payment. The applicants in many proceedings in the AAT, including all social welfare cases (which account for around 25% of AAT decisions) are in receipt of or seeking welfare benefits. Many of these applicants receive some legal aid funding.<sup>413</sup>

4.55 Nevertheless, there is evidence to suggest that middle income Australians are by no means absent from federal courts and tribunals.

- In the Family Court, the Commission's case file survey data showed the median estimated property value at issue in proceedings to be \$151059.<sup>414</sup> Recent studies indicated that the income of parties to Family Court property proceedings is not distinctly higher or lower than that of the general population.<sup>415</sup> The study by the Justice Research Centre found a median

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<sup>410</sup> Overall, almost 70% of litigants in person in the Commission's case file sample were seeking judicial review, including in 31% of the migration cases.

<sup>411</sup> An exact figure has not been possible to obtain. However, 9% (n=14) of 152 applicant solicitors responding to the Commission's survey of solicitors reported that their client received some legal aid funding in their Federal Court proceedings. None of the respondent solicitors responding reported any legal aid funding in their case: T Matruglio *Part two: The costs of litigation in the Federal Court of Australia* ALRC Sydney 1999, 38, table 1 (T Matruglio, Federal Court Empirical Report Part-Two).

<sup>412</sup> An exact figure has not been possible to obtain. However, 17% (n=67) of 385 applicant solicitors and 25% (n=67) of respondent solicitors responding to the Commission's survey of solicitors reported that their client received some legal aid funding in their Family Court proceedings: T Matruglio *Part two: The costs of litigation in the Family Court of Australia* ALRC Sydney June 1999 (T Matruglio, Family Court Empirical Report Part Two) 46, table 1.

<sup>413</sup> As do applicants in veterans' affairs cases, but veterans' affairs clients are not subject to means tests.

<sup>414</sup> Where female applicant and male respondent: T Matruglio & G McAllister *Part one: Empirical information about the Family Court of Australia* ALRC Sydney February 1999, 11, table 5 (T Matruglio & G McAllister, Family Court Empirical Report One).

<sup>415</sup> *id* para 5.4.

annual income for all parties in the Family Court sample of \$25000 to \$28-000.<sup>416</sup>

- Case types in the Federal Court<sup>417</sup> and AAT<sup>418</sup> involve lawyers engaging in contingency fee and speculative arrangements in which the lawyer bears the financial risk of an adverse outcome. This appears to be common in workers' compensation matters in the AAT, and in migration and refugee case in the Federal Court. Lawyers commonly delay billing in family matters until it is concluded. These practices allow greater access to courts and tribunals.

4.56 More generally, the Commission's research does not indicate that the cost of litigation or review proceedings in federal courts or the AAT is 'excessive', either by reference to the amounts or issues in dispute or in absolute terms. The median total legal costs for represented parties in the Commission's survey samples were as follows.

- Federal Court: \$15820 (applicants) and \$8463 (respondents).<sup>419</sup>
- Family Court of Australia: \$2209 (applicants) and \$2090 (respondents).<sup>420</sup>
- AAT: \$2585 (applicants) and \$4006 (respondents).<sup>421</sup>

4.57 In each of these forums there is a wide range of case types, and case costs vary considerably. The range of total legal costs in the sample comprised the following.

- Federal Court: \$350-\$1011042 (applicants) and \$55-\$1130884- (respondents).<sup>422</sup>
- Family Court of Australia: \$40-\$126361 (for applicants) and \$8-\$160532- (respondents).<sup>423</sup>
- AAT: \$50-\$131696 (for applicants) and \$375-\$29586 (respondents).<sup>424</sup>

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<sup>416</sup>R Hunter *Family law case profiles* Justice Research Centre Sydney 1999, para 299-303.

<sup>417</sup>.eg some migration cases.

<sup>418</sup>.eg compensation cases.

<sup>419</sup>T Matruglio, Federal Court Empirical Report Part Two, 57, table 1. This table does not provide a median total legal cost figure but one has been calculated for this discussion paper using the same data.

<sup>420</sup>T Matruglio, Family Court Empirical Report part Two, 54, table 8.

<sup>421</sup>.ALRC *Part two: Empirical information about the Administrative Appeals Tribunal* ALRC Sydney June 1999, table 5.1 (ALRC, AAT Empirical Report Part Two).

<sup>422</sup>T Matruglio, Federal Court Empirical Report Part Two, 57, table 1. This table does not provide a median total legal cost figure but one has been calculated for this discussion paper using the same data.

<sup>423</sup>T Matruglio, Family Court Empirical Report Part Two, 54, table 8.

4.58 Case costs vary, as would be expected, according to case type, the stage in proceedings at which cases were resolved and the process used. For example, in relation to different case types, median total legal costs were reported as follows.

- Federal Court: \$8020 for migration cases, \$39190 for trade practices cases, and \$43000 for intellectual property cases (applicants).<sup>425</sup>
- Family Court of Australia: \$1731 for children only cases, \$2482 for property only cases and \$3184 for cases involving both children and property.<sup>426</sup>
- AAT: \$1487 for social welfare cases, \$1500 for taxation administration cases, \$2455 for veteran's affairs cases and \$4622 for compensation cases.<sup>427</sup>

4.59 In relation to stage and process of disposal, median total legal costs were reported as follows.

- Federal Court: the costs for solicitors' fees and disbursements respectively were \$11750 and \$4500 for cases that resolved prehearing and \$7063 and \$4748 for cases resolved at hearing (applicants).<sup>428</sup>
- Family Court of Australia: the costs for solicitors' fees and disbursements respectively were \$2500 and \$285 for cases that resolved before listing for hearing, \$7750 and \$2986 for cases resolved after listing for hearing and \$3350 and \$899 for cases resolved after judgment was received (applicants in contested (form 7) cases).<sup>429</sup>
- AAT: \$2625 for compensation cases that resolved after two prehearing case events and \$9973 for cases that resolved after five or more prehearing case events. Compensation cases resolved by consent had median total legal costs

<sup>424</sup>ALRC, AAT Empirical Report Part Two, table 5.1.

<sup>425</sup>T Matruglio, Federal Court Empirical Report Part Two, 59–60, tables 2–3. These tables do not provide a median total legal cost figure but these have been calculated for this discussion paper using the same data.

<sup>426</sup>Justice Research Centre *Family Court research part two: The costs of litigation in the Family Court of Australia* ALRC Sydney June 1999, 12, table 3 (Justice Research Centre Family Court Research Part-Two).

<sup>427</sup>ALRC, AAT Empirical Report Part Two, table 5.2.

<sup>428</sup>T Matruglio, Federal Court Empirical Report Part Two, 62, table 4. This table does not provide a median figure for total legal costs. The reason the cases that incurred the highest median costs were those resolved prehearing rather than at hearing is probably because a higher proportion of migration matters go through to final hearing than other Federal Court matters.

<sup>429</sup>T Matruglio, Family Court Empirical Report Part Two, 71, table 2. This table does not provide a median figure for total legal costs. The reason the cases that incurred the highest median costs were those resolved after being listed for hearing, rather than those going through to receiving a judgment is probably because a higher proportion of children's matters go through to final hearing than property matters.

of \$4000, compared to \$5512 for cases that were dismissed and \$9860 for cases resolved by determination after a hearing.<sup>430</sup>

4.60 Other reasons for variation in case costs include the source of funding and the methods of fee calculation used by lawyers. In the Family Court survey lower professional fees were associated with the Family Court scale while the highest fees were associated with written costs agreements based on the time spent.<sup>431</sup>

4.61 **Proportionality.** The Woolf inquiry in the United Kingdom addressed concerns that the cost of many cases in the English Supreme Court were disproportionate to the amounts at stake. The findings of a survey conducted for the Woolf inquiry indicated that average costs among the lowest value claims represented more than 100% of claim value and in cases between £12500 (\$29 750) and £25000 (\$59500) average costs ranged from 40% to 95% of the claim value. It was only when the claim value was over £50000 (\$119000) that the average combined costs of the parties were likely to represent less than the claim.<sup>432</sup>

4.62 The Commission's research into the costs of Federal Court, Family Court of Australia and AAT cases was not able to identify similar problems of disproportionate cost. In general, amounts in dispute were not quantified on case files in the samples. In any case, disputes in federal jurisdictions most often do not involve a specific value claim; for example, children's cases in the Family Court and judicial review cases in the Federal Court.

4.63 One area in which proportionality of costs and amounts in dispute was able to be investigated was in Family Court property cases where information was collected on the property values specified by parties on Form 17.<sup>433</sup> The results of analysis of this data found that the median of the legal costs expressed as a percentage of property value was 3% (n=151) and 12% at the 90th percentile. That is, only one in 10 litigants expended more than 12% of the value of the property in issue in legal costs.

### ***Litigation costs in the Federal Court***

4.64 **Case costs – unrepresented litigants.** In the Commission's survey, 'unrepresented litigants' are taken to be litigants who were unrepresented at the end

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<sup>430</sup> ALRC, AAT Empirical Report Part Two, tables 5.5-5.6 and text.

<sup>431</sup> Justice Research Centre Family Court Research Part Two, 5, table 2B.

<sup>432</sup> Lord Woolf *Access to justice: Final report to the Lord Chancellor on the civil justice system in England and Wales* HMSO London 1996, 17, Annex III (Woolf final report). The research was based on 2 184 cases sampled from those submitted to the Supreme Court Taxing Office in 1990-95. The sample cases were divided roughly equally into 10 case types: medical negligence, personal injury, profession negligence, Official Referees', breach of contract, judicial review, Chancery, Queen's Bench 'other', Commercial, and bankruptcy/Companies Court cases.

<sup>433</sup> Property values were derived from the average of the values declared by the husband and the wife or the value of the property declared by the husband or the wife, if only one party provided a figure. Legal costs were then expressed as a percentage of property value.

of the case process. Some of these parties had already spent a considerable amount on fees to solicitors and barristers in the intervening period. The median total cost of a case in the Federal Court for litigants who were fully or partially unrepresented was \$600 for applicants and \$2165 for respondents.<sup>434</sup> The main cost was solicitors' fees (median \$13479),<sup>435</sup> followed by court hearing fees (median \$1050).<sup>436</sup> The survey showed that photocopying expenses for unrepresented applicants could be a significant cost, with amounts paid ranging from \$10–\$820.<sup>437</sup> For all categories the numbers involved were small.

4.65 Another unspecified cost for unrepresented litigants is the amount of time spent personally preparing their case. From the Commission's survey, unrepresented applicants in the Federal Court claimed to have spent a median of 20 days<sup>438</sup> in case preparation and 2 days<sup>439</sup> attending court. Unrepresented respondents spent a median of 5 days<sup>440</sup> on case preparation and 1 day<sup>441</sup> attending court.<sup>442</sup>

4.66 *Costs by case type – represented litigants.*<sup>443</sup> The numbers in the sample for unrepresented litigants were too small to present an analysis based on case type, but for represented litigants, costs by case type present a more accurate picture of costs to litigants in the Federal Court.<sup>444</sup>

4.67 From the Commission's research, fees paid to solicitors and counsel are the main costs incurred by represented litigants for all case types. For applicants in intellectual property cases the median solicitors' fee was \$36000,<sup>445</sup> and in trade practices cases \$28296.<sup>446</sup> The lowest median figure for solicitors' fees for applicants was in taxation matters (median \$3089), although the numbers involved were small.<sup>447</sup> For represented respondents, the cases with the highest median solicitors'

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<sup>434</sup>T Matruglio, Federal Court Empirical Report Part Two, 35.

<sup>435</sup>Range \$13000–\$13479, n = 2: id 34, table 7.

<sup>436</sup>Range \$500–\$1600, n = 2: ibid.

<sup>437</sup>Median \$300, n = 10: ibid.

<sup>438</sup>Range 1–65 days, n = 14.

<sup>439</sup>Range 0.5–15 days, n = 16.

<sup>440</sup>Range 1–20 days, n = 3.

<sup>441</sup>Range 0–4 days, n = 3.

<sup>442</sup>T Matruglio, Federal Court Empirical Report Part Two, 36, table 8.

<sup>443</sup>The case categories in the Commission's study were migration, trade practices, *Administrative Decisions (Judicial Review) Act 1977* (Commonwealth) (ADJR), Corporations Law, intellectual property, taxation and workplace relations.

<sup>444</sup>Information on general case costs in the Federal Court are available in T Matruglio, Federal Court Empirical Report Part Two.

<sup>445</sup>Range \$8000–\$400000, n = 9: T Matruglio, Federal Court Empirical Report Part Two, Appendix 3, table 8.

<sup>446</sup>Range \$8499–\$570015, n = 24: ibid.

<sup>447</sup>Range \$1870–\$29500, n = 5: ibid.

fees were trade practices matters (median \$27403).<sup>448</sup> The cases with the lowest median solicitors' fees were migration cases (median \$3019).<sup>449</sup> The range of fees, (see footnote 144–147) gives an indication of the variable cost of cases.

4.68 Counsel's fees represent the main cost of disbursements for applicants and respondents in all case types. For applicants the highest counsel's fees were incurred in trade practices matters (median \$14540)<sup>450</sup> and the lowest in taxation matters (median \$1503).<sup>451</sup> For respondents the highest counsel's fees were also incurred in trade practices matters<sup>452</sup> and the lowest in intellectual property matters,<sup>453</sup> although the numbers in the sample were small. Again, these figures should be considered with regard to the range, including the maximum amounts charged for counsel's fees, which in some trade practices cases were over \$200000.<sup>454</sup>

4.69 Other disbursements where significant costs were incurred were charges for office expenses. While the median amounts appeared reasonable, the ranges show significant variations. For example, the median amount spent on office expenses by applicants in trade practices cases was \$899 with a range of \$126–\$30000.<sup>455</sup>

4.70 *Costs by stage of disposal.* The Commission's research found that higher solicitors' fees were associated with cases resolved between the parties than with cases that went to hearing: a median of \$11 750 for applicants at the prehearing stage and \$7063 at hearing.<sup>456</sup> Disbursements were relatively similar at both stages.<sup>457</sup>

4.71 For respondents, cases that went to hearing were more expensive than cases that resolved earlier in terms of both solicitors' fees and disbursements.<sup>458</sup> Solicitors' fees were \$4717 at prehearing and \$13 000 at hearing. Disbursements were \$600 at the prehearing stage and \$5475 at hearing.<sup>459</sup>

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448. Range \$300–\$568000, n = 16. Taxation matters recorded a median of \$77577, but the 11 matters recorded involved several that were heard together and would have recorded the same case costs. Hence the median and maximum figures are the same: T Matruggio, Federal Court Empirical Report Part Two, Appendix 3, table 9.

449. *id.* 59, table 2; appendix 3, table 9.

450. Range \$220–\$200000, n = 17: *id.* appendix 3, table 10.

451. Range \$1360–\$19400, n = 3: *ibid.*

452. Median \$36780, range \$900–\$304000, n = 8: *ibid.*

453. Median \$1875, range \$300–\$6870, n = 4: *ibid.*

454. Maximum (applicants) \$200000, maximum (respondents) \$304000: *ibid.*

455. n = 17: T Matruggio, Federal Court Empirical Report Part Two, Appendix 3, table 10. For respondents the figures were: mean \$5731, median \$1281, range \$126–\$25000, n = 8.

456. *id.* 62, table 4.

457. \$4500 at prehearing and \$4748 at hearing: *ibid.*

458. *id.* 62.

459. *id.* 62, table 4.

4.72 **Charging practices.** The differences in costs charged by solicitors are related to differences in the calculation of costs and billing arrangements. In the Commission's study 14% of applicants and 7% of respondents were charged on the basis of the Federal Court scale,<sup>460</sup> while 61% of applicants' solicitors and 72% of respondents' solicitors charged on the basis of time spent.<sup>461</sup> While most solicitors had regular billing arrangements,<sup>462</sup> others deferred payment to the end of the case<sup>463</sup> or charged on a speculative basis.<sup>464</sup>

#### *Litigation costs in the Family Court of Australia*

4.73 **Case costs.** The survey by the Commission found the total case costs for unrepresented parties applicants and respondents were similar. For an unrepresented applicant in the Family Court the median cost of a case was \$706; \$933 for unrepresented respondents.<sup>465</sup> Represented applicants' and respondents' costs were also similar. Represented applicants had median case costs of \$2209, and respondents, \$2090.<sup>466</sup>

4.74 From the Commission's research Family Court applicants spent a median of \$1940 on solicitors' fees<sup>467</sup> and \$230 on disbursements<sup>468</sup> on their matter when they were represented and \$1000 on solicitors' fees<sup>469</sup> and \$345 on disbursements<sup>470</sup> when they were unrepresented at the conclusion of the matter. For respondents the figures were a median of \$1911 for solicitors' fees and \$235 for disbursements when represented,<sup>471</sup> and \$1700 for solicitors' fees<sup>472</sup> and \$280 on disbursements when unrepresented at the conclusion of the matter.<sup>473</sup>

4.75 For all parties the single most expensive item was solicitors' fees. The most expensive disbursements varied between fees for counsel and experts, although for unrepresented litigants the numbers in the sample preclude a meaningful comparison. For applicants unrepresented at the conclusion of their case, the

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<sup>460</sup> Applicants n = 21, respondents n = 10: id 39, table 2.

<sup>461</sup> Applicants n = 93, respondents n = 98: *ibid*.

<sup>462</sup> 57% (n = 86) of applicants' solicitors; 83% (n = 114) of respondents' solicitors: id 39.

<sup>463</sup> 20% (n = 30) of applicants' solicitors; 10% (n = 13) of respondents' solicitors: *ibid*.

<sup>464</sup> 13% (n = 20) of applicants' solicitors; 3% (n = 4) of respondents' solicitors: *ibid*.

<sup>465</sup> T Matruglio, Family Court Empirical Report Part Two, 41.

<sup>466</sup> *id* 52.

<sup>467</sup> Range \$100-\$85209, n = 351: id 53, table 8.

<sup>468</sup> Range \$4-\$41152, n = 316: *ibid*.

<sup>469</sup> Range \$150-\$15000, n = 13: id 87, table 1.

<sup>470</sup> Range \$5-\$10400, n = 28: *ibid*.

<sup>471</sup> *id* 53, table 8.

<sup>472</sup> Range \$90-\$15000, n = 15: id 87, table 1.

<sup>473</sup> Range \$1-\$7500, n = 25: *ibid*.

median cost of counsel's fees was \$612<sup>474</sup> and experts, \$150.<sup>475</sup> For unrepresented respondents, these figures were \$2500<sup>476</sup> and \$660<sup>477</sup> respectively. Sample numbers for unrepresented litigants were small. Median counsel's fees for represented applicants were \$500<sup>478</sup> and \$744<sup>479</sup> for respondents. Experts' fees were \$400 for applicants<sup>480</sup> and \$800 for respondents.<sup>481</sup>

4.76 As fees paid to solicitors, counsel and experts represent a significant proportion of the costs to a litigant, the Commission also sought in its study to attribute the costs of these fees to specific stages of the case process.<sup>482</sup> This showed that most of the fees charged by solicitors are accumulated in the final hearing stage (median: \$1700 for applicants, \$2035 for respondents), than at the prehearing stage (median: \$1500 for applicants, \$1671 for respondents).<sup>483</sup> Similarly, most fees to be paid to counsel are accrued at the final hearing stage (median \$1975 for applicants, \$2736 for respondents).<sup>484</sup> Experts' fees were also largely attributable to the final hearing stage, but only the figures at the prehearing stage had sufficient sample numbers to be useful.<sup>485</sup>

4.77 For all categories the median office expenses were below \$100. The range indicates that these can be a significant cost for some parties. For unrepresented litigants, photocopying expenses were as much as \$400 for applicants and \$250 for respondents.<sup>486</sup> For represented applicants, the maximum paid for office expenses was \$3000, and for respondents \$25000.<sup>487</sup>

4.78 Another unspecified cost for unrepresented litigants was the amount of time spent personally preparing their matter for court. Data from a small sample of

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<sup>474</sup>.Range \$500-\$3000, n = 5: id 41, table 18.

<sup>475</sup>.Range \$50-\$400, n = 3: *ibid*.

<sup>476</sup>.Range \$9200-\$5000, n = 3: *ibid*.

<sup>477</sup>.Range \$200-\$2000, n = 6: *ibid*.

<sup>478</sup>.Range \$5-\$30000, n = 106: id 53, table 8.

<sup>479</sup>.Range \$5-\$25285, n = 78: *ibid*.

<sup>480</sup>.Range \$35-\$20000, n = 41: *ibid*.

<sup>481</sup>.Range \$75-\$25000, n = 33: *ibid*.

<sup>482</sup>.The stages were: prefilng: initial instructions, advice, preparatory work, prefilng negotiation; prehearing: from commencement of proceedings up to and including prehearing conference and any part thereof; final hearing: from just after prehearing conference to completion of final hearing and any part thereof: T Matruglio, Family Court Empirical Report Part Two, 55.

<sup>483</sup>.At the prefilng stage, solicitors' fees were \$914 for applicants and \$740 for respondents: id 55, tables 9 and 10.

<sup>484</sup>.Prehearing: \$1000 for both applicants and respondents. Prefilng: \$475 for applicants and \$600 for respondents: *ibid*.

<sup>485</sup>.*ibid*.

<sup>486</sup>.Median \$20 for applicants and respondents. n = 14 for applicants, n = 15 for respondents: id 42, table 18.

<sup>487</sup>.Applicants: median \$85, range \$2-\$3000, n = 238; respondents: median \$99, range \$4-\$25000, n=145: id 53, table 8.



unrepresented applicants showed that they spent an average of 61 days (median 10 days) on case preparation and 11 days attending court (median 7 days). Unrepresented respondents spent an average of just over five days on case preparation (median 2 days) and an average and median of 4 days attending court.<sup>488</sup>

4.79 *Cost by stage of disposal and case type.* In the Family Court the cost of cases differ depending on the stage at which the matter resolved and the type of issues in dispute. As shown in the following table, matters in the Family Court resolved after being listed for hearing had similar costs to matters that received a judgment from the court. There would appear to be limited cost savings if a matter settles just prior to the hearing. At every stage, disputes relating to property had higher costs than matters involving only children.

**Table 4.11 Median total cost by case type (Form 7 – applications for final orders only)**<sup>489</sup>

Time of disposition	Case type					
	Property only		Children only		Both	
	n	Median (\$)	n	Median (\$)	n	Median (\$)
Between instructions and initial directions hearing	4	2 047	2	2 331	2	992
After initial directions and up to conciliation conference	66	3 289	114	1 971	23	4 422
After conciliation conference and up to prehearing conference	60	3 511	31	1 791	24	4 492
After prehearing conference and up to start of trial	24	11 285	19	3 753	10	11 105
During trial or at judgment	12	11 275+ 9 436 for each day after the first	26	3 753+ 9 436 for each day after the first	5	11 105+ 9 436 for each day after the first

4.80 *Costs by registry.* The JRC research also found a significant difference in the total costs when broken down by registry.<sup>490</sup> Townsville and Melbourne tended to have significantly higher costs, while Canberra and Dandenong tended to have

<sup>488</sup>.id 43, table 19.

<sup>489</sup>Justice Research Centre 'Family Court research part three: Comparison with the report on "The review of scales of legal professional fees in federal jurisdictions" by Professor Philip Williams et al' ALRC Sydney June 1999, tables 4 and 5 (Justice Research Centre Family Court Research Part Three).

<sup>490</sup>Justice Research Centre Family Court Research Part Three, 5, table 7.

lower costs. A similar significant difference was evident when considering professional fees and disbursements separately.<sup>491</sup>

4.81 *Charging practices.* Charging practices by lawyers impact on costs charged and the ability of litigants to pay. In the Commission's study, 46% of applicants and 35% of respondents were charged on the basis of the Family Court scale,<sup>492</sup> while 23% of applicants' solicitors and 26% of respondents' solicitors charged on the basis of time spent.<sup>493</sup> Table 4.14 shows the costs charged at scale were lower than those charged under other billing arrangements. A significant proportion of solicitors had regular billing arrangements,<sup>494</sup> while others agreed they would defer payment to the end of a case.<sup>495</sup>

### *Review costs in the Administrative Appeals Tribunal*

4.82 *Case costs.* For represented applicants the median total case cost in the AAT was \$2585, and for respondents \$4006.<sup>496</sup> The most expensive single items was for solicitors' fees, which for applicants were a median of \$2088<sup>497</sup> and for respondents \$3481.<sup>498</sup> The most expensive disbursement for represented litigants were fees paid to counsel, which were \$1725<sup>499</sup> for applicants and \$1500 for respondents.<sup>500</sup>

4.83 While the median costs of photocopying generally were modest,<sup>501</sup> the maximum amounts recorded in the Commission's study indicate that for some parties photocopying can be a significant cost.<sup>502</sup>

4.84 *Costs by case type.* There is significant variation in the AAT in the costs incurred with respect to case type.<sup>503</sup> The largest median costs were incurred in the

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<sup>491</sup>.When the sample was split by initiating document, the results were not as clear, with form 7 cases showing no significant difference between registries when considering total fees or professional fees, but with significant differences in disbursement costs between registries. The highest disbursement costs were incurred in Sydney and Melbourne and the lowest were incurred in Darwin and Canberra. With form 12A cases, there was no significant difference between registries for disbursement costs or professional fees separately. However, when combined, there was a significant difference in total costs, with Sydney and Townsville having the highest costs, and Canberra and Hobart having the lowest.

<sup>492</sup>.Applicants n = 175 (total n = 385); respondents n = 95 (total n = 274): T Matruglio, Family Court Empirical Report Part Two, 47, table 2.

<sup>493</sup>.Applicants n = 88 (total n = 385); respondents n = 72 (total n = 274); *ibid.*

<sup>494</sup>.51% of applicants solicitors; 45% of respondent solicitors: *id* 47.

<sup>495</sup>.54% (n = 184) of applicants solicitors; 46% (n = 101) of respondent solicitors: *ibid.*

<sup>496</sup>.ALRC, AAT Empirical Report Part Two, para 5, table 5.1.

<sup>497</sup>.Range \$0-\$46647, n = 148: *id* table 5.1.

<sup>498</sup>.Range \$175-\$16818, n = 91: *ibid.*

<sup>499</sup>.Range \$162-\$96000, n = 56: *ibid.*

<sup>500</sup>.Range \$900-\$11730, n = 38: *ibid.*

<sup>501</sup>.Represented applicants: \$54; represented respondents: \$155: *id* table 3.10, table 5.1.

<sup>502</sup>.Represented applicants maximum \$2428; represented respondents maximum \$1852: *ibid.*

compensation jurisdiction where applicants in the survey paid a median of \$4622<sup>504</sup> and respondents \$4061.<sup>505</sup> Social welfare cases had the lowest costs, with a median of \$1487<sup>506</sup> for applicants and \$1320 for respondents, although the sample size was small.<sup>507</sup> For respondents in veterans' affairs, taxation and other case categories the numbers in the sample for respondents were small and of limited comparative value.<sup>508</sup>

4.85 *Costs by stage of disposal.* There was a significant difference in the cost of compensation cases<sup>509</sup> in the AAT depending on the stage at which the matter resolved.<sup>510</sup> Cases that resolved without a hearing had much lower costs than matters that went to a hearing. However, cases resolved by consent at a final hearing were not significantly cheaper to run than those resolved by determination at hearing. The median cost for a compensation case resolved by consent at a hearing was \$8424, compared to \$9000 for all compensation cases resolved at hearing.<sup>511</sup>

#### *The cost of alternative dispute resolution*

4.86 There is limited evidence about how much ADR costs,<sup>512</sup> and whether, in fact, it is always a cheaper alternative to litigation. Where it resolves a matter the parties may be spared further dispute resolution costs but otherwise the parties may be paying a fee for ADR services in addition to other costs.<sup>513</sup>

4.87 The Commission's survey of solicitors involved in Family Court cases asked whether the client had attended any form of mediation.<sup>514</sup> The costs for solicitors' fees and total disbursements varied depending on whether the mediation undertaken was private, community based mediation, or Family Court or legal aid family conferences. The case sample involved was small.

503. The major case categories used in the Commission's survey were compensation, social welfare, veterans' affairs and taxation. id 9-10.

504. Range \$210-\$22435, n = 53: id table 5.2.

505. Range \$375-\$29586, n = 93: *ibid.*

506. Range \$130-\$6000, n = 13: *ibid.*

507. Range \$754-\$7831, n = 12: *ibid.*

508. *ibid.*

509. Compensation cases were the only AAT case category with enough cases to permit valid analysis.

510. ALRC, AAT Empirical Report Part Two, table 5.4 and text.

511. id tables 5.5, 5.8.

512. ALRC IP 25, para 2.66. In the United States a recent study of mediation and neutral evaluation programs found that there was no strong statistical evidence that the ADR programs evaluated significantly reduced time to disposition or litigation costs: J Kakalik et al *An evaluation of mediation and early neutral evaluation under the Civil Justice Reform Act* RAND Santa Monica 1996, 53. The research evaluated six federal district courts that had mediation or early neutral evaluation programs.

513. ALRC IP 25, para 2.68.

514. Justice Research Centre Family Court Research Part Two.

**Table 4.12 Specific mediation processes by costs<sup>515</sup>**

Mediation process	Solicitors' fees		Disbursements	
	n	Median	n	Median
Family Court mediation	44	\$2 878	41	\$405
Legal aid family conference	29	\$1 848	32	\$224
Community based mediation	18	\$3 625	17	\$401
Private mediation	20	\$5 854	18	\$954

4.88 The Federal Court charges a fee of \$253 for an individual and \$506 for a corporation for mediation by a court officer (for the first attendance at mediation).<sup>516</sup> The Family Court does not charge for voluntary counselling and mediation.<sup>517</sup> In addition to mediation fees parties also incur further costs in having their legal representatives attend mediation. Research by the Commission showed that represented applicants in the Federal Court spent a median of \$2300 on mediation attendance, and respondents, \$1974.<sup>518</sup> The median cost of attendance paid by applicants was \$625, and by respondents, \$1900, but sample size was very small.<sup>519</sup> In the Commission's research on the Family Court, the median cost of attendance for applicants' solicitors at mediation was \$479 and for respondents' solicitors was \$357.

4.89 The services provided by the Commonwealth Ombudsman and other industry ombudsmen are free to the consumer/complainant.<sup>520</sup> Private industry ombudsmen such as the ABIO and the TIO are provided at a cost to the companies that benefit from their services, but there is no cost to complainants who make use of the service.

4.90 Commercial mediation fees vary. For example, fees charged by ACDC in Sydney are \$300 for a registration fee and a \$60 per party per hour administration fee plus disbursements. The latter includes fees for experts, mediators and arbitrators which vary from \$120 per hour to \$400 per hour, plus travel expenses and accommodation. These charges are usually shared equally by the disputing parties. ACDC notes that there is a great variation in costs, depending on the complexity of the case and the efficiency of the parties. However, usual costs, excluding the parties' own legal fees, are \$700-\$2000 per party for mediation, \$700-\$5000 per party for expert determination, appraisal or recommendation, and

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<sup>515</sup> *ibid.*

<sup>516</sup> CCH *Australian High Court and Federal Court Practice* Sydney vol 2 para 30-009.

<sup>517</sup> Charges for these services were imposed in July 1997. However, the Senate disallowed the legislation five months later: *Family Court of Australia Annual report 1997-98*, 19.

<sup>518</sup> The sample size for applicants was 7, and for respondents, 16: T Matruglio, *Federal Court Empirical Report Part Two*, 53, table 18.

<sup>519</sup> The sample size for applicants was 8, and for respondents, 4: *ibid.*

<sup>520</sup> Commonwealth Ombudsman *Client Service Charter* March 1998, 2.

\$1000–\$50000 per party for ACDC arbitration.<sup>521</sup> In comparison, LEADR mediators charge approximately \$500–\$5000 per day, with the majority charging \$750–\$2000 per day.<sup>522</sup>

4.91 A new service, Private Judging, said to be a ‘half-way house between mediation and arbitration’, suggests that it will resolve most disputes in less than 10 per cent of time that might be spent on litigation or arbitration. The cost of this service will be about \$5000–\$6000 a day.<sup>523</sup>

## Cost containment through regulation

4.92 It is difficult to predict the costs of a matter when lawyers are first instructed. The size and resolution of the dispute can depend, among other things, on the approach of the other party. Further, legal advice and case preparation is necessarily labour intensive. Lawyers have particular knowledge and skill and generally direct the services provided. The legal services market is in some ways not an effectively operating market as, with the exception of major repeat players, few of the consumers are knowledgeable about the practice, service quality or fee charging practices.

4.93 One way of containing costs for legal services is by regulating the fees charged by lawyers.<sup>524</sup> This is usually achieved indirectly through court scales that set a fee or rate for items of work performed. Other regulatory measures that impact on cost containment of lawyers’ fees include fee disclosure requirements and the regulation of arrangements for lawyer–client fee agreements.

### Scales

4.94 Scales indicate what costs should reasonably be charged by practitioners acting on behalf of clients. They also provide information to clients and lawyers about fee rates and provide a standard for costs assessment or taxation.<sup>525</sup> In federal jurisdiction, indicative scales apply in the High Court, Federal Court and the Family Court of Australia.<sup>526</sup> Legal aid commissions also have scales that fix the amount

<sup>521</sup> <<http://www.austlii.edu.au/au/other/acdc/About-ACDC/AB8/Fees.html>> (7 June 1999).

<sup>522</sup> ‘LEADR’s facilitation service for advisers and parties’ – printed information provided by LEADR.

<sup>523</sup> ‘Enter the private judge’ *Sydney Morning Herald* 22 June 1999; N Reece ‘Private judges in demand’ *Australian Financial Review* 2 July 1999, 32.

<sup>524</sup> Other options for containing costs are: caps (see para 7.55); insurance, where insurance companies take an active role in monitoring legal costs (see para 6.31-6.38); having legal aid staff rather than private lawyers provide services (see para 7.61-7.64); improving the efficiency of service providers through the use of technology and encouraging the use of case management and other court procedures that improve court efficiency.

<sup>525</sup> AJAC report, 154-5.

<sup>526</sup> No scales exist in the AAT. However, where the tribunal has the power to order or recommend that the respondent pay all or part of the costs of a successful applicant, unless the order otherwise

the commission will pay a solicitor or barrister acting for legally aided clients.<sup>527</sup> Both in Australia and overseas there is continuing discussion on the merit of fee scales, particularly focussed on whether they reduce legal expenses and provide information to parties with which to compare their own costs.

4.95 **United Kingdom and Germany.** In the United Kingdom a fixed cost regime for straightforward cases is being implemented. For more complex cases, estimates of costs are to be published by the court or agreed by the parties and approved by the court.<sup>528</sup> For uncomplicated and predictable litigation courts are to issue guideline costs.<sup>529</sup> In Germany there is a fixed costs regime where costs follow the result of litigation and the loser pays the winner's costs and expenses, including court fees.<sup>530</sup> Lawyers' fees – and even court fees – are determined in proportion to the party's success in the claim. For instance, a plaintiff who recovers only 80% of his or her claim will recover only 80% of the costs. In divorce cases each party bears his or her own costs plus half the court fees.

4.96 Lord Woolf's survey on the fixed cost regime in Germany<sup>531</sup> found that generally practitioners did not charge more than the official scales. It was not difficult for people with low value claims to find legal representation nor did legal practitioners spend less time or provide less than acceptable representation to their clients in such cases. German legal practice is very competitive and there was no

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determines, the costs will be assessed on a party and party basis at 75% of the Federal Court scale: *AAT General Practice Direction 21 August 1996*.

<sup>527</sup> Legal aid scales differ from one State and Territory to another. In family law matters, the scale in the Family Law Rules is often used by the commissions but they have also specified adaptations or variations. In family law matters solicitors' fees are set on a lump sum basis for various stages, with provision for additional payment to be made if substantial additional work is required through circumstances beyond the control of the solicitor. Counsel's fees are payable on a total lump sum based on the estimated length of hearing, also with provision for additional payment for additional substantial work. There is a table of fees for civil matters in all courts (except local and family court) and the Commercial Tribunal, Equal Opportunity Tribunal and HREOC.

<sup>528</sup> Woolf final report. The Law Society (England & Wales) supported a fixed costs regime for fast track cases for fixing party-party costs only, but said it would be contrary to government policy to control solicitor and own client costs in the market: *Law Society Volume 1: Fast track, housing, multi-party actions, expert evidence, costs – Responses by the Law Society Civil Litigation and Courts and Legal Services Committees* Law Society London March 1996, 3.

<sup>529</sup> Three tracks were proposed by the Woolf final report (principally on the basis of the value of the case): a small claims track, a fast track and the multi-track. This system of three tracks is one of the key elements of a reform package being implemented in England and Wales: Lord High Chancellor *Modernising justice: The Government's plans for reforming legal services and the courts* Lord Chancellor's Dept London 1998, para 4.3.

<sup>530</sup> A Zuckerman *Lord Woolf's inquiry: Access to justice – Research conducted for the final report to the Lord Chancellor, July 1996 – German litigation costs: Survey of German practitioners* Lord Chancellor's Dept London July 1996, 8–9; DLeipold 'Limiting costs for better access to justice: The German approach' in A Zuckerman & RCranston (eds) *Reform of civil procedure* Clarendon Press Oxford 1995, 268–9.

<sup>531</sup> A Zuckerman *Lord Woolf's inquiry: Access to justice – Research conducted for the final report to the Lord Chancellor, July 1996 – German litigation costs: Survey of German practitioners* Lord Chancellor's Dept London July 1996.

shortage of lawyers willing to take on these claims.<sup>532</sup> Access to justice is enhanced by widespread legal expenses insurance and as costs follow the event and the loser pays the costs of both parties, plaintiffs know in advance what they may have to pay.<sup>533</sup> For the lowest value claims, the cost of the proceeding is almost as much as the amount of the claim, but the cost/claim value ratio decreases quickly as the value of the claim rises.<sup>534</sup>

4.97 *Australia.* In Australia the Access to Justice Advisory Committee (AJAC)<sup>535</sup> and the Trade Practices Commission (TPC)<sup>536</sup> have recommended that fee scales be abolished. Scales are said to be anti-competitive because they reduce market pressures to compete on price or adopt innovative practices, and they place a floor under market prices for legal services. The TPC argued that item based scales are rigid and reward inefficiency by encouraging work to be performed in outmoded ways, rather than passing on the benefits of new technology or practice management to consumers. The TPC also argued that fee scales do not bridge the information imbalance between lawyers and clients because scales do not provide information about reasonable fees and the total cost of the service and they do not reflect market conditions. The TPC argued that this information imbalance would be better addressed through advertising, disclosure requirements and better consumer education.<sup>537</sup>

4.98 *Williams report.* A lump sum fee scale has been suggested for the federal jurisdiction by the *Report of the review of scales of legal professional fees in federal jurisdictions* (the Williams report).<sup>538</sup> The Williams report considered the present scales to be unsatisfactory because

- they create uncertainty about the amount a successful litigant will recover
- parties may litigate (rather than settle or control expenditure) in the belief they will recover most of the increased expenditure and
- they reward certain work (such as engrossing, drawing and photocopying) which may bias the activity of solicitors towards such work.<sup>539</sup>

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<sup>532</sup> Lawyers also stated that they accepted low monetary value litigants due to obligations to represent their commercial clients in small scale personal litigation, desires to safeguard their reputation, and to attract future clients: A Zuckerman *Lord Woolf's inquiry: Access to justice – Research conducted for the final report to the Lord Chancellor, July 1996 – German litigation costs: Survey of German practitioners* Lord Chancellor's Dept London July 1996, 9–12.

<sup>533</sup> G Dannemann 'Access to justice: An Anglo-German comparison' (1996) 2(2) *European Public Law* 271, 280–81.

<sup>534</sup> *id.* 282.

<sup>535</sup> AJAC report para 5.24–5.26.

<sup>536</sup> Trade Practices Commission *Study of the professions – legal* Final Report TPC Canberra 1994, 157 (TPC final report).

<sup>537</sup> *ibid.*

<sup>538</sup> P Williams *Report of the review of scales of legal professional fees in federal jurisdiction* Attorney-General's Department (Commonwealth) Canberra 1998.

<sup>539</sup> *id.* 15–20.

4.99 The fixed costs scheme proposed by the Williams report determines party-party costs and the amount payable to a solicitor if there is no enforceable fee agreement. To give effect to this, a judge would decide at an initial directions hearing into which category of complexity – direct track, standard track or complex track – a particular case should fall. The categorisation takes account of the number of stages or events through which a matter has proceeded and determines the amount of any eventual cost award. This ensures that litigants know from the outset of the litigation the amount they will receive towards their legal costs from the other party if they are successful. This is expected to create incentives for litigants to control litigation costs because each litigant will have to bear the full cost of any extra expenditure they incur. The set fees proposed allow higher costs for work done in the early stages of the litigation, with recoverable costs decreasing as the case continues in order to encourage early settlement. If the case goes to hearing the amount of the award would depend on the length of the hearing.<sup>540</sup>

4.100 *Concerns with the Williams proposals.* The proposed scales in the Williams report are based on costs calculated from a survey and are intended to reflect market prices. Concerns have been raised that the amounts under the proposed scale are inadequate and do not reflect regional variations in charging practices.<sup>541</sup> There are also concerns about whether a judge or registrar would be in a position to make an accurate assessment of the complexity of a matter at an initial directions hearing.<sup>542</sup>

4.101 An indirect effect of the scheme may be to erode the effect of the costs indemnity rule.<sup>543</sup> The fees proposed in the Williams report are seen to be generally low and in complex matters, in particular, would increase the gap between the costs charged and costs recovered with the successful party recovering only a small portion of the actual costs. The retention of the costs indemnity rule in Australia for civil proceedings is generally favoured<sup>544</sup> as it 'ensure[s] appropriate and prudent use of scarce court resources' and 'is one of the important features which guards our system from many of the excesses of the American legal system'.<sup>545</sup>

4.102 *The Commission's research.* Research conducted for the Commission by the Justice Research Centre (JRC) compared the Williams report fees for family law

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<sup>540</sup>.id 21-22.

<sup>541</sup>.Law Council of Australia *Submission by the Law Council of Australia to the Attorney-General's Department in respect of report of the review of scales of legal professional fees in federal jurisdictions* LCA July 1999, 38, 41.

<sup>542</sup>.id 38-40.

<sup>543</sup>.id 36-37.

<sup>544</sup>.TPC final report; AJAC report para 5.58-5.67; ALRC 75; Business Working Group on the Australian Legal System *Trends in the Australian legal system – avoiding a more litigious society* Allen Consulting Group Sydney 1997, iii.

<sup>545</sup>.Business Working Group on the Australian Legal System *Trends in the Australian legal system – avoiding a more litigious society* Allen Consulting Group Sydney 1997, iii.



matters with the Commission's survey of costs incurred in Family Court of Australia matters.<sup>546</sup> The following table shows that the Commission's figures for the median costs of direct track cases up to trial are higher than the Williams fees but the Commission's figures for standard track cases up to trial are lower. The same applies at the 90th percentile. The cost after the first day of trial from the Commission's figures is considerably higher than Williams figures.<sup>547</sup> The comparison shows the difficulties in fixing cost scales.

**Table 4.13 Comparison of Williams' and ALRC costs figures in family matters<sup>548</sup>**

Time of disposition	Degree of complexity							
	Direct				Standard			
	Williams median	ALRC median	Williams 90th	ALRC 90th	Williams median	ALRC median	Williams 90th	ALRC 90th
Between instructions and initial directions hearing	1 035	—	2 049	—	1 820	2 119	3 000	—
After initial directions and up to conciliation conference	1 200	2 256	4 250	8 031	3 230	2 633	9 809	7 984
After conciliation conference and up to prehearing conference	2 070	3 516	6 100	21 293	4 915	3 438	10 000	7 900
After prehearing conference and up to start of trial	—	9 953	—	—	8 955	5 581	13 344	—
During trial or at judgment	3 890+ 2 890 for each day after the first	9 753+ 9 523 for each day after the first	—	—	8 955+ 2 890 for each day after the first	5 581+ 9 523 for each day after the first	—	—

4.103 A further analysis of costs was undertaken by the JRC using case type rather than case complexity as the relevant grouping and appears at table 4.14. This analysis had larger sample numbers in most categories. When compared with the Williams figures, the median costs for property matters exceeded the set fees in the Williams direct track matters at every stage of disposition.

<sup>546</sup>The Williams report figures used here are those in the findings of the Williams report, not those used in the proposed scales.

<sup>547</sup>There is no comparison of figures for complex family cases as differentiation of such is problematic and no complex cases were included in the data provided by the Commission.

<sup>548</sup>Justice Research Centre Family Court Research Part Three, 3, tables 2 and 3.

4.104 The Commission also sought information on the charging arrangements of solicitors in Federal Court and Family Court of Australia matters. The data on family law proceedings shows that parties were charged significantly lower professional fees and disbursements when the Family Court scale was used, as compared with costs agreements calculated by reference to time spent or some other basis. From this, the scale appears to provide lower, more affordable fees in this high volume jurisdiction. Although current Federal Court and Family Court scales are outdated and therefore less useful than they might be,<sup>549</sup> the Commission's research shows that people still rely on them.<sup>550</sup> The differences in charging practices on fees and disbursements in the Family Court are shown in the tables below.

**Table 4.14 Method of charging of solicitors' fees – Family Court of Australia** <sup>551</sup>

Method of charging	n	Mean	Median	Range
Family Court scale	254	\$3 008	\$1 730	\$50– \$63 900
Written costs agreement – time spent	147	\$7 073	\$3 000	\$68– \$114 854
Written costs agreement – other scale	77	\$6 670	\$2 935	\$250 –\$72 000
Other	36	\$2 533	\$1 453	\$100 –\$14 180

**Table 4.15 Method of charging of total disbursements – Family Court of Australia**<sup>552</sup>

Method of charging	n	Mean	Median	Range
Family Court scale	213	\$976	\$200	\$

<sup>549</sup>Williams report, ch 2.

<sup>550</sup>In the Commission's study 14% of applicants and 7% of respondents were charged at the Federal Court scale: The total number of applicants who responded was 152, and respondents, 137: T-Matruglio, Federal Court Empirical Report Part Two, 40, table 2. In the Family Court 46% of applicants and 35% of respondents were charged on the basis of the Family Court scale: Applicants n = 175 (total n = 385); respondents n = 95 (total n = 274): T Matruglio, Family Court Empirical Report Part Two, 47, table 2.

<sup>551</sup>Justice Research Centre Family Court Research Part Two, table 2B, 5.

<sup>552</sup>id table 2C, 5.

				2 - \$ 2 3
				2 5 4
Written costs agreement – time spent	139	\$2084	\$271	\$ 4 - \$ 4 5
				6 7 8
Written costs agreement – other scale	71	\$2606	\$401	\$ 9 - \$ 5 0
				0 0 0
Other	28	\$911	\$249	\$ 1 2 - \$ 9
				4 2 7

4.105 *The Commission's view.* The event based scales employed by Williams offer a useful model, with the qualifications noted, as to the amounts proposed and applicability to complex matters. The Law Council of Australia's response to the

Williams report echoes these concerns.<sup>553</sup> The Commission supported the retention of the costs indemnity rule in its *Costs shifting* report and continues to do so.<sup>554</sup> The Commission is most concerned with a system which would erode the effect of the costs indemnity rule.

4.106 The Commission supports the development of event based scales, although it recognises there needs to be further analysis of the amounts involved and definitions of the events to be included. The Law Council of Australia has also acknowledged that the concept of event based lump sum scales may be beneficial in promoting certainty and predictability of costs.<sup>555</sup> Event based scales, in particular, give clients a better indication of total costs where information on the events involved in a matter is also available.

4.107 The Commission is also concerned with prescriptive fee scales, particularly in complex litigation. Fixed fee scales are most effective for high volume, routine matters such as often appear in the Family Court of Australia and in certain case types in the Federal Court. Fixed scales are also effective in removing costs differences between registries that are performing the same type of work.<sup>556</sup> The Commission supports the present regime in which scales apply where there is no contract between the client and the lawyer and in which they are used to determine party-party costs.

4.108 It is important that fee scales provide a benchmark for fees charged by lawyers. The Commission recommends enhancing the role of the Federal Costs Advisory Council to calculate event based benchmark scales from which federal courts and tribunals could set their own scales. These scales should be set in consultation with courts, tribunals, legal aid, large repeat players such as insurance companies, the Office of Legal Services Coordination, and, most importantly, costs assessors and taxing officers. The involvement of costs assessors and taxing officers is important because of their practical experience and expertise in relation to costs. The Council should calculate the market based fees for a variety of federal matters with these fees adjusted regularly by formula. There should be a full reconsideration of the fees and event categories every three years. Such a system would give much needed market information on legal costs. Event based scales are more useful

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<sup>553</sup> Law Council of Australia *Submission by the Law Council of Australia to the Attorney-General's Department in respect of report of the review of scales of legal professional fees in federal jurisdictions* LCA July 1999.

<sup>554</sup> ALRC 75 recommended the retention of the costs indemnity rule subject to the following exceptions to the general rules: the rules relating to discipline and case management costs orders; the court determining that the risk of having to pay the other party's costs if unsuccessful will materially and adversely affect the ability of a party to present his or her case properly or negotiate a fair settlement; the rules relating to public interest costs orders.

<sup>555</sup> Law Council of Australia *Submission by the Law Council of Australia to the Attorney-General's Department in respect of report of the review of scales of legal professional fees in federal jurisdictions* LCA July 1999, 4, 34.

<sup>556</sup> The JRC found a significant difference in costs by registry when considering the total costs and solicitors' fees and disbursements separately: Justice Research Centre Family Court Research Part-Three, 5, table 7.

predictors of costs than item based scales. The Commission doubts the utility of such scales for complex cases but this could be further considered by the Federal Costs Advisory Council. It is important that the scales be set in consultation with experts on legal fees. The scheme should have appropriate flexibility so that it does not erode the costs indemnity rule.

**Proposal 4.1.** The Commission recommends that the Federal Costs Advisory Council calculate benchmark event based scales for matters in the federal jurisdiction. The benchmark scales should be calculated in consultation with costs assessors, taxing officers, courts, tribunals, legal aid commissions, 'repeat player' litigants and the Office of Legal Services Coordination in the Attorney-General's Department. The fees should be adjusted regularly by formula and there should be a fundamental reconsideration of the fees set and the event categories every three years.

Courts and tribunals should set their scales based on the benchmarks established by the Council. The scales should not be prescriptive, such that they erode the costs indemnity principle in costs awards.

#### *Costs agreements and fee disclosure*

4.109 In all jurisdictions lawyers and clients may enter into agreements regarding the amount and manner of payment of charges.<sup>557</sup> Generally there is no private recourse to taxation of costs<sup>558</sup> where a valid costs agreement is in place. Rules regulate the transaction arrangements for costs agreements. However, the Federal Court can order taxation of a solicitor-client bill notwithstanding the existence of a costs agreement.<sup>559</sup> In the Family Court of Australia costs agreements may be challenged on a number of grounds including undue influence, uncertainty, unfairness and/or unreasonableness.<sup>560</sup>

<sup>557</sup>.*Legal Profession Act 1987* (NSW) s 184(10), *Legal Practice Act 1996* (Vic) s 96, *Legal Practitioners Act 1981* (SA) s 42(6), *Legal Practitioners Act 1970* (ACT) s 190(2), *Legal Practitioners Act 1974* (NT) s129(2), *Legal Profession Act 1993* (Tas) s129(1), *Legal Practitioners Act 1893* (WA) s 59(1).

<sup>558</sup>. Taxation is an independent assessment or quantification of an appropriate level of lawyers' charges. If parties, or a solicitor and client, disagree about the amount of costs payable they can seek to have those costs taxed. Rules of court provide for the taxation of bills of costs in different jurisdictions: High Court Rules O 71 r 74; Federal Court Rules O62; Family Law Rules O 38 r 47. The rules relating to taxation in the High Court and the Federal Court ordinarily apply to party-party costs disputes. Disputes between solicitors and clients about costs usually are dealt with under State legislation and the rules of the Supreme Courts. The Family Court taxes party-party and solicitor-client bills.

<sup>559</sup>. In *Keith Hercules & Sons v Steedman* (1987) 78 ALR 353 the Full Court held that the power existed, exercisable only in extraordinary circumstances, to direct the taxation in the Federal Court of a disputed solicitor and client bill relating to Federal Court proceedings. In *Burgundy Royale Investments Pty Ltd (in liq) v Westpac Banking Corp Ltd* (1991) 28 FCA 308 Einfeld J held that 'the existence of an agreement does not exempt it from examination as to fairness, possible overcharging and therefore enforceability'.

<sup>560</sup>. A costs agreement must be fair and reasonable: Family Law Rules O 38 r 27(2). In *Weiss v Barker Gosling* (1993) 16 Fam LR 728; FLC 92-399 Fogarty J said there is a common law requirement that

4.110 A number of jurisdictions have adopted practice rules which require lawyers to inform clients of potential costs as soon as practicable after receiving instructions,<sup>561</sup> and in some cases provide a review of costs.<sup>562</sup> In Queensland it is mandatory to have a costs agreement with a client.<sup>563</sup> The abolition of fee scales in New South Wales means that most legal work there is carried out under such agreements. In New South Wales and Victoria there is a statutory requirement to disclose the basis of the costs of legal services to the client as soon as practicable after retention,<sup>564</sup> and an additional statutory requirement in Victoria to provide information regarding possible costs prior to the practitioner being retained.<sup>565</sup> In the Northern Territory and Queensland the making of a costs agreement constitutes an alternative to delivering a bill of costs.<sup>566</sup> In the remaining jurisdictions a costs agreement does not relieve the practitioner from delivering a bill of costs as a prerequisite to enforcement of that agreement.<sup>567</sup> The Family Law Rules require that before any agreement about charges is entered into, the solicitor must give the client a copy of the costs brochure published by the Family Court.<sup>568</sup> The brochure sets out the Family Court scale of costs, the procedure for handling disputes about costs, and information about the availability of independent legal advice concerning the agreement.

4.111 *Fee disclosure by barristers.* Most discussions about legal costs focus on the charging practices of solicitors. Barristers' fees in some jurisdictions are subject to

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the costs agreement be fair and reasonable and that the onus of proof is on the solicitor. In *Schiliro v Gadens Ridgeway* (1995) 19 Fam LR 196; FLC 92-608 the Full Court approved Graham J's finding in the first instance that the requirement of fairness was satisfied if the client understands and appreciates the agreement at the time the agreement is entered into. The agreement must be entered into by the client without undue influence: see *Re P's Bill of Costs* (1982) 8 Fam LR 489.

<sup>561</sup> Qld Solicitors Handbook, 8.01; Law Society SA Conduct Rules, r 9.14(a) and (b); Rules of Practice Tas, r 13(2); Law Institute Vic Conduct Rules, r 12(2)(a); Law Society WA Conduct Rules, r 10.3; Law Society ACT Conduct Rules, r3.1(6).

<sup>562</sup> Law Society SA Conduct Rules, r 9.14(c); Rules of Practice Tas, r 13(4); Law Institute Vic Conduct Rules, r 10.3; Law Society WA Conduct Rules, r 10.3.

<sup>563</sup> *Civil Justice Reform Act 1998* (Qld) s 48. This section does not apply to urgent work or work for which the charges are \$750 or less.

<sup>564</sup> *Legal Profession Act 1987* (NSW) s 175-183; *Legal Practice Act 1996* (Vic) s 86(2). In NSW a failure to disclose costs may constitute unsatisfactory professional conduct or professional misconduct: *Legal Profession Act 1987* (NSW) s 183(2).

<sup>565</sup> *Legal Practice Act 1996* (Vic) s 86(1).

<sup>566</sup> *Legal Practitioners Act 1974* (NT) s 129(1), *Legal Practitioners Act 1995* (Qld) s 5, 23 & 24.

<sup>567</sup> G Dal Pont *Lawyers' professional responsibility in Australia and New Zealand* Law Book Co Sydney 1996, 299.

<sup>568</sup> Order 38. The brochure is entitled *Costs of family law proceedings*.

less regulation than solicitors' fees.<sup>569</sup> Barristers are usually engaged by the solicitor who is liable to ensure payment unless there is an agreement to the contrary.<sup>570</sup>

4.112 In New South Wales and Victoria, legislation allows barristers to enter into costs agreements with a client or solicitor.<sup>571</sup> In New South Wales, barristers are required to disclose to the instructing practitioner the amount of costs if known, or if not known the basis of calculating the costs, and the billing arrangements. If the amount of costs is not disclosed, an estimate of likely costs must be provided, and any significant increases in that estimate must be disclosed.<sup>572</sup> The solicitor is then obligated to disclose this to the client. In practice, such disclosure requirements are not always complied with by barristers.<sup>573</sup> Consequences of this include

- the client need not pay the costs of the legal services unless the costs have been assessed<sup>574</sup>
- the costs of any assessment are payable by the barrister or solicitors seeking to recover costs<sup>575</sup> and
- the practitioner may face charges of unsatisfactory professional conduct or professional misconduct.<sup>576</sup>

4.113 Lay clients and solicitors do not have the same opportunity to object to barristers' fees as such clients have to object to solicitors' fees. For example, in New South Wales solicitors have 30 days from the date of receipt of a barrister's bill to raise objections about the amount and have the bill assessed.<sup>577</sup> In contrast, a client

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<sup>569</sup> Special rules apply to lawyers practising as barristers. In some Australian jurisdictions the legal profession is rigidly divided between barristers and solicitors, and in others it is more flexible. In the latter case some lawyers practise solely as barristers.

<sup>570</sup> In States and Territories where the profession is fused, barristers are able to sue for their fee: R *Quick on Costs* Looseleaf LBC Information Services Sydney 1996 para 8.190. In New South Wales barristers are able to sue for fees. The *Legal Profession Act 1987* (NSW) imposes on counsel the duty to disclose fees and estimates and provides that failure to disclose prevents the barrister from maintaining any action in relation to those unpaid fees unless the costs are assessed by a costs assessor, which assessment is to be at the expense of the barrister: s 175–183. In Victoria, legislation formerly made solicitors liable for a barrister's fee. However, this was repealed when the *Legal Practice Act 1996* (Vic) repealed s 10 of the *Legal Profession Practice Act 1958* (Vic) and did not replace it.

<sup>571</sup> *Legal Profession Act 1987* (NSW) s 184 and *Legal Practice Act 1996* (Vic) s 96(1).

<sup>572</sup> *Legal Profession Act 1987* (NSW) s 175–183. Similar legislation exists in Victoria: *Legal Practice Act 1966* (Vic) s 86–92.

<sup>573</sup> P Mazurek 'The duty to pay counsel: practical lessons from complaints' (1999) 37(2) *Law Society Journal* 34. The NSW Bar Association is currently running a publicity campaign to raise awareness of the disclosure required: I Harrison 'Obligations to make fees disclosure under part 1 of Legal Profession Act' (1999) 64 *Stop Press* 14.

<sup>574</sup> *Legal Profession Act 1987* (NSW) s 182(1).

<sup>575</sup> *id* s 182(3).

<sup>576</sup> *id* s 182(4) & 183(2).

<sup>577</sup> *id* s 200(3). There is no provision for extension of time.

has 12 months in which to obtain an assessment of a solicitor's bill.<sup>578</sup> If a client successfully objects to a barrister's account after the expiration of the 30 day period the solicitor remains liable to pay the barrister but cannot recover the full amount against the client.

4.114 In jurisdictions where there is no scale for barristers' fees, including the High Court and the Federal Court, barristers' fees are assessed at the discretion of the taxing officer. There is little case law on the quantification of counsel's fees because of the extent of discretion given to taxing officers and the restricted right of appeal in some jurisdictions from the exercise of that discretion. It was suggested to the Commission that counsel's fees in New South Wales have increased greatly since the abolition of scales in that State.<sup>579</sup> The practice of barristers charging cancellation fees has also been identified as a problem.<sup>580</sup>

4.115 A costs agreement does not necessarily promote lower costs. It is a mechanism to inform the client and may enhance the bargaining power of the client in some circumstances. Courts can vary or set aside agreements if they are unfair,<sup>581</sup> unreasonable,<sup>582</sup> unjust,<sup>583</sup> or entered into by fraud or misrepresentation.<sup>584</sup> Although courts have the power to overturn costs agreements, generally they have been reluctant to do so if the only basis of objection is excessive costs.<sup>585</sup> A 1993 report from the Lay Observer in Victoria (now the Legal Ombudsman) stated that a valid costs agreement between practitioner and client was no answer to a

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<sup>578</sup>.id s 199(2).

<sup>579</sup>.Costs consultants *Consultation* Sydney 16 April 1999.

<sup>580</sup>.Cancellation fees are charged (in addition to brief on hearing fee) by some counsel when cases are settled, adjourned or hearing dates are vacated. For a discussion on the problem of barristers' cancellation fees in NSW see 'Barristers' cancellation fees still a problem' (1997) 35(6) *Law Society Journal* 28. The question of cancellation fees was considered by Wilcox J in *Commissioner of Australian Federal Police v Razzi [No2]* (1991) 30 FCR 64. His Honour observed that 'the charging of cancellations fees by some barristers seemed to be a practice of very recent origin . . . At a time when legal fees are so onerous as to exclude from significant litigation all but the wealthy and legally-aided, any new practice which further increases costs requires meticulous justification.'

<sup>581</sup>.Fairness refers to the circumstances surrounding the making of the agreement, such as the client's level of understanding of the agreement.

<sup>582</sup>.Reasonableness refers to the terms of the agreement and in particular whether the fees are reasonable having regard to the kind of work to be performed: *NSW Crime Commission v Fleming* (1991) 24 NSWLR 122, 122-4.

<sup>583</sup>.*Legal Profession Act 1987* (NSW) s 208D sets out matters which a costs assessor may have regard to in determining whether a costs agreement is unjust, such as the relative bargaining power of the parties, the economic and educational circumstances of the parties, the form and intelligibility of the language of the agreement, and whether undue pressure or influence was exerted on the applicant.

<sup>584</sup>.*Legal Practice Act 1996* (Vic) s 103.

<sup>585</sup>.In *Weiss v Barker Gosling (No 2)* (1993) 17 Fam LR 626 Fogarty J granted an application for a declaration that the costs agreement was invalid on the ground that the agreement was unreasonable. In *Raphael v Symonds* (unreported) Family Court of Australia 5 March 1998, Moss J set aside a fee agreement, finding that the client could not possibly have understood the implications of the agreement she had signed with her solicitor, that it had not been properly explained to her, and that she had been grossly overcharged. However, this decision was overturned on appeal: *Symonds v Raphael* (1998) 24 FamLR20.



prosecution for professional misconduct constituted by gross overcharging.<sup>586</sup> In response the Council of the Law Institute of Victoria stated that a valid costs agreement

should not expose a solicitor to disciplinary action for misconduct by reason only of the fact that the agreement seeks to commit the client to fees which may be greatly in excess of scale fees.<sup>587</sup>

The Commission agrees with the Lay Observer's approach that gross overcharging misconduct should not be answered simply by proof of contract.

4.116 *Complaints about costs.* Most complaints to legal ombudsmen, commissioners and other complaints bodies relate to costs.<sup>588</sup> Most consumers are unfamiliar with legal terms such as 'solicitor-client' costs, 'party-party' costs, or 'disbursements'. They are also unfamiliar with lawyers' charging practices, for example: the difference between calculations made on the basis of hourly rates, fixed rates, scale rates, lump sum fees and contingency fees, cancellation fees charged by a barrister, and various payment requirements such as paying upfront, as the case progresses or at the end of the case. Consumers are often unaware of their liability for costs if they decide to transfer the case to another lawyer and the options available if they are dissatisfied with their lawyer's bill.<sup>589</sup>

4.117 The AJAC report recommended that lawyers be required to disclose to clients, as soon as reasonably possible, information about the costing method, billing arrangements to be used and an estimate of the total costs (where possible).<sup>590</sup> A number of jurisdictions have adopted these recommendations<sup>591</sup> and the Commission supports the extension of costs and billing disclosure requirements.<sup>592</sup>

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<sup>586</sup>.A Macken 'Gross overcharging: Do scale fees rule?' (1995) 69 *Law Institute Journal* 192.

<sup>587</sup>.id 193. See also *D'Alessandro v Legal Practitioners Complaints Committee* (1995) 15 WAR 198, 209-211 (Ipp J). The court found that the existence of a costs agreement between practitioner and client is no bar to disciplinary proceedings against the practitioner involving complaints of overcharging. It found that the test for determining whether excessive or unreasonable overcharging constitutes professional misconduct generally was more stringent than the test applied in taxation to determine that the costs of a bill should be reduced. For the situation in Queensland see KThompson 'Queensland Law Society Legislation Amendment Act 1997' (1998) 18(1) *Proctor* 12, 13.

<sup>588</sup>.See para 4.127.

<sup>589</sup>.eg solicitors may withhold all client files and documents until the solicitor's bill of costs has been paid in full: New South Wales Law Reform Commission Report 70 *Scrutiny of the legal profession: Complaints against lawyers* NSWLRC Sydney 1993, para 5.69.

<sup>590</sup>.AJAC report, Action 4.2, 143. See also the discussion at para 4.109-4.115.

<sup>591</sup>.Qld Solicitors Handbook, 8.01; Law Society SA Conduct Rules, r 9.14 (a) and (b); Rules of Practice Tas, r 13(2); Law Institute of Victoria Conduct Rules, r 12(2) (a); Law Society WA Conduct Rules, r-10.3; Law Society ACT Conduct Rules, r 10.3.

<sup>592</sup>.The Law Council of Australia also supports the introduction of mandatory fee disclosure in all Australian jurisdictions: Law Council of Australia *Submission by the Law Council of Australia to the Attorney-General's Department in respect of report of the review of scales of legal professional fees in federal jurisdictions* LCA July 1999, 23.

The Attorney-General should ensure that such requirements apply to all lawyers advising, assisting or representing clients in federal matters.

**Proposal 4.2.** The Commission recommends that the New South Wales model for disclosure requirements for solicitors and barristers and the consequences of non-disclosure of costs or estimated costs be adopted by all States and Territories. The Commission further recommends that clients be given the same amount of time in which to object to barristers' fees as they have to object to solicitors' fees.

### *Costs information*

4.118 Consumers who are informed and educated about the range of legal services available and the likely charges and time commitments are obviously in a better position to make informed agreements about fees. Many institutional consumers such as government departments and agencies, legal aid commissions, insurance companies and other large corporations are repeat players which assists them to compare, assess and negotiate fees. Their bargaining power permits them to set their own fees. Most people, particularly in the family jurisdiction, are 'one-off' users of legal services.<sup>593</sup> There is little publicly available information to guide less experienced users of the legal services market.

4.119 Costs disclosure requirements improve the information individuals have about their matter, but there is limited information with which to compare the disclosed information.<sup>594</sup> The market information now available is asymmetric: people may have early information from their solicitor on how much their matter will cost, but little information to compare it with.<sup>595</sup>

4.120 *Competition policy.* The application of competition policy is one way the Commonwealth has sought to enhance access to justice and provide competitive practices for the private costs of federal litigation.<sup>596</sup> The AJAC report identified the

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<sup>593</sup>. One survey found that most (85–94%) people engaged a lawyer for conveyancing, succession arrangements or family disputes. Less than 43% of those surveyed who experienced a 'legal event' sought legal advice. 843 000 people representing 19% of the total surveyed, experienced a legal event. A 'legal event' included incidents involving accident, damage, discrimination, wills, conveyancing, custody, landlord, loan, insurance and government disputes: E Fishwick *Back to basics: legal needs in the '90s* NSW Legal Aid Commission Sydney 1992, 31, 55, 61, 76.

<sup>594</sup>. J Tamblin *Address* Parliament of New South Wales, Legislative Council Standing Committee on Law and Justice, Proceedings of the Seminar on the Motor Accidents Scheme (Legal Costs) Report No 5 June 1997; S Mark *Address* Parliament of New South Wales, Legislative Council Standing Committee on Law and Justice, Proceedings of the Seminar on the Motor Accidents Scheme (Legal Costs) Report No 5 June 1997.

<sup>595</sup>. S Pattison *Speech* ALRC Cost of justice seminar Sydney 19 May 1999, citing J Tamblin *Address* Parliament of New South Wales, Legislative Council Standing Committee on Law and Justice, Proceedings of the Seminar of the Motor Accidents Scheme (Legal costs) Report No 5 June 1997.

<sup>596</sup>. The National Competition Policy (NCP) reform package is stated to have been designed to improve the efficiency of the Australian economy, leading to lower prices for consumers and raised living

implementation of competition principles as one way the Commonwealth could improve access to justice.<sup>597</sup> In 1994 the Trade Practices Commission recommended that the Trade Practices Act should apply in full to the legal profession.<sup>598</sup> An early application of competition policy took place in New South Wales and as a result

conveyancing fees in NSW fell 17 percent between 1994 and 1996, after the abolition of the legal profession's monopoly and the removal of price scheduling and advertising restrictions, leading to an annual saving to consumers of at least \$85-million.<sup>599</sup>

4.121 Dr John Tamblyn,<sup>600</sup> at a review of competition policy in 1997,<sup>601</sup> when speaking of deregulation reforms and promotion of competition in the legal services market, said that the effects of the reforms in New South Wales suggest that there is effective competition at the big business end of the market but there may be market failure problems where there are small clients involved. This view was shared by the NSW Legal Services Commissioner Steve Mark<sup>602</sup> who noted that deregulation cannot work if consumers do not have access to price information.<sup>603</sup>

4.122 Information about legal costs could be improved by data collection and publication. The AJAC report recommended that the federal government provide

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standards, whilst recognising that the public interest must be taken into account in pursuing the reforms: National Competition Council *National competition policy: Some impacts on society and the economy* AusInfo Canberra 1999, 3.

<sup>597</sup> AJAC report, 12-13.

<sup>598</sup> TPC final report, 7-12. See also A Fels 'Can the professions survive under a national competition policy? - The ACCC's view' *Paper* Joint conference - Competition law and the professions 11-April 1997 <<http://www.accc.gov.au/docs/speeches/sp10of97.htm>> (3 August 1999).

<sup>599</sup> A Fels 'Can the professions survive under a national competition policy? - The ACCC's view' *Paper* Joint conference - Competition law and the professions 11 April 1997 <<http://www.accc.gov.au/docs/speeches/sp10of97.htm>> (3 August 1999).

<sup>600</sup> J Tamblyn *Address* Parliament of New South Wales, Legislative Council Standing Committee on Law and Justice, Proceedings of the Seminar on the Motor Accidents Scheme (Legal Costs) Report No 5 June 1997.

<sup>601</sup> Parliament of New South Wales, Legislative Council Standing Committee on Law and Justice, Proceedings of the Seminar on the Motor Accidents Scheme (Legal Costs) Report No 5 June 1997. The Chairman said 'To my knowledge this seminar is the first occasion on which the actual effect of the application of the Hilmer competition policy framework to the legal profession has been reviewed, anywhere in Australia'.

<sup>602</sup> S Mark *Address* Parliament of New South Wales, Legislative Council Standing Committee on Law and Justice, Proceedings of the Seminar on the Motor Accidents Scheme (Legal Costs) Report No 5 June 1997.

<sup>603</sup> The Attorney-General's Dept (NSW) *National competition policy review of the Legal Profession Act 1987: Report* Attorney-General's Dept (NSW) Sydney November 1998 expressed concerns as to whether the reforms had produced a more competitive market. Some of the problems identified were widespread non-compliance with disclosure requirements; disclosure of an hourly rate only; the failure of consumers to compare prices; the incidence of lawyers charging contingency fees for cases where success is almost assured; and the lack of any restriction on lawyers changing their fee estimate. The report concluded that the removal of scales had enhanced competition in certain areas of practice where the services are predictable, such as conveyancing, but it was not clear that competition has affected prices in areas such as litigation.

funding to the ABS to collect and publish data annually on the fees and charging practices of lawyers,<sup>604</sup> and for the federal government and its agencies to publish information on the fees and charges it pays for legal services.<sup>605</sup> The Commission strongly supports the collection of data on fees and charging practices but proposes that this be undertaken by the Federal Costs Advisory Council in its enlarged role and capacity.<sup>606</sup> As part of basic disclosure requirements, AJAC also recommended that lawyers advise clients of where comparative fee information may be obtained.<sup>607</sup> Such practices have not been implemented. The Commission endorses this recommendation to require disclosure of comparative fee information.

**Proposal 4.3.** The government should legislate to require lawyers working in federal jurisdiction to advise clients of comparative fee information (including court scales and information published by the proposed Federal Legal Services Forum) at the time costs disclosure is made to the client.

4.123 *Federal Legal Services Forum.* The Commission further considers there is a need for a national focus on the provision of legal services. While the Law Council provides a national focus for the profession, an independent body is required to oversee the development of a national legal services market from a consumer point of view, a Federal Legal Services Forum (the Forum).<sup>608</sup>

4.124 The Commission does not intend the Forum to have any regulatory or complaints monitoring function. It should work with existing regulatory bodies within the States and Territories to research the implications of trends within the legal services market and develop options suitable for implementation on a national basis. In relation to the proposed function of facilitating the collection of data regarding fees and costs, this work, as stated, would be undertaken by the Federal Costs Advisory Council.

4.125 The Commission envisages that the Forum would be accountable to parliament through the federal Attorney-General and be supported by a small secretariat funded by the federal government. The Forum's members, appointed by the Attorney-General, should reflect the range of interest groups in legal services provision. There should be members from business, consumer organisations, research bodies, State and Territory legal ombudsmen and the legal profession. The Forum should cultivate working relations with federal, State and Territory

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<sup>604</sup>.AJAC report, 147.

<sup>605</sup>.ibid.

<sup>606</sup>.See para 4.108.

<sup>607</sup>.id 143-5.

<sup>608</sup>.The Commission's proposal for a Federal Legal Services Forum is drawn from a proposal by the NSW Law Reform Commission for a Public Council on Legal Services Report 31 *First report on the legal profession – General regulation and structure* NSWLRC Sydney 1982, para 5.26-5.40. The major difference between this proposal and that of the NSW Law Reform Commission is the composition of the Forum.

governments as appropriate to facilitate the development of a national legal profession. Essentially the Forum would assist legal services consumers by identifying areas of research and providing information and reports highlighting expected standards and costs of services, as well as providing independent advice to the federal Attorney-General with a focus on improving the federal legal services market for consumers.

**Proposal 4.4.** The government should establish a Federal Legal Services Forum with a review and advisory role in relation to consumer issues in legal services in the federal jurisdiction. The Attorney-General should appoint members to the Forum from the range of interest groups in legal services, including small business, consumer organisations, research bodies, State and Territory legal ombudsmen and the legal profession. The Federal Legal Services Forum should be assisted by the provision of a secretariat. Its functions should include

- coordinating data collection and issuing publicly accessible information regarding fees and costs associated with various legal services in the federal jurisdiction
- consultation with legal professional bodies, legal ombudsmen, consumer groups and government with a view to facilitate development of policies and benchmark standards to enhance legal services on a national basis
- identifying areas in need of reform in legal services provision and undertaking or facilitating research in such areas.

4.126 *Office of Legal Services Coordination.* In relation to the provision of legal services for government, an agency such as the Office of Legal Services Coordination in the Attorney-General's Department should coordinate and report information kept by individual agencies on an annual basis. The information should include categories similar to those produced in the Logan Report (AGS and private firm categories could be amalgamated into 'external legal service provider' to protect the confidentiality of private firm and AGS contracts). Total expenditure on private counsel, expenditure on internal and external legal service provision, and expenditure on litigation services in courts and tribunals, legal services involving agreements, and legal advice services should also be reported.

**Proposal 4.5.** That the Office of Legal Services Coordination prepare an annual report on the costs of legal services provided to the government. Information should include the costs of internal and external legal service providers, expenditure on litigation services in courts and tribunals and legal services involving agreements and advice.

### *Reasonable fees*

4.127 While fee disclosure and an improvement in comparative costs information will assist a client to determine whether the fees charged by their lawyers are reasonable, lawyers are generally not required to charge fees that are reasonable.

From June 1994 to June 1997, in New South Wales, the number of complaints relating to overcharging rose from 16% to almost 40% of complaints – a total of almost 2 000 complaints relating to fee charging over that period.<sup>609</sup> Disciplinary cases concerning overcharging have limited success. In *Council of the Law Society of NSW v Foreman*<sup>610</sup> a complaint about costs in the vicinity of \$500 000 in a Family Court matter was dismissed by the Legal Professional Disciplinary Tribunal on the grounds that the solicitor and client had a valid costs agreement.<sup>611</sup> A similar situation, involving the failure to disclose information about costs, was recently determined in the Australian Capital Territory. The court commented on the high level of the costs involved in the matter, but did not find that there had been improper overcharging.<sup>612</sup>

4.128 The Law Society of Western Australia's *Professional conduct rules* state that

[a] practitioner shall charge no more than is reasonable by way of costs for his services having regard to the complexity of the matter, the time and skill involved, any scale costs that might be applicable and any agreements to costs between the practitioner and his client.<sup>613</sup>

4.129 In Tasmania a practitioner may charge a 'reasonable' fee for work done, and a list of factors that may be taken into account when determining the fee applies in the absence of a cost agreement between practitioner and client.<sup>614</sup>

4.130 Most overseas jurisdictions have practice rules that provide a list of relevant factors to consider when determining whether a fee is reasonable. For example, the American Bar Association *Model rules of professional conduct* state that

A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;

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<sup>609</sup>Office of the Legal Services Commissioner *Annual report 1995–96*, 27; Legal Ombudsman *Annual report 1997*, 16; Office of the Lay Observer *10th Annual report July 1996 to June 1997*, 15–16.

<sup>610</sup>*Council of the Law Society of NSW v Foreman* (1994) 34 NSWLR 408.

<sup>611</sup>'If costs of this order in a single matrimonial property case between a married couple are truly regarded as reasonable, there may be something seriously wrong in the assessment of reasonableness within the legal profession which the Court should resolutely correct': *Council of the Law Society of NSW v Foreman* (1994) 34 NSWLR 408 (Kirby P). Misconduct was proved in this case because the solicitor had altered client documents after the event.

<sup>612</sup>R Campbell 'Lessons for ACT lawyers' *Canberra Times* 22 April 1998, 9.

<sup>613</sup>Law Society WA Conduct rules, r 16.5.

<sup>614</sup>Rules of Practice Tas, r 85.

- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.<sup>615</sup>

4.131 Such a rule should be included in Australian practice rules.<sup>616</sup> It is important that practitioners and professional disciplinary bodies have clearer guidelines on what are reasonable charges, and on gross overcharging as misconduct.

**Proposal 4.6.** Professional legal bodies should include guidelines in practice rules that indicate the factors to consider when determining whether fees are reasonable, and make it clear that breach of these guidelines may amount to unsatisfactory professional conduct or professional misconduct.

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<sup>615</sup>American Bar Association *Annotated model rules of professional conduct* 3rd ed ABA Chicago 1996, r1.5.

<sup>616</sup>AJAC report, 149–77.

## 5. Lawyers and practice standards

### Introduction

5.1 This chapter considers issues relevant to professional conduct and civil justice system reform. Although the Commission's focus is on the federal civil justice system, discussion of professional practice cannot easily be restricted to federal matters. The Commission has, however, focussed its discussion on particular forms of conduct and reforms which are directly relevant to the federal civil justice system, whether in relation to civil litigation and family law proceedings before courts, administrative review proceedings before tribunals or associated alternative dispute resolution (ADR) processes.

5.2 Professional practice rules fulfil a number of roles. They provide a base for education, practical guidance to practitioners, and an agreed standard of behaviour to which disciplinary bodies can refer. For professional practice rules to be useful, the rules should represent attainable aims and be useful in dealing with the continuing ethical dilemmas of professional life, command respect and be enforceable.<sup>617</sup> Practitioners need to know the rules, take them seriously, apply them and understand the consequences of enforcement.

5.3 Although lawyers' practice obligations are increasingly defined in statutes or in court or tribunal rules or practice directions, the Commission considers that the profession should be proactive in defining its obligations to clients, the courts, tribunals, opposing parties and witnesses. The lawyer's obligation to pursue vigorously the interests of clients is an important one. This is balanced against competing, overriding obligations to the court and to the proper administration of justice. Courts, tribunals and governments have a role in regulating lawyers' conduct, but the interests of clients and the profession may be compromised if the legal profession is not the primary player in defining and securing appropriate practice standards, as well as implementing them.

5.4 The Commission considers that civil justice reform requires not more rules of court enshrining lawyers' obligations to assist courts to deal justly with cases — as recommended by Lord Woolf — but commitment by the profession to evaluate, coordinate and elaborate its practice rules and disciplinary processes and to provide appropriate guidance on the rules in the form of commentary appended to the rules. Such rules and commentary should feature particular practice areas, such as family law practice and the competing roles and responsibilities of lawyers as advisers, advocates, negotiators, and representatives within ADR processes and as neutrals facilitating such processes. This would provide guidance to practitioners dealing with distinctive issues and dilemmas not covered by general practice rules. Many of

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<sup>617</sup> I Freckelton 'Enforcement of ethics' M Coady & S Bloch (eds) *Codes and ethics and the professions* Melbourne University Press Melbourne 1996, 164.



these initiatives have been taken up by the profession. The force of the Commission's proposals is to endorse and accelerate such initiatives.

5.5 Issues regarding education and training in relation to professional practice standards are considered in chapter 3.

## The changing role of the profession

5.6 A predominant public image of a lawyer is a person engaged in advocacy work before a court.<sup>618</sup> In fact, only about 20%–25% of practitioners hold themselves out as courtroom advocates.<sup>619</sup>

5.7 Solicitor profile surveys conducted in New South Wales and Victoria give some indication of this. The trend is towards the creation of larger firms, with increasing percentages of practitioners employed in firms with 21 or more partners.<sup>620</sup> There are also increasing numbers of practitioners employed by government agencies or corporations.<sup>621</sup> At the same time there also are growing numbers of sole practitioners.<sup>622</sup> The professional profile is one dominated by large firms, sole practices and employed corporate and government lawyers. Further changes are anticipated with the globalisation of legal practice and the probable advent of multi-disciplinary practices.

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<sup>618</sup>.D Weisbrot *Australian lawyers* Longman Cheshire Melbourne 1990, 238.

<sup>619</sup>.Eleven per cent of practitioners hold themselves out to practise as a 'barrister': statistics collated by Law Council of Australia (LCA) for inclusion in the *Australian legal directory* 1998 edition, supplied by LCA June 1998. However, there are a number of practitioners, particularly in States such as Tasmania, South Australia, Western Australia and in the Northern Territory, who specialise as courtroom advocates but do not consider themselves to be 'barristers'.

<sup>620</sup>.In 1998 in NSW only 0.6% of firms had more than 20 partners, but 25% of all NSW solicitors were working in these firms: Law Society of NSW Research Report No 2 *Profile of the Solicitors of New South Wales 1998* Law Society of NSW Sydney 1998, 24.

<sup>621</sup>.Government lawyers include legal aid practitioners and practitioners in prosecution agencies, as well as other qualified practitioners employed in various agencies undertaking work ranging from litigation to research. In 1993, about 8% of practitioners were employed by governments. In 1998, the Law Society of New South Wales reported that since 1988 there had been a 43% growth in the numbers of government lawyers: Law Society of New South Wales Research Report No 2 *Profile of the solicitors of New South Wales 1998* Law Society of NSW Sydney 1998, 15. There had been a 27% increase in the number of legal officers employed by federal government departments and agencies since 1989: figures obtained from the Public Service and Merit Protection Commission, Canberra November 1998. In 1993, 3% of practitioners in Australia were employed by corporations, with the figures higher in New South Wales and Victoria. The number of inhouse corporate lawyers in NSW has doubled in eight years, with inhouse corporate lawyers now comprising more than 10% of the membership of the Law Society of NSW: P Fair 'Corporate practice in a deregulating environment' (1997) 7(2) *Australian Corporate Lawyer* 10.

<sup>622</sup>.Sole practitioners constituted 19% of New South Wales solicitors in 1998, and sole practitioner firms (with only one principal) constituted 79% of all firms, a 66% increase in the number of sole practices in New South Wales since 1988: Law Society of NSW Research Report No 2 *Profile of the Solicitors of New South Wales* Law Society of NSW Sydney 1998, 24, 28.

5.8 In a 1998 survey of Victorian solicitors, civil litigation ranked as the third dominant area of practice, with 29% of solicitors claiming that more than 25% of their time was spent on civil litigation matters. Advocacy work for solicitors ranked number 16, with 6% of solicitors undertaking such work. Other dominant areas relevant to federal jurisdiction included commercial law (rank one, 37%) and family law (rank five, 16%).<sup>623</sup> Similar results were found in the 1998 survey of New South Wales solicitors.<sup>624</sup> There are indications that lawyers are increasingly involved in arbitration, mediation, and conciliation, and as professional arbitrators, mediators and conciliators.<sup>625</sup>

5.9 These shifts in the working practices of the profession parallel other changes in the legal professional ethos engendered by the global economic and legal market. One such change, which has been the subject of much academic and judicial commentary, is characterised as a shift in professional practice from a 'service' ideal to one based on business imperatives.<sup>626</sup> This shift has occurred in order to meet the needs of a changing business environment in which the profession must operate.

In past times . . . [t]he profession was far smaller, and those qualified to appear in court were far fewer. Wrongdoing was readily recognised and, in the small professional communities that previously existed, the stigma of overstepping the conventions was an effective sanction. Circumstances have, however, changed. The increase in litigation and the number of lawyers, together with the wide geographic dispersal of lawyers, has dissipated the power of collegiate disapproval and, in any event, values have altered significantly. There is, today, very strong competition between lawyers, brought about by the increase in their numbers, economic recession, and the application of the free market economic theory to the profession.<sup>627</sup>

5.10 Changing professional practices and ethics are frequently described and lamented in American law journals and books.<sup>628</sup> It is not clear that Australia is

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<sup>623</sup> 'LIV annual survey of legal practitioners' (1999) 73(3) *Law Institute Journal* 53.

<sup>624</sup> Civil litigation ranked as the third dominant area of practice, with 29% of solicitors claiming that more than 25% of their time was spent on civil litigation matters. Advocacy work for solicitors ranked number 10, with 9% of solicitors undertaking such work. Other dominant areas relevant to federal jurisdiction included commercial law (rank two, 31.1%) and family law (rank six, 15%): Keys Young *Practising certificate survey 1998–99* Law Society of NSW Sydney 1999. For further discussion on the changing profession, see ch 3.

<sup>625</sup> As an example of this, the membership of Lawyers Engaged in Alternative Dispute Resolution (LEADR) has increased from 815 in 1993 to 1385 in 1996 and 1 822 in 1999 (including approximately 500 New Zealand members): *Correspondence* LEADR 15 July 1999.

<sup>626</sup> M Solomon 'Client relations: ethics and economics' (1991) 23 *Arizona State Law Journal* 155; D Dawson 'The legal services market' (1995) 5 *Journal of Judicial Administration* 147; M Kirby 'Legal professional ethics in times of change' *Paper* St James Ethics Centre Forum on Ethical Issues Sydney 23 July 1996.

<sup>627</sup> D Ipp 'Reforms to the adversarial process in civil litigation — Part I' (1995) 69 *Australian Law Journal* 705, 726–7. See also D Dawson 'The legal services market' (1996) 5 *Journal of Judicial Administration* 147.

<sup>628</sup> eg see A Kronman *The lost lawyer — failing ideals of the legal profession* Harvard University Press Massachusetts 1993.

experiencing a similar decline in professional standards. However, the Australian legal profession, as with the American, is no longer a small, homogenous association of people undertaking similar types of work. Legal work is a competitive business, practitioners generally work long hours for variable returns. In 1997–98, 36% of NSW solicitors<sup>629</sup> and 40% of Victorian solicitors<sup>630</sup> were earning less than \$50 000, while recent surveys showed that partners in elite law firms now earn an average of \$550 000 a year, and that high quality lawyers in ‘hot’ areas of law also were commanding higher salaries.<sup>631</sup> At all levels of the profession, long working hours are the norm. A Victorian study showed that 61% of solicitors worked more than 50 hours a week (24% working 60 or more hours per week).<sup>632</sup>

5.11 The increasing trend towards specialisation creates a need for particular and detailed guidance in certain fields which are developing their own culture and practice norms.<sup>633</sup> There is a need for further research into the practice norms of different specialty groups within the legal profession and the development of better practice models.

5.12 It is in this context of change to the legal profession and the federal civil justice system that the Commission has considered legal professional standards.

## Sources for professional standards of conduct

5.13 Professional ethics is a study of those values held in common by members of a profession. In professions, members are taken to be linked by common values and interests; the requirement of specialised skills and knowledge; and a ‘service’ ideal stemming from other people’s dependence on the skills and knowledge held by the profession.<sup>634</sup>

5.14 Practitioners in each State and Territory are admitted as officers of the Supreme Court, and these courts have inherent and statutory jurisdiction to regulate and discipline practitioners. Legal professional rules comprise statements concerning ethical principles and practice standards derived from the common law, statutes, rules of courts, and the rules, guidelines and principles drafted and approved by legal professional associations. Professional practice rules generally provide a comprehensive (but not exhaustive) guide to members of the profession

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<sup>629</sup>In NSW these percentages increase to 57% of suburban and 43% of country solicitors earning less than \$50 000: Law Society of NSW Research Report No 2 *Profile of the Solicitors of New South Wales* Law Society of NSW Sydney 1998, 37 & 41.

<sup>630</sup>‘LIV annual survey of legal practitioners’ (1999) 73(3) *Law Institute Journal* 54.

<sup>631</sup>A Burrell ‘Lawyers notch up record year for income increases’ *Australian Financial Review* 28 July 1999, 3.

<sup>632</sup>‘LIV annual survey of legal practitioners’ (1999) 73(3) *Law Institute Journal* 53.

<sup>633</sup>G Gibson *Submission* 141.

<sup>634</sup>D Weisbrot *Australian lawyers* Longman Cheshire Melbourne 1990, 4. See also R Fullinwider ‘Professional codes and moral understanding’ M Coady & S Bloch (eds) *Codes and ethics and the professions* Melbourne University Press Melbourne 1996, 73.

as to expected conduct. A breach of the rules may be considered to be a breach of professional conduct subject to sanction, including, for the most severe cases, loss of accreditation.

5.15 While the legal profession has traditionally developed its own practice standards, there is a trend towards regulating practitioner conduct by other methods. The use of court rules and legislation to regulate practitioner conduct has generally occurred in situations where existing professional practice standards are inconclusive or silent on the matter. In the United States in particular, practitioner conduct is increasingly regulated by court rules.<sup>635</sup> The new Civil Procedure Rules recently introduced in the United Kingdom also incorporate practitioner standards into court rules, and thus greater reliance on judges to oversee practitioner conduct.<sup>636</sup> In Australia, there is a growing trend to define practitioner obligations in legislation, for example, in the *Family Law Act 1975* (Cth), or in legislation establishing particular tribunals.

## The development of professional practice rules

5.16 In Australia the legal profession is essentially regulated on a State and Territory basis.<sup>637</sup> In New South Wales, Queensland and Victoria, the profession is divided and solicitors and barristers are regulated separately.<sup>638</sup> In accordance with the *Judiciary Act 1903* (Cth), a person entitled to practise as a barrister or solicitor or both in the Supreme Court of a State or Territory is also entitled to practise in any federal court,<sup>639</sup> or any court exercising federal jurisdiction.<sup>640</sup> The Chief Executive

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<sup>635</sup> See discussion of the experience in the United States at para 5.75-5.77 below.

<sup>636</sup> See para 5.70-5.74 for further discussion of the Civil Procedure Rules 1999 (UK).

<sup>637</sup> The United States is also a federal jurisdiction. A set of written Canons of Professional Ethics had been in place since 1908 to give ethical guidance to practitioners across the US. In 1969 the American Bar Association adopted a new Model Code of Professional Responsibility, which was subsequently adopted by the vast majority of state and federal jurisdictions, providing a fairly uniform set of conduct rules for all practitioners in the US. Redrafted Model Rules of Professional Conduct were adopted in 1983. The Model Rules contain a rule-commentary format, combining a concise rule with explanatory guidance. The Model Rules serve as a national framework for the implementation of standards of professional conduct. They have been adopted, with local variations, by professional associations and courts in most state and federal jurisdictions.

<sup>638</sup> However, in NSW and Victoria many of the regulatory and disciplinary functions are now the same for solicitors and barristers. At present there is no statutory regulation of barristers in Queensland, although the Queensland government has recently proposed common admission and regulation of Queensland practitioners: Queensland Government 'Legal profession reform' *Green paper* June 1999. There is no statutory regulation of ACT barristers. Bar associations now exist in all other States and Territories, although they are generally voluntary organisations and professional regulation is primarily conducted through the law societies. The case is different in Western Australia where the Legal Practice Board has primary powers of regulation, but the Law Society and the Bar Association have both established their own sets of professional practice rules.

<sup>639</sup> *Judiciary Act 1903* (Cth) s 55B(1).

<sup>640</sup> *id* s 55B(4).

and Registrar of the High Court maintains a Register of Practitioners entitled to practise in federal courts.<sup>641</sup>

5.17 The rules in place in the States and Territories are similar, but have differences which must be noted by practitioners moving from jurisdiction to jurisdiction. There are no national professional practice rules in force, although the Law Council of Australia and the Australian Bar Association have model rules which they have sought to have adopted on a national basis.<sup>642</sup>

5.18 The move towards written compilations of professional practice rules in Australia gained momentum in the early 1980s. The Law Society of Western Australia adopted a structured set of rules in 1983, followed by the law societies of South Australia and the Australian Capital Territory in 1984, and the Law Society of the Northern Territory in 1985. The Law Institute of Victoria published its statutory practice rules in 1984. Queensland's *Solicitors handbook* in 1992 provided a comprehensive guide to conduct, although not in a rule format. The Law Society of New South Wales did not adopt a comprehensive set of rules until 1994,<sup>643</sup> although a basic form of solicitors' rules had been in place and the Law Society had published *Riley's manual* which compiled the different rulings and decisions relating to procedure and professional conduct.

5.19 The New South Wales Bar Association has had a comprehensive set of rules for a number of years, and the Western Australian Bar since 1991. Most bar associations in Australia adopted uniform rules developed by the Australian Bar Association in 1993. The Victorian Bar, the South Australian Bar Association and the Northern Territory Bar Association have rules based on the 1993 *Code of Conduct*. However, a new set of uniform rules, known as the 1995 *Advocacy Rules*, have been endorsed by the Australian Bar Association and adopted by the bar associations in New South Wales, Queensland and the Australian Capital Territory.<sup>644</sup>

## A national market and national rules

5.20 In 1992, under the *Mutual Recognition Act 1992 (Cth)*,<sup>645</sup> a person registered to practise a profession or occupation in one State was able to practise in any other

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<sup>641</sup>.id s 55C. A person's name must be removed from the Register if the person is no longer entitled to practise under State law: s 55C(3); *Little v Registrar of the High Court* (1991) 29FCR 544. Thus, if a practitioner is suspended or struck off the roll of a Supreme Court, or does not maintain a current practising certificate, their rights of practice in federal courts are to be similarly suspended or cancelled.

<sup>642</sup>.See para 5.24-5.26.

<sup>643</sup>.The Law Society of NSW acquired power to make rules binding upon solicitors on 1 July 1994 as a result of amendments to the *Legal Profession Act 1987* (NSW).

<sup>644</sup>.The 1995 *Advocacy Rules* were originally developed by the NSW Bar Assoc.

<sup>645</sup>.Complementary legislation was passed in all States. This followed a 1989 decision in the High Court which determined that an interstate practitioner could not be prevented from practising in a Queensland court on the basis of a residency requirement

State,<sup>646</sup> subject to registration with the relevant regulatory authority in the other State.<sup>647</sup> Interstate practitioners were required to apply for recognition, pay admission fees, and maintain practising certificates in each jurisdiction in which they wished to practice.

5.21 The Hilmer National Competition Policy Review recommendations of 1993 accelerated the development of a national market for legal services.<sup>648</sup> The Trade Practices Commission (TPC) released its report on competition and regulation of the legal profession in March 1994<sup>649</sup> and, consistent with the Hilmer competition policy, recommended an integrated national legal services market with formal recognition in each State and Territory of the practising rights of lawyers admitted in any other jurisdiction.<sup>650</sup>

5.22 The Law Council of Australia supported the principles of the Hilmer report and the TPC final report, particularly the objective of a national legal services market. In 1995 the Law Council released its *Blueprint for the structure of the legal profession*, based on the following general principles and objectives

- (1) national competition policy principles apply to the legal profession;
- (2) lawyers admitted in any State or Territory of Australia are able to practise law throughout Australia;
- (3) existing constraints which prevent a lawyer's right to practise without restriction throughout Australia are removed in order to facilitate the development of a national market in legal services;
- (4) recognition that the independence of the legal profession is implemented by uniform State and Territory legislation;
- (6) the self regulation of the legal profession is subject to an external and transparent process of accountability to ensure that the rules of the professional bodies are not inconsistent with national competition policy principles;
- (7) the protection of consumers of legal services through comprehensive education and training of the legal profession and the development of a uniform standard of client care;
- (8) proper information is available for consumers of legal services as to quality and costs of legal services.<sup>651</sup>

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It is a matter of national importance that, if they wish, State residents should be able to utilise the services of interstate practitioners in conducting litigation in the courts of their State. The practice of law also plays an increasingly important part in the national economy and contributes to maintaining the single economic region which is a prime object of federalism: *Street v Queensland Bar Association* (1989) 168 CLR 461, 589 (McHugh J).

<sup>646</sup> *Mutual Recognition Act 1992* (Cth) s 17.

<sup>647</sup> *id* s 19. In most jurisdictions there are, however, specific residency requirements if a practitioner or firm wishes to register a legal office or firm in the new jurisdiction.

<sup>648</sup> National Competition Policy Review *National competition policy* AGPS Canberra 1993 (Hilmer report).

<sup>649</sup> Trade Practices Commission *Study of the professions – legal* Final report 1994 (TPC final report).

<sup>650</sup> The Access to Justice Advisory Committee (AJAC) also supported a national market for legal services: Access to Justice Advisory Committee *Access to justice – an action plan* AGPS Canberra 1994 (AJAC Report) 124–128.

<sup>651</sup> LCA *Blueprint for the structure of the legal profession: A national market for legal services* LCA Canberra 1994, 2.

5.23 The concept of a 'driver's licence' practising certificate, issued by one jurisdiction but recognised in all other Australian jurisdictions, has been supported in principle by all professional associations in Australia, although the States and Territories with smaller professions also have been concerned to maintain their identity, competitiveness and market share. Presently legislation recognising a travelling practising certificate regime is in effect in New South Wales, Victoria and the Australian Capital Territory.<sup>652</sup> Protocols for indemnity insurance and discipline for such 'travelling' lawyers are being developed by the Law Council of Australia.<sup>653</sup> While a cooperative approach, and retention of independent regulation in each jurisdiction, was the preferred option of the professional bodies,<sup>654</sup> the option of a federal regulatory body responsible for licensing and regulating lawyers throughout the country is still being canvassed.<sup>655</sup>

#### *Uniform professional practice rules*

5.24 As a part of its national professional blueprint, the Law Council has developed and adopted the *Model rules of professional conduct and practice* (the Model Rules) to form a model for national practice rules.<sup>656</sup>

5.25 The Australian Bar Association likewise has been working to achieve uniformity of professional practice rules for barristers across jurisdictions.<sup>657</sup> The 'Advocacy rules' included in the Law Council's Model Rules are based on the 1995 *Advocacy rules* adopted by the Australian Bar Association.<sup>658</sup>

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<sup>652</sup> Legislation was passed in South Australia in early 1999, but is not to take effect until a number of procedural matters, including recognition of disciplinary procedures, are finalised. The Law Society of NT has agreed to enter the scheme, and will be making recommendations to the NT government to introduce legislation for a travelling practising certificate regime in 1999. The Law Society of WA has similarly agreed to participate in the scheme.

<sup>653</sup> The LCA collectively refers to these issues, and other issues of a national nature, under the rubric of National Cooperation.

<sup>654</sup> These options were discussed in the AJAC report. While the Committee supported a centralised regulatory body, it also suggested that a cooperative approach would be more practical due to expected opposition by the States and Territories: AJAC report, 127-128.

<sup>655</sup> R Heinrich 'Centralised regulation of the legal profession' (1998) 36(5) *Law Society Journal* 19.

<sup>656</sup> The Model Rules were developed for the LCA by the Law Society of NSW. The conduct rules of the Law Society of NSW and the Law Society of ACT are compatible with these Model Rules. Other professional associations have supported the Model Rules, in some cases adopting them in principle, and are working towards official adoption in the near future. The LCA is planning a plain English rewrite of the rules in anticipation of national adoption.

<sup>657</sup> The 1993 *Code of conduct* was adopted by all local bar associations except in Tas. In some cases the *Code of conduct* was adopted in principle only, such as in WA where the 1991 Conduct Rules continue in force as the official rules of the WA Bar Assoc. However, the NSW Bar Assoc subsequently rejected the 1993 *Code of conduct* and adopted its own rules. The Aust Bar Assoc then adopted the NSW rules as the basis for its 1995 *Advocacy rules*, which are intended to supersede the 1993 Code. The Qld and ACT Bars have adopted the 1995 *Advocacy rules*.

<sup>658</sup> There has been an *International code of ethics* supported by the International Bar Association (IBA) since 1956, with the current version dating from 1988. The Code of Ethics contains a simple outline of the expected conduct of practitioners and applies to any lawyer of one jurisdiction to his or her

5.26 The Law Council, in its efforts to encourage the adoption of uniform professional practice rules, also advocates uniform disciplinary processes.

### *The United States experience*

5.27 The United States legal profession is similarly dispersed across different jurisdictional boundaries, with the conduct of lawyers regulated by disciplinary agencies under the supervision of State Supreme Courts.<sup>659</sup> This has typically created disparate systems of regulation of professional practice, as in Australia. However, the American Bar Association Model Rules of Professional Conduct (ABA Model Rules) operate as an influential code of conduct for lawyers in all jurisdictions.<sup>660</sup> Many jurisdictions have adopted the ABA Model Rules as the basis for professional practice, achieving some simulation of a national set of professional practice rules. However, recent indications from the United States show that the standards in each jurisdiction are gradually diverging, sometimes by local adaptations to ABA Model Rules and sometimes by a failure to adopt the ABA Model Rules. This is causing problems for lawyers and clients in an increasingly national market.<sup>661</sup>

5.28 In 1997, the United States Committee on Rules of Practice and Procedure of the Judicial Conference found that the current system of regulating attorney conduct fails to provide meaningful guidance to attorneys who must divine which standard a federal court will apply to their conduct.<sup>662</sup> While some American commentators suggested a national bar and national regulation of professional conduct as the solution, the Committee drafted 10 uniform Federal Rules of Attorney Conduct to apply to all lawyers appearing before federal courts. This approach is said to be inadequate as

- it fails to deal with state responsibility for regulating and disciplining lawyers
- with the exception of government lawyers, there are few lawyers that have a truly 'federal' practice, thus increasing disparity of practice rules rather than creating uniformity
- it creates difficulties for lawyers with multi-jurisdictional practices, who must determine which rules are applicable at what time

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contacts with a lawyer of another jurisdiction or to his or her activities in another jurisdiction. The Code does not absolve a practitioner from the obligation to comply with any local professional conduct requirements. The IBA may bring incidents of alleged violations to the attention of relevant organisations. The International Code of Ethics is attached as an appendix to the Law Society of New Zealand's Rules of Professional Conduct for Barristers and Solicitors.

<sup>659</sup> Although it can be argued that other forms of disciplinary sanction, including court orders and negligence actions are becoming more influential in the regulation of lawyer conduct in the USA: D-Wilkins 'Who should regulate lawyers?' (1992) 105 *Harvard Law Review* 799.

<sup>660</sup> id 810.

<sup>661</sup> 'Uniform federal rules of attorney conduct: A flawed proposal' (1998) 111 *Harvard Law Review* 2063.

<sup>662</sup> id 2072.



- lawyers appearing before federal tribunals remain subject to state rules.<sup>663</sup>

5.29 The experience in the United States highlights the problems that can arise with disparate professional practice standards across the same national market, even in the situation where the ABA Model Rules provide some focus for uniformity. Specific rules for practice in federal courts create greater disparity and confusion rather than the intended consistency and clarity.

### *Regulation and discipline*

5.30 The Access to Justice Committee (AJAC) preferred the option of a single regulatory body, responsible for licensing and regulating all practitioners in Australia with one set of professional practice rules and a disciplinary process to apply across all jurisdictions.<sup>664</sup> However, it was acknowledged that a cooperative approach to achieve such an adoption would be preferred due to expected opposition by the States and Territories and the difficulties of securing uniform or harmonised legislation throughout the States and Territories.<sup>665</sup>

5.31 With respect to the arrangements for such regulatory bodies, a number of submissions to the Commission were concerned with a lack of adherence to and enforcement of the professional practice rules.<sup>666</sup> Certain submissions observed that the disciplinary systems protected the legal profession rather than the complainant.<sup>667</sup>

5.32 Non-lawyer participation in disciplinary systems is one method of providing a measure of independence and accountability to ensure public confidence in such systems. This principle is now well accepted, and has been introduced to varying degrees in the States and Territories.

5.33 While participation of lay members on disciplinary tribunals has been accepted in all jurisdictions, the establishment of the New South Wales Office of the Legal Services Commissioner (OLSC (NSW)) in 1994 was a major change to the structure of professional regulation. Significant regulatory power was transferred from the professional associations in New South Wales to an independent, non-lawyer, government appointee.<sup>668</sup> Similarly, the Victorian Legal Ombudsman,

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<sup>663</sup> .ibid.

<sup>664</sup> .AJAC report 127-128.

<sup>665</sup> .id 128.

<sup>666</sup> .eg Lone Fathers WA *Submission* 156.

<sup>667</sup> .eg Medical Consumer Association of NSW *Submission* 185.

<sup>668</sup> .The establishment of the Office of the Legal Services Commissioner was the direct result of recommendations made by the NSW Law Reform Commission as a result of its inquiry into the legal profession. See NSWLRC Report 70 *Scrutiny of the legal profession: complaints against lawyers* Sydney 1993.

established in 1997, has certain regulatory powers in relation to Victorian practitioners.<sup>669</sup>

5.34 Professional bodies and various legal ombudsmen have documented that the most common complaints about practitioners comprise of unethical conduct, negligence, overcharging, incompetence, delay, failure to comply with instructions, and a failure of communication,<sup>670</sup> matters which often fall short of criteria for professional misconduct or unsatisfactory professional conduct. Most complaints are in fact dismissed.<sup>671</sup> There is a need to distinguish between consumer and ethical complaints,<sup>672</sup> and for regulatory bodies to have a defined role in mediating or otherwise resolving 'complaints' and 'disputes' that do not amount to professional conduct issues.

5.35 Based upon experience gained in handling public complaints regarding legal services, the OLSC (NSW) has established separate procedures for the handling of 'consumer disputes' that do not raise conduct issues.<sup>673</sup>

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<sup>669</sup>Proposals contained in a recent discussion paper on the Queensland legal profession indicate there may be further development of non-lawyer regulation of the profession: Queensland Government 'Legal Profession Reform' *Green paper* Queensland Department of Justice and the Attorney-General June 1999 and comment by R Bond 'Strange events in Queensland' *The Australian Financial Review* 16 July 1999, 31. The paper is available at <http://www.justice.qld.gov.au/pdfs/green1.pdf> (19 July 1999).

<sup>670</sup>See for example The Legal Ombudsman (VIC) *Annual report 1998*, 32–33; OLSC (NSW) *Annual report 1995–96*, 26; Legal Ombudsman (Tas) *Annual report 1997*, 3. Complaints relating to negligence constituted 34% of complaints about legal practitioners in Victoria during the 1997–98 financial year: The Legal Ombudsman (VIC) *Annual report 1998*, 33. Only complaints about costs outnumbered complaints relating to negligence. Similarly, complaints relating to wrong advice, poor representation, inefficiency/incompetence, delay, negligence and poor service/work, amounted to 32% of complaints against practitioners in Tasmania in 1997: Legal Ombudsman (Tas) *Annual report 1997*, 4.

<sup>671</sup>In NSW, almost 62% of complaints closed by the Law Society were dismissed after investigation as disclosing no professional misconduct or unsatisfactory conduct, and 50% of complaints were similarly dismissed by the Bar Assoc: OLSC (NSW) *Annual report 1996–97*, 19. Figures in Qld show a similar pattern. There were 621 complaints to the Qld Law Society in 1996–97, 16 solicitors were charged with a disciplinary offence, 16 were censured and 10 received a stern letter, leaving 93% of complaints unfinalised, dismissed by the Law Society, or otherwise dropped by the complainant or Law Society: Office of the Lay Observer (Qld) *Lay Observer: 10th Annual report July 1996 to June 1997*, 11. The Qld Lay Observer (now the Legal Ombudsman) stated that many complainants dissatisfied with the results of an investigation by the Qld Law Society hold the view that the Law Society is protecting 'their own': Office of the Lay Observer (Qld) *Lay Observer: 10th Annual report July 1996 to June 1997*, 7; Legal Ombudsman (Qld) *Annual report 1997–98*. A recent report by the Legal Ombudsman of Tasmania, which showed an increased level of complaints against practitioners, sparked public debate in Tasmania about their complaints system: Legal Ombudsman (Tas) *Annual report 1997*.

<sup>672</sup>The use of terms for misconduct differs and are defined differently in each jurisdiction: *Legal Profession Act 1987* (NSW) s127; *Legal Practitioners Act 1981* (SA) s 5; *Legal Profession Act 1993* (Tas) s-56; *Legal Practice Act 1996* (Vic) s 137; *Legal Practitioners Act 1970* (ACT) s 37; *Legal Practitioners Act 1974* (NT) s 45(2). There is no statutory definition in Queensland or Western Australia.

<sup>673</sup>OLSC (NSW) *Annual Report 1996–97* OLSC (NSW) Sydney 1998, 16. This consumer satisfaction has been confirmed by a small pilot study undertaken by a market research firm, Frank Small & Associates.

This approach has been welcomed by our clients. Consumers get quick resolution, and practitioners are spared the agony and expense of lengthy investigation that may not necessarily resolve the fundamental problem ... Communication problems, delays, disputes about small bills, failure to pay third parties, file transfer problems and allegations of rudeness are commonly dealt with in this manner.<sup>674</sup>

5.36 'Disputes' in Victoria are defined as disputes over legal fees of less than \$15-000, where a pecuniary loss has been caused by the practitioner, or where the dispute is related to the delivery of legal services. Disputes are dealt with by the relevant professional association, not the Legal Ombudsman. A comprehensive mediation process is outlined in the legislation to facilitate the resolution of a dispute.<sup>675</sup>

5.37 The National Competition Policy Review of the *Legal Profession Act 1987* (NSW) by the NSW Attorney-General's Department has highlighted issues relating to the disciplinary system, including a comparison of the powers and functions for handling and investigating complaints in New South Wales and Victoria.<sup>676</sup> This review is focussed on complying with the Competition Principles Agreement endorsed by the Council of Australian Governments (COAG), but the results may provide a basis for development of a disciplinary model to be implemented in each State and Territory.

5.38 The Commission considers that professional bodies and State and Territory governments should continue to work together to develop a national profession through cooperative recognition and regulatory practices, and the adoption of uniform practice rules and a uniform disciplinary process. The Commission supports further consideration of the feasibility of establishing a single regulatory body for all Australian practitioners and the appropriate mechanisms to facilitate the establishment of such a body. The Law Council of Australia should undertake a feasibility study regarding a single regulatory body, and present the results to COAG for consideration. The Commission's proposal for a Federal Legal Services Forum may assist further cooperation and collaboration between the federal, State and Territory governments and legal professional bodies.<sup>677</sup>

**Proposal 5.1.** The Law Council of Australia should be requested to supply to the Council of Australian Governments a statement concerning the feasibility of establishing and, if feasible, the form and arrangements for, a single regulatory body for all Australian practitioners.

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<sup>674</sup>.id 14.

<sup>675</sup>.*Legal Practice Act 1996* (Vic) s 122-136.

<sup>676</sup>.A-G's Dept (NSW) Issues Paper Vol 3 *National competition policy review of the legal profession Act 1987* A-G's Dept (NSW) Sydney 1998, ch 9.

<sup>677</sup>.See para 4.123-4.125; proposal 4.4.

## The impact of professional practice rules

5.39 The Commission considers that professional practice rules play an important role in regulating the conduct of practitioners, and thus in contributing to the proper administration of justice. The rules themselves do not, and cannot, provide a complete solution. Indeed, one practitioner (now a judge) noted, concerning the distillation of ethical principles into legal practice rules, that

[I]awyers tend to see rules as things to be circumvented in the pursuit of the client's interests. They may be honoured in the letter but ignored in the spirit. This is a potentially dangerous situation, for if lawyers approach codes of professional ethics in the same way they approach, say, revenue law then the underlying aim soon becomes avoidance rather than compliance.<sup>678</sup>

5.40 In submissions to the Commission the following complaints were made concerning practitioner conduct (in several instances the submission referred to a particular lawyer or case)

- fostering or encouraging litigation for financial benefit<sup>679</sup>
- abandoning clients when the money runs out<sup>680</sup>
- pressuring client to accept a result that does not meet the client's needs or desires<sup>681</sup>
- failing to act on the client's instructions<sup>682</sup>
- competitive strategies to win the case at expense of efficacy and equity<sup>683</sup>
- frustrating the client and the legal process by conduct designed to maintain conflict<sup>684</sup>
- lack of understanding or sympathy for the client's specific situation<sup>685</sup>
- failure to inform the client about the progress or status of the case<sup>686</sup>
- abuse of subpoenas<sup>687</sup>
- controlling, obstructing or discouraging communication between disputants<sup>688</sup>
- delays in correspondence<sup>689</sup>

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<sup>678</sup> K Crispin *Professional ethics and the prosecutor* DPP Canberra 1992, 7.

<sup>679</sup> J McIlwraith *Submission 37*; E Davies *Submission 103*; FLRAA *Submission 157*; S Boscolo *Submission 188*; K May *Submission 220*; LANSW family law practitioners *Consultation* Sydney 14 September 1998; Albury Law Society *Consultation* Albury 2 December 1998.

<sup>680</sup> FLRAA *Submission 157*.

<sup>681</sup> NSW Bar Assoc. *Submission 88*; FLRAA *Submission 157*.

<sup>682</sup> Lone Fathers NT *Submission 123*; Lone Fathers WA *Submission 156*; FLRAA *Submission 157*.

<sup>683</sup> D Brown *Submission 66*; NRMA *Submission 81*.

<sup>684</sup> J Wade *Submission 86*; E Davies *Submission 103*.

<sup>685</sup> B Boettcher *Submission 84*; FLRAA *Submission 157*; S Boscolo *Submission 188*; HALO *Submission 225*.

<sup>686</sup> FLRAA *Submission 157*.

<sup>687</sup> ICA *Submission 85*.

<sup>688</sup> J Wade *Submission 86*.

- lacking relevant knowledge of issues or facts<sup>690</sup>
- ignorance of ADR processes.<sup>691</sup>

A number of submissions to the Commission criticised lawyers' 'win at all costs' attitudes.<sup>692</sup>

5.41 A report conducted on behalf of the Business Working Group on the Australian Legal System noted, with respect to interlocutory processes, that

The rules of civil litigation are often used as a delay tactic, a 'fishing' expedition or a means to increase litigation costs. For example, the interlocutory proceedings of discovery and/or interrogatories may be employed to hold up a case where a party or its solicitors are not prepared to attempt to resolve the case for whatever reason. Over-discovery and over production is not an uncommon tactic to subvert the process and bury relevant documents among bundles of material. So too, a claim may be filed without due inquiry into the merits of the application and the discovery and interrogatory process is used as a vehicle to elicit the facts of a case and determine whether the claim is with or without foundation. Involving such procedures may also be a means to deliberately raise the costs incurred by the opposing party . . . <sup>693</sup>

5.42 Concern about the use of such tactics against financially or emotionally weaker opponents was raised in a number of submissions to the Commission.<sup>694</sup> Parties can, by tactical play, force settlement on terms unduly favourable to the stronger party, or create high costs for the weaker party.<sup>695</sup> Solicitor Geoffrey Gibson, has commented

If you can afford it, the tactic is to make big cases bigger by dragging in more parties. Two things follow. First, the pressure increases on each party to settle because of the risks posed by the litigation as a whole. . . Secondly, the case may get so big that the probabilities against its being fought through to judgement increase the bargaining power of the party with the weaker case, because sooner or later the court may have to say that it just cannot deal with this sort of colossus.<sup>696</sup>

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<sup>689</sup>.FLRAA *Submission 157*.

<sup>690</sup>.M Nasser *Submission 10*; D Brown *Submission 66*; K Grezel *Submission 73*; Medical Consumers Assoc of NSW *Submission 185*; S Boscolo *Submission 188*; RRT *Submission 211*; HALO *Submission 225*; Federal Court practitioners *Consultation Sydney 23 June 1999*.

<sup>691</sup>.WLRG Vic *Submission 162*.

<sup>692</sup>.P Heerey *Submission 73*; NRMA *Submission 81*; NSW Bar Assoc *Submission 88*.

<sup>693</sup>.Business Working Group on the Australian Legal System *Trends in the Australian legal system- avoiding a more litigious society* Allen Consulting Group Sydney 1998, 29.

<sup>694</sup>.eg LANSW *Submission 71*.

<sup>695</sup>.K Grezl *Submission 73*. See also ACCI *Submission 61*.

<sup>696</sup>.G Gibson *Submission 141*.

5.43 While sanctions or common law remedies may exist to overcome some of these problems,<sup>697</sup> the Commission suggests that clearer rules of professional misconduct should also limit the use of such tactics.

## **The structure of professional practice rules**

5.44 The structure of the rules can impact upon the way in which the rules are perceived, understood and followed by lawyers.

5.45 Professional practice rules may be prescriptive – duty-directed, stating specific duties, or aspirational – virtue-directed, stating desirable aims even though actual conduct may fall short of this ideal.<sup>698</sup> The major function of aspirational codes is to educate and encourage high standards. Aspirational codes cannot mandate compliance. Compliance, deterrence, punishment, or protection can best be achieved through a prescriptive code.<sup>699</sup>

### *A commentary approach in overseas jurisdictions*

5.46 Professional practice rules in a number of overseas jurisdictions incorporate a ‘rule-commentary’ approach. The New Zealand Rules of Professional Conduct for Barristers and Solicitors, the ABA Model Rules, and a number of practice rules in Canadian jurisdictions including Alberta’s Code of Professional Conduct,<sup>700</sup> are examples of a rule-commentary approach. This approach provides for the combination of brief, prescriptive rules with an explanatory commentary which provides additional guidance as to how the rules may be interpreted in practical situations.<sup>701</sup> In addition the ABA Model Rules include general ethical principles in a preamble to the rules.

5.47 The rules relating to communication between practitioner and client provide a useful comparison of the forms of different types of rules. In Australia, this rule is a standard feature of the professional practice rules. Although differing in detail, the Law Society of South Australia rules and the Queensland Bar Association rules provide

A practitioner shall keep a client apprised of all significant developments in any matter entrusted by the client unless the client has instructed the practitioner to do otherwise.<sup>702</sup>

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<sup>697</sup>.See discussion at para 5.54.

<sup>698</sup>.L Skene ‘A legal perspective on codes of ethics’ M Coady & S Bloch (eds) *Codes and ethics and the professions* Melbourne University Press Melbourne 1996, 111.

<sup>699</sup>.ibid.

<sup>700</sup>.Law Society of Alberta *Code of Professional Conduct* Law Society of Alberta.

<sup>701</sup>.G Dal Pont ‘Drafting rules of professional conduct’ [1996] *New Zealand Law Journal* 313, 317.

<sup>702</sup>.Law Society of SA Conduct Rules, r 9.8.

A barrister must seek to assist the client to understand the issues in the case and the client's possible rights and obligations, if the barrister is instructed to give advice on any such matter, sufficiently to permit the client to give proper instructions, particularly in connexion with any compromise of the case.<sup>703</sup>

5.48 The prescriptive form of the ABA Model Rules is similar to such Australian rules. The difference is the commentary attached to the American rule which provides guidance as to the application of the rule.

**Rule 1.4 Communication**

- (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
- (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

**Comment**

[1] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. For example, a lawyer negotiating on behalf of a client should provide the client with the facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision regarding a serious offer from another party. A lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable. See Rules 1.2(a). Even when a client delegates authority to the lawyer, the client should be kept advised of the status of the matter.

[2] Adequacy of communication depends in part on the kind of advice or assistance involved. For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others. On the other hand, a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfil reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of the representation.

[3] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example. Where the client is a child or suffers from mental disability. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigency may also require a lawyer to act for a client without prior consultation.

[4] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when

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<sup>703</sup>Qld Barristers' Rules, r 17.

the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rule or orders.<sup>704</sup>

5.49 The rule which requires prompt and full information be provided to clients is a very important one. As stated, poor communication is a significant cause of complaints about lawyers. Lawyers would have a much better sense of the scope and application of this rule if commentary, as in the ABA example, were appended to the statement of principle. It would also give much clearer guidance for law teachers and students in the now mandatory professional studies on legal ethics.

#### *Suggestions for a commentary approach in Australia*

5.50 The Legal Profession Advisory Council in New South Wales has recommended that the Law Society of New South Wales adopt a principle-rule-commentary approach to its professional conduct rules.<sup>705</sup> The Law Society of New South Wales, in its submission to the Advisory Council, expressed reservations regarding the Advisory Council's proposal, stating that ethics cannot be regulated and any attempt to cover all situations in a code may result in practitioners adopting a legalistic, rather than an ethical, approach.<sup>706</sup>

5.51 A principle-rule-commentary approach to professional practice rules is not the equivalent of a codification. Commentary provides guidance to practitioners, incorporating practical interpretations of the rules and possible examples of application. A commentary style currently exists in the legal practice guide *Riley's*,<sup>707</sup> and also in extensive literature published by the Law Society of New South Wales in its journals, pamphlets and booklets.<sup>708</sup> Law societies and bar associations in other jurisdictions publish similar commentary material aimed at assisting practitioners in their daily practice.

5.52 A principle-rule-commentary approach to professional practice rules combines appropriate features of these varied publications into one document, providing a more accessible and authoritative guide to professional conduct and improving the relevance of professional practice rules to the daily work of

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<sup>704</sup> American Bar Association *Annotated model rules of professional conduct* 3rd ed ABA Chicago 1996, 33-34.

<sup>705</sup> Legal Profession Advisory Council 'Report and recommendation of the Legal Profession Advisory Council pursuant to sections 57H(1) and 59(2)(b) of the Legal Profession Act' *Unpublished* 1997.

<sup>706</sup> Submission by Law Society of NSW to the Legal Profession Advisory Council.

<sup>707</sup> F Riley *New South Wales solicitors manual* Law Society of NSW Sydney 1994; although this publication is currently out of print.

<sup>708</sup> See for example N Dolan *Civil litigation – A guide to good practice* Law Society of NSW Sydney 1992.



practitioners.<sup>709</sup> As stated, commentary would also assist in educating students and practitioners in regards to application of the rules.<sup>710</sup>

5.53 The Law Council of Australia has commented that such drafting would be time consuming and difficult.<sup>711</sup> The Commission concedes that preparatory work to compile and compare commentary style rules, and drafting an Australian commentary, would be time consuming, but much of this background research and initial drafting could be undertaken by a researcher. One option would be to convene a single purpose working group to oversee preparatory research and drafting.

**Proposal 5.2.** Legal professional bodies and regulatory bodies should adopt a principle-rule-commentary approach to professional practice standards within model rules for a national legal profession.

## The content of professional practice rules

### Introduction

5.54 The Commission does not consider that professional practice rules should codify all aspects of professional conduct – this is neither possible nor desirable. The rules should be sufficiently comprehensive to feature the salient principles of practice and ethical obligations for negotiation, ADR practice, advice and advocacy. The common law augments such rules but is not always the most appropriate vehicle to explicate practice standards. Issues concerning professional practice rules may arise on the appeal of a matter. The court is concerned with the particular case circumstances, not the text of legal ethics. It is for the profession to ensure that practice rules provide appropriate and sufficient guidance to practitioners by covering relevant areas of practice.

5.55 Professional practice rules are designed to delineate practitioner obligations to the court and to the client. On the ethical issues raised, the rules are generally clear and concise. However, on several matters relevant to the proper workings of

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<sup>709</sup> Another mechanism for publicising and explicating professional practice rules is by ‘rulings’ made by the regulatory body. Such rulings ensure that practitioners are made aware of recent decisions and their possible impact upon professional practice and to clarify a rule where professional practice is in question. For example, the Law Society of NSW uses rulings to report on particular types of professional misconduct: ‘Professional Conduct Committee exposes the Part X files’ (1998) 36(7) *Law Society Journal* 32. Such reports present the consensus view of the Law Society’s Professional Conduct Committee as well as summarise correct law and procedure where it appears a common error or misconception exists within the profession. Similarly, the Law Institute of Vic Ethics Committee has resumed an earlier practice of publishing rulings made for the guidance of practitioners: ‘Ethics Committee rulings’ (1999) 73 (3) *Law Institute Journal*, 36. These rulings can be a helpful addition to any professional practice rules and may be incorporated into the commentary to the rules.

<sup>710</sup> See ch 3 for further discussion relation to education in relation to ethics and professional practice.

<sup>711</sup> Law Council of Australia *Consultation* 21 July 1999.

the administration of justice, the rules are limited. The rules do not directly address particular practice problems including whether practitioners should encourage or assist litigation or claims which have limited or no merit, or which are instigated simply to win time. The rules do not proscribe discovery tactics designed to obscure or 'drown' relevant documents. Further, the rules tend to be directed to litigation and court advocacy rather than the full array of advice and representative services undertaken by lawyers for clients.

*The administration of justice and the duty to the client*

5.56 Justice Crispin has analysed the general principle that a lawyer's obligation is to serve the client's interests, and stated that the implications of this principle are that

- the lawyer must act as if he or she assumes the justice of the cause: whatever his or her personal opinions, the case must be conducted from start to finish as if he or she were completely convinced of it
- the lawyer must assume the accuracy of the client's instructions: he or she is not entitled to permit any personal misgivings to influence the conduct of the case
- the lawyer has an ethical obligation to ignore the interests of others, however vulnerable, to the extent to which they conflict with those of the client – even the interests of the wider community.<sup>712</sup>

5.57 The Law Council of Australia submitted to the Commission that its Model Rules adequately deal with the duty to the administration of justice (the duty to the court), and that the rules adequately state that the duty to the court predominates in situations of conflict with the duty to the client.<sup>713</sup>

5.58 Practice rules in Australia do clearly set out duties to the client, including a rule or general principle that practitioners should serve their clients competently and diligently.<sup>714</sup> Specifically in relation to advocacy, a number of rules require a practitioner

... to advance and protect the client's interests to the best of the practitioner's skill and diligence, uninfluenced by the practitioner's personal view of the client or the client's activities, and notwithstanding any threatened unpopularity or criticism of the practitioner or any other person . . .<sup>715</sup>

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<sup>712</sup>K Crispin *Professional ethics and the prosecutor* DPP Canberra 1992, 26–29.

<sup>713</sup>See for example *LCA Submission 126*.

<sup>714</sup>NSW Solicitors' Rules, r 1.1; Law Society of ACT Conduct Rules, r 1.2; Law Institute of Vic Conduct Rules, r 3; Law Society of SA Conduct Rules, r 9.7; Rules of Practice Tas, r 10(1); Law Society of NT Conduct Rules, r 9.3; Law Society of SA Conduct Rules, r 9.1; Law Society of NT Conduct Rules, r 9.1; Law Society of WA Conduct Rules, r 5; Qld Solicitors' Handbook, 7.00; Vic Bar Rules, r 3. See also Qld Solicitors' Handbook, 5.02.

<sup>715</sup>See NSW Solicitors' Rules, r 23.A.16; Law Society of ACT Conduct Rules, r 17.1; NSW Barristers' Rules, r 16; Qld Barristers' Rules, r16; Vic Bar Rules, r 10.

All Australian practice rules referring to conduct in court include rules similar to the following

- a practitioner should not knowingly make a misleading statement to a court
- a practitioner should take steps to correct, as soon as possible, any misleading statement for which the practitioner or his/her client or witness was responsible
- practitioners shall ensure the court is informed of any relevant decision on a point of law or any legislative provision which maybe relevant, or any misapprehension by a judge as to the effect of an order being made.

5.59 However, the rules are mostly silent on the circumstances when it is permissible for a practitioner to act otherwise than in accordance with a client's instructions. Once a retainer has been accepted, practitioners generally have a duty to see the matter through to conclusion unless there is just cause for terminating the retainer.<sup>716</sup> A number of the rules include some description of when there would be just cause for termination, particularly in situations where continuing to act would breach practice rules or conflict with the lawyer's obligation to the court.<sup>717</sup>

5.60 The practice rules also set out a number of limitations on conduct, and in some cases positive duties, which are aimed at upholding the practitioner's duty to the administration of justice. A number of rules compel a practitioner to be more than a 'mouthpiece' of the client or the instructing practitioner by using his or her own forensic judgement independently, after appropriate consideration of the client's and the instructing practitioner's desires.<sup>718</sup>

5.61 Practitioners can have positive duties to provide information to the court in *ex parte* applications,<sup>719</sup> and in cases where the practitioner knows, or is told by the client, that the client has information required by a rule or order of the court, or the client has committed perjury.<sup>720</sup>

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<sup>716</sup>Law Society of SA Conduct Rules, r 9.11; Law Society of NT Conduct Rules, r 9.7; NSW Solicitors' Rules, r 5.1; Law Society of ACT Conduct Rules, r 6.1; LCA Model Rules, r 5.1.

<sup>717</sup>Qld Solicitors' Handbook, 5.03; Law Society of WA Conduct Rules, r 17.3; Law Society of SA Conduct Rules, r 9.10; Law Society of NT Conduct Rules, r 9.6; Rules of Practice Tas, r 95; NSW Barristers' Rules, r 93-102; Qld Barristers' Rules, 93-102; Vic Bar Rules, r 92-95; WA Bar Rules, r 8, 12.

<sup>718</sup>NSW Solicitors' Rules, r 23.A.18; Law Society of ACT Conduct Rules, r 18.1; LCA Model Rules, r17.3; NSW Barristers' Rules, r 18; Qld Barristers' Rules, r 18; Vic Bar Rules, r 16.

<sup>719</sup>A practitioner is under a duty to disclose all matters within the practitioner's knowledge which are not protected by legal professional privilege, and should seek the client's waiver of the privilege for relevant issues: NSW Solicitors' Rules, r 23.A.24-24A; Law Society of ACT Conduct Rules, r 19.4-5; LCA Model Rules, r 17.9-10; NSW Barristers' Rules, r 24-25; Qld Barristers' Rules, r 24-25.

<sup>720</sup>The practitioner should seek to have the client reveal the true information, but the practitioner may not reveal the information to the court himself or herself. A practitioner in this situation should terminate the retainer: NSW Solicitors' Rules, r 17, 23.A.32; Qld Solicitors' Handbook, 4.06; Law Society of ACT Conduct Rules, r 12.1, 15, 20.1; LCA Model Rules, r 11.1, 15, 17.18; NSW Barristers' Rules, r 32; Qld Barristers' Rules, r 32; Vic Bar Rules, r 29.

5.62 The rules generally state that ‘practitioners should not engage in, or assist, conduct that is calculated to defeat the ends of justice or is otherwise in breach of the law’.<sup>721</sup> The rules of the Law Societies of South Australia and the Northern Territory make clear that a practitioner should not tender advice to a client when the practitioner knows the client is requesting advice to advance an illegal purpose.<sup>722</sup>

5.63 The rules restrict practitioners alleging criminality, fraud or other serious misconduct without fair or reasonable grounds,<sup>723</sup> and ensure that such allegations or suggestions against any person are

- reasonably justified by the material then available to the practitioner
- appropriate for the robust advancement of the client’s case on its merits
- not made principally in order to harass or embarrass the person
- not made principally in order to gain some collateral advantage for the client or the practitioner or the instructing practitioner out of court.<sup>724</sup>

5.64 The rules relating to practitioner advocates also include rules on the limitations on cross-examination, integrity of evidence (for example, limitations on conferral and communication with witnesses), and integrity of hearings (for example, limitations on the publication of material relating to proceedings).

5.65 The Law Society of Western Australia specifically states that if a practitioner observes another practitioner making a mistake or oversight which ‘may involve the other practitioner’s client in unnecessary expense of delay’, that mistake or oversight should not be fostered and, unless it would prejudice his or her own client, a practitioner should draw the mistake or oversight to the attention of the other practitioner.<sup>725</sup>

5.66 In the rules of the Law Societies of Western Australia, the Northern Territory, and Queensland, additional practice rules specify that practitioners shall

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<sup>721</sup>General principle under ‘Relations with Clients’: Model Rules, NSW Solicitors’ Rules and Law Society of ACT Conduct Rules. See also Law Society of SA Conduct Rules, r 9.9; Qld Solicitors’ Handbook, 4.08; Law Society of WA Conduct Rules, r 3.1; Vic Bar Rules, r 4.

<sup>722</sup>Law Society of SA Conduct Rules, r 9.9; Law Society of NT Conduct Rules, r 9.5.

<sup>723</sup>NSW Solicitors’ Rules, r 23.A.36-38; Law Society of SA Conduct Rules, r 16.3; Law Society of WA Conduct Rules, r 13.6-7; Law Society of ACT Conduct Rules, r 21.2-21.4; Law Society of NT Conduct Rules, r 16.9; LCA Model Rules, r 17.22-24; NSW Barristers’ Rules, r36-38; Qld Barristers’ Rules r 36-38; Vic Bar Rules, r 34, 38, 42.

<sup>724</sup>NSW Solicitors’ Rules, r 23.A.35; Law Society of SA Conduct Rules, r 16.3; Law Society of WA Conduct Rules, r 13.6-8; Law Society ACT Conduct Rules, r 21.1; Law Society of NT Conduct Rules, r 16.7-9, 16.13; LCA Model Rules, r 17.21; NSW Barristers’ Rules, r 35; Qld Barristers’ Rules, r35; Vic Bar Rules, r 31.

<sup>725</sup>Law Society of WA Conduct Rules, r 18.2.

- act with due courtesy to the court<sup>726</sup>
- use their best endeavours to avoid unnecessary expense and waste of the court's time.<sup>727</sup>

The following are included in the rules of the Law Societies of Western Australia and the Northern Territory only

- practitioners shall, when requested, inform the court of the probable length of the case<sup>728</sup>
- practitioners shall inform the court of the possibility of settlement.<sup>729</sup>

5.67 While this brief survey of existing practice rules indicates that the duty to the administration of justice is recognised in the rules, the ambit and application of this duty is not sufficiently clear and is given variable expression.

#### *Limitations of existing practice rules*

5.68 The limitations of the rules are exemplified by the *White Industries* case.<sup>730</sup> The case concerned the breach of a rule clearly stated in practice rules, forbidding practitioners to allege fraud unless the practitioner has reasonable grounds for believing that the factual material provides a proper basis for the allegation, the material will be admissible, and the client has been advised of the seriousness of the allegation. The case also concerned, as Justice Goldberg found, a breach by the solicitors of 'the duty it owed to the Court with propriety, not to be a party to an abuse of process and not to obstruct or defeat the administration of justice'. This obligation is not explicated in the Rules. Justice Goldberg summarised the ethical breach.

I do not consider that it is a proper use of Court process and procedures to institute a proceeding to delay a respondent or defendant in asserting and enforcing a right, and obtaining recovery in respect of it, when the applicant or plaintiff and its legal advisers believe that there is no basis for the institution of the proceeding and that it cannot succeed. It was also unreasonable because [the solicitor] had insufficient information on which to form a view that the proposed proceeding had any realistic prospects of success. He had not given careful consideration to whether the proceeding should be instituted because he had no time to do so and, in any event, the purpose of the proceeding was for a different purpose, that is different from the purpose of seeking to vindicate a right. It was also unreasonable because the proceeding propounded a cause of action pleading fraud when not only was there no factual basis for the allegation but he had given no consideration to whether

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<sup>726</sup>Law Society of WA Conduct Rules, r 13.4(a); Law Society of NT Conduct Rules, r 16.5(a); Qld Solicitors' Handbook, 4.07.1.

<sup>727</sup>Law Society of WA Conduct Rules, r 13.4(b); Law Society of NT Conduct Rules, r 16.5(b); Qld Solicitors' Handbook, 4.07.1.

<sup>728</sup>Law Society of WA Conduct Rules, r 13.4(c); Law Society of NT Conduct Rules, r 16.5(c).

<sup>729</sup>Law Society of WA Conduct Rules, r 13.4(d); Law Society of NT Conduct Rules, r 16.5(d).

<sup>730</sup>*White Industries (Qld) Pty Ltd v Flower & Hart* (1998) 156 ALR 169.

there was a factual basis for pleading fraud and he had given no consideration to the issue of whether fraud should be pleaded.

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The fact that [the client] had a robust approach to litigation, did not believe anything was impossible and was unconcerned about entering into litigation with limited prospects made it all the more important for Flower & Hart to have regard to the manner in which it instituted and conducted proceedings on his behalf and on behalf of his companies and to be conscious of its duty to the Court.<sup>731</sup>

5.69 The *White Industries* case was unusual because of the documentary evidence of client discussions available to the court. Some media commentary on the case claimed that it was not unusual for practitioners to utilise tactical play,<sup>732</sup> although no commentator indicated that practitioners routinely assert fraud when there was no factual basis for such claim. Certainly there are reported cases of unmeritorious *ex parte* injunctions undertaken with limited merit and to secure a collateral business advantage. These likewise were held to be an abuse of process.<sup>733</sup> This kind of behaviour, and the need for regulation, was highlighted in one submission to the Commission.

In our view, judges must impose cost sanctions upon lawyers who commence proceedings prematurely, and thereby cause costs to be wasted by parties and cause the system as a whole to function inefficiently. In addition, ethical requirements need to be put in place by relevant professional bodies.<sup>734</sup>

### ***United Kingdom Civil Procedure Rules***

5.70 This issue of trial tactics has been dealt with in the new United Kingdom Civil Procedure Rules.<sup>735</sup> The Rules set down the overriding objective of case management, namely enabling the court to deal with cases justly.<sup>736</sup> Rule 1.1 states that

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<sup>731</sup>.id 249-250. An appeal against this case was recently dismissed by the Full Court of the Federal Court: *Flower & Hart v White Industries (Qld) Pty Ltd* (unreported) [1999] FCA 773 (11 June 1999).

<sup>732</sup>.See for example B Lane 'Elusive benchmarks' *Weekend Australian* 25 July 1998, 20; C Merrit 'The High Court judge who could hang his profession' *Australian Financial Review* 25 July 1998, 22; Editorial comment 'Judge must answer to Parliament' *Sunday Canberra Times* 26 July 1998, 10.

<sup>733</sup>.For an overview of abuse of process cases resulting in findings of lawyers in contempt see M-Chesterman & P Kearney 'Lawyers in contempt' (1988) 26(5) *Law Society Journal* 42. The *White Industries* case has been cited as authority of abuse of process in a number of subsequent decisions eg *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) ATPR 141-679 (Merkel J); *Abriel v Australian Guarantee Corp* (unreported) [1999] FCA 50 (5 February 1999) (Branson J).

<sup>734</sup>.Arthur Robinson *Submission* 189.

<sup>735</sup>.The Civil Procedure Rules 1999 (UK) commenced operation on 26 April 1999. Rules can be viewed at [http://www.open.gov.uk/lcd/civil/procrules\\_fin/cprocrf.htm](http://www.open.gov.uk/lcd/civil/procrules_fin/cprocrf.htm) (15 July 1999).

<sup>736</sup>.The Civil Procedure Rules 1999 (UK) were influenced by draft rules developed by Lord Woolf and appended to the Woolf final report: Lord Woolf *Access to justice: Final report to the Lord Chancellor on the civil justice system in England and Wales* HMSO London 1996; Lord Woolf *Access to justice draft civil proceedings rules* HMSO London 1996.

Dealing with a case justly includes, so far as is practicable –

- (a) ensuring that the parties are on an equal footing;
- (b) saving expense;
- (c) dealing with the case in ways which are proportionate –
  - (i) to the amount of money involved;
  - (ii) to the importance of the case;
  - (iii) to the complexity of the issues; and
  - (iv) to the financial position of each party;
- (d) ensuring that it is dealt with expeditiously and fairly; and
- (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

Rule 1.3 states that the parties must help the court to further the overriding objective, thereby imposing a duty on lawyers (as representatives of parties) to assist the court to deal with cases justly.

5.71 There have been a number of criticisms of Lord Woolf's proposals for reform. One critic viewed the reforms as permitting '*ad hoc* exercises of subjective, antagonistic and potentially prejudicial judicial discretion to meet the perceived exigencies of individual cases'.<sup>737</sup> Certainly, each of the elements set out in Rule 1.1 invokes a broad and largely unguided discretion. For example, while judges can ensure that both parties comply with court rules and procedures, it can be difficult for a judge to seek to ensure, so far as is practicable, that the parties are on an equal footing.

5.72 Other features in Rule 1.1 require consideration of the importance of the case, the complexity of the issues, and the financial positions of each party. The criteria raise as many questions as they answer – is it the importance of the case to society, to the parties, or to the development of the common law that is the determining factor? How are judges to decide such matters? How do judges obtain information about the parties' financial positions?

5.73 In its present formulation, this rule for litigation practice is not easily implemented by a judge. There is no doubt the litigation system would work better if lawyers and litigants worked cooperatively, undertook work proportionate to the claims, and engaged from points of relative parity. But how can such engagement be mandated and how does it sit with the lawyer's obligation to be a partisan advocate for the client?

5.74 It may be that an obligation on practitioners to approach cases in a 'proportionate' manner is more appropriate as a professional practice rule than as a rule of court. Certainly such an obligation in practice standards would require a narrower duty than that invoked by Lord Woolf. The Commission does not support

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<sup>737</sup>N Andrews 'The adversarial principle: fairness and efficiency' in A Zuckerman & R Cranston (eds) *Reform of civil procedure: essays on 'Access to justice'* Clarendon Press Oxford 1995, 182.

adoption of a court rule similar to the United Kingdom rule mandating 'proportionate' litigation practice.

*United States Federal Rules of Civil Procedure and practice rules*

5.75 It was suggested by the Law Council of Australia that Rule 11 of the United States Federal Rules of Civil Procedure is a useful example of how sensible prehearing litigation behaviour and advice can be incorporated within a court rule. Rule 11 requires a pleading, written motion or other paper to be signed by at least one attorney, or by the party if unrepresented. The rule then includes particular requirements relating to representations being made to the court.

By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, —

- (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or increase in the cost of litigation;
- (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

The rule provides the court with positive authority to impose sanctions against attorneys, law firms, or parties who have violated the rule.

5.76 The ABA Model Rules also include clearer, positive duties concerning litigation practice than do Australian rules. The obligations imposed on American lawyers include duties to desist from behaviour which may be contrary to the administration of justice. Commentary to the ABA Model Rules provides guidance as to the interpretation of the rule and its practical application.

**Rule 3.1.** A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

**Comment.** The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure . . . The action is frivolous . . . if the client desires to have the action taken primarily for the purposes of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of the existing law.



**Rule 3.2.** A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

**Comment.** Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain the rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of the action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.<sup>738</sup>

5.77 Such professional practice rules can assist practitioners to have a clearer understanding of appropriate conduct. From submissions to the Commission, a rule in the form of Rule 3.1 would be of real assistance to practitioners dealing with family law litigants, and Rule 3.2 likewise has clear relevance to federal civil practice. This is not to assume that tensions between a client's instructions and the practitioner's duties to the administration of justice will ever be easily overcome.

**Proposal 5.3.** The Federal Court Rules and Family Law Rules should adopt an appropriate rule, consistent with Rule 11 of the United States Federal Rules of Civil Procedure, which requires practitioners and unrepresented parties to consider the purpose and content of pleadings and other papers before presentation to the court. Appropriate sanctions should be specified in the rule.

**Proposal 5.4.** The Law Council of Australia should ensure that model professional practice standards incorporate a rule, consistent with Rules 3.1 and 3.2 of the American Bar Association Model Rules of Professional Conduct and relevant commentary, providing circumstances in which proceedings are not to be commenced or assertions not made, and obliging practitioners to make reasonable efforts to expedite litigation.

### *Overservicing*

5.78 Another aspect of practitioner conduct noted in some submissions to the Commission concerns overservicing, which refers to practitioners providing services above and beyond what is required for the efficient and effective conduct of a matter.

5.79 There are a number of possible causes of overservicing. There are financial incentives for some practitioners to prolong a case, particularly where the client is billed by the hour or by the day.<sup>739</sup> Most practitioners discount such incentives,

<sup>738</sup>American Bar Association *Annotated model rules of professional conduct* 3rd ed ABA Chicago 1996, 297, 303.

<sup>739</sup>G Gibson *Submission 141*.

pointing out the commercial realities that clients generally desire an efficient and speedy resolution to a dispute.<sup>740</sup>

5.80 Inexperienced practitioners may also be a source of overservicing. The Law Council of Australia concedes that inexperienced practitioners may inadvertently contribute to some instances of short term delay within the system.<sup>741</sup>

5.81 Criticism has been levelled at the profession for conducting matters in a fashion that leaves 'no stone unturned' which can contribute to the private and public costs of litigation. Geoffrey Gibson describes the 'loss of nerve', which derives from a combination of business pressures, fear of negligence suits and lower levels of experience throughout the profession.

The loss of nerve is made worse by the fear of failure, either through being successfully sued, or even colourably sued, for professional negligence, or being overturned on appeal, or just making a fool of yourself. It runs from the litigant through to the top of the courts. The litigant wants a level of assurance that cannot be got. The temptation is there to throw lawyers and money at a problem. The solicitor worries about leaving something out. When it comes to discovery, it may be safer to put everything in . . . It is better to be safe than sorry. Similarly, with counsel, it would be safer to read everything in sight; you cannot afford to leave it to the solicitors. When the inexperienced barrister comes to cross-examine, the lack of experience often means there is a lack of judgement or nerve about where to start or where to stop. This lack of judgement is a major reason for the excessive time taken for both criminal and civil trials.<sup>742</sup>

5.82 The Law Council of Australia has also noted a 'real world problem' of negligence actions taken against practitioners.

There are some reformers who insist that litigators should restrict, refine or narrow issues in dispute. The other view is that clients will complain or sue, if clients' interests are not protected or advanced to the full extent the law permits by litigators taking every possible step on their behalf . . . The former criticism is often heard in the reform context which is a reflection about cost and delay. The latter criticism is supported by the culture of judicial decisions in professional negligence actions which imposes on lawyers such a high duty that they are at risk if they do not take every point that is possibly available or arguable to a client. The Law Council would wish to find some way of discussing with judges what is the correct balance to be achieved between the duty lawyers have to clients and the pressure that is now being imposed by the community to narrow the length and cost of proceedings.<sup>743</sup>

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<sup>740</sup> Arthur Robinson *Submission 189*.

<sup>741</sup> LCA *Submission 197*.

<sup>742</sup> G Gibson *Submission 141*.

<sup>743</sup> LCA *Submission 126*. See also recent case of *NRMA Ltd v Morgan* (unreported) [1999] NSWSC 407 (13 May 1999) (Giles J), in which a number of practitioners were found liable to pay damages to NRMA for the handling of the failed NRMA float proposal and subsequent litigation.

5.83 One suggested method of protecting practitioners is to provide legislative exemption, or capping, of liability for negligence for practitioners whose clients have sued claiming that the lawyer failed to pursue certain points in a case or did not act with sufficient zeal. The Commission cautions against broader exemption of liability for practitioners without further discussion of the public interest issues involved.

5.84 In litigation as in other practice areas there is no simple solution to the problems of overservicing. Throughout this discussion paper, the Commission has made recommendations to discourage over-management of cases, whether in courts or tribunals. Effective case management offers a partial solution to some forms of overservicing. The Commission's support for the Federal Court individual docket system is premised on its assumption that this type of case management system allows a judge, informed by a knowledge of the issues in the case to make appropriate directions to limit the ambit of discovery or confine issues. Such directions can be relied upon by the practitioner in a claim of professional negligence to obviate the need to 'leave no stone unturned'. In the Commission's view, such case management systems combined with the recommended professional practice rules offer the best way to control overservicing.

#### *Prehearing conduct and conduct in non-litigious matters*

5.85 There are a number of areas which are dealt with either perfunctorily or not at all in Australian professional practice rules. Two of those areas are the prehearing conduct of practitioners involved in litigation and conduct in matters that do not involve litigation.

5.86 The Law Council of Australia recommended to the Commission that prehearing conduct ought to have the same degree of attention in professional practice rules as the advocacy rules have now received.<sup>744</sup> Further, as noted by the Law Council, many of the rules apply to advocates, but are silent in relation to the instructing practitioner. Both advocates and instructing practitioners should have clear guidance as to appropriate conduct in prehearing and non-litigious matters. The Commission supports this approach.

5.87 A number of rules require practitioners to communicate effectively and promptly with clients.<sup>745</sup> The rules differ in detailing matters to be raised with the client, but generally require that clients be informed of significant developments in a matter.<sup>746</sup> Queensland solicitors, for example, are specifically required when acting

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<sup>744</sup>LCA *Submission 126*.

<sup>745</sup>Law Society of SA Conduct Rules, r 9.14; Law Institute of Vic Conduct Rules, r 12(1).

<sup>746</sup>Qld Solicitors' Handbook, 4.04; Law Society of WA Conduct Rules, r 10.1; Law Society of SA Conduct Rules, r 9.8; Rules of Practice Tas, r 10(2); Law Society of NT Conduct Rules, r 9.4; Law Society of ACT Conduct Rules, r 3.2.

in contentious business to inform clients of relevant avenues available for settlement and the resolution of issues in dispute.<sup>747</sup>

5.88 A number of rules require practitioner advocates to seek to assist the client to understand issues in the case, and to understand his or her rights and obligations, so as to enable the client to give proper instructions, particularly in relation to a compromise of the case.<sup>748</sup> In the Australian Capital Territory in cases of unexpected delay, the practitioner is required to provide an explanation of such delay and whether or not the client may assist to resolve the delay.<sup>749</sup>

5.89 There is only one jurisdiction with a positive obligation on the practitioner to seek to resolve appropriate disputes without resort to litigation. The rules of the Law Society of Western Australia state

A practitioner shall when in his client's best interests endeavour to reach a solution by settlement out of court rather than commence or continue legal proceedings.<sup>750</sup>

As noted above, Queensland solicitors are required to advise clients of settlement options, but not positively to seek such settlement.<sup>751</sup>

5.90 Other rules make little reference to advising or informing of dispute resolution options, although the Law Society of New South Wales guide to good practice advises practitioners to advise clients about ADR processes and the benefits of ADR.<sup>752</sup> The Business Working Group on the Australian Legal System supports the imposition of ethical obligations on practitioners to advise clients of alternatives to litigation.<sup>753</sup>

5.91 United States and Canadian jurisdictions place greater emphasis on advising clients of options for dispute resolution, and require practitioners to attempt to use these processes. The Code of Professional Conduct of the Law Society of Alberta includes a rule stating that

A lawyer must recommend that a client accept a compromise or settlement of a dispute if it is reasonable and in the client's best interests.<sup>754</sup>

The commentary to this rule states that

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<sup>747</sup>. This was the subject of a Council Resolution in July 1994: Qld Solicitors' Handbook, 7.00.

<sup>748</sup>. NSW Solicitors' Rules, r 23.A.17; Law Society of ACT Conduct Rules, r 17.2; LCA Model Rules, r17.2; NSW Barristers' Rules, r 17; Qld Barristers' Rules, r 17; Vic Bar Rules, r 12.

<sup>749</sup>. Law Society of ACT Conduct Rules, r 3.3.

<sup>750</sup>. Law Society of WA Conduct Rules, r 5.7.

<sup>751</sup>. Qld Solicitors' Handbook, 7.00.

<sup>752</sup>. F Riley *New South Wales Solicitors Manual* Law Society of NSW Sydney 1994, para 2255A.

<sup>753</sup>. Business Working Group on the Australian Legal System *Trends in the Australian legal system- avoiding a more litigious society* Allen Consulting Group Sydney 1998, 28.

<sup>754</sup>. Law Society of Alberta *Code of Professional Conduct* Law Society of Alberta ch 9 r 16.

it is to the general benefit of society and the administration of justice that lawyers discourage unmeritorious suits and seek the early resolution of disputes . . . Determining whether settlement or compromise is a realistic alternative requires objective evaluation and the application of a lawyer's professional judgement and experience to the circumstances of the case. The client must then be advised of the advantages and drawbacks of settlement versus litigation. Due to the uncertainty, delay and expense inherent in the litigation process, it is often in the client's interests that a matter be settled. On the other hand, because a lawyer's role is that of an advocate rather than adjudicator, going to trial is justified if the client so instructs and the matter is meritorious . . . In addition to conventional legal process, a lawyer should consider alternative dispute resolution.

5.92 While it should be acknowledged that many practitioners in Australia already conduct themselves in this way, the inclusion in the professional practice rules of specific obligations, such as those outlined above from Western Australia and Alberta on settlements and of the ACT on delay, can ensure that practitioners are aware of the accepted standard of conduct in relation to advising and assisting clients in prehearing procedures and non-litigation matters. The standards should also address the need for timeliness of such advice and assistance.<sup>755</sup>

**Proposal 5.5.** Professional practice rules should include a clear indication of accepted standards of conduct and practice in relation to advising and assisting clients in prehearing and non-litigation matters, including standards that practitioners shall, as early as possible

- advise clients of relevant non-litigious avenues available for resolution of a dispute
- when in their client's best interests, endeavour to reach a solution by settlement out of court rather than commence or continue legal proceedings
- must notify the client if, in the practitioner's opinion, it is in the client's best interests to accept a compromise or settlement and that, in the practitioner's opinion, the compromise or settlement is a reasonable one
- in cases of unexpected delay, provide an explanation of such delay and whether or not the client may assist to resolve the delay.

Such rules should apply equally to barristers and solicitors.

### *Conduct during negotiation*

5.93 Practitioners play a vital role in negotiating and settling matters, yet professional practice rules provide little guidance as to the conduct expected of practitioners when conducting such negotiations. This is of particular importance given that, to be most effective for the client, the approach to negotiation may variously require partisan and facilitative tactics and behaviour.

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<sup>755</sup>See para 12.74–12.84 for discussion in relation to timeliness of settlement in the AAT and para-11.160–11.173 in relation to the Family Court of Australia.

Negotiation, not subjected to the rigours of trial, provides an ideal cover for whatever unethical practices a party is able to engage in, provided these do not go as far as to put the other party on notice. Such practices are not subject to the scrutiny of court procedures and safeguards, like examination and cross-examination of witnesses — there is no forum for testing the veracity of contentions made. . . . The unethical lawyer can therefore engage in such conduct, reasonably secure in the knowledge that it is unlikely that the conduct will ever be discovered. Should it be discovered, then there are really no effective sanctions available, in any event. Lack of sanctions results in lack of deterrent to such conduct and, perhaps, goes so far as to facilitate it.<sup>756</sup>

5.94 The Professional Conduct Rules of the Law Society of Alberta, Canada, include a complete chapter on ‘The lawyer as negotiator’, which is headed by a general principle stating the lawyer’s duty to seek a resolution of a dispute in accordance with the client’s instructions, rules, and accompanying commentary. The rules are as follows

1. A lawyer must not lie to or mislead an opposing party.
2. If a lawyer becomes aware during the course of a negotiation that
  - (a) the lawyer has inadvertently misled the opposing party, or
  - (b) the client, or someone allied with the client or the client’s matter, has misled an opposing party, intentionally or otherwise, or
  - (c) the lawyer or the client, or someone allied with the client or the client’s matter, has made a material representation to an opposing party that was accurate when made but has since become inaccurate, then (subject to confidentiality) the lawyer must immediately correct the resulting misapprehension on the part of the opposing party.
3. (a) A lawyer must not make a settlement offer on behalf of a client except on the client’s instructions.
  - (b) A lawyer must promptly communicate all settlement offers to the client.
4. A lawyer must not negotiate an agreement that the lawyer knows to be criminal, fraudulent or unconscionable.
5. When negotiating with an opposing party who is not represented by counsel, a lawyer must:
  - (a) advise the party that the lawyer is acting only for the lawyer’s client and is not representing that party; and
  - (b) advise the party to retain independent counsel.

5.95 The extensive commentary on these rules gives guidance to practitioners about appropriate and inappropriate conduct in relation to negotiations. For example, in relation to Rule 3, the commentary states

. . . the issue of whether to settle a dispute is so fundamental to a lawyer’s representation that it must be the subject of discussion with and direction from the client. Every offer received from an opposing party must be presented to the client

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<sup>756</sup>J Parke ‘Lawyers as negotiators: Time for a code of ethics?’ (1993) 4 *Australian Dispute Resolution Journal* 216, 222. See also R Harris ‘Contrasting “principled negotiation” with the adversarial model’ (1990) 20 *Victoria University of Wellington Law Review* 91.

for consideration, regardless of the client's earlier instructions. Similarly, the client's approval must be obtained before an offer originating with the lawyer is communicated to an opposing party.

5.96 Rules consistent with the Law Society of Alberta statement are included in recent Australian professional practice rules. Those Rules state that the practitioner has a duty to not make, or to rectify if made, a false statement to the opponent in relation to the case, including its compromise.<sup>757</sup> The rule is directed to advocates, but should apply to all practitioners undertaking any kind of oral or written correspondence with another party. Further, as with the Alberta example, such rules need to be given elaboration or commentary and advertised widely within the practising profession.

5.97 A number of federal statutes include requirements to negotiate in good faith. The *Native Title Act 1993* (Cth) provides one example. In a 1996 decision concerning the Native Title Act, the National Native Title Tribunal (NNTT) set out to define 'good faith'.<sup>758</sup> NNTT member Sumner put forward a list of indicia to assist in determining whether negotiations had been in good faith, including

- unreasonable delay in initiating communications in the first instance
- the unexplained failure to communicate with the other parties within a reasonable time
- failure to follow up a lack of response from the other parties
- failure to take reasonable steps to facilitate and engage in discussions between the parties
- failing to respond to reasonable requests for relevant information within a reasonable time
- stalling negotiations by unexplained delays in responding to correspondence or telephone calls
- unnecessary postponement of meetings
- sending negotiators without authority to do more than argue or listen
- shifting position just as agreement seems in sight
- adopting a rigid non-negotiable position
- failure to make counter-proposals
- unilateral conduct which harms the negotiating process, for example, using inappropriate press releases
- refusal to sign a written agreement in respect of the negotiation process or otherwise
- failure to do what a reasonable person would do in the circumstances.<sup>759</sup>

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<sup>757</sup> NSW Solicitors' Rules, r 23.A.51-52; Law Society of ACT Conduct Rules, r 23.1-3; LCA Model Rules, r 17.36-38; NSW Barristers' Rules, r 51-53; Qld Barristers' Rules, r 51-53; Vic Bar Rules, r 50-51.

<sup>758</sup> *Western Australia v Taylor* (1996) 134 FLR 211. See also D Spencer 'Complying with a requirement to negotiate in good faith' (1998) 9 *Australian Dispute Resolution Journal* 226.

<sup>759</sup> *id* 224-225.

5.98 The Commission considers it is appropriate to include a requirement for practitioners to negotiate in good faith in all civil matters. The rules should indicate what is required of a practitioner when negotiating in good faith. While the indicia set out above are derived from a particular statutory context, they provide a helpful starting point to define such obligations in practice rules.

**Proposal 5.6.** National professional practice rules should provide guidance, by way of explanatory commentary, as to expected standards of conduct and practice of practitioners negotiating any civil matter on behalf of a client. The rules should require that where practitioners negotiate on behalf of a client, that they do so in 'good faith'. The commentary to the rules should include a practical explanation of what is meant by 'good faith' negotiations.

#### *Provisions relating to ADR*

5.99 Legal practitioners are increasingly involved in ADR processes, advising clients about the process, representing clients participating in the processes, and, as neutrals, conducting ADR processes. The need for improved guidance as to the proper conduct of lawyer-mediators and lawyers representing clients in ADR processes has been recognised in Australia and overseas.<sup>760</sup>

5.100 A number of professional associations have published rules or guidelines for the conduct of practitioners involved in mediation or arbitration. The NSW and Queensland Barristers' Rules specifically permit barristers to represent a client in a mediation, or act as an arbitrator or mediator.<sup>761</sup> Rule 9 of the Tasmanian Rules of Practice restricts a practitioner from holding himself or herself out as a mediator or arbitrator without the approval of the Law Society of Tasmania. Rule 7A of the Law Society of Western Australia's rules provides additionally that practitioners engaged in mediation must comply with the provisions of the general professional practice rules. The rules also define mediation, and prescribe particular rules of conduct for practitioners functioning as mediators.<sup>762</sup>

5.101 A number of rules state that practitioners cannot act for a client involved in an arbitration where the practitioner has previously advised or acted for the arbitrator in connection with the arbitration.<sup>763</sup>

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<sup>760</sup>M Gaines 'A proposed conflict of interest rule for attorney-mediators' (1998) 73 *Washington Law Review* 699; J Parke 'Lawyers as negotiators: Time for a code of ethics?' (1993) 4 *Australian Dispute Resolution Journal* 216, 226. For further recommendations on practice standards see IP 25, para 8.8.

<sup>761</sup>NSW Barristers' Rules, r 74(d) and (g); Qld Barristers' Rules, r 74(d) and (g).

<sup>762</sup>For example Rule 7A.2 states that the mediator shall maintain impartiality towards all those involved in the mediation process, while Rule 7A.3 states that a practitioner functioning as a mediator should regard all parties to the dispute as his clients.

<sup>763</sup>NSW Barristers' Rules, r 87(h); Qld Barristers' Rules, r 87(h); Vic Bar Rules, r 92(h); Law Society WA Conduct Rules, Sch 2.



5.102 In 1996, the Law Council of Australia approved ethical standards for lawyer-mediators.<sup>764</sup> In September 1997 the Law Society of New South Wales adopted 'The Law Society of NSW Charter on mediation practice: a guide to the rights and responsibilities of participants', setting out the expected behaviour of parties as well as lawyer mediators. Further, the Law Society of New South Wales published a 'Mediation and Evaluation Information Kit' in February 1999, which provides information and extensive guidance to legal practitioners with the aim of promoting negotiated settlement.

5.103 ADR professional organisations, to which many legal practitioners with ADR accreditation belong, have independently formulated their own practice standards stating the responsibilities and codes of conduct applicable to their members. These guidelines and codes of conduct are more comprehensive than the legal professional bodies' ADR guidelines but, in the event of members breaching rules, ADR associations have limited powers of sanction.

5.104 The Commission sees a need for a national model practice rule relating to lawyer neutrals and lawyers acting for clients participating in ADR processes, in order to provide guidance as to appropriate practice in this growing area. The Commission supports harmonisation of relevant standards and rules of ethical conduct for legal and non-legal ADR practitioners.

**Proposal 5.7.** National professional practice rules for lawyer neutrals in ADR processes and lawyers acting for clients participating in ADR processes should be adopted and should include a rule requiring practitioners to participate in good faith when representing clients participating in such processes.

#### *Family law proceedings and representing children*

5.105 A number of professional associations have produced guidelines in areas of specialist practice such as family law, mediation, and for practitioners representing children. The Commission has addressed the particular issue of practice standards and representative actions in chapter 10.

5.106 The Law Society of New South Wales' Family Law Advisory Code of Practice, for example, contains guidelines on dealing with clients who have suffered domestic violence, the paramount interest of children in family law disputes, conflicts of interest issues, approaches to settlement and advising on settlement options, dealing with unrepresented parties, as well as outlining particular obligations set out in the Family Court Rules. The Law Society of Western Australia has appended family law guidelines to its professional conduct rules. Other associations are considering introducing guidelines for practitioners of family law.

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<sup>764</sup>Law Council of Australia 'Ethical standards for mediators' (1997) 32(2) *Australian Lawyer* 29.

The federal government has produced guidelines for practitioners representing the federal government.<sup>765</sup>

5.107 In *Seen and heard: priority for children in the legal process*, the Commission and the Human Rights and Equal Opportunity Commission identified a need for standards or practice guidelines for practitioners representing children in family law, care and protection, juvenile justice and other civil and administrative matters.<sup>766</sup> Guidelines of this nature would deal with issues such as

- determining the basis of representation and the degree to which a child should direct litigation
- ensuring direct contact between child and legal representative
- interviewing and providing information to child parties and clients
- the use of language appropriate to the age and maturity of the child
- development of lawyer-client relationship and advocacy of the child's legal rights.<sup>767</sup>

5.108 The Victorian Law Foundation and the Law Societies of South Australia and New South Wales are currently developing guidelines for solicitors representing children. The Victorian guidelines are directed to practice in the Victorian Children's Court, but these will be applicable to a wider variety of circumstances and jurisdictions. While the current initiatives for drafting family and child representative standards may be local ones, the ultimate objective, which the Commission supports, is for national practice standards for family practitioners and practitioners representing children.

**Proposal 5.8.** National professional practice standards should be developed for family practitioners and practitioners representing children.

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<sup>765</sup> See ch 8.

<sup>766</sup> ALRC & HREOC *Seen and heard: priority for children in the legal process* ALRC Sydney 1997 (ALRC 84), para 13.82–87.

<sup>767</sup> *id* rec 70–72.

## 6. Assistance with legal costs

### Introduction

6.1 This chapter considers methods of assisting users of the federal civil justice system with their legal costs and ways to improve this assistance. Legal aid is the best known form of assistance and this is discussed in detail in the following chapter. Other forms of federal financial assistance are the tax deductions for legal costs as a business expense. Further, the government subsidises the use of federal courts and tribunals. Court fees do not reflect the full cost to the government of cases resolved or determined. In relation to court fees, the Commission favours restructuring these fees to promote early and effective dispute resolution.

6.2 Legal costs are also privately subsidised. Legal expenses insurance schemes could, but do not yet provide such private subsidy. Lawyers provide assistance directly to clients by pro bono work or through certain billing practices, such as contingency fees or delaying claims for payment. The expansion of these practices is discussed and explored within the context of the federal jurisdiction.

6.3 Further assistance can be provided by information, whether print literature, telephone hotlines, or information on the internet. The changing nature of this type of assistance and the increasing demand for it is also discussed.

### Legal aid

6.4 Prior to 1972 there was almost no Commonwealth legal aid funding, and with the exception of New South Wales, most State and Territory schemes operated on the basis of charity provided by the legal profession rather than assistance provided by the government.<sup>768</sup> In 1997–98 legal aid commissions (LACs) and community legal centres (CLCs) received funding of about \$270 million, of which the Commonwealth government contributed 45%, or \$126 million.<sup>769</sup> This Commonwealth funding is provided under a series of agreements with each State and Territory. Funding of \$102 million is proposed for 2000/2001.<sup>770</sup> The financial elements of the current agreements with LACs are set out in chapter seven.

### Court fees

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<sup>768</sup>.D Weisbrot *Australian lawyers* Longman Cheshire Melbourne 1990, 239–44.

<sup>769</sup>.Legal Aid NSW *Annual report 1998*, 60, 68, 69; Legal Aid Victoria *Annual report 1997/98* <<http://home.vicnet.au/~viclegal/aboutvla/annual/>> (April 22 1999); Legal Aid Qld *Annual report 1997/98*, 6, 39, 46; Legal Services Commission SA *20th annual report 1997–98*, 27, 32, 33; Legal Aid Tasmania *Annual report 1998*, 30, 34; Legal Aid WA *1997/98 Annual report*, 50, 61, 62; Legal Aid ACT *21st annual report 1997/98*, 36, 41, 46; NT *Legal Aid Annual report 1997–98*, 44, 60.

<sup>770</sup>.See Appendix E.

6.5 Filing and hearing fees in federal courts and tribunals represent only a fraction of the running costs of the forum in which they are charged. The rationale for this subsidy is access to justice — people should not be prevented from bringing proceedings to courts and tribunals. Court fees are however, intended to discourage trivial, vexatious or unmeritorious claims.

6.6 In other areas of public expenditure there are institutional pressures to limit or reduce public spending, with an assumption that users of government services should pay for them. The Access to Justice Advisory Committee (AJAC) noted that the application of user pays to the services provided by courts is problematic. It is difficult to conceptualise the users of the service; respondents are brought into the process but may benefit from the outcome. There are also community benefits in the effective operation of the court system and in precedents created by individual disputes.<sup>771</sup>

6.7 There are practical difficulties in developing a court fee structure that reflects the actual costs of the services provided. These vary with the complexity and cost of different matters.<sup>772</sup>

A policy which treats the civil justice system merely as a service to be offered at cost in the market place, and to be paid for by those who choose to use it, profoundly and dangerously mistakes the nature of the system and its constitutional function.<sup>773</sup>

6.8 It should also be remembered that the most significant costs incurred in litigation are the costs paid to legal practitioners, and it is these costs that impose significant barriers to litigation.

### *Fees in federal courts and tribunals*

6.9 Australian federal courts and tribunals have set fee structures for filing and hearing fees. The following table shows the current fees charged in federal courts and tribunals.

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<sup>771</sup> Access to Justice Advisory Committee *Access to justice – an action plan* AGPS Canberra 1994, 384–5 (AJAC report).

<sup>772</sup> AJAC report, 384. See also Senate Standing Committee on Legal and Constitutional Affairs *The cost of justice: Checks and imbalances* AGPS Canberra August 1993, 85–94.

<sup>773</sup> R Scott, cited by Lord Ackner *Hansard* (H of L) 14 July 1997, 865. See also G Brennan 'The state of the judiciary' (1998) 72 *Australian Law Journal* 33 and A Gleeson 'Access to justice' (1992) 66 *Australian Law Journal* 270, 272.

It overlooks the role of the courts as instruments of the sovereign, enforcing legal rights and obligations as an alternative to self-help and the private redress of grievances.

The opposite view is held by the Lord Chancellor, Lord Irvine *Hansard* (H of L) 14 July 1997, cited in Lord Chancellor's Department *Civil court fees – A discussion paper* Lord Chancellor's Department February 1998 <<http://www.open.gov.uk/lcd/consult/civ-just/fees.htm>> (23 March 1999)

the present principle is to recover the full cost of providing the civil courts, less an amount equivalent to the sum of exemptions and remissions.

**Table 6.1 Fees in federal courts and tribunals**<sup>774</sup>

	High Court	Federal Court	Family Court	AAT
Filing fee				505
– corporation	2 022	1 213	–	–
– individual	1 011	505	–	–
Filing fee				
– dissolution of marriage, declaration of validity of marriage	–	–	505	–
– financial or Pt VII proceedings			152	
– court fees – appeal			623	
Setting down fee				
– corporation	–	2 022	–	–
– individual		1 011		
Hearing fee			303	
– corporation	3 033	–	–	–
– individual	1 516		–	
Daily hearing fee – notice of motion, application to review power of registrar				
– corporation	–	404	–	–
– individual		202		
Daily hearing fee – application or appeal				
– corporation	–	809	–	–
– individual		404		
Daily hearing fee – chambers summons, notice of motion or application under O 55 r 1				
– corporation	505	–	–	–
– individual	253			
Daily hearing fee – (Full Court)				
– corporation	1 516	–	–	–
– individual	758			
Mediation fee	–	253	–	–

6.10 The Commission sees merit in the Federal Court's system of differential filing and hearing fees for corporate and individual litigants, although a survey of small business disputes conducted by the Attorney-General's Department indicated that such fees preclude litigation by some small business disputants.<sup>775</sup> In the

<sup>774</sup>High Court of Australia (Fees) Regulations, reg 4, 4A, 5, Sch 1; Federal Court of Australia Regulations, reg 2, 2AA, 2A, Sch; Family Law Regulations 1984, reg 11, 16; Administrative Appeals Tribunal Regulations, reg 19. The fees presented for the High Court only include fees for civil law work. These regulations provide for fee increases on each biennial anniversary of 1 July 1996. The figures in this table reflect the increases from 1 July 1998.

<sup>775</sup>At the National Legal Aid Forum held in April 1999 it was proposed that wealthy corporations be charged court sitting fees of more than \$5 000 a day and the funds raised be used for legal aid. The scheme would be means tested so that the wealthier the company the more they would pay, although the amount would still be low compared to the other costs companies incur in litigation: CBrown *Speech* National Legal Aid Forum Towards 2010 Canberra 21 April 1999; CBaren 'Court charge for firms urged' *West Australian* 23 April 1999, 36. A similar suggestion has been raised by Tasmanian Attorney-General: C Anderson 'Wealthy urged to help pay hefty court costs' *Hobart*

Commission's view, the simple distinction between 'individual' and 'corporate' litigants for these purposes needs refinement with a category of 'small business' introduced (and meriting lower fees than corporations) or discretion utilised to charge small businesses the fees set for individuals.<sup>776</sup>

6.11 The purpose and effect of any increase in such fees needs to be considered. At present all court fees are returned to the general funds of the federal government.

**Question 6.1.** The Commission invites comment on the suggestion to treat small business and large corporations differentially and to increase court fees charged to large corporations.

### *Graduated hearing fees*

6.12 Daily hearing fees apply in the High Court and the Family Court. These do not apply in all federal courts and tribunals nor are the rates varied depending on the length of the hearing. The Commission considers there is merit in the Singapore system of graduated hearing fees which operate to encourage settlement and more accurately targets those taking up court resources. It is a truism in federal courts and the AAT that a very small percentage of cases take up disproportionate amounts of court time. In the High Court of Singapore<sup>777</sup> the following daily hearing fees are charged.<sup>778</sup>

Day 1	No fee
Days 2-5	\$1 500 per day
Days 6-10	\$2 000 per day
Days 11-end	\$3 000 per day

6.13 The advantage of the Singapore scheme is that it allows open access for the vast majority of claims which are heard within one day. Germany also has a system of graduated court fees. Court fees there are fixed by law as units representing a

*Mercury* 11 May 1999, 9; GDaley 'Move to cut legal costs' *Examiner (Launceston)* 11 May 1999, 6. The Australian Chamber of Commerce and Industry has criticised the suggestion on the basis that it promotes inequality before the law: C Baren 'Court charge for firms urged' *West Australian* 23 April 1999, 36, quoting M Paterson, chief executive of the Australian Chamber of Commerce and Industry.

<sup>776</sup>Some suggest that filing fees from large corporations should be used to fund legal aid: C Brown in C-Baren 'Court charge for firms urged' *West Australian* 23 April 1999, 36. See also P Patmore in C-Anderson 'Wealthy urged to help pay hefty court costs' *Hobart Mercury* 11 May 1999, 9; G Daley 'Move to cut legal costs' *Examiner (Launceston)* 11 May 1999, 6.

<sup>777</sup>The hierarchy of Singapore courts is as follows: Supreme Court and the Subordinate Courts. The Court of Appeal and the High Court comprise the Supreme Court. The District Courts, Magistrate Courts, specialised courts and the Small Claims Tribunal comprise the Subordinate Courts: The Singapore Judiciary *Annual report* 1997, 12.

<sup>778</sup>The Supreme Court and Subordinate Courts of Singapore *A charter for court users* The Supreme Court and the Subordinate Courts Singapore 1997, 29.

percentage of the value of the claim.<sup>779</sup> One unit is payable when the proceedings are commenced and two payable on delivery of a judgment (these two units are not payable if the matter is withdrawn or if there is a judgment based on consent or settlement). Four and a half units are payable on appeals and up to five units may be payable for a further appeal.<sup>780</sup> The Commission sees considerable merit in this scheme. It could be used to more accurately retrieve costs from large corporations – to replace individual and corporation fees.

6.14 The United Kingdom has recently introduced a ‘pay-as-you-go’ system of court fees where the emphasis is on full recovery of the cost of the court system as well as on encouraging settlement.<sup>781</sup> It is not a system of graduated hearing fees, but rather a system in which fees are set for the three primary stages of the court process, and charges imposed each time litigants choose to proceed further. The majority of court costs are recovered by an initial filing fee that is related to the value of the claim.<sup>782</sup> A second fee is payable for filing an allocation questionnaire that reflects the increase in work required to review a case and allocate it to an appropriate track. A third fee is charged if a listing questionnaire is filed or if a case proceeds to trial.<sup>783</sup> These fees are set at a flat rate which attempts to match the average cost of work at each stage of the proceeding.

6.15 There appears to be a strong case for charging additional fees after, say, the first two days of hearing.<sup>784</sup> A system of graduated hearing fees would encourage

- shorter hearings – parties will be encouraged to be efficient, set limits on examination, cross examination and submission times
- settlement – to the extent that there is a financial incentive to avoid lengthy formal processes
- the use of alternative dispute resolution services where the fees for those services are set at relatively attractive levels.

6.16 The Commission proposes this scheme for the Federal and Family Courts. For the fee system to fully impact on practitioner efficiency, court and practitioner rules should require the disclosure and explanation of the court fee structure to litigants prior to filing originating process or putting on a defence.

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<sup>779</sup>A Zuckerman ‘German litigation costs: Survey of German practitioners’ *Lord Woolf’s inquiry: Access to justice*, research conducted for the Final Report to the Lord Chancellor July 1996, 7.

<sup>780</sup>id 7–8.

<sup>781</sup>United Kingdom Court Service 26 April 1999 <<http://www.courtservice.gov.uk/feeguid.htm>> (29 June 1999).

<sup>782</sup>Lord Chancellor’s Department *Consultation paper ‘Fee levels and charging points’* November 1998, 1.6 <<http://www.gtnet.gov.uk/lcd/consult/civ-just/civilffr.htm>> (29 June 1999).

<sup>783</sup>id 2.1–2.5.

<sup>784</sup>The Commission’s research shows that the median number of days of a final hearing in the Federal Court is 1: T Matruglio & G McAllister *Part one: Empirical information about the Federal Court of Australia* ALRC Sydney March 1999, 33 (T Matruglio & G McAllister, Family Court Empirical Report Part One).

6.17 The Commission considers that a system of graduated hearing fees in federal civil jurisdiction would be most relevant in the Federal Court. There are risks in imposing graduated fees on all matters in family law where proceedings are open to manipulation or abuse, especially by parties better able than their opponent to bear the additional cost of a longer hearing. Similarly, in the United Kingdom, court fees in family law proceedings do not represent full cost recovery as in other courts. The Lord Chancellor expressed concern that full cost court fees in family proceedings would jeopardise the interests of children and victims of domestic violence.<sup>785</sup>

6.18 An alternative to a graduated fee would be to introduce a 'long hearing surcharge'. This would be a one-off fee for hearings that extend beyond a certain number of days. It would have some of the benefits of the graduated fees, such as improving practitioner efficiency and possibly encouraging settlement. It also acknowledges that the graduated fee structure sometimes may be unfair to an applicant if the case is extended due to delaying tactics or inefficiencies by the other party or the court – although it would always be open to the judge to waive the additional fees in these circumstances and even to impose a costs order on the offending party. The surcharge may reflect more accurately the applicant's wish and preparation for a longer trial.

**Question 6.2.** The Commission invites discussion on the issue of graduated court fees or a long hearing surcharge for matters in the Federal Court and the Family Court and the safeguards appropriate to such fees in family proceedings and in cases of hardship.

#### *Fee exemption and waiver*

6.19 Federal courts and tribunals exempt people who receive legal aid, social or study assistance, or are in prison from payment of court fees.<sup>786</sup> Courts and tribunals also have discretion to waive fees where payment would cause financial hardship to the person, after consideration of the person's income, day to day living expenses, liabilities and assets.<sup>787</sup> In 1997-98 the High Court, Federal Court, Family Court and the AAT together waived or exempted about 39% of the potential fees payable, as shown in the following table. Such exemptions and waivers are appropriate to secure access to justice.

<sup>785</sup> Lord Chancellor's Department *Consultation paper* 'Fee levels and charging points' November 1998, 3.2 <<http://www.gtnet.gov.au/lcd/consult/civ-just/civilfr.htm>> (29 June 1999).

<sup>786</sup> High Court of Australia (Fees) Regulations, reg 4, 4A, 5; Federal Court of Australia Regulations, reg 2, 2AA, 2A; Family Law Regulations 1984, reg 11, 16; Administrative Appeals Tribunal Regulations, reg 19. Similarly in the United Kingdom parties enrolled in various government social aid programs are exempt from paying some or all court fees. Additionally if the payment of a fee would involve undue financial hardship on a party the court may waive the fee: United Kingdom Supreme Court Fees Order 26 April 1999 <<http://www.courtservice.gov.uk/scfees.htm>> (29 June 1999).

<sup>787</sup> High Court of Australia (Fees) Regulations, reg 4, 4A, 5; Federal Court of Australia Regulations, reg 2, 2AA, 2A; Family Law Regulations 1984, reg 11, 16; Administrative Appeals Tribunal Regulations, reg 19.



**Table 6.2 Exemption and waiver of fees (1997–98)**<sup>788</sup>

Court or tribunal	Fees waived or exempted (\$million)	Total potential fees <sup>a</sup> (\$ million)	% waived <sup>b</sup>
High Court	0.4	0.9	42
Federal Court	0.8	9.0	9
Family Court	13.7	28.3	48
AAT	0.4	0.7	5
Total	15.3	38.9	39

a Total of fees received and fees waived and exempted.

b Percentage of fees waived or exempted in relation to total potential fees.

## Tax deductions

6.20 A major form of public funding of civil litigation is the tax deduction granted to business litigants for their legal costs.<sup>789</sup>

### *Tax law*

6.21 The general rule for tax deductibility is that losses or outgoings are deductible from a person's assessable income to the extent that they are incurred in gaining or producing assessable income or necessarily incurred in carrying on a business for the purpose of gaining or producing the person's assessable income. Such losses or outgoings are not deductible to the extent that they are capital, or of a capital nature; of a private or domestic nature; or incurred in relation to gaining or producing exempt income.<sup>790</sup> Under this rule, litigation expenses incurred by businesses will usually be tax deductible; litigation expenses of individuals are less likely to meet the tests, since individuals are more likely to be involved in litigation in areas (such as family law) not directly related to the gaining of assessable income, or which fall under capital or private and domestic exclusions.

### *Equity arguments*

6.22 Businesses are major users of the Federal Court. One estimate, now somewhat dated, is that deductions for legal costs incurred in litigation by business each year are in the order of \$250 million.<sup>791</sup>

<sup>788</sup>High Court *Annual report 1997–98*, 25, 48; Federal Court *Annual report 1997–98*, 64, 83; Family Court of Australia *Annual report 1997–98*, 43; AAT *Annual report 1997–98*, 123.

<sup>789</sup>T Murphy Legal Aid Commission of NSW *Submission 71-2*.

<sup>790</sup>*Income Tax Assessment Act 1997* (Cth) s 8.1.

<sup>791</sup>Australian Law Reform Commission Report 75 *Cost shifting – who pays for litigation* ALRC Sydney 1995, para 3.33 (ALRC 75). The Commission noted that \$700 million is claimed as deductions from assessable income for legal costs incurred in litigation by businesses each year. At a tax rate of 36-percents in the dollar this was a loss of taxation revenue of \$250 million. The figure was based on research by the Civil Justice Research Centre which found that 43 per cent of time spent by lawyers

6.23 The availability of tax deductions for corporate litigation expenses is said to produce unfair or undesirable consequences.<sup>792</sup> On this view tax deductibility is an indirect and inequitable public subsidy to business, and businesses are spared from paying the full price of their litigation expenses.<sup>793</sup> Direct subsidies to particular means-tested individuals, in the form of legal aid funding, are strictly controlled, subject to merits tests, and have been reduced in recent years. Further, the availability of tax deductions to some litigants is said to reduce the risk for them of litigation.<sup>794</sup>

6.24 Submissions to the Legal Aid Inquiry argued that the current arrangements were inequitable and open to abuse.<sup>795</sup> The New South Wales Law Society Task Force<sup>796</sup> considered that tax deductibility of legal expenses in litigation creates an incentive for businesses to litigate rather than use ADR. The task force recommended making tax deductions available for ADR, but not for litigation.

#### ***Business taxpayer arguments***

6.25 Submissions to the Commission argued that altering the rule on tax deductibility for litigation expenses could increase the costs of doing business, and could make Australian business less competitive overseas.<sup>797</sup> The New South Wales Bar Association considered that any proposal to remove tax deductibility would not improve access to the courts by individual litigants, could discourage businesses from seeking early legal advice, and ultimately result in more rather than less litigation.<sup>798</sup>

6.26 Some industries, such as the insurance industry, routinely and necessarily engage in litigation as part of their ordinary business. A submission to the Legal Aid Inquiry argued that to disallow deductions for litigation expenses would be to treat

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working in commercial law is spent on commercial litigation work and the Australian Bureau of Statistics Legal and Accounting Services Survey 1992-93 which found that \$1637.4million was earned from legal services in commercial, finance and business law during 1992-93.

<sup>792</sup>Senate Legal and Constitutional References Committee *Inquiry into the Australian legal aid system – Third report* Senate Printing Unit Canberra June 1998; ALRC 75, para 3.33; AJAC report, 215-21.

<sup>793</sup>Legal Aid Commission of NSW *Submission 71*; also ALRC 75, para 3.34. This argument was discussed in Trade Practices Commission *Study of the professions – legal* Draft report TPC Canberra 1993, 475-9; Trade Practices Commission *Study of the professions – legal* Final report TPC Canberra 1994, 214-6.

<sup>794</sup>ALRC 75, para 3.34.

<sup>795</sup>Senate Legal and Constitutional References Committee *Inquiry into the Australian legal aid system – Third report* Senate Printing Unit Canberra June 1998, para 10.19.

<sup>796</sup>Law Society of NSW Task Force 'Access to the civil courts' in Law Society of NSW *Accessible justice summit: Summary of proceedings and selected papers* Law Society of NSW Sydney 1992, 48.

<sup>797</sup>Law Council of Australia *Submission 126*.

<sup>798</sup>New South Wales Bar Association *Submission 88*.

the insurance industry differently from other industries able to deduct their day to day business expenses.<sup>799</sup>

6.27 A recent report by the Business Working Group on the Australian Legal System<sup>800</sup> argued that the availability of tax deductions does not provide an incentive for business to pursue litigation, and that there are significant disincentives for business to litigate 'just as there are strong disincentives for business to incur other controllable expenses'.<sup>801</sup> The report noted a number of arguments against altering the existing rule on deductibility.

- There is no clear policy reason to distinguish legal expenses from other deductible business expenses.
- Many business litigants are small businesses forced to litigate for legitimate business reasons. For these parties, and for any business litigants engaging in litigation for purposes of delay or harassment, the non-availability of tax deductions will not alter their litigation behaviour.
- Many business disputes involve money claims. While expenses incurred in litigation are deductible, amounts awarded as a result of the action will be assessable. Amounts awarded to individual litigants [for example under personal injury claims] are not generally assessable.
- Removal of tax deductibility for non-contentious legal advice is undesirable as it could deter businesses from seeking early advice and engaging the services of lawyers;<sup>802</sup> but it will often be impossible to make a distinction in practice between such non-contentious legal advice and contentious or litigation-related legal work.<sup>803</sup>

### *Recent recommendations*

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<sup>799</sup>Insurance Council of Australia *Submission 58* to Senate Legal and Constitutional References Committee *Inquiry into the Australian legal aid system*, 526. The Insurance Council also pointed out that removing deductibility would increase costs to policyholders, and that to remove the deduction could place Australian businesses at a competitive disadvantage with businesses in other countries.

<sup>800</sup>Business Working Group on the Australian Legal System *Trends in the Australian legal system – avoiding a more litigious society* Allen Consulting Group 1998.

<sup>801</sup>id 25, quoting Law Society of NSW 'Legal services: a legitimate business expense' *Media release* 1 May 1997. Submissions to the Commission on its *Cost shifting* inquiry commented that, in practice, business litigants do not take tax deductibility into account when deciding whether to pursue litigation. It was also submitted that dispute resolution is an inevitable and essential part of running a business and it is appropriate for the tax system to recognise this: ALRC 75, para 3.33–3.42.

<sup>802</sup>This argument appears to contradict the earlier contention that business decisions on litigation are not affected by the tax deductible status of litigation expenses.

<sup>803</sup>Business Working Group on the Australian Legal System *Trends in the Australian legal system – avoiding a more litigious society* Allen Consulting Group 1998, 25–6.

6.28 The Trade Practices Commission, AJAC, this Commission and the Senate Legal Aid Inquiry have all recommended that the availability of tax deductibility for litigation expenses be reviewed to ensure just and equitable tax treatment of those expenses.<sup>804</sup> The Trade Practices Commission concluded that

... an examination is warranted by appropriate authorities of the tax deductibility of legal and litigation expenses focusing on any adverse consequences for efficiency and equity that may result.<sup>805</sup>

6.29 Major reforms to Australian tax legislation and policy are currently under development or under consideration.<sup>806</sup> The Commission considers that detailed consideration should be given to this issue, in particular to identify the extent of the deductions claimed for litigation expenses and the degree to which claims for such deductions, and their connection with the carrying on of the business, are required to be substantiated in income tax returns.

**Proposal 6.1.** The Australian Taxation Office should be asked to report on whether

- it is feasible to devise 'benchmark' amounts allowable as deductions for litigation expenses for certain types of case
- deductions for litigation expenses can be restricted, in some or all cases, to taxed costs, and on what basis such taxed costs should be calculated
- it is feasible to require taxpayers claiming deductions for litigation expenses to show these claims in a separate category on their tax return
- taxpayers claiming deductions for litigation expenses should be required to substantiate all such claims; and what form this substantiation should take.

6.30 The Commission invites comments on these issues.

## Insurance

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<sup>804</sup> Senate Legal and Constitutional References Committee *Inquiry into the Australian legal aid system – Third report* Senate Printing Unit Canberra June 1998, 185.

<sup>805</sup> TPC final report. The AJAC report, para 8.19, concluded that it could not make a firm recommendation on the tax deductibility of litigious legal expenses as any consideration of this issue involves complex social and economic considerations requiring detailed analysis. The committee recommended that the 'Government should commission a review of the current law and practice governing the tax deductibility of litigation legal expenses.' ALRC 75, para 3.42, concluded that 'the impact of the tax system on litigation should be examined further'. The Commission recommended that data should be collected from the Australian Taxation Office or the Australian Bureau of Statistics indicating the amount of tax deductions claimed each year for legal expenses or, more particularly, for litigation expenses.

<sup>806</sup> The Government is currently developing major reforms to tax legislation, including introduction of a GST; the staged introduction of the *Income Tax Assessment Act 1997* (Cth); J Ralph *Review of business taxation* <<http://www.rbt.treasury.gov.au>> (2 August 1999).

6.31 Insurance companies provide funding for legal services in situations where they subrogate an action (most often in personal injury and property damage matters).<sup>807</sup> There is no publicly available data on the amount spent by insurance companies in subrogating these claims.

6.32 Another aspect of insurance in relation to litigation is legal expenses insurance (LEI). As with other forms of insurance, LEI provides, in exchange for some form of policy payment, funding for legal services. LEI is a potentially significant development in enhancing access to justice.<sup>808</sup> While it has been available in Australia for a number of years, LEI has not been taken up in any significant scale to date.<sup>809</sup> There is no public data on the size of the current market for LEI in Australia. It is likely to be small for matters in federal civil jurisdiction.

#### *Legal expenses insurance overseas*

6.33 LEI has been available in the United Kingdom since the early 1970s as an 'add-on' annexed to another form of insurance,<sup>810</sup> or a 'stand-alone' policy which covers a range of legal expenses. Estimates suggest that the UK market is quite small. The Woolf report indicated that insurance could play a larger part in funding litigation and that a rapid increase in the availability of insurance is important to greater access to the courts.<sup>811</sup> The report noted however that for insurers to increase their involvement there would need to be much greater certainty – and moderation – of costs in order to enable insurers to offer attractive and affordable terms. The move to implement fixed scales in Australian federal courts follows this assumption.

6.34 LEI is more extensive in Germany. In 1992 approximately 50% of German households held some form of LEI policy. Almost all of these policies are 'stand-alone'.<sup>812</sup> General policies normally exclude divorce and administrative law. The prevalence of LEI in Germany is said to be linked to the system of fixed

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<sup>807</sup>.50% of litigation in New South Wales District and Supreme Courts relates to personal injury or property damage claims: ALRC 75, para3.20.

<sup>808</sup>.AJAC report, ch 10.

<sup>809</sup>.One scheme operating in Australia is Legalsure which provides a legal fees (for specified services) and tax audit fees insurance policy. This company reports that most of its policy holders are well educated and largely self employed, but the mass market has not been reached: LegalSure Consultation 8March 1998. A group scheme involving members of the Public Service Association and the Australian Nurses Federation has reportedly been working well over a number of years in South Australia. The scheme is run on a very tight budget and benefits are limited: Senate Legal and Constitutional References Committee *Inquiry into the Australian legal aid system – Third report* Senate Printing Unit Canberra June 1998, 142.

<sup>810</sup>.Usually household or motor insurance and covering limited risks.

<sup>811</sup>.Lord Woolf *Access to justice – Final report to the Lord Chancellor on the civil justice system in England and Wales* HMSO London 1996, 89.

<sup>812</sup>.In contrast, in Sweden, where there is also widespread LEI, policies are a common add-on to household insurance.

litigation costs and thus to the predictability of costs for insurers and insureds.<sup>813</sup> Widespread insurance contributes to an abundance of low value litigation, because it enables people to bring claims which they could not otherwise afford to litigate.<sup>814</sup> It has been suggested that Germans with insurance are likely to sue, prefer to fight rather than settle and often fight adverse decisions on appeal.<sup>815</sup>

6.35 LEI is known as 'prepaid legal plans' in the United States. The plans operate in the same way as LEI, relying on a panel of lawyers in private practice to provide services covered.<sup>816</sup> Prepaid legal plans are reasonably widespread in the US<sup>817</sup> but demand appears to have plateaued.<sup>818</sup> The most successful plans are union and insurance plans offered through large national employer companies such as Sears Roebuck and Pizza Hut. Otherwise the most successful plans are those offering telephone advice services. An underlying problem is selling the need to take out legal expenses insurance to persons who rarely, or cannot anticipate their need to use a lawyer. Medical, dental or household insurance has a higher priority.

#### *Consideration of legal expenses insurance*

6.36 The legal profession in Australia favours LEI as a means of increasing access to justice for people who are not eligible for legal aid.<sup>819</sup> The Law Council of Australia supports the promotion of LEI provided the schemes

- give broad general cover to participants (recognising that there may need to be matter and merit guidelines to achieve economic viability)
- guarantee to provide support to meritorious claims falling within the cover
- are committed to the principle of solicitor of choice
- pay reasonable fees to legal practitioners for work performed under the scheme.<sup>820</sup>

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<sup>813</sup>N Young 'Doubts over new justice scheme' *Sydney Morning Herald* 15 May 1998, 29.

<sup>814</sup>Although as a consequence of the well-developed market for LEI the proportion of cases assisted by legal aid is very low: N Rickman and A Gray 'Access to the market for legal services' in A-Zuckerman and R Cranston (eds) *Reform of civil procedure: Essays on 'Access to justice'* Clarendon Press Oxford 1995, 320.

<sup>815</sup>G Dannemann 'Access to justice: An Anglo-German comparison' (1996) 2(2) *European Public Law* 285.

<sup>816</sup>Simple access plans entitle members to unlimited telephone advice from 'hotline' attorneys. Statistics from prepaid plans which provide access services alone or in combination with more comprehensive services indicate that between 60% and 80% of the problems presented by member clients to an attorney can be resolved by telephone: M Polkinghorne 'The charging of costs by legal practitioners' *Paper Legal Profession Advisory Council* Sydney 1998.

<sup>817</sup>39% of the US population is covered by a legal services insurance plan, an increase of 7% on the previous year: Report by the National Resource Center for Consumers of Legal Services NSW *Law Society Journal* June 1998, 104.

<sup>818</sup>M Polkinghorne 'The charging of costs by legal practitioners' *Paper Legal Profession Advisory Council* Sydney 1998.

<sup>819</sup>Submissions to the Commission by the Law Council (*Submission 126*) and NSW Bar Association (*Submission 88*) strongly support the promotion of legal expenses insurance. This view was also expressed by H Coonan, B Walker and M Lavarch, panelists, *The cost of justice* Seminar ALRC Sydney 19 May 1999.

6.37 The Law Council stated that LEI should save money for the public purse by reducing the number of people who cannot access legal advice and assistance. This should enhance the prospect of speedy resolution of disputes through proper assistance being available.<sup>821</sup>

6.38 LEI is unlikely to contribute significantly to alleviating the need for legal aid.<sup>822</sup> Given the strict means test now in force, legal aid beneficiaries are unlikely to be able to afford LEI and are often outside the scope of employment or union-based insurance schemes.<sup>823</sup> In Germany, much high volume, low claim work conducted by lawyers is covered by LEI while in Australia this work is primarily conducted in magistrates courts and tribunals and generally does not involve lawyers. To the extent that LEI affords a further avenue for access to justice the Commission supports its development, although the Commission cannot see significant scope for LEI in the federal civil jurisdiction. The high volume federal civil work is in family proceedings and most LEI schemes exclude such claims. AJAC has suggested that the Commonwealth could take the lead and develop a legal expenses insurance scheme for its own employees<sup>824</sup> and the Commission supports this suggestion. The Commission understands that the Law Foundation of NSW is currently conducting research on the feasibility of LEI.

**Proposal 6.2.** The Commonwealth should develop a legal expenses insurance scheme for its own employees.

## Pro bono work

6.39 Pro bono work refers to legal services provided by a lawyer for free or for a substantially reduced fee, in the public interest. There are many pro bono schemes in operation in Australia, some attached to courts and others run through practitioners' associations and CLCs. Many lawyers provide pro bono work outside such schemes. They do not charge for their all time or heavily discount their fees.

6.40 The value of pro bono work done by lawyers around Australia is difficult to quantify. Lawyers and legal professional associations do not keep statistics on the quantity or value of the pro bono work they undertake or coordinate.<sup>825</sup> There are

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<sup>820</sup>.Law Council of Australia *Submission 126*.

<sup>821</sup>.The Council noted that many legal expenses insurance policies contain provisions either requiring or encouraging parties to mediate prior to commencing litigation.

<sup>822</sup>.Senate Legal and Constitutional References Committee *Inquiry into the Australian legal aid system – Third report* Senate Printing Unit Canberra June 1998, 129.

<sup>823</sup>.AJAC report, para 10.44.

<sup>824</sup>.AJAC report, ch 10, action 10.2.

<sup>825</sup>.In Victoria, Voluntas coordinates information about pro bono services: Voluntas 'Building a pro bono culture' (1999) 73(6) *Law Institute Journal* 49. Their first report demonstrates the difficulty in quantifying pro bono work because few law firms keep the necessary statistics. 91% of the firms

also definitional problems with what is pro bono work. Some lawyers equate work done for legal aid as pro bono because of the low level of remuneration, while others would also include matters in which they have substantially reduced, but not waived, their fees.

6.41 The New South Wales Law Society 1997-98 practising certificate survey estimated the amount of pro bono work in March 1997 at about 63 000 hours,<sup>826</sup> or about \$74million in value.<sup>827</sup> The New South Wales Bar Association valued the pro bono work it referred to barristers in federal matters in 1998-99 at about \$85000.<sup>828</sup>

6.42 Research by the Justice Research Centre on data collected in Family Court matters shows that many privately funded clients receive some pro bono work from their lawyers. In cases funded by legal aid a larger proportion (10-50%) of the time spent on the case was uncharged.<sup>829</sup>

**Table 6.3 Proportion of uncharged time in Family Court matters by source of funding**<sup>830</sup>

Time spent without charging	Source of funding		
	Private funding	Legal aid	Both
0%	203 (40%)	1 (4%)	0 (0%)
10-25%	266 (52%)	15 (54%)	14 (70%)
25-50%	30 (6%)	7 (25%)	3 (15%)
50-75%	5 (1%)	3 (11%)	2 (10%)
75-100%	8 (2%)	2 (7%)	1 (5%)
Total	512	28	20

6.43 Recently the Federal Court announced a cooperative scheme concluded with the Victorian, Queensland and New South Wales Bars and the Queensland Law Society to develop new pro bono schemes to assist unrepresented litigants in specialist areas including immigration, administrative, law, veterans' and social security entitlements, human rights and bankruptcy.<sup>831</sup> Under the schemes, the Federal Court judge responsible for the case will refer it to a court registrar, who

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surveyed did not keep records about the amount of pro bono work done by the firm: N Gration *Pro bono survey report* Voluntas June 1999, 8.

<sup>826</sup> Keys Young *Practising certificate survey 1997-98 Final report* September 1997, 33.

<sup>827</sup> Law Society of NSW 'Survey disproves "greedy lawyers" theory' *Media release* 29 September 1997. See also Law Society of NSW 'Unsung work of lawyers celebrated at 1998 Pro Bono Awards' *Media release* 27 October 1998 <<http://www.lawsocnsw.asn.au/about/media/19981027-162765.html>>.

<sup>828</sup> This comprised 69 matters in the Federal Court. The figure relates to 542 hours of work at \$156 per hour or 7.85 hours per matter: NSW Bar Association *Consultation* 12 July 1999.

<sup>829</sup> T Matruglio *Part two: The costs of litigation in the Family Court of Australia* ALRC Sydney June 1999, table 3A.6 (T Matruglio, Family Court Empirical Report Part Two).

<sup>830</sup> T Matruglio, Family Court Empirical Report Part Two, 6, table 3A.

<sup>831</sup> K Moore 'Federal Court legal assistance scheme' (January 1999) 73 *Law Institute Journal* 1, 20; IBarker 'Federal Court pro bono scheme' (May 1999) *Stop Press* 15.



will attempt to arrange free representation from one of the volunteer specialist barristers on the list.

6.44 The New South Wales Law Society has recommended that legal practices undertake a minimum pro bono commitment of 10 hours per solicitor or the equivalent of 1% of billable work (whichever is less) each year, and that law schools introduce pro bono requirements for law students as a component of their legal training.<sup>832</sup>

6.45 In the United States pro bono service is an ethical requirement. Every state has some provision in its rules of professional conduct focusing on the responsibility of each lawyer to provide pro bono public service. Thirty seven states have rules identical or similar to the American Bar Association Model Rule<sup>833</sup> which sets out an aspirational standard regarding the pro bono service responsibility of every lawyer, and includes a recommended annual hourly standard.<sup>834</sup> The rules makes it clear that the pro bono requirement is an ethical, individual responsibility, personal to each lawyer.<sup>835</sup> The American Bar Association assists the legal community to meet its pro bono responsibilities through policy and program development. Many American law schools also have developed pro bono requirements along the lines suggested by the New South Wales Law Society, supported by funding from the profession and alumni.

6.46 The Commission sees merit in professional associations recommending aspirational standards for pro bono work to their members. Although some American states have mandatory reporting requirements,<sup>836</sup> an aspirational rule is

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<sup>832</sup>Law Society of NSW *Access to justice – Final report* Law Society of NSW Sydney December 1998, 15–16, recommendations 38 and 40. The Centre for Legal Process suggested that requiring lawyers to provide pro bono services goes against the ‘culture’ of pro bono, would result in discrimination in the quality of service provided to pro bono clients compared to fee paying clients, and could work hardship on smaller firms who do not have capacity to provide legal services for free: Centre for Legal Process *Future directions for pro bono legal services in New South Wales* Law Foundation of New South Wales Sydney 1998, 80.

<sup>833</sup>American Bar Association Model Rules of Professional Conduct Rule 6.1.

<sup>834</sup>The ABA recommended annual hourly standard is currently 50 hours. Other states adopt a different standard, for example in Florida and Massachusetts there is an expectation that each lawyer contribute at least 25 hours each year. Some states have a ‘buy-out’ provision whereby those lawyers who, by choice or inability, do not provide direct service can make a monetary contribution.

<sup>835</sup>The commentary to the rule notes, however that there may be times when it is not feasible for a lawyer to render pro bono service, or there may be times when it is more feasible for a firm to satisfy its pro bono responsibility collectively by having a group of attorneys devote many hours of time on pro bono service: American Bar Association Standing Committee on Pro Bono and Public Service *Comments on professional responsibility of lawyers as set forth in rule 6.1 of the Model Rules of Professional Conduct* January 1999  
<[http://www.abanet.org/scripts/ooop/qfullhit.htm?CiWebHitsFile=%2Fcpr %2Fbillings1%Ehtml&](http://www.abanet.org/scripts/ooop/qfullhit.htm?CiWebHitsFile=%2Fcpr%2Fbillings1%Ehtml&)>

<sup>836</sup>For example, in Florida lawyers are required to report each year their pro bono service, their contribution to a legal services provider, or alternatively, the fact that they neither provided services nor contributed.

often used to encourage an ethical duty to do pro bono work. A formalised, coordinated approach to pro bono work could enhance access to the legal system for clients, and also assist lawyers in meeting their pro bono responsibilities. One view is that it is important to measure pro bono activity, so as to promote a pro bono culture and to advocate for its sensible place in the scheme of access to law.<sup>837</sup> In the United States many firms publicly promote their involvement in pro bono work. Many Australian firms also provide pro bono services,<sup>838</sup> and could make greater use of this when promoting their services.

**Proposal 6.3.** The Commission proposes that all lawyers be required to undertake a prescribed measure of pro bono services each year.

## Contingency fees

6.47 Contingency fee arrangements allow lawyers to be paid on the basis of the outcome of a legal action. If the case is successful, the client will be charged a fee, and if unsuccessful, the lawyer will not be paid. Contingency fees are a way of improving access to justice for those who have a good case but cannot afford a lawyer.

6.48 Contingency arrangements may cover a variety of agreements between the lawyer and the client. A speculative fee agreement is where the lawyer charges the usual fee only if the action is successful. More usual is an uplift fee (or conditional fee) arrangement where the lawyer receives, in addition to his or her usual fee, an agreed flat amount or percentage uplift of the usual fee if the action is successful.<sup>839</sup> With percentage fee agreements the lawyer charges an amount calculated as a percentage of the amount awarded by the court. With any of these arrangements the litigant still carries the risk of having to pay the costs of the other party if the claim is unsuccessful, and is responsible for paying disbursements.<sup>840</sup>

6.49 Contingency fee arrangements are usually offered in personal injury and workers compensation matters and are prohibited in criminal and family law work. The lawyer bears the costs risk until the matter is resolved. There is no free assistance the arrangement is essentially a loan.

### *The position at common law*

<sup>837</sup> S Rice 'Editorial' (1999) 4(2) *Winter Bulletin* 2.

<sup>838</sup> For example, the Public Interest Law Clearing House Incorporated, which acts as an assessment and referral service, listed 42 member firms in 1998.

<sup>839</sup> A 25% uplift fee is allowable in NSW and Victoria: s 187(2),(3),(4) *Legal Profession Act 1987* (NSW), s98 *Legal Practice Act 1996* (Vic); a 100% uplift fee is allowable in South Australia: r 8.10 *Professional Conduct Rules*. In Queensland a 50% uplift fee is allowed for barristers: *Barristers' Rules*, r 102A(d). In Tasmania, the charging of uplift fees by barristers is expressly prohibited: r 92(1) *Rules of Practice 1994* (Tas).

<sup>840</sup> Some lawyers arrange litigation loan for clients with a bank, usually for the purposes of disbursements only.

6.50 Common law rules against maintenance and champerty prohibit some contingency fee arrangements.<sup>841</sup> Uplift fee agreements are in substance a share of the proceedings.<sup>842</sup> In *Clyne v NSW Bar Association*<sup>843</sup> the High Court held that lawyers may charge speculative fees provided the lawyer considers the client's case has a reasonable chance of success and that the lawyer does not have an interest in the proceedings other than the payment of the normal fee if successful.

6.51 *Australia.* In all jurisdictions in Australia lawyers are permitted to charge clients on a speculative fee basis, but not on a percentage basis.<sup>844</sup> Some jurisdictions permit an uplift fee<sup>845</sup> in respect of certain types of work.<sup>846</sup> In the remaining jurisdictions uplift fee agreements may amount to champerty.<sup>847</sup>

6.52 Generally contingency fee arrangements are made between lawyers and their clients. A new organisation, Justice Corporation Pty Ltd, intends to fund fees and disbursements incurred by litigants, in return for a percentage of the damages awarded, without any other involvement in the case. The legality of this scheme has not been determined and there are competing views about the ethics of the scheme.<sup>848</sup>

6.53 Various reports have commented on uplift contingency fees in Australia. The TPC Final Report recommended that lawyers should be permitted to charge an uplift to a maximum of 25% but not a percentage of the award or financial outcome.<sup>849</sup> The *Justice statement* recommended the introduction of contingency fees, except in family or criminal law cases, to be accompanied by safeguards for

<sup>841</sup> Maintenance occurs where a person supports litigation in which he or she has no legitimate concern without lawful justification. Champerty is a form of maintenance where assistance is given in return for a share in the proceeds of litigation in the event of success: *Hill v Archibold* [1968] 1 QB 686; Lord Hailsham of St Marylebone (ed) *Halsbury's Laws of England* vol 9 4th ed Butterworths London 1974, 272. Percentage fee agreements would be champertous.

<sup>842</sup> For examples of cases see G Dal Pont *Lawyers' professional responsibility in Australia and New Zealand* LBC Information Services Sydney 1996, 309.

<sup>843</sup> (1960) 104 CLR 186.

<sup>844</sup> For discussion on legislation and professional rules which permit speculative fee agreements and prohibit percentage fee agreements see G Dal Pont *Lawyers' professional responsibility in Australia and New Zealand* LBC Information Services Sydney 1996, 310-1.

<sup>845</sup> A 25% uplift fee is allowable in NSW and Victoria: s 187(2),(3),(4) *Legal Profession Act 1987* (NSW), s98 *Legal Practice Act 1996* (Vic); a 100% uplift fee is allowable in South Australia: r 8.10 *Professional Conduct Rules*. In Queensland a 50% uplift fee is allowed for barristers: *Barristers' Rules*, r 102A(d). In Tasmania, the charging of uplift fees by barristers is expressly prohibited: r 92(1) *Rules of Practice 1994* (Tas).

<sup>846</sup> Contingency fee agreements are prohibited in criminal proceedings in all jurisdictions and in family proceedings in Victoria.

<sup>847</sup> G Dal Pont *Lawyers' professional responsibility in Australia and New Zealand* LBC Information Services Sydney 1996, 311.

<sup>848</sup> A Burrell and C Merritt 'Rivkin's new career – financing litigants' *Australian Financial Review* 21 June 1999, 3.

<sup>849</sup> TPC final report.

clients, such as a requirement that lawyers assess the risks of winning or losing a case and provide a written assessment of these risks to clients when proposing a contingency fee arrangement.<sup>850</sup> The AJAC report recommended the introduction of contingency uplift fees (except in criminal and family matters, and subject to safeguards) with a maximum uplift factor of 100%, and noted that careful monitoring of contingency fee arrangements should take place.<sup>851</sup> The Commission in its report *Grouped proceedings in the Federal Court* recommended contingency fees for group proceedings, subject to court approval.<sup>852</sup>

6.54 The Business Working Group on the Australian Legal System<sup>853</sup> opposes contingency fees on the basis that they can encourage applicants to file marginal suits for their possible nuisance settlement value. Such behaviour impacts upon the business community who spend management time and resources defending these claims. Defendants may make settlement offers, even where they have a good case, to avoid the greater cost of defending the matter. Some lawyers have commented that uplift fees are unnecessary as lawyers will take work on contingency regardless of whether an uplift is available. Lawyers are able to initially to assess the risk; the little risk taken is being unnecessarily rewarded.<sup>854</sup>

#### *Advantages and disadvantages*

6.55 Contingency fees can facilitate access to justice for those who have a good case but cannot afford a lawyer. They are well understood by most clients, provide an appropriate allocation of risk between lawyer and client, facilitate freedom of contract between lawyer and client, and assist in the deregulation of the profession.<sup>855</sup> The Justice Corporation proponents argue that it will increase access

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<sup>850</sup> Attorney-General's Department *Justice statement* Attorney-General's Department (Cth) Canberra May 1995, 48-50.

<sup>851</sup> AJAC report.

<sup>852</sup> ALRC 46 *Grouped proceedings in the Federal Court* Sydney 1988, para 273-300. In England conditional fees have been permitted since 1995, allowing for success fees of up to 100 per cent: M Zander 'The government's plans on legal aid and conditional fees' (1998) 61 *Modern Law Review* 546. Conditional fee agreements have so far only been permitted for personal injury claims, insolvency cases and for claims under the European Convention on Human Rights. The Middleton Report recommended that conditional fees should be extended to all civil claims: *Report to the Lord Chancellor by Sir Peter Middleton GCB* Lord Chancellor's Dept London 1997. The Lord High Chancellor announced intended changes to the law to allow conditional fees in some types of family cases as well: *Modernising Justice* A white paper presented to Parliament by the Lord High Chancellor, December 1998, 25. He intends to widen the scope of conditional fees further by making it possible for the winning party to recover the success fee from the losing party. Contingency fees are widely used in the United States which has become renowned as a highly litigious society, however the United States does not have an accident compensation scheme and a lot of the litigation there is based on claims for damages for personal injury. The United States schemes are usually percentage fee schemes which can provide windfalls out of proportion to the work involved in a case.

<sup>853</sup> Business Working Group on the Australian Legal System *Trends in the Australian legal system – avoiding a more litigious society* Allen Consulting Group 1998.

<sup>854</sup> B Walker *Speech* ALRC Cost of Justice Seminar 19 May 1999; B Slade *Correspondence* 22 July 1999.

<sup>855</sup> G Dal Pont *Lawyers' professional responsibility in Australia and New Zealand* LBC Information Services 1996, 308; K Tokeley 'Taking a chance: A proposal for contingency fees' (1998) 28 *VUWLR* 17.

to legal services by small litigants. Its detractors suggest it will lead to the American system of contingency fees where a percentage of the damages can be taken for financially supporting the litigation.<sup>856</sup>

6.56 Two of the major concerns – that contingency fees will create a flood of litigation or encourage people to pursue unmeritorious claims, have not occurred. Litigants are still exposed to the risk of paying the opponent's costs if they are unsuccessful and lawyers are still taking on some risk if the case is unsuccessful and they do not receive payment.

6.57 The Commission has made proposals elsewhere in this discussion paper with respect to fee arrangements in representative proceedings and compensation matters in the AAT, which are the most common contingency arrangements in federal jurisdiction.<sup>857</sup> Apart from those areas contingency fee arrangements have limited application in federal jurisdiction, particularly where there is no financial claim involved. The Commission does not support extending contingency arrangements for family matters, nor does it support the introduction of fees based on a percentage of the outcome. The Commission does however support the continuing availability of contingency fees and recognises that uplift fee arrangements can encourage lawyers to take a matter on contingency.

## Legal information through technology

### *What is available*

6.58 There is a large volume of information on law and legal services already available on the internet. The value of this information depends on the quality and specificity of the information and people's access and ability to use it to their benefit.<sup>858</sup> Search engines lack discretion and may turn up vast quantities of information of limited relevance.<sup>859</sup> Governments, courts, tribunals, universities, law firms and other legal assistance organisations all publish information that can directly or indirectly assist people to identify, understand and resolve their legal problems.

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<sup>856</sup> A Burrell and C Merritt, 'Rivkin's new career – financing litigants' 21 June 1999 *Australian Financial Review* 3.

<sup>857</sup> See para 12.72-12.73; proposal 12.4.

<sup>858</sup> Despite the growing use of the internet, and the notoriously enthusiastic uptake by Australians of technology, there are still significant proportions of the population that do not have internet access. Australians mostly have access to computers and the internet either at home or at work. 56.9% of Australian adults have access to a computer and 25% are accessing the internet. 42% of Australian households have a computer, with larger proportions of households in capital cities having a computer than households in other areas. 14% of households access the internet from home: Australian Bureau of Statistics *1999 Year Book Australia* No 81 ABS Catalogue No 1301.0 AusInfo 1999, 591-593.

<sup>859</sup> Lord Chancellor's Department *Consultation paper 'Resolving and avoiding disputes in the information age'* Lord Chancellor's Department September 1998, ch 2  
<<http://gate.ccta.gov.uk/lcd/consult/itstrat/civpre.htm>> (3 February 1999).

6.59 Many law firms, community justice centres, legal aid commissions and ADR organisations have an internet home pages which provide information on members of the firm, their areas of practice, office locations and contact details. Some firms also provide legal information, usually by publishing papers presented by members of the firm for other forums<sup>860</sup> or newsletters.<sup>861</sup> Most Australian law societies and bar associations have internet home pages providing information to members and the public.<sup>862</sup>

6.60 Australia is a world leader in providing free access to legal information. Many other countries aspire to acquire data bases such as are available on SCALEplus<sup>863</sup> and AustLII.<sup>864</sup> All federal and state legislation,<sup>865</sup> regulations and cases are represented on such sites, including historical as well as current material.

6.61 As well as the home and office, other sources of internet access are public libraries and internet cafes. Access from these sources will be enhanced by the federal government's Online Public Access Initiative (OPAI) that provides financial support to the development of systems that enhance public online access, as well as access to special and disadvantaged groups.<sup>866</sup>

6.62 Although internet access and participation will increase, people will still need alternate information sources. 18.5% of the total population of Australia do not speak English well or at all.<sup>867</sup> If they are to utilise electronic legal information they will need access to translation software on the relevant internet site.<sup>868</sup>

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<sup>860</sup>.eg Gilbert and Tobin <<http://www.gtlaw.com.au>>.

<sup>861</sup>.eg Freehill Hollingdale and Page <<http://www.fhp.com.au>>.

<sup>862</sup>.Law Council of Australia <<http://www.lawcouncil.and.au>>; Law Society of New South Wales <<http://lawsocnsw.asn.au>>; New South Wales Bar Association <<http://www.nswbar.asn.au>>; Law Society of Tasmania <<http://www.taslawsociety.asn.au>>; ACT Law Society <<http://www.lawsocact.asn.au>>; Queensland Bar Association <<http://www.brassocqld.com.au>>; Law Institute of Victoria <<http://www.liv.asn.au>>; Victorian Bar Association <<http://www.vicvbar.com.au>>; Law Society of South Australia <<http://www.lssa.asn.au>>; Law Society of Western Australia <<http://www.LawSocietyWA.asn.au>>.

<sup>863</sup>.<<http://scaleplus.law.gov.au>>.

<sup>864</sup>.Australian Legal Information Institute <<http://www.austlii.edu.au>>.

<sup>865</sup>.On 22 July 1999 Justice Kirby launched AustLII's National Law Collection, which now contains the complete legislation of all Australian jurisdictions, the decisions of all federal courts and the decisions of the Supreme Courts of all States and Territories: University of Technology 'Kirby launches AustLII's National Law Collection — public access to all Australian law is now free' *Media release* University of Technology Sydney 21 July 1999.

<sup>866</sup>.R Alston '\$2 million for projects providing public online access' *Media release* 13 June 1997 <<http://www.dcita.gov.au>> (30 March 1999).

<sup>867</sup>.Australian Bureau of Statistics 1999 *Year Book Australia* AusInfo Canberra No 1301.0 1999, 100 table-5.48.

<sup>868</sup>.The Federal Court links its website to the translation service offered by AltaVista <<http://www.altavista.com>>.

6.63 In Victoria the government has been active in building a state wide series of channels in an electronic service delivery project known as 'Maxi'.<sup>869</sup> There is a Business Channel and a Land Channel<sup>870</sup> and the Law Reform Committee of the Victorian parliament has proposed that the Department of Justice establish a Legal Channel.<sup>871</sup>

6.64 A national website for legal information could provide; a single, first port of call for people seeking advice on legal services;<sup>872</sup> basic factual advice and information; and a gateway to other sources of advice, for example, court websites or the proposed Victorian legal channel. It could take a similar approach to the Victorian site by categorising information with a user focus, for example by life event, rather than by formal legal categories. This is particularly important for general users. While individual court and tribunal home pages provide a significant amount of information, they do so in relation to their own services. A coordinating directory for all legal services across Australia, federal and State, directing people to the respective home pages, would assist.

**Proposal 6.4.** The Commission recommends that the federal government establish a first port of call online civil justice service to act as a central point of reference for anyone seeking information or advice on a legal problem and guiding users to the appropriate information elsewhere on the internet.

6.65 Such a website could be established through the current Window on the Law website or some similar site with an easily remembered domain name and address.

#### *Individual advice and generic advice*

6.66 Publicly available legal information services accessible through public access terminals, kiosks and through access to the World Wide Web (soon to be widely available from home TV sets) will offer comprehensible guidance on the law and legal processes which hitherto was available only through costly one-to-one consultations with legal advisors.<sup>873</sup>

6.67 Anecdotal evidence from the Family Court suggests many unrepresented litigants inform themselves through the internet. However, there is a large gap in

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<sup>869</sup>.Parliament of Victoria Law Reform Committee *Technology and the law* Government Printer Melbourne May 1999, para 5.27.

<sup>870</sup>.id para 5.29.

<sup>871</sup>.id para 5.54; recommendation18.

<sup>872</sup>.A similar need has been recognised in the UK: Lord Chancellor's Department *Consultation paper 'Resolving and avoiding disputes in the information age'* Lord Chancellor's Department September 1998, ch 3 <<http://gate.ccta.gov.uk/lcd/consult/itstrat/civdlc.htm>> (3 February 1999).

<sup>873</sup>.G Hoon MP 'Preface' to Lord Chancellor's Department *Consultation paper 'Resolving and avoiding disputes in the information age'* Lord Chancellor's Department September 1998 <<http://gate.ccta.gov.uk/lcd/consult/itstrat/civcon.htm>> (3 February 1999).

the information base. The commentary, journals and annotations that assist lawyers are often inappropriate for use by people without legal training.

6.68 A new market in generic information is geared to such individual users. In this context the nature of advice services is set to change from being specialised for individuals to generic for groups.<sup>874</sup> In *The future of law*, Richard Susskind identified this as a significant area of change in the future provision of legal services.

6.69 This involves

- movement from a fundamentally advisory/consultative legal service to reusable, less specialist legal information and guidance service, where one-to-one consultations no longer dominate but where many citizens benefit from the packaging of legal experience
- a change from a substantially reactive legal service to an increasingly proactive service with the potential for much earlier legal input into the affairs of non-lawyers
- a shift from a legal system centred on time-based billing to one where many legal services are sold in the manner of commodities, in some cases, it is likely, selling in high volumes for mass consumption at low prices
- a change from today's system where access to the law can be difficult or bewildering to one where its greater availability and friendlier delivery empowers and motivates users
- a shift from today's compartmentalisation of legal advice to the delivery of multi-disciplinary service.<sup>875</sup>

6.70 Court and tribunal websites already contain information of this nature providing assistance to unrepresented litigants, witnesses and other court users.

6.71 This type of generic information is being developed and implemented using decision support systems within Commonwealth government agencies to improve the consistency of departmental decision making.<sup>876</sup> For example, a Family Decision Support System developed for Centrelink asks the client, with the assistance of Centrelink staff, a series of simple questions that give effect to the legislative requirements for obtaining allowances administered by Centrelink. A split screen shows the questions and answers on the left, with guidance material

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<sup>874</sup>R Susskind *The future of law – Facing the challenges of information technology* Clarendon Press Oxford 1996, 286.

<sup>875</sup>R Susskind *The future of law – Facing the challenges of information technology* Clarendon Press Oxford 1996. See also Lord Chancellor's Department *Consultation paper 'Resolving and avoiding disputes in the information age'* Lord Chancellor's Department September 1998, ch 3 <<http://gate.ccta.gov.uk/lcd/consult/itstrat/civdlc.htm>> (3 February 1999).

<sup>876</sup>Department of Defence (Defcare library; Multi-Period Incapacity Calculator), Comcare (Compensation Research Library), Department of Finance (Commonwealth Managers' Toolbox), Centrelink (Family Decisions Support System), Department of Family and Community Services (FAMnet), Department of Veterans' Affairs (Compensation Claims Processing System) <<http://www.softlaw.com.au>> (30 June 1999).



such as commentary, legislation, policy, and (to be added) significant court and tribunal decisions on the right.<sup>877</sup> The guidance material shows why a question is being asked and the legislative basis for it. The system presents a complex report of a person's eligibility, giving detailed reasons based on the legislation. A person's entitlement under each allowance is calculated immediately, without the applicant or Centrelink staff specifying what allowances are sought, and an applicant can change their answers to consider how different circumstances, for example, a change in their level of income, would affect their entitlements.<sup>878</sup>

6.72 The main benefits of such systems are that they promote accuracy and consistency in decision making. Clients at trials felt it was an open and fair process because they could see the reasons for the questions, it was speedy,<sup>879</sup> and provided immediate information on entitlements. There is also a significant capacity for data collection. For example, information could be searched to find the number of applicants receiving a certain benefit that have a child under the age of five.

6.73 One area that is yet to be addressed in relation to the use of decision support systems is review processes. Although evaluations of such systems has been favourable,<sup>880</sup> it is not clear whether a review of a decision made using such a system would be made again using the same system. The Commission is not aware of any such decisions that have been reviewed within departments or by external bodies such as the Commonwealth Ombudsman or the Administrative Appeals Tribunal.

6.74 The Commission supports the extension and application of such systems in federal jurisdiction. The federal government should be proactive in facilitating such systems.

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<sup>877</sup>.Demonstration to the Commission, G Masri, *Softlaw Consultation* 1 July 1999.

<sup>878</sup>.*ibid.*

<sup>879</sup>.An application would take you through about 20 screens. Manual processing of the quantity of information that is covered by this process would require about 400 screens.

<sup>880</sup>.Demonstration to the Commission, G Masri, *Softlaw Consultation* 1 July 1999.

## 7. Legal aid

### Introduction

7.1 The terms of the Commission's reference and the focus of its research do not extend to considering legal aid funding or how funding is determined, nor does the Commission have data which informs proposals for broad structural changes to the delivery of legal aid services. These issues have been the subject of much debate and are presently under consideration by the federal government.<sup>881</sup> Accordingly, the discussion in this chapter is limited to identifying within federal civil jurisdiction, the types of matter for which assistance is required and how best to provide such assistance.

7.2 The discussion derives from the Commission's terms of reference – to consider access to justice, case management and case resolution. The proposals are directly linked to discussion on case management in the Federal Court, Family Court of Australia (Family Court) and federal review tribunals. The case types considered here are family matters which concern children and family violence issues, refugee and certain migration cases, social security cases and veterans' entitlement cases.

### The cost of legal aid commissions and community legal centres

7.3 In Australia and overseas jurisdictions, public and policy debates have questioned whether direct subsidies to poor disputants and litigants through legal aid are the appropriate and most cost effective way to ensure access to justice for those in need; whether such legal aid services could be better coordinated, or delivered in different or 'unbundled'<sup>882</sup> forms and through different arrangements of service providers; and whether the government should continue to 'subsidise' the litigation of parties with the capacity to pay.<sup>883</sup> The debate also concerns whether there should be a rationalisation or re-ordering of government subsidies to particular disputants.<sup>884</sup>

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<sup>881</sup>D Williams 'A modern legal aid framework – the Commonwealth government's strategy for reform of legal aid services in Australia' *Keynote address* Legal Aid Forum – Towards 2010 Canberra 21-April 1999, para 124.  
<<http://law.gov.au/ministers/attorney-general/articles/Legalaidforum.html>> (15 July 1999).

<sup>882</sup>'Unbundling' or targeting refers to the provision of legal services less than full representation, at specific stages during a dispute and is discussed further at para 7.26–7.30.

<sup>883</sup>For example, via tax deductibility of litigation expenses for corporations. See para 6.20–6.30.

<sup>884</sup>For example, one view is that

the level of resources to be devoted to [a] procedure should be commensurate with the importance of the right. As different rights may be ranked against each other, claims for legal aid can also be ranked, with those protecting fundamental rights given a higher

7.4 While the debate about the costs of litigation often focusses on the extent of public funding, the rationale which underlies how governments choose to expend funds on legal resources and assistance is rarely explored. This requires a consideration of the concepts of rationing and cost containment – questions concerning to what extent, and how, the state should provide social insurance against the costs of using the legal system, who receives legal services, how much recipients receive, what services are provided and in what types of matters.<sup>885</sup> In Australia such questions are complicated by the federal structure and issues about respective federal/state responsibilities. The High Court decision in *Dietrich v R*<sup>886</sup> also impacted on such questions. In particular, there has been concern that the *Dietrich* decision has the potential to direct legal aid funding to criminal law matters at the expense of civil and family law matters.<sup>887</sup>

### *Government funding*

7.5 The total amount spent by the federal government on legal aid and family services in 1997–98 was \$171 million. This figure includes the administration expenses of the Legal Aid and Family Services (LAFS) division of the Attorney-General's Department,<sup>888</sup> legal aid commissions (LACs), community legal centres (CLCs) and other organisations.<sup>889</sup> Of this \$171 million, 73% (\$124 million) was given to LACs and CLCs.<sup>890</sup> State governments contributed a further \$93

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ranking than those protecting lesser rights: T Goriely and A Paterson 'Introduction' in A Paterson and T Goriely (eds) *A reader on resourcing civil justice* Oxford University Press Oxford 1996, 3.

No formal mechanism for such 'ranking' has been applied in Australia. The debate about systems for prioritising access to legal resources funding is a significant one in the UK and the US. See R Dingwall et al *Rationing and cost-containment in legal services* Lord Chancellor's Department Research Series No 1/98 March 1998, 15–20 which provides an example of how a ranking scheme could work drawn from the programs developed for health care services in Oregon, USA.

<sup>885</sup>.R Dingwall et al *Rationing and cost-containment in legal services* Lord Chancellor's Department Research services No 1/98 March 1998, 3.

<sup>886</sup>.*Dietrich v R* (1992) 109 ALR 385.

<sup>887</sup>.Senate Legal and Constitutional References Committee *Inquiry into the Australian legal aid system – Second report* June 1997. The subsequent Senate Legal Aid Inquiry noted that there are no comprehensive, readily available, statistics on the number of *Dietrich* applications being made, but that the fragmented and anecdotal information collected by the Committee since the Second Report (12 months previously) indicated that the number of applications for stays on *Dietrich* grounds was increasing. It is possible that some of the applications may be made with a view to delaying proceedings rather than ultimately being successful: Senate Legal and Constitutional References Committee *Inquiry into the Australian legal aid system – Third report* Senate Printing Unit Canberra June 1998 (Senate Legal Aid Inquiry), para 1.28.

<sup>888</sup>.LAFS was renamed the Family Law and Legal Assistance division from January 1999.

<sup>889</sup>.Attorney-General's Dept (Commonwealth) *Annual report 1997–98*, 85.

<sup>890</sup>.Provision of legal aid + legal aid grants + federal legal aid program: Attorney-General's Dept (Commonwealth) *Annual report 1997–98*, 85.

million to fund LACs and CLCs in 1997–98.<sup>891</sup> Under current agreements, \$102.8 million is to be provided by the federal government for 1999–2000.<sup>892</sup>

7.6 CLCs also receive separate funding from the federal and State governments.<sup>893</sup> The federal funding allocation for regional CLCs for 1998–99 is \$22.2 million<sup>894</sup> and will increase by \$11.4 million over the next four years for spending on

- legal advice telephone service (\$3.1 million)
- new regional centres (\$4.9 million)
- capital upgrade (\$0.9 million)
- program support fund (\$0.8 million)
- clinical legal education project (\$1.7 million).<sup>895</sup>

A further \$1.2 million has been appropriated in the 1999–2000 budget to extend access to legal services with five new community legal services and a legal outreach service.<sup>896</sup>

### *Private funding*

7.7 As well as government contribution to legal aid, LACs generate some revenue, by obtaining costs orders in cases and client contributions, and receive funding from legal professional associations. In 1997–98, LACs generated a total of

<sup>891</sup>Recording of federal funding can vary from LAC to LAC due to differing accounting practices. Legal Aid NSW *Annual report 1998*, 60, 68, 69; Legal Aid Victoria *Annual report 1997/98* <<http://home.vicnet.net.au/~viclegal/aboutvla/annual/>> (22 April 1999); Legal Aid Qld *Annual report 1997/98*, 39; Legal Services Commission SA *20th annual report 1997–98* 27, 33; Legal Aid Tasmania *Annual report 1998* 30, 34; Legal Aid WA *1997/1998 Annual report* 50, 61; Legal Aid ACT *21st annual report 1997/98* 36, 41; N T Legal Aid *Annual report 1997–1998* 44, 60.

<sup>892</sup>*Agreement between the Commonwealth of Australia and the Australian Capital Territory in relation to the provision of legal assistance* 3 October 1997; *Agreement between the Commonwealth of Australia and New South Wales in relation to the provision of legal assistance* 3 September 1997; *Agreement between the Commonwealth of Australia and Tasmania in relation to the provision of legal assistance* 18 July 1997; *Agreement between the Commonwealth of Australia and the Northern Territory in relation to the provision of legal assistance* 4 July 1997; *Agreement between the Commonwealth of Australia and South Australia in relation to the provision of legal assistance* 18 July 1997, and B Withers *Consultation* 12 July 1999; *Agreement between the Commonwealth of Australia and Western Australia in relation to the provision of legal assistance* 26 February 1998; *Agreement between the Commonwealth of Australia and Queensland in relation to the provision of legal assistance* 30 June 1997; *Agreement between the Commonwealth of Australia and Victoria in relation to the provision of legal assistance* 7 November 1997.

<sup>893</sup>In NSW, for example, \$2 748 792 of funding was provided for CLCs by the federal government and \$2 178 915 by the NSW government: Legal Aid NSW *Annual report 1998*, 47.

<sup>894</sup>J Fahey Minister for Finance and Administration *The Commonwealth public account 1998–99 Budget paper* No 4 AGPS Canberra 1998, 114.

<sup>895</sup>D Williams ‘Community legal services expanded’ *News release* May 1998 <<http://law.gov.au/ministers/attorney%2Dgeneral/releases/news%5Fservices.html>> (18 May 1999).

<sup>896</sup>Attorney-General’s Department *Portfolio budget statement 1999–2000*, 33.

\$53.7 million, comprised of \$21.4 million from client contributions<sup>897</sup> and recovered costs, and \$23.8 from law societies.<sup>898</sup>

### *Total funding*

7.8 The combined funding of LACs and CLCs, received from government, self funding and private sources was \$270.8 million in 1997–98. Federal government funding for LACs and CLCs amounted to \$123.8 million, or 46% of the total combined funding.<sup>899</sup>

### *Contingent legal aid funds*

7.9 LACs traditionally have not competed with the private profession for fee generating business.<sup>900</sup> One area in which they could compete is through contingent legal aid (or assistance) funds (CLAFs). A number of State and Territory CLAFs provide funding assistance in civil matters to litigants who do not qualify for legal aid.<sup>901</sup> Relevant to federal civil litigation is the suggestion that LACs fund family law property cases to generate income for children's matters.<sup>902</sup> LACs could enter the contingency fee market through

- funding a litigant's professional fees and disbursements, including counsels' fees and recovering a 'fund fee' as a percentage of any award obtained<sup>903</sup>

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<sup>897</sup>.\$9 million less than the \$30.4 million recovered in 1996–97.

<sup>898</sup>.Legal Aid NSW *Annual report 1998*, 68; Legal Aid Victoria *Annual report 1997/98* <<http://home.vicnet.net.au/%7Eviclegal/aboutvla/annual/>> (22 April 1999); Legal Aid Qld *Annual report 1997/98*, 39, 46; Legal Services Commission SA *20th annual report 1997–98* 27, 32, 33; Legal Aid Tasmania *Annual report 1998*, 30; Legal Aid WA *Annual report 1997/1998*, 61, 62; Legal Aid ACT *21st annual report 1997/98*, 41, 46; NT Legal Aid *Annual report 1997–1998*, 60.

<sup>899</sup>.This has declined from around 85% of LAC budgets in the 1980s to 40–58% in 1995–96, depending on the Commission: F Regan 'The politics of priorities' *Paper International legal aid conference Edinburgh 18–20 June 1997*, 2.

<sup>900</sup>.D Weisbrot *Australian lawyers* Longman Cheshire Melbourne 1990, 245.

<sup>901</sup>.The LACs in Queensland and Victoria have implemented schemes to act in civil matters on a contingency basis and the Law Society in Western Australia had administered a civil law fund for the conduct of matters on a contingency basis, which was suspended for review in 1997: see Senate Legal Aid Inquiry, para 7.51. See also the Senate Legal and Constitutional References Committee, *Inquiry into the Australian legal aid system – Second report* Senate Printing Unit Canberra June 1997, para 2.49. The South Australian Litigation Assistance Fund (SALAF) was launched in 1992 to fully fund successful applicants' litigation with start-up funding provided by the Legal Practitioners Guarantee fund and 15% of successful awards providing ongoing funding. The Northern Territory CLAF, jointly implemented by Legal Aid, the NT Law Society and the Attorney-General's Dept, provided funding for disbursements only, with a discretion to recover the funding. See also Access to Justice Advisory Committee *Access to justice – an action plan* AGPS Canberra 1994 (AJAC Report) 261.

<sup>902</sup>.Legal Aid Group *Consultation* Sydney 28 May 1999.

<sup>903</sup>.eg SALAF and Western Australian Litigation Assistance Fund (WALAF): AJAC Report 259.

- funding a litigant's disbursements, for example, by way of an interest-bearing loan, which may or may not be called upon, depending upon the litigant's success and/or ability to pay<sup>904</sup>
- contingency fee agreements with clients who are able to fund disbursements
- funding premium disbursements and/or guaranteeing against adverse costs orders to assist clients in gaining private legal representation
- funding private practitioners to act for clients in return for an uplift.<sup>905</sup>

7.10 CLAFs and litigation lending schemes are limited as

[CLAFs] provide financial assistance only for civil matters and usually only in cases in which a monetary or property award may be recovered by the assisted person. Litigation lending schemes are restricted to financial assistance for disbursements, and only in limited circumstances. Litigation lending schemes increase the community's access to justice only when a litigant can make arrangements to cover the professional fees of his or her lawyer, for example, when a lawyer is willing to take the case on a speculative fee basis.<sup>906</sup>

7.11 The Senate Legal and Constitutional References Committee *Inquiry into the Australian legal aid system – Third report* (Senate Legal Aid Inquiry) expressed reservations about the commercial realities of such arrangements. These concerns included possible pressure on clients to settle on unfavourable terms where the lawyer is not prepared to take the risk of an unfavourable judgment. The disbursements involved are often such that, even though professional fees are held back, neither the client nor the practitioner can or will meet the costs of running the case.<sup>907</sup>

7.12 These reservations are important. A modified suggestion is for LACs to implement a litigation guarantee scheme which fully funds disbursements and any adverse costs order, in return for a premium by way of percentage of any winnings.<sup>908</sup> An extension of such a guarantee scheme has been established by Justice Corporation Pty Ltd which is funding the disbursements in current matters in return for 8% of the amount of the damages awarded.<sup>909</sup> Justice Corporation intends in the future to fund both fees and disbursements incurred in civil litigation

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<sup>904</sup>.AJAC Report 260 citing Law Society of NSW Task Force 'Access to the civil courts' in Law Society of NSW *Accessible justice summit: Summary of proceedings and selected papers* 1992, 52–3.

<sup>905</sup>.For a discussion of uplift and contingency fees generally see para 6.47–6.57.

<sup>906</sup>.AJAC Report 260.

<sup>907</sup>.Senate Legal Aid Inquiry, para 7.50–7.54.

<sup>908</sup>.Legal aid group *Consultation* 28 May 1999.

<sup>909</sup>.A Burrell & C Merritt 'Rivkin's new career – financing litigants' *Australian Financial Review* 21 June 1999, 3.

matters.<sup>910</sup> The legality of this scheme has not been determined and there are competing views about its ethics.<sup>911</sup>

7.13 There are a number of issues raised by LAC's entry into a contingency fee market including

- State District and Supreme Court matters would be more fertile ground for raising revenue than federal matters, since few matters in federal jurisdiction provide damages awards. Legal aid funding may need to be reassessed so that access to the revenue raised was not disproportionately small for federal law divisions of LACs.
- Criteria for selecting cases should not simply coincide with their revenue raising potential. There are important questions concerning how cases for contingency funding should be selected
- Where funding creates a financial interest for LACs in a case, conflict of interest is more likely to exist and the ability of the LAC to advise or assist associated parties in a matter more limited. This may impact on legal aid's broader obligation to disadvantaged claimants and litigants. Such conflict of interest issues might be resolved if the contingency work was conducted by an associated but separate section of the LAC.

7.14 The proposals deserve further investigation. The Commission is not disposed to recommend such proposals without further discussion or information.

**Question 7.1.** The Commission invites comment on whether legal aid commissions should develop contingent legal aid funds and other initiatives to supplement their funding from other sources. Should such funds provide assistance for all legal costs, just fees or just disbursements? How, if at all, should such funding be accommodated within federal civil cases, including family law?

## Coordination of legal aid

7.15 In the past, the federal government has been criticised for its failure to work with individual LACs to develop uniform priorities for expenditure.<sup>912</sup> Federal

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<sup>910</sup> See A Burrell & C Merritt 'Rivkin's new career – financing litigants' *Australian Financial Review* 21-June 1999, 3. See also PPuri 'Financing litigation by third party investors: A share of justice?' (1998) 36(3) *Osgoode Hall Law Journal*, 515.

<sup>911</sup> In its first case, Justice Corporation was permitted to fund its client's action against Clayton Utz, as the respondent did not challenge its involvement. Consequently, precedent regarding legality is yet to be set: A Burrell 'Rivkin chalks up a court victory for Justice Corp' *Australian Financial Review* 16 July 1998, 3.

<sup>912</sup> F Regan 'The politics of priorities: Legal aid priority setting in Australia 1996/7' *Paper International legal aid conference Edinburgh* 18–20 June 1997, 3. This lack of federal direction for legal aid

government agreements with each of the States and Territories identify the same priorities, but establish different contract terms.<sup>913</sup> Progress towards coordination of legal aid has been made through National Legal Aid<sup>914</sup> and has been identified as a priority by the federal government.<sup>915</sup> In addition, a review of CLCs is being conducted by the federal government.<sup>916</sup>

7.16 Areas in which national coordination in legal aid could be beneficial include the expansion of registration of experts and use of generic expert reports,<sup>917</sup> cooperative community and continuing legal education<sup>918</sup> and the use of the administrative or servicing innovations of one jurisdiction in other jurisdictions.<sup>919</sup>

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policies was prevalent in the 1980s and was acknowledged by the government in 1995: Attorney-General's Dept *Justice statement* AGPS Canberra 1995.

<sup>913</sup> *Agreement between the Commonwealth of Australia and the Australian Capital Territory in relation to the provision of legal assistance* 3 October 1997; *Agreement between the Commonwealth of Australia and New South Wales in relation to the provision of legal assistance* 3 September 1997; *Agreement between the Commonwealth of Australia and Tasmania in relation to the provision of legal assistance* 18 July 1997; *Agreement between the Commonwealth of Australia and the Northern Territory in relation to the provision of legal assistance* 4 July 1997; *Agreement between the Commonwealth of Australia and South Australia in relation to the provision of legal assistance* 18 July 1997; *Agreement between the Commonwealth of Australia and Western Australia in relation to the provision of legal assistance* 26 February 1998; *Agreement between the Commonwealth of Australia and Queensland in relation to the provision of legal assistance* 30 June 1997; *Agreement between the Commonwealth of Australia and Victoria in relation to the provision of legal assistance* 7 November 1997. See also M Cramsie 'Where the latest cuts leave legal aid' (1998) 36 (5) *Law Society Journal* 62-63.

<sup>914</sup> R Coates *Submission* 275.

<sup>915</sup> The federal Attorney-General announced recently that the government's strategy for reform of legal aid would focus upon greater national accessibility and uniformity in the provision of legal aid services, and an integrated approach between LACs, community legal services, the private profession, courts and prosecution authorities: D Williams 'A modern legal aid framework – the Commonwealth government's strategy for reform of legal aid services in Australia' *Keynote address Legal Aid Forum – Towards 2010* Canberra 21 April 1999, para 33, 106 <<http://law.gov.au/ministers/attorney-general/articles/Legalaidforum.html>> (15 July 1999).

<sup>916</sup> D Williams 'Government expands community legal services' *News release* May 1999, 1. <<http://law.gov.au/ministers/attorney%2Dgeneral/releases/news%5Fservices.html>> (18 May 1999). In Victoria, an Implementation Advisory Group or senior government and legal aid officers has been formed to formulate strategies to improve access to CLCs: D Williams *Enhancing community legal services in Victoria* Joint press release federal and Victorian Attorney-General's Departments 25 June 1999.

<sup>917</sup> At present, National Legal Aid produce a register of expert witnesses for criminal matters. In addition, the National Legal Aid Family Law Section managers confer regarding appropriate experts for family law matters: R Coates *Submission* 275. In its inquiry into children in the legal process the Commission was told of the difficulties in securing children's experts for legal aid cases: Australian Law Reform Commission and Human Rights and Equal Opportunity Commission Report 84 *Seen and heard: priority for children in the legal process* Sydney 1997 (ALRC 84). Similar coordination could assist in some native title or veterans' cases.

<sup>918</sup> In existence at present is a national register of community legal education programs and publications compiled by National Legal Aid and the National Association of Community Legal Centres: R Coates *Submission* 275.

<sup>919</sup> eg the federal government requires the use of LA Office, a software package developed by Legal Aid Queensland in all LACs: R Coates *Submission* 275.



7.17 In the development of a national legal aid scheme, consideration should be given to the role of the newly formed Australian Legal Assistance Forum, which could play an important role in coordinating and enhancing legal aid services.<sup>920</sup> This body contains representatives of the directors of all LACs, the Law Council of Australia, Aboriginal and Torres Strait Islander Legal Services (ATSILS) and CLCs. Its objects are

- to promote cooperation between service providers in the interests of clients to ensure that the legal needs of those clients are met with the best and most effective service available to address these individual needs
- to regularly disseminate information and promote communication amongst the service providers on issues of mutual concern to enhance the ability of those providers to address client needs
- to inform governments and other organisation on the needs of those clients and on issues relevant to the practical delivery of legal assistance and representation services and
- to assist governments and other organisations in the development of policies to enhance access to justice for all Australians.<sup>921</sup>

The Commission supports such initiatives.

**Proposal 7.1.** Within the present proposal of the federal government that delivery of legal aid be coordinated on a national basis, consideration should be given to expanding or improving

- registers of experts which should include experts relevant to family and civil matters
- where appropriate the utilisation of generic expert reports
- coordination of community legal education, information services and administrative innovation and continuing legal education for staff of service providers.

### *Special needs funding*

7.18 As part of such coordination, there has been debate on the ranking and funding of particular cases. Certain matters in the federal civil jurisdiction funded by legal aid are expensive and use a disproportionate share of legal aid funds.<sup>922</sup> This problem generally arises in relation to federal criminal matters.<sup>923</sup> This affects the funding of other federal civil matters, particularly family law cases.

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<sup>920</sup>.Australian Legal Assistance Forum *Media release* 22 April 1999.

<sup>921</sup>.*ibid.*

<sup>922</sup>.Attorney-General's Dept *Transcript of evidence* Senate Legal and Constitutional Legislation Committee Estimates Hearings 26 February 1998, cited in Senate Legal Aid Inquiry, para 6.19.

<sup>923</sup>.In the ACT one 1999 federal criminal matter was expected to cost \$500000, considerably more than the \$50 000 federal charges budget for the territory: N Mapstone 'ACT legal aid services under threat' *The Canberra Times* 13 April 1999, 1. See also N Mapstone 'Fund mooted for "expensive" legal

7.19 The Senate Legal Aid Inquiry recommended that the government monitor the expenditure on the various categories of legal aid matters to determine if disproportionate expenditure in one priority area is depriving another area of appropriate funding.<sup>924</sup> The legal aid guidelines for federal criminal matters establish cost management ceilings as one means of containing such cost.<sup>925</sup> It is suggested that a special needs fund be established for LACs to use to fund expensive cases rather than draw from the general pool of legal aid funds.<sup>926</sup> The federal Attorney-General has acknowledged the need for such a fund,<sup>927</sup> although it has not yet been established. The Law Council of Australia has welcomed the suggestion, on the basis that new money is allocated to the fund rather than reducing existing funding to the LACs.<sup>928</sup>

**Proposal 7.2.** The federal government should provide a fund administered by the Attorney-General's Department to meet the costs of providing legal aid in complex, expensive federal matters.

#### *Funding children's representation*<sup>929</sup>

7.20 The Family Court may order separate representation for a child in family law proceedings.<sup>930</sup> LACs retain authority to decide whether a grant of legal assistance will be made for such representation.<sup>931</sup>

7.21 In its submission to the Senate Legal Aid Inquiry, the Family Court proposed that a designated fund for separate representation of children be established. The

aid' *The Canberra Times* 21 April 1999, 3; N Mapstone 'Balancing scales on legal-aid costs' *The Canberra Times* 24 April 1999, 3.

<sup>924</sup> Senate Legal Aid Inquiry, para 4.11.

<sup>925</sup> D Williams 'A modern legal aid framework – the Commonwealth government's strategy for reform of legal aid services in Australia' *Keynote address* Legal Aid Forum – Towards 2010 Canberra 21-April 1999 para 123. Other suggestions include reform of court procedures to reduce the length and cost of criminal trials: para 114–120  
<<http://law.gov.au/ministers/attorney-general/articles/legalaidforum.html>> (16 June 1999).

<sup>926</sup> Senate Legal Aid Inquiry, para 6.41.

<sup>927</sup> N Mapstone 'Fund mooted for "expensive" legal aid' *Canberra Times* 21 April 1999, 3.

<sup>928</sup> LCA 'Law Council welcomes Attorney's consideration of special needs fund for legal aid commissions' *Media release* 22 April 1999 <<http://www.lawcouncil.asn.au/lcarned83.htm>> (16 June 1999).

<sup>929</sup> The federal Attorney-General announced recently that the government is to develop a strategy to address the issue of separate representation of children in family law matters, in light of the increase in appointments by the court, the resultant cost to legal aid and the application of means and merits tests before funding is made available: D Williams 'A modern legal aid framework – the Commonwealth government's strategy for reform of legal aid services in Australia' *Keynote address* Legal Aid Forum – Towards 2010 Canberra 21 April 1999, para 124.  
<<http://law.gov.au/ministers/attorneygeneral/articles/Legalaidforum.html>> (15 July 1999).

<sup>930</sup> *Family Law Act 1975* (Commonwealth) s 68L.

<sup>931</sup> Senate Legal Aid Inquiry, para 5.91, 5.92.

fund would be controlled by the Court and supplemented by contributions from parents and the sharing of costs in relation to experts reports.<sup>932</sup>

7.22 In New Zealand, the Crown provides such a fund, which pays for the expenses of representing children as they occur. The fund is administered by the court, who may order the parties to reimburse some of these expenses at the conclusion of the matter.<sup>933</sup>

7.23 The Commonwealth Guidelines require LACs to seek to defray payment from all parties not legally aided for the cost of providing a separate children's representative.<sup>934</sup> LACs now assess a party's capacity to pay and seek payment from each party in an appropriate or proportionate manner depending on their means.<sup>935</sup>

**Question 7.2.** The Commission invites comment on whether a designated fund should be created for separate representation of children and, if so, whether such fund should be administered by the Family Court, legal aid commissions or some other body.

## Prioritising and targeting legal aid

There is now a growing consensus among commentators on legal aid that defining the right array of service components – varying with type of law, client need, case priorities, type of service being offered . . . or the collective characteristics of the needs of certain groups of clients . . . is far more useful.<sup>936</sup>

7.24 Governments have prioritised particular funding areas. In certain case types, such as veterans' matters, there are few restrictions or refusals of applications for aid. Governments generally are disposed to fund in accordance with demand. In other areas, such as immigration and refugee matters, particular grants of aid are made, and cases are funded to the level of the grant and no more. There is extensive reliance on pro bono and private, speculative fee arrangements in this area. Difficulties arise in such case types as family matters, where there is extended demand, enhanced need, and a finite budget. In such cases, debate now focusses on prioritising and targeting funding.

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<sup>932</sup>Family Court of Australia *Submission 97* to Senate Legal and Constitutional References Committee *Inquiry into the Australian legal aid system* 1323.

<sup>933</sup> *ibid*; ALRC 84.

<sup>934</sup> Senate Legal Aid Inquiry, para 5.95.

<sup>935</sup> *id* para 5.95–5.97.

<sup>936</sup> Ontario Legal Aid Review *Report of the Ontario Legal Aid Review: a blueprint for publicly funded legal services* Queen's Printer for Ontario 1999, ch 7  
<<http://www.attorneygeneral.jus.gov.on.ca/olar/ch7.htm>> (18 June 1999).

7.25 Within the group of people who may require but cannot afford legal assistance, some, by their profile and characteristics and the facts in issue, demand priority treatment. Such cases are unlikely to be suitable for consensual resolution and are likely to require adjudication, and thus specialised, thorough and ongoing legal advice, evidence gathering and advocacy. Such priority cases in family law matters are those where there are allegations of child abuse and/or family violence, and those where the parties have language or emotional difficulties which preclude effective self representation.<sup>937</sup>

7.26 In contrast to these 'priority' clients, there are other clients whose cases can proceed or be resolved with limited assistance. This invites debate on targeting or 'unbundling' legal services, the selective provision of one, or some but not all, of the services in the 'full package' of legal representation. Such assistance includes the provision of legal, procedural or tactical advice; assistance with preparing documents; representation at certain points in proceedings or for a major case event (discontinuous representation); and duty lawyer representation.<sup>938</sup>

7.27 The preparation of initiating applications and documents and obtaining medical and other key evidence, have been identified as targeted services which can provide clients with the capacity to continue effectively with their matter unassisted.<sup>939</sup> All LACs operate 'face to face' advice clinics, telephone advice services and duty lawyer programs. Many of these targeted services are also provided by CLCs, through clinical legal education programs or pursuant to contracts tendered by relevant government departments. Relationships Australia provides mediation services for families, children and adolescents, as well as other relationship support services such as marriage and relationship counselling and education; family therapy and skills training; and contact therapy.<sup>940</sup>

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<sup>937</sup>.The special needs of family law cases for representation has been recognised by the American Judicature Society: J Goldschmidt et al *Meeting the challenge of pro se litigation – a report and guidebook for judges and court managers* American Judicature Society Chicago 112.

<sup>938</sup>.The 'full service package' is described as: (1) gathering facts, (2) advising the client, (3) drafting correspondence and documents, (4) researching the law, (5) drafting correspondence and documents, (6) negotiating and (7) representing the client in court: G Bellow and B Moulton *The lawyering process: Materials for clinical instruction in advocacy* 1978 cited in F Mosten 'Unbundling of legal services and the family lawyer' (1994) (28) *Family Law Quarterly* 421, 423.

<sup>939</sup>.Legal Aid New South Wales defines minor assistance as 'advice and work done in the giving of advice (ie simple correspondence, phone call) but not where a formal legal aid application is submitted'. Legal Aid New South Wales *Annual report 1998*, 78. This is usually given when dealing with the application for aid. Determination of legal aid applications often takes time. Pending the determination the solicitor may commence settlement negotiations, assist with the preparation of documents or court forms or assist the client's case indirectly by arranging housing, drug and alcohol or other counselling. Minor assistance is also provided by solicitors at CLCs.

<sup>940</sup>.<<http://www.relationships.com.au/support/index.htm>> (28 July 1999).

7.28 The aim of targeted services is to narrow the gap between full representation and no representation.<sup>941</sup> Lord Woolf has commented favourably on unbundling as a process that

would offer a real way forward in terms of making justice accessible to those on moderate incomes who are currently not eligible for legal aid. Such an approach poses a challenge to both professional lawyers and other advisers as to how best to develop schemes that can provide the level of assistance needed within a cost ceiling appropriate to the matter at issue.<sup>942</sup>

7.29 Providing such services requires effective coordination of government subsidised legal services, the sharing of expertise, information and education resources, and the joint training of LAC and CLC staff in interviewing and identifying clients' needs. Within such schemes, legal aid entities need to identify routine and difficult cases and the particular assistance or service which could facilitate the presentation or resolution of the case. The task is not easy but is essential if the problems associated with 'the service roundabout' of limited service provision are to be avoided.<sup>943</sup>

7.30 There are risks to practitioners and problems for clients in the provision of such limited services. Practitioners may not be informed of all relevant matters and may inadvertently give advice that is incomplete or wrong, exposing the client to risks, and the practitioner to an action for negligence.<sup>944</sup> In the United States, where targeted legal services are an expanding industry for lawyers, it has been suggested that 'the legislature grant civil immunity from liability to lawyers when they provide limited scope, discrete task representation'.<sup>945</sup> The Law Reform Commission of Western Australia has noted that new retainer arrangements may be necessary in providing targeted services that give lawyers immunity from liability.<sup>946</sup>

### *Who receives legal aid*

7.31 Before elaborating on this debate, it is useful to document who receives legal aid. The guidelines and priorities set by the federal government and LACs

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<sup>941</sup> Ontario Legal Aid Review *Report of the Ontario Legal Aid Review: a blueprint for publicly funded legal services* Queen's Printer for Ontario 1998 ch 7  
<<http://www.attorneygeneral.jus.gov.on.ca/olar/ch7.htm>> (18 June 1999).

<sup>942</sup> Lord Woolf *Access to justice: Interim report to the Lord Chancellor on the civil justice system in England and Wales* Lord Chancellor's Dept London 1995, 129.

<sup>943</sup> See para 7.79.

<sup>944</sup> F Mosten 'Unbundling of legal services and the family lawyer' (1994) (28) *Family Law Quarterly* 421, 430.

<sup>945</sup> *ibid.*

<sup>946</sup> Law Reform Commission WA *Review of the civil and criminal justice system – Consultation paper: Litigants in person, unreasonable and vexatious litigants* Perth March 1999, 15 quoting Lord Woolf *Access to justice: Interim report to the Lord Chancellor on the civil justice system in England and Wales* Lord Chancellor's Department London 1995, 129.

determine who receives legal aid. Federal funding provides for legal services in matters which arise in federal jurisdiction including family law, veterans' affairs and administrative law matters, and others specified as federal priority matters.<sup>947</sup>

7.32 The working priorities of LACs direct primarily that no criminal trial should be stayed for lack of funding. Veterans' affairs then have the highest priority followed by other items in the list without distinction.<sup>948</sup> Priority is also given to resolving matters through processes that do not involve litigation.

7.33 *Means and merits tests.* When determining an application for legal aid, commissions apply a means test and merits test. People ineligible for a grant of legal aid may receive limited legal assistance, generally legal advice.

7.34 In 1997–98, 28 784 applications for legal aid were approved in NSW (9319 in family law), 31 814 in Victoria (6 453 in family law), 22 445 in Queensland (4 976 in family law) and 12 723 in South Australia (2 704 in family law).<sup>949</sup>

7.35 *Family law.* Priorities for legal aid family law matters include matters arising under the *Family Law Act 1975* (Commonwealth), the *Child Support (Assessment) Act 1989* (Commonwealth) and the *Child Support (Registration and Collection) Act 1988* (Commonwealth). Protecting the safety of a child or spouse who is at risk is accorded the highest priority in making grants of aid in family law.<sup>950</sup>

7.36 A recent Justice Research Centre (JRC) study of family law clients found that clients funded by legal aid<sup>951</sup> and clients of CLCs tend to be women,<sup>952</sup> social

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<sup>947</sup>Legal aid is also available in anti-discrimination and consumer protection matters arising under federal law: B Slade *Submission 278; Agreement between the Commonwealth of Australia and the Australian Capital Territory in relation to the provision of legal assistance* 3 October 1997; *Agreement between the Commonwealth of Australia and New South Wales in relation to the provision of legal assistance* 3 September 1997; *Agreement between the Commonwealth of Australia and Tasmania in relation to the provision of legal assistance* 18 July 1997; *Agreement between the Commonwealth of Australia and the Northern Territory in relation to the provision of legal assistance* 4 July 1997; *Agreement between the Commonwealth of Australia and South Australia in relation to the provision of legal assistance* 18 July 1997; *Agreement between the Commonwealth of Australia and Western Australia in relation to the provision of legal assistance* 26 February 1998; *Agreement between the Commonwealth of Australia and Queensland in relation to the provision of legal assistance* 30 June 1997; *Agreement between the Commonwealth of Australia and Victoria in relation to the provision of legal assistance* 7 November 1997.

<sup>948</sup>Legal Aid NSW *Consultation* 28 May 1999.

<sup>949</sup>Information obtained from annual reports of the respective States.

<sup>950</sup>Attorney-General's Dept (Commonwealth) *Legal aid – about us* <[http://law.gov.au/aghome/commaff/lafs/legal\\_aid/aboutus/html#whom](http://law.gov.au/aghome/commaff/lafs/legal_aid/aboutus/html#whom)> (27 July 1999).

<sup>951</sup>Clients of LAC staff lawyers or legally aided clients of private firms.

<sup>952</sup>The JRC has reported that in all LACs two third of inhouse clients in family law matters were female. 56.7% of legal aid clients represented by private solicitors were female: R Hunter *Family law case profiles* Justice Research Centre Sydney June 1999, para 136. Other research shows that the proportion of women seeking free legal assistance in property matters is particularly high. There are 2.5 times as many women seeking advice at CLCs than men: NSeaman *Fair shares? Barriers to equitable property settlements for women* Womens Legal Services Network April 1999.

security recipients, and are often born in non-English speaking countries.<sup>953</sup> 3.4% of inhouse clients were of Aboriginal or Torres Strait Islander descent.<sup>954</sup> Aboriginal and Torres Strait Islander Legal Services also represent clients in family law matters, although this is not a priority area of work.<sup>955</sup> In 1997–98, ATSILS assisted 2 225 clients in family law matters.<sup>956</sup>

7.37 Subject to the means and merit tests, there are few restrictions on grants of aid for parenting orders in the Family Court.<sup>957</sup> Guidelines also provide for the provision of child representation by legal aid.<sup>958</sup> The federal guidelines restrict grants of aid for property proceedings.<sup>959</sup> Consequently, legal aid work in family matters is directed to children's matters, and generally children from families in social and economic hardship, and where there are allegations of abuse and neglect.<sup>960</sup>

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<sup>953</sup> 26% of all overseas-born clients were from non-English speaking countries; 10% were born overseas in English speaking countries: R Hunter *Family law case profiles* Justice Research Centre Sydney June 1999, para 40.

<sup>954</sup> R Hunter *Family law case profiles* Justice Research Centre Sydney June 1999, para 42. While this figure may appear low, it is high compared to the total Aboriginal and Torres Strait Islander population in Australia of 2.1%: Australian Bureau of Statistics 1999 *Year book Australia No 81* No1301.0 AusInfo Canberra 1999, 102 table S1.1.

<sup>955</sup> Aboriginal Legal Services *Brochure* as at 28 May 1999. The majority of complaints received by ATSIC about ATSILS regard the inability of ATSILS to provide legal assistance in family law matters: ATSIC *Consultation* 15 June 1999.

<sup>956</sup> 3% of the total clients for the year: ATSIC *Annual report 1997–98*, 89.

<sup>957</sup> One restriction is to consider whether primary dispute resolution has, or ought to have been attempted: Legal Aid and Family Services *Commonwealth guidelines – Legal assistance in respect of matters arising under Commonwealth laws* Guideline 2.

<sup>958</sup> However, this is assisted by the potential for recovering the child representative's costs to the parties: Legal Aid and Family Services *Commonwealth guidelines – Legal assistance in respect of matters arising under Commonwealth laws* Guideline 2. Guideline 3 allows legal aid to be granted for child maintenance and child support departure application.

<sup>959</sup> There are a number of wider consequences of these restrictions, particularly for women, who are often the party requiring adjustment of property interests under s 79 of the *Family Law Act 1975* (Commonwealth) and therefore may lack the financial resources to pay for legal representation. Family violence and power inequalities generally may cause PDR process to be ineffective or inappropriate. For a detailed discussion of these issues, see: N Seaman *Fair shares? Barriers to equitable property settlements for women* Womens Legal Services Network 28 April 1999 recommendations 5, 8.1.

<sup>960</sup> Note that in most States, legal aid is available for respondents to applications brought by family services departments under State children's care and protection legislation: eg see *Children (Care and Protection) Act 1997* (NSW) (but note that new legislation is to come into effect shortly). The merit test does not apply to such grants. The States and Territories are responsible for funding these matters. Most such work is undertaken by inhouse lawyers from LACs: in NSW see Legal Aid NSW *Legal aid policies* July 1998, para 9. Aid is also available, subject to means for proceedings concerning irretrievable breakdown between parent and child and applications for variation or rescission of previous orders. In the JRC's study, LAC inhouse cases were more likely to proceed to hearing than privately-funded cases. However, many such hearings were in local courts. The funding guidelines generally permit funding only for contested proceedings. In NSW, the LAC uses State local courts with specialist family magistrates where possible. Over 40% of LAC cases had some local or magistrates' court involvement, compared with 21% for private solicitors' cases: R Hunter *Family law case profiles* Justice Research Centre Sydney June 1999, 121. See also T Brown et al *Violence in*

7.38 **Veterans' affairs cases.** The Returned and Services League and Legacy receive most veterans' legal services funding to assist people making applications for veterans' pensions and benefits. Decisions refusing benefits are reconsidered by the Department of Veterans' Affairs, by the Veterans' Review Board, and on review to the AAT. At the AAT, stage funding of legal services is provided by LACs.<sup>961</sup> The funding of veterans' affairs matters is part of the base funding provided to LACs.<sup>962</sup> Veterans' affairs clients are not subject to means tests,<sup>963</sup> nor to any contribution, but they are subject to a merits test.<sup>964</sup>

7.39 There is generally a very low refusal rate for applications for legal aid for veterans' matters. In 1997-98 a total of 1402 applications were approved and only 62 refused.<sup>965</sup> In veterans' matters, aid may be granted to mediate or investigate the merits of a case and is also available for appeals to the AAT, the Federal and High Courts.<sup>966</sup> Aid for an original action is only available if a conditional costs agreement with a private solicitor could not reasonably be expected.<sup>967</sup> Cases which proceed to the AAT often give rise to issues of policy.<sup>968</sup>

7.40 **Immigration and refugee cases.** Under new guidelines, effective from 1 July 1998, legal aid is generally not available for immigration and refugee cases. Assistance in such cases is now provided through the Immigration Advice and Application Assistance Scheme (IAAAS) operated by the Department of Immigration and Multicultural Affairs (DIMA), which has contracted Legal Aid

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*families: Report No 1 – The management of child abuse allegations in custody and access disputes before the Family Court of Australia* The Family Violence and Family Court Research Program, February 1998, 71.

<sup>961</sup> Senate Legal Aid Inquiry, para 7.35.

<sup>962</sup> Prior to 1 July 1997 this funding was provided separately.

<sup>963</sup> A senior member of the AAT has observed that:

[G]uidelines which operate in relation to assistance in the veterans jurisdiction are far more open and far more flexible than those in other jurisdictions and that, as a consequence of that, if a veteran wants to be represented it would be most unusual for them not to gain assistance': B Barbour AAT Submission to Senate Legal Aid Inquiry, para 7.39.

<sup>964</sup> The federal Attorney-General announced that, following concerns expressed by the veterans' community, a committee including representatives from the Attorney-General's Department and the Department of Veterans' Affairs was established, and has been holding discussions with a view to achieving consistent national practice across LACs: D Williams 'A modern legal aid framework – the Commonwealth government's strategy for reform of legal aid services in Australia' *Keynote address* Legal Aid Forum – Towards 2010 Canberra 21 April 1999, para 61.  
<<http://law.gov.au/ministers/attorney-general/articles/Legalaidforum.html>> (15 July 1999).

<sup>965</sup> Legal Aid and Family Services, Attorney-General's Dept *Legal aid in Australia 1997-98 Statistical yearbook* Attorney-General's Department Canberra July 1998 as amended: T Nyeman *Correspondence* Legal Aid Branch Attorney-General's Department 13 July 1999, 13.

<sup>966</sup> Note, however, that following the federal/State agency agreement on 1 July 1997, Legal Aid NSW may no longer grant aid to veterans for appeals to the VRB: B Slade *Submission 278*; Legal Aid NSW *Legal aid policies* Policy and Education Branch Sydney July 1998.

<sup>967</sup> Legal Aid NSW 'Legal aid policies' *Veterans' pension matters – Commonwealth guidelines*, para 4.2.

<sup>968</sup> L Sadlier *Consultation* 1 July 1999.



NSW, the Refugee Advice and Case Service (RACS) and the Immigration Advice and Rights Centre (IARC) to provide advice and assistance to asylum seekers.<sup>969</sup> The contract funding with Legal Aid NSW was exhausted by demand in January 1999.<sup>970</sup> The current policy directive states that legal aid for federal administrative law matters is only available 'if exceptional circumstances exist'.<sup>971</sup>

7.41 *Social security cases.* Social security appeals to the AAT may receive legal aid funding for preparation, evidence gathering and submissions where

- overpayments exceed \$5 000
- the applicant is at significant risk of prosecution
- the applicant cannot afford to pay for medical reports and the appeal is about the health of the applicant or of someone for whom the applicant has a parental responsibility
- the applicant cannot adequately prepare or present his or her case due to disability or disadvantage
- the appeal raises important or complex questions of law.

7.42 Legal aid for representation at the AAT may only be granted where the applicant may incriminate him/herself, the case is complicated, the applicant by reason of disability or disadvantage cannot adequately prepare or present the case, or the appeal raises important or complex questions of law.<sup>972</sup>

7.43 These are the priority areas identified by government for funding. Within such funding areas there are varied cases. The emphasis increasingly is on identifying those cases requiring extended assistance and those cases which can progress or be resolved with limited assistance.

## Legal assistance in family law matters

### *Priority cases*

7.44 In family law, cases involving children and allegations of abuse and/or family violence frequently require a determination in order to be resolved. Other cases of concern include those where parties, who may be of non-English speaking background, are unable effectively to prepare and present their case because of language differences. The Commission considers that such cases should be

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<sup>969</sup> National Legal Aid Submission to the Senate Legal and Constitutional Affairs References Committee on the Operation of Australia's Refugee and Humanitarian Program DRAFT Sydney 25 June 1999, 1; Legal Aid Consultation 1 July 1999.

<sup>970</sup> Legal Aid NSW Consultation Sydney 1 July 1999.

<sup>971</sup> Legal Aid NSW Policy Bulletin No 5/99 Sydney May 1999. These issues are being considered by the Senate Legal and Constitutional Affairs References Committee on the Operation of Australia's Refugee and Humanitarian Program.

<sup>972</sup> Legal Aid and Family Services Commonwealth guidelines – Legal assistance in respect of matters arising under Commonwealth laws Guideline 3.

identified early by legal aid lawyers and the Family Court. The Commission's proposals in chapter 11 concerning case management in the Family Court should allow targeted, appropriate and speedy adjudication, if this is required to assist vulnerable parties or protect the children involved. The Commission considers such cases to be a priority for the provision of legal aid services and that this representation or assistance should continue to be provided until such priority cases are resolved.<sup>973</sup>

7.45 Such priority cases present as private family disputes, but they have many of the characteristics of, and are attendant with the same difficulties as, public law care and protection cases. In such cases there is a clear public interest in securing an appropriate case outcome. There are difficulties in adjudicating these cases where the parties and the children are without representation and there is limited reliable evidence concerning a vulnerable family situation.<sup>974</sup> These matters were addressed in the Commission's report *Seen and heard*.<sup>975</sup>

7.46 The Commission's proposals concerning family reports<sup>976</sup> should also assist in securing information in such cases. Legal, court and counselling services should cooperate to secure timely, appropriate and cost-effective identification, intervention and support in such cases. The evaluation of the Magellan project<sup>977</sup> of management of child abuse cases should assist in this regard.<sup>978</sup>

7.47 In most instances, it will be preferable for such cases to be conducted inhouse by legal aid staff to ensure continuing oversight, the provision of support by inhouse social workers and the expertise of lawyers experienced in family violence and child abuse cases. The inhouse environment, which allows difficult matters to be workshopped between lawyers of differing levels of experience and corresponding supervision and education, can be an important factor in effective representation of the more difficult cases. To assist in calculating the funding requirements for such priority cases, LACs should calculate the number of such cases, the time and services expended on them and use the data to anticipate future funding requirements.

**Proposal 7.3.** That the federal government consider developing guidelines for legal aid commissions to identify 'priority' family law cases involving

<sup>973</sup>.See *In the Marriage of Sajdak* (1992) 16 Fam L R 280; owing to the withdrawal of legal representation, a non-English speaking litigant failed to adduce relevant evidence or seek an adjournment because she did not understand the procedures. The Full Court set aside the trial decision and ordered a new trial.

<sup>974</sup>.See para 11.99, 11.104.

<sup>975</sup>.ALRC 84.

<sup>976</sup>.See para 11.80-11.108.

<sup>977</sup>.See para 11.124.

<sup>978</sup>.Legal Aid NSW *Consultation* 6 July 1999.

vulnerable, unskilled parties, allegations of abuse and family violence and that

- solicitors in advice clinics and duty solicitors who advise and appear for clients in such matters follow up the clients' cases to ensure that legal representation is continuous
- these cases be allocated funding to provide representation of clients and children by inhouse legal aid lawyers wherever possible
- legal aid commissions in conjunction with law societies agree upon a panel of solicitors to act in such priority cases where inhouse legal aid solicitors are unable to act.

### *Targeted services in family law*

7.48 The cases involving vulnerable, unskilled parties mentioned in proposal 7.3 above should constitute the core for priority family law public assistance. In other family cases within means and merits tests, targeted assistance can take the form of information about dispute resolution options; assessment of settlement proposals and of the merits of the case; preparation of information or bargaining positions for negotiations or conciliation;<sup>979</sup> analysis of available income and help to develop realistic economic plans; or referral to necessary ancillary professionals such as therapists, appraisers, or vocational counsellors.<sup>980</sup> Targeted assistance in family matters may also extend to representation on a 'duty only' or otherwise limited basis.

7.49 The simplification of procedures in the Family Court was designed to allow unrepresented parties to initiate proceedings. For those cases in which the legal and factual issues are straightforward, simplified procedures assist the parties to run their cases without the need for representation. In such cases 'targeted' assistance at strategic points (for example, the drafting of consent orders) may be all that is required. One consequence, and a matter to consider and guard against, is that the demand upon advice clinics and duty solicitors may increase and some of these cases develop complications as they proceed, which may be beyond the capabilities of the client or the resources of the advice clinic.

7.50 ***Conferences and mediation.*** Unbundling and targeting family law legal services focusses attention on the provision of ADR. LACs around Australia conduct settlement conferences and mediation in family law matters with a relatively high degree of success.<sup>981</sup> As stated, the aim of such processes should be to secure appropriate, effective settlements, not simply high settlement rates. Legal

<sup>979</sup>.eg Springvale Legal Service has recommended the use of legal aid funding to assist litigants to prepare for litigation: Springvale Legal Service *Hitting the ceiling* Springvale Legal Service Victoria August 1998, 21.

<sup>980</sup>.F Mosten 'Unbundling of legal services and the family lawyer' (1994) (28) *Family Law Quarterly* 421, 429.

<sup>981</sup>.eg Legal Aid NSW reported full resolution of disputes from 51% of conferences and 48% of mediations in: *Legal Aid NSW Annual Report 1998*, 25.

Aid Queensland has drawn criticism of its conferencing program in this regard.<sup>982</sup> In Queensland, most legal aid applicants are referred to the conferencing program. The parties, legal representatives (if there are any) and a chairperson meet in an attempt to resolve the dispute. A conference may occur at any point in family law proceedings but a conference is a prerequisite to receiving assistance to commence proceedings in the Family Court. Matters not resolved are the subject of a report by the chairperson to Legal Aid to determine whether there should be further funding of either or both parties based on the merits of the case. In 1997–98, 2484 conferences were held, 2 025 of which were fully or partially settled.<sup>983</sup>

7.51 Research suggests that there is an optimal settlement rate for family law matters. If a high percentage are settled quickly, this can indicate that the process is coercive and that some of the settlement agreements made may not be appropriate or durable.<sup>984</sup> Exclusionary criteria should be applied before referring clients to conferencing<sup>985</sup> so as to exempt family violence and abuse cases. In Queensland, guidelines exclude from conferencing cases involving family violence or an imbalance of negotiating ability,<sup>986</sup> but it is suggested that these criteria are not applied carefully enough.<sup>987</sup>

7.52 The Queensland program highlights some of the risks in ‘unbundling’ legal assistance. The discrete services offered should not be presented as a once only entitlement to assistance. In their comments to the Commission, legal aid and private practitioners supported the concept of legal aid provision for negotiation and dispute resolution services. The remaining issue concerns how this is provided. The consensus was that such services should not be structured for screening or determining entitlement to full legal aid. Further, in family law matters it is essential that the nature and extent of the limited grant be kept confidential so that the other party does not subvert the arrangement. They can (and some do) employ tactics to exhaust the grant and continue ‘battle’ with the now unrepresented party.<sup>988</sup>

### *Negotiation in family law*

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<sup>982</sup>.eg WLS Inc Brisbane *Submission 218*.

<sup>983</sup>.Legal Aid Qld *Submission 248*.

<sup>984</sup>J Kelly ‘A decade of divorce mediation research: some answers and questions’ (1996) 34(3) *Family and conciliation courts review* 373, 375. The high proportion of ‘repeat’ cases in the Commission’s sample of Family Court cases confirms the need to secure lasting settlements. See para 11.23.

<sup>985</sup>.For the impact upon access to justice for women of inadequate exclusionary criteria in Queensland legal aid conferencing see: N Seaman *Fair Shares? Barriers to equitable property settlements for women* Women’s Legal Services Network April 1999.

<sup>986</sup>.Legal Aid Qld *Submission 248*.

<sup>987</sup>.N Seaman *Fair shares? Barriers to equitable property settlements for women* Womens Legal Services Network April 1999; Legal Aid NSW *Consultation 6 July 1999*; WLS Inc Brisbane *Submission 218*.

<sup>988</sup>J Dewar et al *The impact of changes in legal aid on criminal and family law practice in Queensland* Faculty of Law Griffith University 1998, 85; J Disney *Consultation* Sydney 23 July 1999.

[T]he real distinction in family law disputing lies not in litigation versus PDR,<sup>989</sup> but in obtaining legal representation (and arriving at a settlement via solicitor negotiations) versus directly accessing community-based or private dispute resolution services (and arriving at a settlement with the assistance of a neutral third party).<sup>990</sup>

7.53 JRC research indicates that where parties have representation they are more likely to attempt<sup>991</sup> and to be successful in negotiations to resolve the matter. The converse is that unrepresented litigants are less likely to resolve their dispute through negotiation and more likely to have the matter dismissed or discontinued, or to withdraw or receive default judgment.<sup>992</sup> Although parties in the Commission's case sample continued with settlement attempts throughout proceedings, there was an early emphasis on securing settlement.<sup>993</sup> Consultations stressed that parties and practitioners could determine when matters were 'ripe' for settlement. This supports increasing the relative share of resources devoted to timely negotiation with the assistance of a lawyer.

7.54 Informally, such assistance is presently provided by duty solicitors in family matters, at both the Family Court and in local courts. For example, in the Family Court at Albury, solicitors sometimes act as informal mediators, assisting in any negotiations and advising parties on the range of options and likely outcomes if a matter proceeds to trial.<sup>994</sup> Legal Aid NSW also grant aid for conferencing and other early dispute resolution attempts in family law matters.<sup>995</sup>

**Proposal 7.4.** The guidelines for funding federal legal assistance in family matters should allow legal aid commissions to designate 'matter stages' which direct funding to assist clients in the preparation of preliminary stages of litigation, in negotiations aimed at the resolution of a dispute, or to prepare for particular PDR processes. Such staged funding arrangements should be evaluated to assess their effectiveness in securing appropriate, lasting resolution of disputes.

<sup>989</sup>.Primary dispute resolution (PDR). These are services offered by the Family Court or community based organisations to assist in the resolution of a dispute prior to a court hearing. For further discussion of PDR services see para 11.140–11.159.

<sup>990</sup>.R Hunter *Family law case profiles* Justice Research Centre Sydney June 1999, para 168.

<sup>991</sup>.In the JRC sample, in matters conducted by LAC staff, negotiations involving solicitors were attempted in 71% of cases. In cases run by private solicitors, negotiations between solicitors were held in 70% of cases. In CLC cases, solicitor negotiations occurred in 62% of cases in the sample. All other attempted resolution types occurred in less than 50% of cases: R Hunter *Family law case profiles* Justice Research Centre June 1999, para 68, 84 table 3.7, 252.

<sup>992</sup>.Justice Research Centre *Family Court research part one: The costs of litigation in the Family Court of Australia* ALRC Sydney June 1999, 30 table 43A (Justice Research Centre Family Court Research Part One).

<sup>993</sup>.T Matruggio *Part two: The costs of litigation in the Family Court of Australia* ALRC Sydney June 1999, 61 table 18 (T Matruggio, Family Court Empirical Report PartTwo)

<sup>994</sup>.Albury Law Society *Consultation 2* December 1998.

<sup>995</sup>.B Slade *Submission 278*.

### *Caps and stage of matter grants*

7.55 Most legal aid grants are subject to an upper limit on the amount that can be spent on legal services. Such 'caps' are generally imposed for legal aid funding of litigation services. 'Stage of matter' funding limits the amount of aid funding granted to a discrete 'stage' of the matter and a limit of funding to be expended during each stage. Once the stage has been completed LACs then determine whether funding will be granted for the next stage. Family law funding typically is set in 2-3 stages.

7.56 The current legal aid agreements between the federal government and the States specify a cap for legal aid funding in family law matters of \$10 000 for each party and \$15 000 for a child representative. There is a discretion (except in Victoria and South Australia) for the States to exceed this ceiling in exceptional circumstances.

7.57 It is arguable that a cap on the level of legal aid funding and the division of funding into stages encourages people to better manage their cases.<sup>996</sup> For example, one family law practitioner commented that capped funds force practitioners to work a lot harder on the resolution of issues and reduces 'intransigence by people who can no longer string out cases at will, or make a plethora of applications'.<sup>997</sup>

7.58 The benefits of stage of matter grants and caps are

- the funding organisation has more control over expenditure; the expenditure is not as demand driven
- funding is available for more people as costs in any single matter are contained
- legal practitioners are encouraged to be efficient
- better case management is encouraged due to concerns over costs.

7.59 However, concerns have also been raised about caps on legal aid funding. Major concerns are that the uniform imposition of caps and funding limits mean that opposing parties have full knowledge of the funding arrangements of the legally aid party. Consequently

- the opposing party is able to pursue meritless proceedings or protract certain stages of litigation with a view to exhausting their opponents' legal aid funding

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<sup>996</sup>Against this notion is the argument that the capped grant promotes inequity between parties in complex litigation: B Slade *Submission 278*.

<sup>997</sup>P Innes 'Does legal aid have a future in Victoria?' (1998) 72 (3) *Law Institute Journal* 10-11.

- the opposing party is able to pressure the legally aided party into an inappropriate settlement at the time that the cap has been reached.<sup>998</sup>

7.60 Other concerns about caps and stage of matter grants are

- litigants receive limited services from their lawyers<sup>999</sup> or alternatively the lawyers contribute many hours of unpaid work to the case in order to provide an adequate service<sup>1000</sup>
- caps may be unrealistic in relation to the work required or inappropriate for a complex, intractable case<sup>1001</sup>
- the application of caps presumes litigation will take a similar course and does not allow for complex matters unless there is reassessment by the legal aid provider
- there can be difficulties for clients with special needs, for example, where interpreter services are required<sup>1002</sup>
- factors beyond the control of the party subject to the cap, such as court delays and the court's uniform interlocutory and interim processes, can lead to the earlier exhaustion of allocated funds
- stage of matter grants can compound these problems at each stage if funding is withdrawn and the litigant is unrepresented at crucial times in the case, for example, part way through a hearing.<sup>1003</sup>

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<sup>998</sup>J.Dewar et al *The impact of changes in legal aid on criminal and family law practice in Queensland* Faculty of Law Griffith University 1998, 85; J Disney *Consultation* Sydney 23 July 1999.

<sup>999</sup>Private practitioners in Queensland and Victoria have stated that they are increasingly providing partial service in family law matters because of the restrictions of the legal aid funding caps: See Springvale Legal Service *Hitting the ceiling* Springvale Legal Service Victoria August 1998, 4-5 and J.Dewar et al *The impact of changes in legal aid on criminal and family law practice in Queensland* Faculty of Law Griffith University 1998, ch 4. Springvale Legal Service found that the lawyers surveyed assisted their clients to continue unrepresented in 41% of cases that had reached the legal aid cap, although none rated their clients as having better than a fair ability to represent themselves – 92% were rated as having such poor ability that representing themselves was 'not an option'.

<sup>1000</sup>Springvale Legal Service *Hitting the ceiling* Springvale Legal Service Victoria August 1998, 1; J.Dewar et al *The impact of changes in legal aid on criminal and family law practice in Queensland* Faculty of Law Griffith University 1998 iii.

<sup>1001</sup>See, eg, FCLC (Vic) Inc *Submission 207*.

<sup>1002</sup>The inclusion of interpreter costs in the calculation of professional costs for the purposes of legal aid means that cases requiring interpreter services reach the cap more quickly, and may disadvantage people from non-English speaking backgrounds.

<sup>1003</sup>The federal Attorney-General announced recently that a national review of family law stage of matter limits is being conducted, in consultation with all legal aid commissions, the Family Court and the Family Law Section of the Law Council of Australia, aimed at achieving at greater national consistency in the way in which these matters are handled across commissions. The Attorney-General commented that the changes resulting from this review, 'may allow the current notion of caps to be replaced': D Williams 'A modern legal aid framework – the Commonwealth government's strategy for reform of legal aid services in Australia' *Keynote address* Legal Aid Forum – Towards 2010 Canberra 21 April 1999, para 66.  
<<http://law.gov.au/ministers/attorney-general/articles/Legalaidforum.html>> (15 July 1999).

**Proposal 7.5.** That legal aid commissions develop new procedures for assessing and imposing funding limits upon legally aid cases. Such new procedures should ensure that

- uniform caps are abolished in favour of capping procedures which assign appropriate funding according to the individual circumstances of each case
- certain case types (such as priority cases discussed in paragraph-7.44–7.47) be identified on a national basis to assist legal aid commissions to assign appropriate funding limits to cases
- funding arrangements for legally aided clients remain strictly confidential.

## Service delivery

### *Legal aid solicitors and private practitioners*

As payments for legal aid work decline in real terms, family lawyers may choose to abandon legal aid work rather than compromise quality. In this (and other) respect(s), salaried legal aid services may have more to offer.<sup>1004</sup>

7.61 Relevant to the debate on ranking cases for funding, an additional question is how to deliver effective legal aid services. Past debate on delivering legal aid has focussed on whether it is preferable to provide representation through solicitors employed by LACs or private practitioners.<sup>1005</sup> Overseas studies have compared the cost and efficiency of legal aid staff and private practitioners. There is little Australian data on this subject.<sup>1006</sup> The majority of legally aided matters are assigned to private practitioners. In family law, for example, in NSW in 1997–98 2-528 matters were handled inhouse and 6 791 assigned to private practitioners; that is

<sup>1004</sup> R Hunter and A Genovese 'Qualitative aspects of quality: an Australian experiment' 12 *Justice Issues* (1999) 28. See also B Slade 'Not enough lawyers – legal aid civil law service delivery' (1998) 36 (11) *Law Society Journal* 58, 59.

<sup>1005</sup> Ontario Legal Aid Review *Report of the Ontario Legal Aid Review: a blueprint for publicly funded legal services* Queen's Printer for Ontario 1998, ch 7  
<<http://www.attorneygeneral.jus.gov.on.ca/olar/ch7.htm>> (18 June 1999).

<sup>1006</sup> G Meredith *Legal aid: Cost comparison – Salaried and private lawyers* AGPS Canberra 1983, 57–8; National Legal Aid Advisory Committee *Legal aid for the Australian community* AGPS Canberra 1990, 332. The JRC is presently conducting the second stage of a study into family law case profiles that will compare inhouse and private services: JRC *Consultation* Sydney 28 May 1999. Only the Legal Aid ACT records such data. In 1997–98 the average cost of a family law case conducted in-house was \$880 and on referral to a private practitioner was \$1 532. Costs per case were greater for all referred work than for cases conducted in-house. For general law: \$1 344 inhouse, \$2 123 private practitioners; criminal law: \$835 inhouse, \$1048 private practitioners: Legal Aid ACT *21st annual report 1997/98*, 11. For overseas comparisons, see T Goriely *Legal aid delivery systems: Which offer the best value for money in mass casework? A summary of international experience* Lord Chancellor's Dept Research series No 10/97 London December 1997, 1. Cost per case comparisons are problematic as they often involve comparisons of different work.



37% inhouse. In Victoria 34% of cases were handled inhouse and in Queensland 17%.<sup>1007</sup> Fee reductions have made it less viable to do legal aid work.<sup>1008</sup>

7.62 The JRC study showed inhouse family law cases resolved in a shorter time than for private practitioners.<sup>1009</sup> There were also differences in resolution time between private solicitors' cases which were funded by legal aid and those funded privately, as set out below. Again these differences can be explained by the different profiles of legally aided and self funded cases.<sup>1010</sup>

**Table 7.1 Resolution times by service provider<sup>1011</sup>**

Service provider	No resolved cases	Median resolution time	90th percentile resolution time
Legal aid in-house	301	4.1 months	14.0 months
Private solicitor: self funded	112	11.0 months	25.7 months
Private solicitor: legally aided	62	6.0 months	19.4 months
Private solicitor: both	10	15.0 months	36.6 months
Community legal centre	107	6.0 months	14.2 months

7.63 Inhouse lawyers tended to more closely monitor the means and merits of clients in reassessing their eligibility for legal aid, which leads to aid being withdrawn in some cases.<sup>1012</sup> The second stage of the JRC study should provide further data on this issue.

7.64 While comparisons of the quality of service offered by inhouse and private practitioners are important, such comparisons are made difficult by varying case

<sup>1007</sup>Information obtained from annual reports of the respective States and Territories. Figures for Tasmania supplied by National Legal Aid. In family law, Legal Aid NSW has a more extensive inhouse practice than the LACs in Victoria and SA. Legal Aid Qld has a limited inhouse family law practice, other than in the area of child representation and group-based child support forums. See R Hunter *Family law case profiles* Justice Research Centre Sydney June 1999, para 24.

<sup>1008</sup>R Hunter and A Genovese 'Qualitative aspects of quality: an Australian experiment' (July 1999) 12-*Justice Issues* 5, 5, 26. The federal Attorney-General announced recently that the government is to consult with LACs to attempt to ensure that private practitioners are reasonable remunerated for their services, that funding paid at each stage is more strictly controlled to ensure that work is performed competitively and cost effectively and that there is national consistency regarding these issues: D Williams 'A modern legal aid framework – the Commonwealth government's strategy for reform of legal aid services in Australia' *Keynote address* Legal Aid Forum – Towards 2010 Canberra 21 April 1999, para 109.  
<<http://law.gov.au/ministers/attorney-general/articles/Legalaidforum.html>> (15 July 1999).

<sup>1009</sup>R Hunter *Family law case profiles* Justice Research Centre Sydney June 1999, para 426. An explanation of the time differences between LAC and private lawyers may be the additional transaction time for private lawyers in corresponding with and awaiting approval from the LAC and inhouse use of local courts for many family matters.

<sup>1010</sup>Resolution times were greater when property issues only were in dispute: *ibid*.

<sup>1011</sup>*id* 200 table 6.7.

<sup>1012</sup>Legal Aid NSW *Consultation* 28 May 1999.

type and load.<sup>1013</sup> In an evaluation of legal aid service delivery, commentators point to the value of working in a 'community of lawyers' inhouse.<sup>1014</sup> Mentoring and support assists in the development of a quality practice. The Commission's proposals, set out in this chapter, assume that inhouse servicing is most appropriate for particular types of family law matters, where LAC expertise in child abuse and family violence cases can be most effective and solicitors can have their own social work assistance provided. This is not to discredit the value of a mixed system of service provision<sup>1015</sup> particularly to provide services for those living outside metropolitan areas<sup>1016</sup> and in cases where conflict of interest prevents one of the parties from being represented by an employed legal aid solicitor.

### *Community legal centres*

7.65 CLCs provide legal advice, information, minor assistance and advocacy for a range of individuals and groups in the community, especially those who are on low incomes or otherwise disadvantaged in their access to justice. CLCs provide assistance relating to legal matters arising both under federal and State law.<sup>1017</sup> This assistance is provided by employed solicitors and volunteers, student lawyers and pro bono lawyers.<sup>1018</sup> CLC reliance on volunteer workers means they can provide services at a lower cost per case than that provided by LAC staff or private lawyers.

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<sup>1013</sup> Ontario Legal Aid Review *Report of the Ontario Legal Aid Review: a blueprint for publicly funded legal services* Queen's Printer for Ontario 1998 ch 7  
<<http://www.attorneygeneral.jus.gov.on.ca/olar/ch7.htm>> (18 June 1999). One recent survey shows 78% of legal aid clients were satisfied with the form of services provided and 82% were satisfied with the quality of services provided: R Lindsay 'Legal aid funding' (1997) 24(8) *Law Society of Western Australia Brief* 23, 23. The second stage report by the JRC will compare the services offered by inhouse and private practitioners in NSW, Victoria, Queensland and SA, with consideration for the type, cost, time, quality and quantity of services provided: R Hunter, JRC *Consultation* Sydney 28 May 1999.

<sup>1014</sup> R Hunter and A Genovese 'Qualitative aspects of quality: an Australian experiment' 12 *Justice Issues* (1999) 17.

<sup>1015</sup> T Goriely *Legal aid delivery systems: Which offer the best value for money in mass casework? A summary of international experience* Lord Chancellor's Department Research series No 10/97 London December 1997, 5. In 1990 the National Legal Aid Advisory Committee endorsed Australia's mixed system of legal aid service delivery, involving the private legal profession and salaried workers in LACs and CLCs: National Legal Aid Advisory Committee *Legal aid for the Australian community* 1990. A National Legal Aid report considered that Australia had arguably the best legal aid model available: a mixed model involving partnerships between federal and State governments, inhouse lawyers, private practitioners and CLCs: National Legal Aid *Meeting tomorrow's needs on yesterday's budget: the undercapacity of legal aid in Australia* 1996, 10.

<sup>1016</sup> J Dewar et al *The impact of changes in legal aid on criminal and family law practice in Queensland* Faculty of Law Griffith University 1998, 97, 99.

<sup>1017</sup> Generally, CLCs do only limited case work in family law matters: R Coates *Submission* 275. In NSW, Kingsford Legal Centre does 10% of its case work in family law: Kingsford Legal Centre *Annual Report* 97 35. Redfern Legal Centre open case files in 7% of cases, 12% of which are family law: Redfern Legal Centre *Annual Report 1997-1998*, 7. Many CLCs do little or no representation work, particularly in NSW and Queensland: R Hunter *Family Law Case Profiles* Justice Research Centre June 1999, para 207.

<sup>1018</sup> Attorney-General's Dept (Commonwealth) Community Legal Services website  
<[http://law.gov.au/aghome/commaff/lafs/legal\\_aid/dirclc.html#program](http://law.gov.au/aghome/commaff/lafs/legal_aid/dirclc.html#program)> (2 June 1999).

7.66 CLCs offer general legal assistance for the geographical area in which they are situated, and a number of them, such as the Immigration Advice and Rights Centre and the Welfare Rights Centre, provide specialist services.<sup>1019</sup>

7.67 The federal government has recently undertaken major reviews of CLCs in South Australia and Victoria. This review will extend to all States.<sup>1020</sup> It has resulted in the establishment of new CLCs in rural areas<sup>1021</sup> and may result in amalgamation of certain metropolitan CLCs.<sup>1022</sup>

### *Contracted services*

7.68 Contracting of legal aid services involves paying a practitioner or firm a lump sum to perform a certain amount of legal aid work (for example, a set number of matters). Contracts are usually allocated through a tendering process. The use of contracting in Australia and other jurisdictions has been evaluated and some of these conclusions are presented below. These schemes have involved criminal law work as well as civil.

7.69 In the United Kingdom a key change expounded in the Middleton Report was to use contracts in the delivery of legal aid, using the purchasing power of the Legal Aid Board to get better quality and price for legal services.<sup>1023</sup> England and Wales plan to replace the existing legal aid scheme with a new Community Legal Service (CLS),<sup>1024</sup> which procures legal services under contracts designed to target priority cases. This is said to enable the CLS to control its budget, ensure quality service to consumers (only those lawyers who meet prescribed quality standards will be able to obtain contracts and their performance will be monitored), promote

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<sup>1019</sup>.Austlii CLCs website <<http://www.austlii.edu.au/au/other/clc/index.html>> (2 June 1999).

<sup>1020</sup>.The two reports are: *Community legal centres in South Australia: a fabric for the future* May 1998: referred to in D Williams 'Improving access to community legal centres in South Australia' *News release* November 1998, and *Review of the Victorian Community legal centre funding program* July 1998 <<http://home.vicnet.net.au/~viclegal/review/terml.htm>> (24 February 1999).

<sup>1021</sup>.Most recently, the federal Attorney-General has announced that a new CLC will be set up in Mount Isa to be managed and run by the Queensland Legal Aid Commission, with outreach through video links to surrounding areas: D Williams 'Community legal services boosted in Queensland' *News release* 22 April 1999 <<http://law.gov.au/aghome/agnews/1999newsag/555%5F99.htm>> (18 May 1999).

<sup>1022</sup>.The drive towards amalgamation of CLCs with each other and with LACs has been criticised by these organisations: eg B Slade 'Community legal centres and legal aid commission offices: relationships and roles' *Paper* November 1995, 2.

<sup>1023</sup>.*Report to the Lord Chancellor by Sir Peter Middleton* Lord Chancellor's Department London September 1997, para 3.17.

<sup>1024</sup>.Lord High Chancellor *Modernising justice – the government's plans for reforming legal services and the courts* White Paper presented to parliament by the Lord High Chancellor December 1998, para 3.1.

better value for money by providing the basis for competition and fix prices to encourage greater efficiency.<sup>1025</sup>

7.70 Contracting of mass legal aid casework is more common in the United States than in other countries.<sup>1026</sup> Studies there have been critical of their schemes.<sup>1027</sup> Criticisms include contracted lawyers spending too little time with their clients, rushing through cases and, in criminal matters, encouraging clients to plead guilty. It has been suggested that problems lie not so much in the principle of contracting, but with poor monitoring and implementation. Findings as to quality have been overwhelmingly negative. Tendering has been price driven, with no criteria as to the quality of the service provided under the contract.<sup>1028</sup>

7.71 In Australia, similar concerns have been expressed about such contracts. Problems are said to arise if a case becomes protracted or more complicated. Lawyers may lose their incentive to devote resources to the matter after it ceases to be cost effective.<sup>1029</sup> Practitioners are said to be inclined to take on simple, cost effective cases rather than more difficult, complex ones.<sup>1030</sup> This problem has been identified in relation contracting under the IAAAS<sup>1031</sup>

There is no apparent method of quality control of the work done by tenderers who are granted contracts, and no system of feedback for the contractors. It is submitted that when deciding which agent, firm or organisation is to get an IAAAS contract, the quality of the work done should play some role rather than just the cost. It is submitted that the aim should be to provide *quality* advice and representation rather than to merely pay lip service to the provision of such service.<sup>1032</sup>

7.72 Competitive tendering in a small market such as Australia is said to favour established providers, particularly if there is not an effective system of review.<sup>1033</sup>

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<sup>1025</sup> *id* para 3.19. It should be noted that legal aid in the UK exists in a different historical and social climate to the Australian context. As there is no inhouse legal aid service in the UK and at the same no capping, legal aid has historically been demand-driven with costs increasing accordingly. Changes in the system in the UK respond to this kind of cost increase and reflect a different situation to that which occurs in Australia: R Hunter *Consultation* 6 July 1999.

<sup>1026</sup> Contracting is concentrated in certain areas according to the 'legal aid plan' in that area, but contracting does not occur in all areas.

<sup>1027</sup> T Goriely *Legal aid delivery systems: Which offer the best value for money in mass casework? A summary of international experience* Lord Chancellor's Dept Research series No 10/97 London December 1997, 7- discusses the studies which have been done and their conclusions.

<sup>1028</sup> R Hunter *Consultation* 6 July 1999.

<sup>1029</sup> S Correy *Transcript* Radio National Background briefing — legal aid 2 March 1997 <<http://www.abc.net.au/rn/talks/bbing/stories/s10604.htm>> (14 January 1999).

<sup>1030</sup> Immigration Advice and Rights Centre *Consultation* 22 July 1999.

<sup>1031</sup> See para 7.40.

<sup>1032</sup> National Legal Aid *Submission made to the Senate Legal and Constitutional Affairs References Committee on the Operation of Australia's Refugee and Humanitarian Program DRAFT* Sydney 25 June 1999, 11.

<sup>1033</sup> S Correy *Transcript* Radio National Background briefing — legal aid 2 March 1997 <<http://www.abc.net.au/rn/talks/bbing/stories/s10604.htm>> (14 January 1999).

No Australian pilot scheme for contracting of legal services has produced cost savings. Accordingly, contracting may be justifiable more as a means of quality control rather than to reduce costs.<sup>1034</sup>

7.73 As an alternative to contracting, Legal Aid Queensland has established a preferred supplier scheme in February 1998, serviced by electronic lodgement of applications, notification of decisions and payment of fees. 397 legal firms were selected for preferred supplier status. According to Legal Aid Queensland, the tendering of duty lawyer services has provided substantial savings without affecting the quality of the services provided to clients.<sup>1035</sup> There have also been concerns that limited funding and reduced practitioner availability have qualified the effectiveness of the scheme.<sup>1036</sup>

### *Court network schemes*

7.74 Many courts have services which offer assistance to unrepresented litigants, such as court orientation; court processes and procedures; and referral to advice services and other resources such as emergency accommodation. The services are provided to all courts in Victoria, including the Family Court, by the Court Network.<sup>1037</sup> This service is funded by the State government, and is largely staffed by trained volunteers, from a range of backgrounds, such as students of psychology, law and social work and retired people. They are trained for specific jurisdictions. Two volunteers are on duty at all times while the court is operating. The Court Network is able to assist either or both parties.<sup>1038</sup> Other States do not have a such comprehensive organisation of this nature, but some courts have similar services.<sup>1039</sup>

7.75 Similar schemes also operate in many courts in the United States.<sup>1040</sup> Certain United States courts have initiated sophisticated schemes to assist unrepresented litigants, including the 'Quickcourt' self-service centres, which provide on-site access to court documents, procedural advice, assistance with forms, referral information and pro bono assistance from lawyers.<sup>1041</sup>

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<sup>1034</sup>.R Hunter *Consultation* 6 July 1999.

<sup>1035</sup>.Legal Aid Queensland *Annual report 1997/98*, 17.

<sup>1036</sup>.Legal Aid NSW *Consultation* 28 May 1999; Dewar et al *The impact of changes in legal aid on criminal and family law practice in Queensland* Faculty of Law Griffith University 1998, 77-78.

<sup>1037</sup>.Court Network *Annual Report 1997-98*.

<sup>1038</sup>.H Chapman *Consultation* 28 October 1998.

<sup>1039</sup>.Note, however, that there a number of women's court support schemes. See Australian Law reform Commission Report No 69 *Equality before the law: justice for women part I* Sydney 1994 (ALRC69).

<sup>1040</sup>.See J Goldschmidt et al *Meeting the challenge of pro se litigation – a report and guidebook for judges and court managers* American Judicature Society Chicago, 72-102.

<sup>1041</sup>.This originated in Arizona, and has been taken up in other US States. See D Venables 'Quickcourt of Arizona – just a gimmick or a view of the future?' (1995) 5 (6) *Computers and Law* 10. See also ALRC IP 23 *Technology – what it means for federal dispute resolution* ALRC Sydney 1998, para 6.9-6.19 for a discussion of kiosks in use in Australia and overseas.

7.76 In the United Kingdom, Citizens' Advice Bureaux give advice on many legal and other issues, and consideration is being given to locating advice centres run by these services within courts. In his final report, Lord Woolf recommended that

- information technology kiosks be piloted in courts
- permanent advice centres should be set up in larger courts
- a duty advice scheme for general legal assistance be implemented in high workload courts.<sup>1042</sup>

7.77 Given the level of confusion and distress which certain unrepresented litigants experience, such schemes could serve a useful function. At present, court and tribunal registry staff provide some such assistance but not legal advice relevant to the matter at hand. In survey forms completed by unrepresented litigants in the Federal and Family Courts and the AAT, such persons consistently noted receiving assistance with forms and information on proceedings from court and tribunal staff.<sup>1043</sup> The Court Network service has a broader function. It is proactive; workers from the service might approach parties in waiting areas who appear 'lost'; provide company or emotional support to those in distress or who are worried about their safety; provide information on court processes and referrals to legal or community assistance agencies. In extreme circumstances, they have assisted with the handover of children for contact.<sup>1044</sup>

7.78 Such a service might also be of value in the AAT, although some aspects of it are already provided by the AAT unrepresented litigants service.<sup>1045</sup> The need for such a service is not as significant in the Federal Court, where the number of unrepresented litigants is small and a pro bono scheme has been arranged for such litigants. The Commission thoroughly supports the provision of the type of assistance of a Court Network scheme in all Family Court registries. It could be most effectively utilised in conjunction with the court's information desk and duty lawyer schemes.

**Proposal 7.6.** That the federal government consider establishing Court Network schemes in all Family Court registries. The federal government should consider franchising or tendering contracts for appropriate organisations to set up permanent Court Network centres at Family Court premises. The schemes should be integrated with information desk and the legal aid commission duty lawyer schemes at each registry.

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<sup>1042</sup> Lord Woolf *Access to justice: Final report to the Lord Chancellor on the civil justice system in England and Wales* HMSO London 1996 recommendations 283, 288, 290.

<sup>1043</sup> See T Matruglio, Family Court Empirical Report Part Two; ALRC *Part two: Empirical information about the Administrative Appeal Tribunal* ALRC Sydney June 1999 (ALRC, AAT Empirical Report PartTwo).

<sup>1044</sup> H Chapman *Court Network Consultation* 28 October 1998.

<sup>1045</sup> See ch 12.

## Referral

7.79 Although there is a degree of coordination at a broad policy and administrative level, there is little coordination, sharing of case and practice information or referral cooperation, occurring between LACs, CLCs, and ATSILS.<sup>1046</sup> The lack of coordination can produce inefficiencies. Persons requiring legal assistance may often be referred from one CLC or legal aid office to another<sup>1047</sup> without receiving substantial assistance.<sup>1048</sup> Appropriate referral is important. Community legal service providers should ensure that adequate advice is provided by the first provider who assists a person. Otherwise the first provider should verify referrals in relation to accuracy, availability and appropriateness.<sup>1049</sup>

7.80 Australian referral issues are mirrored in overseas experiences. In May 1998 the Ontario Legal Aid Review found limited coordination a fundamental problem between legal aid and ancillary community legal service providers.<sup>1050</sup> The Review emphasised early assessment of each case to determine the type and level of legal assistance needed

The system should provide early, sophisticated assessment of each case and the services it requires. The system must encourage early legal intervention, emphasizing advice, mediation, settlement and resolution where appropriate.

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<sup>1046</sup>As to coordination of legal aid, see para 7.15. As to CLCs, most States have secretariats or similar overarching bodies, and there is a National Association of CLCs. In addition, the federal government administers its Commonwealth Community Legal Services (CLS) program through the Legal Aid Branch of the Family Law and Legal Assistance Division of the Attorney-General's Dept. The branch is responsible for the development of consistent national policy and the coordination of program improvement initiatives across the community legal services sector:  
<[http://law.gov.au/aghome/commaff/lafs/legal\\_aid/dirclc.html#program](http://law.gov.au/aghome/commaff/lafs/legal_aid/dirclc.html#program)> (27 July 1999).

<sup>1047</sup>There are over 200 such points of referral for legal or legally-related assistance in NSW, under the headings of: Aboriginal, accidents compensation, adoption, children's legal services, communications, complaints against professionals, consumer, credit and debt, crime, disability and guardianship, discrimination, dispute resolution, domestic violence, drugs, employment, family, government and privacy, health, housing, immigration and refugees, insurance, superannuation, interpreters, legal information access, mental health, motor vehicle and traffic, neighbours, sex offences, small business, tenancy, welfare, wills and funeral. In addition to the general State and federal courts, there is a range of 32 specialist courts and tribunals which may or may not be the appropriate venue for a certain action: Legal Aid NSW *Operational support telephone list* September 1998.

<sup>1048</sup>Legal aid group *Consultation* Sydney 28 May 1999.

<sup>1049</sup>The federal Attorney-General announced recently that the government is conducting a 'Service Standards and Performance Indicators Project' of CLCs, together with a project to formulate and implement a new data collection and reporting system for the Community Legal Services Program which will 'assist planning and evaluation of service delivery': D Williams 'A modern legal aid framework — the Commonwealth government's strategy for reform of legal aid services in Australia' *Keynote address* Legal Aid Forum — Towards 2010 Canberra 21 April 1999, para85, 89.  
<<http://law.gov.au/ministers/attorney-general/articles/Legalaidforum.html>> (15 July 1999).

<sup>1050</sup>Ontario Legal Aid Review *Report of the Ontario Legal Aid Review: a blueprint for publicly funded legal services* May 1999, 3 <<http://www.attorneygeneral.jus.gov.on.ca/olar/ch10.htm>> (16 June 1999).

The system should provide different degrees of legal assistance, based on the prioritization of legal needs, client circumstances, and potential individual and systemic impact.

The system should have the flexibility to address simple matters efficiently and quickly, and enable emergency or complex cases to be referred to more extensive legal assistance and representation.

Given the multifaceted nature of many family law needs, the legal aid system should be able to coordinate its services with non-legal community service providers.<sup>1051</sup>

7.81 In the United Kingdom the Lord Chancellor has described similar problems and solutions.

Even where help is available, it is too difficult for people in need to find out about local services, and to identify which source of help would be best for their problem. As a result, many who could be helped simply struggle on alone, and may end up before a court as unprepared and unassisted defendants, or claimants with an unwinnable case.

The lack of effective referral networks of providers means that even when someone has taken the difficult first step, and sought help, he or she may be sent away. The lack of proper targeting also fails to make proper use of the resources available in the advice sector. For example, a fully trained lawyer who spends his or her time providing straightforward money advice, or checking welfare benefit entitlement, is not only wasting their own expertise, but is also denying that expertise to those customers whose problem really needs it.<sup>1052</sup>

7.82 Unrepresented and otherwise disadvantaged persons are often faced not only with a lack of legal knowledge but also English language and computer literacy difficulties. It is important that access to information be developed not only in electronic form such as internet sites, but also in easily accessible and readily understood printed versions. The coordination of advice, information and assistance is critical for effective legal aid delivery. In the same way as courts and tribunals are working to stream cases to appropriate dispute resolution and case management processes, legal advice agencies need to identify cases, analyse the type of assistance needed and provide or ensure effective referral for such appropriate and necessary assistance. Information on referral agencies and practice is essential. Training in case and dispute resolution analysis would also assist. Technology can assist to open channels of communication between agencies. The Commission sees this as the critical task in legal assistance servicing.

**Proposal 7.7.** A comprehensive referral directory for legal and non-legal advice and services in each State should be created and made available to

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<sup>1051</sup> .ibid.

<sup>1052</sup> Lord Chancellor's Dept *The Community Legal Service – A consultation paper: Modernising justice'* ch 2 <[www.open.gov.uk/lcd/comlegser/repindex1.htm](http://www.open.gov.uk/lcd/comlegser/repindex1.htm)> (4 June 1999).



advisers and the public. The directory should be made available on the internet and in printed forms. The directory should

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

Such directory could be partially funded by law societies and private legal and ADR practitioners who are listed. It should be comprehensively advertised in courts, tribunals, legal aid commissions, community legal centres and public libraries. The directory should be monitored and updated to include and delete services where appropriate.

The directory could appropriately be prepared or facilitated by the Law Foundation and State law societies.

**Proposal 7.8.** That State and federal Attorney-General's Departments in consultation with National Legal Aid, legal aid commissions, national and State community legal centre secretariats and law societies develop a process for the coordination and exchange of information between legal (and appropriate non-legal) service providers.

- One purpose of the coordination should be to provide one-stop advice where the advice provider is accountable for providing an adequate response to a given enquiry. Such advice provider should be able to contact other organisations, panels of specialist legal aid and private practitioners and refer back to the client with the correct advice.
- The advice should also allow diverse legal service providers to apportion work according to resources and expertise. For example, certain legal centres may undertake more or less advice or case work or advice or case work in specialist areas.

### *Conflict of interest*

7.83 A common difficulty faced by clients who seek advice or representation from legal aid is that the other party in the dispute is, or has been, advised or represented by an inhouse legal aid solicitor in the past. In such circumstances, the client must approach a private lawyer, and apply for legal aid funds for that lawyer. JRC

research has found that, for family law matters, legal aid is more likely to be granted for inhouse representation than for referral to a private lawyer.<sup>1053</sup>

7.84 The incidence of conflict of interest is high in LACs because of the relatively large number of employed solicitors within the 'firm' and the diversity of practice areas. Conflict of interest can prevent a later arriving party obtaining 'one-off' advice, advice from a different inhouse legal aid solicitor, or assistance in an area of law unrelated to that of the dispute.<sup>1054</sup>

7.85 The *Legal Aid Commission Act 1979* (NSW) does not on its face prevent both parties being advised or given representation in such situations, other than by the same solicitor

... a solicitor shall not act for more than one party to the same proceedings if to do so would create a conflict of interest.<sup>1055</sup>

7.86 The common law rules on conflict of interest assume that clients are entitled to expect from their lawyer unfettered service of their interest.<sup>1056</sup> The central issue is whether there is 'a real and sensible possibility of a conflict arising between the opposing interests',<sup>1057</sup> or of 'the misuse of confidential information'.<sup>1058</sup> Professional rules require that even where there is no prejudice to the clients involved, they must be fully informed of the nature and implications of such conflict and assent to the lawyer's involvement.<sup>1059</sup> In many such instances, 'Chinese walls' between the office or divisions of legal aid may be a sufficient safeguard against conflict.<sup>1060</sup> Such 'Chinese walls' already operate effectively in cases of conflict of interest between private and inhouse sections of LACs. LACs do not act for 'clients' referred to private solicitors undertaking legal aid, but they do keep files on such

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<sup>1053</sup>. In the sample analysed, 4.4% of inhouse cases were found ineligible for legal aid and 2.8% rejected for an extension of aid, against 11.5% and 12.6% for referred cases: R Hunter *Family law case profiles* JRC Sydney June 1999 table 6.8.

<sup>1054</sup>. At Legal Aid NSW there is no policy document which covers conflict (although memos have been circulated from time to time for support staff) and solicitors apply their judgment to the common law regarding conflict of interest. However, the computer system registers a conflict where the other party has been acted for or advised previously, and *prima facie* identifies this as a conflict: Legal Aid NSW *Consultation* 22 July 1999. A recent memo to family law legal assistants noted that previous presentation or advice constituted a conflict where that assistance was also in family law or child support, in relation to criminal matters involving family violence, or in any matter where legal aid have acted in house: Legal Aid NSW *Family law legal assistance workshop* Information booklet Sydney October 1998.

<sup>1055</sup>. s 37 (2). Generally, LAC legislation in other States does not deal with conflict of interest.

<sup>1056</sup>. Riley *New South Wales Solicitors manual* Butterworths Sydney 287.

<sup>1057</sup>. *Watson v Watson* (Unreported) Supreme Court of NSW No. 4347/96, 25 May 1998, 12 (Santow J).

<sup>1058</sup>. *Farrow Mortgage Services P/L (in Liq) v Mendall Properties P/L* [1995] 1 VR 1 (Hayn J); *Watson v Watson* (Unreported) Supreme Court of NSW No. 4347/96, 25 May 1998, 12 (Santow J); *Yunghanns and Ors v Elfic Ltd* (Unreported) Supreme Court of Victoria No. 5970/97, 3 July 1998, 7 (Gillard J).

<sup>1059</sup>. J Disney et al *Lawyers* LBC Sydney 1986, 788-792.

<sup>1060</sup>. Legal aid group *Consultation* Sydney 28 May 1999.

clients, which contain the client's application for aid and supporting documentation, which is confidential and sensitive.<sup>1061</sup> Conflict issues will arise more frequently in the integrated referral and advice system proposed by the Commission. Such issues need to be identified and clarified, and appropriate policies and administrative arrangements developed to guard against the problems which can arise if there is a conflict of interest to the client's detriment, or clients are denied assistance because of an apparent conflict.

**Proposal 7.9.** That legal aid commissions consult to clarify and develop a national policy regarding conflict of interest in legally aided matters so as to guard against and to minimise occurrence of such conflict, and specifically that

- legal aid commissions develop a national policy which clearly identifies those situations in which a conflict of interest occurs and which precludes the conflicted party from assistance or representation by an inhouse legal aid solicitor
- legal aid commissions develop administrative arrangements which minimise the occasion for conflict by effectively separating confidential information held by drop-in advice and casework administration, and where appropriate, administration between legal aid commission branch offices
- where an applicant for legal aid is referred to a private solicitor for reason of conflict of interest, such person's application for legal aid be processed as a priority to minimise the disadvantage caused by delay in obtaining legal representation.

**Proposal 7.10.** That the federal and State governments consider whether there is a need to clarify in legislation

- the requirements for constructing effective 'Chinese walls' between different legally aided agencies, different divisions within legal aid commissions, different legal aid commission branch offices and between discrete functions of legal aid commissions, such as advice, duty and casework.

## Legal assistance in administrative law cases

### *Immigration and refugee matters*

7.87 Prior to the recent limitation to grants of legal aid for immigration matters, inhouse legal aid lawyers provided 16 hours of initial legal assistance to clients at the primary stage of an application. A well prepared application directed to the primary and merits appeal process considerably assists decision making

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<sup>1061</sup>Legal Aid NSW Consultation 22 July 1999.

processes.<sup>1062</sup> Such applications are particularly important given the increasing emphasis to determination on the papers.<sup>1063</sup> In its submission to the Commission, the Refugee Review Tribunal acknowledged the nexus between legal representation and 'focussed' submissions.<sup>1064</sup> In a recent case in the Federal Court, Justice Wilcox stressed the importance of the availability of publicly funded independent legal advice early in the review process

In my view, the better course is to establish a system whereby people whose applications are refused have assured access to proper interpretation services and independent legal advice. If that were done, the number of applications for judicial review would substantially decrease. Those that proceeded would be better focussed and the grounds of review more helpfully stated. If applicants cannot afford legal advice, as is ordinarily the case, it ought to be provided out of public funds.<sup>1065</sup>

7.88 Assistance at the front end of the process is generally taken to be cost effective for case resolution although the numbers requiring early assistance can put a strain on advice services.<sup>1066</sup> Even so, an assessment of the merits of an application and advice as to relevant facts can save time and money for applicants and tribunals. Following merits review, a solicitor's letter to the Australian Government Solicitor (AGS) setting out any errors with determination has often secured consensual remit to the relevant tribunal for a new determination.<sup>1067</sup> Again, this represents considerable costs savings. Given the specialisation needed to give immigration assistance, inhouse LAC lawyers and lawyers from specialist legal centres such as Refugee Advice and Casework Service (Australia) Inc (RACS) and Immigration Advice Rights Centre (IARC)<sup>1068</sup> are best qualified to provide such advice and assistance.<sup>1069</sup>

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<sup>1062</sup>. 'It makes a dramatic difference to a person's prospects if they have their primary application prepared properly': Legal Aid NSW *Consultation* Sydney 1 July 1999. Properly prepared applications are more likely to result in a correct decision at first instance: IARC *Consultation* 22 July 1999.

<sup>1063</sup>. National Legal Aid *Submission made to the Senate Legal and Constitutional Affairs References Committee on the Operation of Australia's Refugee and Humanitarian Program DRAFT* Sydney 25 June 1999, 11.

<sup>1064</sup>. RRT *Submission* 274.

<sup>1065</sup>. *Mbuaby Paulo Muaby v Minister for Immigration & Multicultural Affairs* [1998] FCA 1093 at [2] (Wilcox-J).

<sup>1066</sup>. Legal Aid NSW *Consultation* Sydney 1 July 1999.

<sup>1067</sup>. *ibid*; IARC *Consultation* 22 July 1999.

<sup>1068</sup>. IARC provides assistance to approximately 4 000 people each year and a further 1 000 people attend education seminars. IARC also produces an 'Immigration kit' as a practical guide for immigration advisers: IARC *Submission to the Senate Legal and Constitutional Legislation Committee: Migration Legislation Amendment (Judicial Review) Bill 1998* Sydney January 1999.

<sup>1069</sup>. Legal Aid *Consultation* 1 July 1999. The Department of Immigration and Multicultural Affairs, and the Review Tribunals have commented on the high quality of non-profit organisations such as IARC and RACS: Joint Standing Committee on Migration *Protecting the vulnerable? The migration agents registration scheme* AGPS Canberra 1996, para 4.53.

**Proposal 7.11.** That Commonwealth legal aid guidelines in relation to immigration and refugee matters be altered, and sufficient federal government funding be made available, to fund

- preparing applications (in cases satisfying means and merits tests for spouse, child, character refusals and refugee matters) to the Department of Immigration and Multicultural Affairs, the Migration Review Tribunal and the Refugee Review Tribunal
- providing limited assistance such as drafting correspondence to the minister in respect of such matters.

### *Veterans' affairs cases*

7.89 Legal aid in veterans' matters is targeted to representation at a hearing, rather than to interlocutory stages of the reconsideration, primary review or AAT process. Targeting aid in this manner can discourage parties from seriously considering resolution of the matter until legal aid is available. The early dispute resolution events in veterans' matters can thus be rendered less effective and matters proceed unnecessarily to the AAT.<sup>1070</sup> Funding arrangements should be reconsidered to have regard to the entire review process and to assist in ways which could help to resolve the matter. For example, if the case turns on a dispute concerning a medical condition and the provision of a medical report could assist in this matter, the attention of legal aid, the Department of Veterans' Affairs, the Veterans' Review Board and the AAT should focus on the early provision of such report. The Commission's consultations indicated that frequently cases in welfare, veterans' and compensation matters are taken through lengthy review processes when the only issue is a medical one and that medical issue is able to be resolved by securing an independent medical report.<sup>1071</sup> The departments, tribunals and legal advice agencies should cooperate to develop appropriate and cost effective ways to obtain such reports in these cases whether by intervention of the departments, the tribunals or legal aid.<sup>1072</sup>

**Proposal 7.12.** That Commonwealth legal aid guidelines be altered to allow limited grants of aid in veterans' matters to clients who satisfy the merits test, to be available for the purposes of

- paying for necessary early disbursements, such as medical reports
- preparing or advising on applications for entitlement
- conducting initial negotiations and drafting correspondence to the Department of Veterans' Affairs in respect of refused applications.

### *Social security matters*

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<sup>1070</sup>.Legal Aid Consultation Sydney 28 May 1999.

<sup>1071</sup>.eg Legal Aid NSW Consultation Sydney 1 July 1999.

<sup>1072</sup>.See ch 12.

7.90 Social security matters, as with veterans' matters, can often be determined quickly and satisfactorily provided that an independent report on the applicant's medical condition is made available at an early stage in the process of the application. Doctors contracted by Centrelink to provide reports use basic standard form reports and do not address issues which are not raised by the client. LACs at present are not able to make targeted grants to obtain medical reports.<sup>1073</sup>

**Proposal 7.13.** That federal legal aid guidelines be altered to allow limited grants of aid in social security matters, to clients who satisfy the merits test, to be available for the purposes of

- paying for early necessary disbursements, such as medical reports;
- preparing applications for entitlement;
- conducting initial negotiations and drafting correspondence to Centrelink in respect of refused applications.

## Assistance by non-lawyers

7.91 Another mechanism for providing assistance on legal and related issues is to have non-lawyers assist clients in routine matters. The use of non-lawyers, some law students<sup>1074</sup> and paralegals for advice, legal research, simple representation or as a 'McKenzie friend' role, is common in the United States, Britain and Canada.<sup>1075</sup>

7.92 Persons not legally qualified often have specialist knowledge in discrete legal areas.<sup>1076</sup> Such specialists routinely assist in migration,<sup>1077</sup> housing and welfare,<sup>1078</sup> and veterans' matters.<sup>1079</sup> While representation by paralegals or lay advocates does not typically occur in family law matters, parties are sometimes assisted or supported by friends or family members, as 'McKenzie friends' or court network supporters.<sup>1080</sup>

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<sup>1073</sup>.Legal Aid NSW *Consultation* Sydney 1 July 1999.

<sup>1074</sup>.The use of students to provide legal assistance in discussed within the context of clinical legal education in para 3.11-3.29.

<sup>1075</sup>.Ontario Legal Aid Review *Report of the Ontario Legal Aid Review: a blueprint for publicly funded legal services* Queen's Printer for Ontario 1998  
<<http://www.attorneygeneral.jus.gov.on.ca/olar/olarcvr.htm>> (21 June 1999).

<sup>1076</sup>.Policy on the reservation of legal work to lawyers is changing. In December 1998 the Law Council of Australia issued its policy on the reservation of legal work, defining core areas of business which should be reserved for lawyers. These core areas of work included court appearances, advice regarding contentious matters and litigation, wills and probate and conveyancing. The Queensland Law Society was the only body opposed to the Law Council policy, saying that the claiming of a monopoly is counter productive to solicitors' image and profile.

<sup>1077</sup>.Legal Aid NSW *Consultation* Sydney 1 July 1999.

<sup>1078</sup>.Welfare Rights Centre Queensland <<http://www.dovenetq.net.au/community/wrc>> (8 July 1999).

<sup>1079</sup>.Queensland Returned and Services League *Pensions, advocacy and welfare*, 1  
<<http://www.qld.rsl.org.au/welfare/whatwedo.html>> (8 July 1999).

<sup>1080</sup>.Unlike private law firms, LACs do not generally use paralegals for tasks such as interlocutory court appearances or to take witness statements.

7.93 Often people seeking legal help also need assistance in relationship and parenting or drug and alcohol counselling, and/or assistance with housing or emergency refuge. Such assistance is available from non-legal specialists.<sup>1081</sup> The 'multi-disciplinary' one-stop service<sup>1082</sup> envisaged for legal aid requires a pragmatic approach to legal problem solving and an environment which adopts a 'non-lawyer ethos'.<sup>1083</sup>

7.94 One important group of specialists who assist in legal aid work is social workers, as 'a legal problem often goes hand in hand with a myriad of social problems'.<sup>1084</sup> Certain legal aid commissions<sup>1085</sup> have a social work section providing assistance with refuge accommodation, community housing, relationship and parenting counselling, and enrolment in drug and alcohol or mental health programs. Legal aid social workers often compile reports on the individual or family for the court or tribunal.

**Proposal 7.14.** That legal aid commissions, in consultation with law societies, work to expand the use of non-lawyers and law students by legal aid commissions, under supervision by fully qualified principals, in areas such as straightforward legal representation before tribunals and as paralegals in interlocutory work in the courts, as well as in social work and other non-legal areas.

## Research and data collection

7.95 There is little data on the extent of need for legal assistance in Australia.<sup>1086</sup> The need for such information has been acknowledged by the Chair of National

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<sup>1081</sup>Legal Aid NSW *Consultation* 13 July 1999.

<sup>1082</sup>Note that the American Bar Association recently released a report which recommends that multi-disciplinary practices (MDPs) be permitted in the United States: 'Warning on the impact of MDPs' *Australian Financial Review* 11 June 1999, 26.

<sup>1083</sup>J Disney *Consultation* Sydney 2 July 1999.

<sup>1084</sup>Legal Aid NSW *Consultation* 13 July 1999.

<sup>1085</sup>Legal Aid NSW has a team of three social workers: J Alexander, head of Social Work Legal Aid NSW *Consultation* 13 July 1999. Other than New South Wales, only Legal Aid Queensland has an inhouse social work department. The Legal Services Commission of South Australia has family and financial counsellors that are available to the general public. Legal Aid Western Australia has a domestic violence unit that specialises in providing legal services to women who are victims of family violence: Legal Aid NSW *Consultation* 13 July 1999; Legal Aid Qld *Consultation* 13 July 1999; Legal Aid WA *Consultation* 13 July 1999; Legal Aid SA *Consultation* 13 July 1999; Legal Aid Tasmania *Consultation* 13 July 1999; Legal Aid Victoria *Consultation* 13 July 1999; NT Legal Aid *Consultation* 13 July 1999; Legal Aid ACT *Consultation* 13 July 1999.

<sup>1086</sup>This was acknowledged by the Senate in its inquiry into legal aid and highlighted the need for a national study of unmet legal needs to assess the real impact of the reduction of legal aid funding: Senate Legal Aid Inquiry, para 2.20–2.33.

Legal Aid and the federal Attorney-General.<sup>1087</sup> The Senate Inquiry into Legal Aid was also critical of the lack of data available on legal aid.<sup>1088</sup> The Inquiry noted several deficiencies in the existing available information, including

- the lack of timeliness in the production of the Attorney-General's Department's Statistical Yearbook, and the apparent lack of relevance of some of that data<sup>1089</sup>
- the lack of adequate data upon which to make an informed judgment of the demand for legal aid services which is not being met; and
- the absence of data by which to measure the impact which the 1 July 1997 changes are having on the legal aid system.<sup>1090</sup>

7.96 The government has commissioned a 'Legal Assistance Needs Study' to investigate the need for legal aid, including formulating indicators of need, and the effectiveness of different models of legal aid service delivery.<sup>1091</sup> This study is expected to assist the government to determine priorities for delivery of legal assistance services and provide a basis for future funding.<sup>1092</sup> The first phase was to establish a methodology for the equal distribution of legal aid funds.<sup>1093</sup> The second phase will identify the need for legal aid as expressed in demand for services.<sup>1094</sup> While this is expected to provide valuable information, ongoing data collection is also required.<sup>1095</sup>

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<sup>1087</sup>.D Williams 'A modern legal aid framework – the Commonwealth government's strategy for reform of legal aid services in Australia' *Keynote address Legal Aid Forum – Towards 2010* Canberra 21 April 1999, para 86–88.  
<<http://law.gov.au/ministers/attorney-general/articles/Legalaidforum.html>> (15 July 1999). See also J Dewar et al *The impact of changes in legal aid on criminal and family law practice in Queensland* Faculty of Law Griffith University 1998, iii.

<sup>1088</sup>.Senate Legal Aid Inquiry, para 2.3.

<sup>1089</sup>.The statistical yearbooks are no longer expected to be produced: Attorney-General's Dept *Consultation* 28 May 1999.

<sup>1090</sup>.Senate Legal Aid Inquiry, para 2.4.

<sup>1091</sup>.D Williams & J Fahey 'Study to ensure legal aid assists the needy' *News release Attorney-General's Dept and Ministry for Finance and Administration* 11 May 1998  
<<http://www.dofa.gov.au/media/press/legalaid%5Fassist.html>> (10 February 1999).

<sup>1092</sup>.D Williams 'A modern legal aid framework – the Commonwealth government's strategy for reform of legal aid services in Australia' *Keynote address Legal Aid Forum – Towards 2010* Canberra 21 April 1999, para 40–44  
<<http://law.gov.au/ministers/attorney-general/articles/legalaidforum.html>> (27 July 1999).

<sup>1093</sup>.The first report was published in December 1996: Rush Social Research and John Walker Consulting Services *Legal assistance needs phase 1: Estimation of a basis-needs planning model* Attorney-General's Dept Canberra December 1996.

<sup>1094</sup>.D Williams 'A modern legal aid framework – the Commonwealth government's strategy for reform of legal aid services in Australia' *Keynote address Legal Aid Forum – Towards 2010* Canberra 21 April 1999, para 40–44  
<<http://law.gov.au/ministers/attorney-general/articles/legalaidforum.html>> (27 July 1999).

<sup>1095</sup>.A UK study considering the available information on legal aid delivery systems in Canada, Australia, the USA and the UK also found that there has been little empirical work in Australia on the preference between inhouse and private delivery of legal aid: T Goriely *Legal aid delivery systems Which offer the best value for money in mass casework? A summary of international experience* Lord Chancellor's Dept Research Series No 10/97 London December 1997, 35.



7.97 The JRC has been funded by the Australian Law Council Foundation to undertake a quantitative study of changes over a five year period regarding litigants in person in the Family Court. The study is analysing changes in case type, litigant type, stages of representation and outcomes and whether these can be associated with changes to the *Family Law Act 1975* (Commonwealth), legal aid funding and simplification of procedures in the Family Court.<sup>1096</sup> The Commission supports such evaluation and ongoing data collection.

7.98 Collecting and analysing data regarding unrepresented litigants requires careful definition of the data which is sought. A party may be unrepresented for the entirety of proceedings, may be fully represented, or represented for part of the proceedings. The Commission's research into the Family Court noted whether parties were unrepresented at commencement and/or finalisation, and categorised parties as receiving no, full, or partial representation.<sup>1097</sup> These categorisations are important. As many parties are conscious of the need to conserve funds, they may utilise lawyers for some but not all case events. The figures on unrepresented parties may be quite misleading if the data does not distinguish those who had no legal assistance and those who had partial legal assistance.

**Proposal 7.15.** Legal aid commissions should report annually on

- data on applications and refusals for legal aid (specifying case and litigant type)
- duration and outcomes in legal aid cases.

**Proposal 7.16.** Federal courts and tribunals should report annually as to the number of unrepresented litigants before them. In gathering such data, courts and tribunals should consult to develop a standard definition of 'unrepresented litigant' and information by reference to such definition.

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<sup>1096</sup>.R Hunter *Consultation* 14 July 1999.

<sup>1097</sup>.T Matruglio & G McAllister 'Part one: Empirical information about the Family Court of Australia' ALRC Sydney February 1999, 68, 69.

## 8. The federal government as a litigant

### Introduction

8.1 The government has a key role in the federal civil justice system – it drafts the laws which can impact on the volume, complexity and costs of litigation. It funds the court and review systems, sets court fees, and finances alternative dispute resolution (ADR) programs and legal aid, directly affecting the degree of access to the law by litigants.<sup>1098</sup>

8.2 This chapter discusses the role and impact of government in managing its legal disputes and as a party to legal proceedings. It examines federal government legal service delivery and the model litigant policy.

### Profile of federal government involvement as a litigant

8.3 Government, as with private individuals, operates within a highly regulated legal environment. Federal government dispute resolution has changed over the last 20 years. The introduction of the ‘administrative law package’ has seen a steady legalisation and judicialisation of administrative decision making; government legal services have been ‘untied,’ with government departments and agencies making increased use of private legal firms for advice, assistance and representation; the corporatisation and privatisation of a number of government functions and services has led to outsourcing of various services and, in some cases, a greater complexity of contractual arrangements; and many service functions have been decentralised, requiring agencies to develop individual relationships with service providers.

8.4 Federal government legal disputes have the potential to involve the federal government as a party to litigation in State or federal courts, tribunal proceedings or to prompt investigation by the Commonwealth Ombudsman. Some indication of the extent of federal government involvement is indicated by the following. In an analysis of 100 of the most recent Federal Court decisions recorded on AustLII,<sup>1099</sup> the federal government was a party in 54 of the 99 civil matters. Federal departments or agencies with the highest participation rate were the Minister for Immigration and Multicultural Affairs (25), the Commissioner or Deputy Commissioner of Taxation (7), the Australian Competition and Consumer Commission (7), the Repatriation Commission (2), the Australian Industrial Relations Commission (2), and the National Native Title Tribunal (2).<sup>1100</sup>

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<sup>1098</sup> See ch 4 for a full discussion of the public costs of civil litigation.

<sup>1099</sup> Decisions dated from 25 June 1999 to 22 July 1999:  
<[http://www.austlii.edu.au/au/cases/commonwealth/federal\\_ct/recent-cases.html](http://www.austlii.edu.au/au/cases/commonwealth/federal_ct/recent-cases.html)> (26 July 1999).

<sup>1100</sup> Others included the Department of Social Security, the Reserve Bank of Australia, the Merit Protection Commissioner, the Child Support Agency, the Department of Defence, the National

8.5 These figures were consistent with the empirical information collected in the Federal Court by the Commission.<sup>1101</sup> Government agencies comprised 47% of respondents (317 of 672), and 7% of applicants (49 of 695) in the case sample.<sup>1102</sup> In over one third of all cases (249 of 678, or 37%) an individual filed against a government agency. Migration cases accounted for 148 of these or 59%.

8.6 In the Commission's data, cases in which the government was a party were more likely to go to hearing in the Federal Court. Migration, cases under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR) and taxation cases made up 39% of the total cases, and 48% of the cases which went to hearing in the sample.<sup>1103</sup> As cases on review, such an outcome is not surprising. The departments or agencies with the highest participation rates in the Federal Court included the Department of Immigration and Multicultural Affairs (DIMA) (161 as respondent, 7- as applicant), Australian Taxation Office (ATO) (51 as respondent, 6 as applicant), the Australian Securities Commission (now ASIC), Department of Social Security, Department of Primary Industries and Energy, and the Australian Customs Service.

8.7 There also are a significant number and range of administrative matters involving government agencies and departments. Some measure of this is provided by the following figures for matters lodged or finalised in federal merits review tribunals in 1997-98.

- Administrative Appeals Tribunal (AAT) – 7 330 applications lodged
- Veterans' Review Board (VRB) – 11 312 applications lodged
- Social Security Appeals Tribunal (SSAT) – 11 628 applications lodged
- Small Claims Taxation Tribunal – 322 applications lodged
- Immigration Review Tribunal (IRT) – 4 172 applications lodged
- Refugee Review Tribunal (RRT) – 7 398 applications lodged.

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Competition Council, the Department of Employment, Education, Training and Youth Affairs, and the Commonwealth. Similar results were found in a study of the 100 most recent cases posted on the AustLII site as at 8 March 1999, with 48 of the 98 civil cases involving the federal government.

<sup>1101</sup> T Matruglio & G McAllister *Part one: Empirical information about the Federal Court of Australia* ALRC Sydney March 1999, 12-14 (T Matruglio & G McAllister, Federal Court Empirical Report Part One).

<sup>1102</sup> On the assumption that the government was a litigant (whether applicant or respondent) in the migration, ADJR and taxation cases with the balance of government litigants in unknown proportions in the remaining categories of case (trade practices, intellectual property, corporations and other), it can be shown that 55% of cases involved a government party: Migration – 23%, ADJR – 9%, Taxation – 7%, Trade Practices, Corporations, Intellectual Property and Other – 16%. Note – these figures include State government agencies, but are a small minority of overall government agencies in the sample: T Matruglio & G McAllister, Federal Court Empirical Report Part One table 2.

<sup>1103</sup> In the case sample, migration (42%), ADJR (56%) and taxation (50%) cases had the highest rate of disposal by judgment compared with intellectual property (13.5%), corporations (17.9%) and trade practices (19.4%): T Matruglio & G McAllister, Federal Court Empirical Report Part One 6 & 33.

Administrative proceedings vary in complexity from simple visa or benefit claims to matters involving extensive technical and expert evidence.<sup>1104</sup>

8.8 Where departmental administrative decisions are disputed there may be internal review, merits review before portfolio tribunals or the AAT, with a further appeal to or review by the Federal Court. In 1997–98, there were 174 appeals from AAT decisions filed in the Federal Court, 132 appeals from the IRT finalised in the Federal Court, and a total of 518 separate court proceedings relating to RRT decisions finalised in the Federal Court, Full Federal Court and the High Court.

8.9 These disputes involving the Commonwealth before courts and tribunals represent a very small percentage of the actual disputes in which government agencies are involved. Such disputes can be categorised as follows

- internal disputes – involve an agency and staff, such as workers compensation, workplace disputes and discrimination claims
- contractual disputes – between agency and service provider
- interdepartmental disputes – between agencies
- rights and entitlements – often involve individuals, and derive from government functions providing services or money to the public
- immigration – involve both immigration and refugee claims
- government regulation – derive from particular government regulatory functions – disputes can involve individuals, small or big business
- revenue collection – from individuals and business, disputes can arise over application or quantum and
- constitutional and policy cases – government sometimes intervenes in private disputes before courts to argue certain policy matters.

## **Federal government legal representation**

8.10 The Attorney-General is First Law Officer of the Commonwealth and the provision of legal services is taken to be a part of his/her responsibilities for the general operation of the federal justice system. Traditionally, the Attorney-General's Department was the primary provider of legal services to the federal government.

8.11 Independent agencies and government business entities have had general access to private sector legal service providers since at least the mid 1970s.<sup>1105</sup> Since 1995, federal departments and agencies have been able to use private sector legal services for general legal advice, concerning legal agreements, and for tribunal matters. From July 1997, all government legal work, including court work, was open for competition, except for work relating to cabinet, national security and

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<sup>1104</sup> One example often cited as the complex end of AAT matters is the diesel fuel rebate case, involving a claim valued at \$93million: *Re Boral Resources (NSW) Ltd and Chief Executive Officer of Customs* AAT 11282 (4 October 1996).

<sup>1105</sup> B Logan et al *Report of the Review of the Attorney-General's Legal Practice* AGPS Canberra 1997, 57 (the Logan Report).

constitutional matters which can be conducted only by the Australian Government Solicitor (AGS). Use of private firms for litigation work has been limited to date.<sup>1106</sup>

8.12 An additional, complementary development has seen enhanced government agency recruitment and utilisation of inhouse lawyers.<sup>1107</sup> In 1998, the Law Society of New South Wales reported that since 1988 the number of government lawyers practising in New South Wales had grown by 43%.<sup>1108</sup> Other 1998 estimates suggested a 27% increase in the number of legal officers employed by federal government departments and agencies between 1989 and 1998, a significant increase when compared with the declining numbers of other professionals employed in the public service.<sup>1109</sup> Inhouse lawyers provide internal legal advice, handle legal transactions on a daily basis, are used extensively by some agencies as advocates before tribunals, and are also involved in briefing and liaising with external legal service providers.<sup>1110</sup>

8.13 In March 1997 the *Report of the Review of the Attorney-General's Legal Practice* (the Logan report) was released. As a part of its review of the Attorney-General's Legal Practice and government legal services, the committee appointed to conduct the review estimated government expenditure on legal services. The report utilised figures from the 1995–96 financial year and surveys conducted from December 1995–February 1996. Excluding costs of private counsel, the Logan Report calculated that 11% (\$1.6million) of legal services expenditure on tribunal services went to private law firms, 36% (\$5.2 million) to inhouse lawyers, and 53% (\$7.8 million) to the Attorney-General's Legal Practice (now AGS). In relation to court litigation expenditure, again excluding private counsel costs, 6% (\$2.2million) was expended by government on private law firms, 10% (\$3.9million) on inhouse lawyers, and 84% (\$31.3 million) on the Attorney-General's Legal Practice.

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<sup>1106</sup> Until 1 September 1999, departments are required to seek approval to contract a private legal service provider for litigation work. 45 such approvals involving 10 agencies had been given as at the beginning of April 1999: I Govey 'The Commonwealth as a litigant – how the Commonwealth should behave as a litigant' *Paper The management of disputes involving the Commonwealth. Is litigation always the answer?* Conference Canberra 22 April 1999. From 1 September 1999 individual approvals are not required. See para 8.33–8.59 for further discussion.

<sup>1107</sup> In 1992 Justice Deirdre O'Connor noted that there was an increasing tendency for corporations and government bodies to employ persons who are qualified legal practitioners as 'inhouse' solicitors or counsel: *Re Proudfoot and Human Rights and Equal Opportunity Commission* (1992) 28 ALD 734.

<sup>1108</sup> The Law Society of New South Wales Research Report No. 2 *Profile of the solicitors of New South Wales 1998* Law Society of NSW Sydney October 1998, 15. Note these figures relate only to NSW and do not provide a breakdown of federal and State government agencies and departments.

<sup>1109</sup> Figures provided by the Public Service and Merit Protection Commission Canberra in November 1998.

<sup>1110</sup> An alternative being used by some agencies is the outplacement of AGS or private firm lawyers in government client offices. This option provides the convenience that inhouse lawyers provide, and can be a more cost effective way of obtaining external legal services. There is also a high turnover of lawyers participating in outplacement assignments for career development reasons, which, it is said, can lead to less than optimal service arrangements: S Gath 'Managing the inhouse legal function in an environment of contestability' (1999) 91 *Canberra Bulletin of Public Administration* 23, 24.

8.14 Data from the Commission's AAT case file survey is consistent with such trends. Of the 1 502 cases analysed, 67% of government agency representation was provided by inhouse advocates, 16% by private practitioners, and 17% by the AGS.<sup>1111</sup> The type of representation used by agencies varied between case types. For example, in veterans' affairs cases, the Department of Veterans' Affairs was most often represented by a departmental advocate while in compensation cases, the government respondent usually retained a lawyer from the AGS or private sector who in turn may have briefed counsel.

## Dispute resolution in government

8.15 As with business, government agencies employ a variety of methods to resolve disputes. The limited information available makes it difficult to analyse the effectiveness of dispute management and resolution within and by government agencies.

8.16 In dealing with disputes, government agencies are expected to utilise fair and transparent processes and decide the matter according to law. Frequently government agencies are required to give written reasons for their decisions. Internal or interagency contractual disputes involving government agencies are resolved in the same way as any private dispute with government, having regard to the fact that

... economic implications of litigation require, at least within the present system of litigation, careful and individualised case management [which] focuses both on the merits of the case and what it is really about, and also on the economics of disposing it, and accordingly the priority and processes which will be accorded to it.<sup>1112</sup>

Cost effective and expert management and resolution of disputes is as important to government as it is to corporations or business.

8.17 The federal government's model litigant rules incorporate aspects of appropriate dispute avoidance and management techniques.<sup>1113</sup> Relevant to dispute management, the rules state

The Commonwealth must act honestly and fairly in handling claims by:

- promptly dealing with claims and not causing unnecessary delay;

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<sup>1111</sup>.ALRC *Part one: Empirical information about the Administrative Appeals Tribunal* ALRC Sydney June 1999, table 7.3. (ALRC, AAT Empirical Report Part One).

<sup>1112</sup>.H Steele 'Economic implications of commercial litigation' *Paper* Beyond the Adversarial System Conference Brisbane 10-11 July 1997, 9.

<sup>1113</sup>.Further discussion on model litigants rules follows at para 8.33-8.59.

- paying legitimate claims without litigation, including making partial settlements of claims or interim payments, where it is clear that liability is at least as much as the amount to be paid;
- acting consistently in the handling of claims;
- endeavouring to avoid litigation, wherever possible;
- where it is not possible to avoid litigation, keeping the costs of litigation to a minimum, including by:
  - not requiring the other party to prove a matter which the Commonwealth knows to be true; and
  - not contesting liability if the Commonwealth knows that the dispute is really about quantum; and
- not undertaking and pursuing appeals unless the Commonwealth believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest.<sup>1114</sup>

8.18 A variety of techniques are employed to deal with disputes including better communication by counter staff, internal review and case monitoring, review on the papers and ADR techniques such as conciliation or mediation. Depending on the matter, certain or several of these arrangements may be employed. These varied mechanisms have been widely practised in other countries, and are increasingly utilised in federal government departments and agencies.

#### *Overseas experience with dispute resolution in government*

8.19 In advancing effective dispute resolution involving their government agencies, the United States and Canada have initiated government-wide facilities and policies for dispute resolution.

8.20 In the United States, the *Administrative Dispute Resolution Act*, passed in 1990 and confirmed and updated in 1996, specifies that agencies may use ADR proceedings to resolve issues relating to an administrative program, if the parties agree to such proceeding. The implementation of ADR programs is most notable for internal workplace and contractual disputes. However, a number of federal agencies have introduced ADR techniques to resolve disputes relating to civil enforcement functions and individual claims against the government (such as disputes over subsidies or reimbursements). While the Act does not extend to federal court actions, many of the ADR programs are intended to resolve disputes which would otherwise proceed to a court.

8.21 In February 1996, the United States President issued an Executive Order directing agencies to employ ADR techniques as a way to reduce the civil litigation case load. As an example of implementation, the United States Department of Veterans' Affairs issued the following directive in 1997.

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<sup>1114</sup>A full copy of the rules can be found at the homepage of the Office of Legal Services Coordination at <<http://law.gov.au/aghome/legalpol/olsc/modellit.htm>> (2 August 1999).

Every attorney must consider utilizing ADR techniques with a particular emphasis on mediation in every controversy or dispute involving two or more individuals. In analyzing whether a dispute is appropriate for mediation, some general considerations should be kept in mind.

ADR *may* be the preferred option when:

- The Department would benefit from a quick resolution of the issues.
- This is a case where setting precedent is not the objective or where the legal issues are of minimal significance.
- Emotions may be diffused if a mediator becomes involved.
- Your chances of winning at trial are less than you would like.
- The costs of preparing for trial are substantial relative to anticipated recovery.
- There is a factual dispute based on the credibility of witnesses.
- The case is going to become a battle of the experts.
- Opposing counsel is contentious, incompetent or difficult.
- Opposing counsel is an obstacle to resolution.
- The time commitment for litigation is difficult to manage.
- The potential for negative publicity outweighs the potential benefits of winning.
- If you do win this case, an appeal is likely.
- If you do lose this case, you will be liable for the other side's attorney's fees.

ADR *may not* be a preferred option when:

- There is a public policy issue which must be settled.
- The law is not well established and a legal precedent is desired.
- The parties involved in the dispute may not be similarly situated, e.g., one party to the dispute may be easily intimidated by the other party of the dispute.
- There is no incentive for one party to the dispute to seek to expeditiously resolve the dispute.

In order to effectively carry out this policy, each attorney will undergo training in basic ADR principles.<sup>1115</sup>

8.22 In a presidential memorandum of May 1998, an Interagency Alternative Dispute Resolution Working Group was established to support agencies in their development of ADR schemes.<sup>1116</sup> There are four sub-working groups, each focussing on a particular type of dispute. The secretariat of the Working Group, which involves a wide variety of federal agencies, is provided by the Department of Justice. All United States federal agencies are expected to implement at least one new administrative dispute resolution program by the end of September 1999. The Commission considers that there is considerable merit in this flexible, integrated approach to government dispute management beyond a simple recitation of a preference for ADR.

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<sup>1115</sup>.Department of Veterans' Affairs, Office of General Counsel, OGC Directive 02-97-01, 16 June 1997.

<sup>1116</sup>.Activities of the Working Group, including minutes of meetings, can be found at <<http://www.financenet.gov/financenet/fed/iadrwg/>> (5 April 1999).



8.23 In Canada, the Department of Justice also has an ongoing dispute resolution initiative which aims to make use of dispute resolution techniques at the federal government level and beyond. Some of the initiative's activities have included

- working with the Treasury Board to remove disincentives to early settlement
- providing ADR training to government employees and
- development of ADR pilots schemes in government agencies.

8.24 The Department of Justice is now working with the Canadian Treasury to establish a dispute resolution fund to assist agencies to develop ADR programs and training, with the aim of avoiding litigation. The Canadian scheme appears to be more centralised than the United States arrangement.

#### *Dispute resolution initiatives*

8.25 While the federal Attorney-General's Department recently has sought information on how departments and agencies use ADR, there is, as yet, no Australian government-wide initiative comparable to the those of the United States and Canada to encourage government departments to utilise ADR for broader conflict and dispute management. There are important agency initiatives in such dispute resolution but there is little data on the effectiveness or otherwise of particular dispute resolution options. Recent initiatives include the following.

- **Primary decision making** – Comcare has piloted a dispute management program to improve initial decision making within the organisation, primarily through improvement in communication of decisions to claimants with written notification being sent after telephone contact, and staff training in conflict resolution techniques. Centrelink has also developed a pilot for improved grievance handling, avoidance and resolution of disputes, with resulting increased productivity and cost savings.
- **Departmental reactions to merits review** – In 1997–98 the Department of Veterans' Affairs established a program to screen all applications lodged with the Veterans' Review Board to check the soundness of the primary decision. A number of primary decisions were varied, such that the withdrawal rate of VRB applications increased from 35% to 40%.
- **Merits review tribunal processes** – The Migration Review Tribunal (MRT) has initiated a process where case officers assist tribunal members to investigate and prepare applications for hearing. In regard to the AAT, where research showed a sizeable proportion of workers' compensation matters settled 'at the door' of the tribunal,<sup>1117</sup> the AAT has implemented a mandatory conciliation conference for represented parties to encourage earlier consideration of the merits of the case.

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<sup>1117</sup>See ch 12.

- **Alternatives to litigation** – The Australian Competition and Consumer Commission (ACCC) increasingly resolves matters using s 87B of the *Trade Practices Act 1974* (Cth) by negotiating with parties to undertake remedial action, such as corrective advertising or direct mailing, rather than through litigation. The ACCC also uses intensive education campaigns within an industry to avoid non-compliance and is directly involved in encouraging industry use of ADR.
- **Litigation planning** – The Australian Taxation Office (ATO) has a litigation Test Case Program, in which the legal costs of all parties are funded by government. Test cases are approved for matters likely to clarify the law for the wider community. Seven such cases were approved for funding in 1997–98.
- **Improving the ability for government to settle** – In conjunction with the *Finance Management and Accountability Act 1997* (Cth), the government reviewed policies regarding settlement of disputes and claims. Arrangements for agency approval of settlements were simplified in Finance Directions. Settlements for amounts not exceeding \$10 000 can be approved by the chief executive of the agency (or authorised officer) on the basis of a common sense view that the settlement is in accordance with legal principle and practice. Settlements above this amount require written advice from the legal service provider that the settlement is in accordance with legal principle and practice, and the agreement of the chief executive officer (or authorised officer).

8.26 These initiatives indicate the federal government’s growing awareness of, and sensibility concerning, effective dispute management and dispute resolution. This is not to say that the government should overemphasise settlements or cultivate a settlement culture, but where matters can and ought to be compromised, this should be done earlier in the process without expenditure of time and money associated with pursuing matters through a variety of administrative processes and/or court procedures. The Commission’s proposals in this chapter, and proposals in other chapters relating to tribunal proceedings<sup>1118</sup> and legal aid,<sup>1119</sup> are designed to ensure appropriate and effective early resolution of such disputes.

#### *A new direction for dispute management in the federal government*

8.27 The Commission’s consultations indicated that there is a need for a coordinated approach to dispute resolution in Australian federal government agencies. The Canadian centralised model driven by one particular agency, which allocates dispute resolution funds, is unlikely to be a satisfactory model for our federal system. There is considerable experimentation in dispute resolution in the

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<sup>1118</sup> See ch 12.

<sup>1119</sup> See ch 7.

varied federal agencies and outsourced entities. At this stage, it is likely to be counterproductive to order and organise such arrangements from a centralised agency. By contrast, the executive order and working group model developed in the United States provides the exhortation to consider ADR, the flexibility for agencies to develop appropriate internal programs and a supportive forum for the sharing of ideas and experiences. The Commission considers this model is more appropriate.

8.28 Under such a dispute management policy, each department and agency should be required to develop a dispute avoidance and management plan for each area of potential dispute handled by the agency. This can encourage effective management and resolution of disputes in all government departments and agencies. Additionally, there should be an evaluation of mechanisms and processes of dispute management and resolution, to identify new approaches and ensure existing processes are working effectively.

8.29 While the Commission is not proposing a centralised model, there is a role for the Attorney-General's Department to play in establishing a 'best practice' model for dispute resolution within government departments and agencies. Development of a best practice model could draw upon the ACCC publication *Benchmarks for dispute avoidance and resolution – A guide*<sup>1120</sup> and the soon to be published Australian Standards for the Prevention, Handling and Resolution of Disputes. Government agencies can benefit from the ACCC's work as much as the private sector. Additionally, the departments and agencies could look to corporations with expertise in handling disputes for suggestions on how to develop appropriate dispute management techniques and systems.<sup>1121</sup>

8.30 The Administrative Review Council is undertaking a project to review internal review processes within the federal government. The Council is examining current processes and addressing the possibility of government wide standards. Agencies could draw upon the results of this project in the development of dispute avoidance and management plans.

8.31 The establishment of an 'Interagency Working Group' based on the US model could assist agencies in developing and implementing dispute avoidance and management plans by providing a forum for sharing experience and knowledge for the development of such plans, and for the evaluation of dispute management and resolution techniques. The Attorney-General's Department could appropriately coordinate such a group.

8.32 In developing a dispute avoidance and management plan, agencies should also consider their arrangements for purchasing and managing external legal services. The ATO, for example, has established a committee to examine the

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<sup>1120</sup>.ACCC *Benchmarks for dispute avoidance and resolution – A guide* AGPS Canberra 1997.

<sup>1121</sup>.P Meadows 'The Commonwealth government as a litigant' *Paper* The management of disputes involving the Commonwealth. Is litigation always the answer? Conference Canberra 22 April 1999.

agency's litigation function and the procurement of external legal services, including identifying and implementing litigation best practice standards.<sup>1122</sup>

**Proposal 8.1.** That the Attorney-General's Department develop a 'best practice' dispute avoidance and management plan for federal government departments and agencies.

**Proposal 8.2.** That each department and agency be required to establish a dispute avoidance and management plan, covering all types of disputes concerning the agency and all aspects of dispute avoidance, management and resolution. Such plans should be consistent with the approach to disputes and litigation set down in the model litigant rules.

**Proposal 8.3.** An interagency dispute management working group, comprising relevant agency representatives, should be established and coordinated by the Attorney-General's Department, to provide a forum for sharing experience and knowledge on dispute management and resolution, to assist to develop dispute avoidance and management plans, and to evaluate such arrangements.

## The federal government as a model litigant

### *The model litigant principle*

8.33 The Commonwealth has the same rights in litigation as a private litigant. As one American judge described it

... government and private litigators are simply lawyers on opposite sides of any given legal action. One generally attacks agency action; the other generally defends it against the selfsame attacks. The legal skills acquired in these pursuits are identical.<sup>1123</sup>

8.34 However, Australian and other common law courts repeat their expectations that government litigants should behave as model litigants. This expectation is said to derive from the fact that the government lawyer's client is not an individual citizen but the citizenry at large, a client of whom the community expects high standards and whose ultimate objective is that justice be done.<sup>1124</sup> This obligation is said to arise in civil as well as criminal proceedings.<sup>1125</sup>

<sup>1122</sup> Commissioner of Taxation *Annual report 1997-98*, 10-11.

<sup>1123</sup> *Etelson v Office of Personnel Mgt* 684 F.2d 918, 927 (DC Cir 1982).

<sup>1124</sup> P Wald "'For the United States": Government lawyers in court' (1998) 61(1) *Law and Contemporary Problems* 107, 110-115.

<sup>1125</sup> In the United States see the ABA Model Rules of Professional Conduct Rule 3.8 cmt. (1983); see also Model Code of Professional Responsibility EC 7-14 (1981) — 'A government lawyer in a civil action ... has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust

8.35 A Canadian government lawyer expressed his understanding of the source of the model litigant obligation on government lawyers at the launch of the Commonwealth Association of Public Sector Lawyers in 1996.

In the Canadian context at least, public service lawyers must never forget that they are using the authority of their Minister, the Minister of Justice and Attorney-General; this is crucial in our system of Parliamentary government where elected officials are responsible and accountable. This reminds us that our authority is not really ours; it is held in trust . . . The main duty of the Minister is to enhance respect for the Constitution and the law and thus it flows that this is the main duty of public service lawyers.<sup>1126</sup>

8.36 The same principle was recently expressed in Australia.

The AGS does not have public interest responsibilities of its own but rather performs these functions in its capacity as the government's solicitor. It is the Attorney-General's responsibilities as first officer which in effect necessitate the AGS behaving in a manner consistent with the Attorney's public interest responsibilities. The Attorney-General's public interest responsibilities stem from his primary role as first law officer. This encompasses general responsibility for Commonwealth laws, the legal system and the Commonwealth's role in the legal system . . . The Attorney-General's interest in more general matters concerning Commonwealth litigation includes establishing policy on the pleading of statutes of limitation and the regulation of counsel fees. The maintenance of the model litigant policy is also one of his particular responsibilities. In performing these responsibilities, the Attorney-General has established policies and guidelines for the conduct of Commonwealth litigation . . . The identity of particular legal service providers, whether AGS or private law firms, is irrelevant. The policies and guidelines established apply to the conduct of all Commonwealth legal work.<sup>1127</sup>

### *Criticism of government conduct*

8.37 Judges expect from government parties and their lawyers high standards of competence, candour and civility. Deviations from these professional norms often result in judicial rebukes.

It used to be regarded as axiomatic that the Crown never takes technical points, even in civil proceedings . . . I am sometimes inclined to think that in some parts — not all — of the Commonwealth, the old-fashioned traditional, and almost instinctive, standard of fair play to be observed by the Crown in dealing with

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settlements or results.' See also *Freeport-McMoran Oil & Gas v FERC* 962 F.2d 45, 46–47 (DC Cir 1992).

<sup>1126</sup>J Tait 'The public service lawyer, service to the client and the rule of law' (1997) *Commonwealth Law Bulletin* 542, 544.

<sup>1127</sup>B Bishop *Hansard* House of Representatives 9 February 1999, 2156.

subjects, which I learned a very long time ago to regard as elementary, is either not known or thought out of date. I should be glad to think that I am mistaken.<sup>1128</sup>

The Court and the Attorney-General, to whom the Crown Solicitor is responsible, have a joint responsibility for fostering the expeditious conduct of and disposal of litigation. It is extremely important that the Crown Solicitor's Office set an example to the private legal profession as to conscientious compliance with the procedures designed to minimise cost and delay.<sup>1129</sup>

8.38 Judge Patricia Wald of the United States provided concrete examples of the 'higher standard' expected of government lawyers.<sup>1130</sup>

#### A. Competence

On the whole, judges expect a level of competence from government attorneys — even new and inexperienced ones — that we do not expect from private counsel. We have come to wince at misspellings and typographical errors, the punctuation mistakes and gaps in logic, and the omitted precedent that appear with lamentable frequency in the product of private attorneys, but we become downright agitated when we see the same errors in the government's work. While we recognize that private firms range in size from the one person shop to the multi-hundred lawyer firm, we view the US government — of which there is only one — as a large organization with the financial and intellectual resources to train its lawyers before it sends them to court. We expect agency attorneys to be acquainted with relevant precedent and current developments and to lend the court the benefit of their experience in litigating similar cases. Because so many agencies are repeat players in our court, their lawyers quickly develop reputations — on either end of the spectrum — that can suitably affect the court's attitude toward their clients if such standards are not met. . .

#### D. Civility

The court expects . . . civility from its counsel toward one another. It is safe to say, however, that we are probably less tolerant of incivility, sarcasm, or belittling of an opponent when it comes from government attorneys than from private ones. This, I believe, is due to an underlying notion that we are all part of the same government: government attorneys' insensitivity reflects on the court as well.

#### E. Consistency

Consistency in government positions taken before the same court or different courts is one of the most vexing aspects of the relationship between judges and government lawyers. The problem arises in a variety of forms and contexts.

1. *Consistency in the Same Case.* In an era where the same basic factual dispute is capable of being legally conceptualized to give rise to several actions in several

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<sup>1128</sup> *The Melbourne Steamship Company Limited v Moorehead* (1912) 15 CLR 333, 342 (Griffith CJ).

<sup>1129</sup> *Kenny v South Australia* (1987) 46 SASR 268, 273 (King CJ).

<sup>1130</sup> P Wald "'For the United States": Government lawyers in court' (1998) 61(1) *Law and Contemporary Problems* 107, 119–122.

courts involving the same parties, the potential for inconsistent positions by government lawyers is a legitimate concern . . .

[A] frequent source of tension between government lawyers and judges [concerns] the occasional need for government lawyers to recede altogether from a position taken in a particular case because of a decision made by superiors and confess error or withdraw a petition or defense altogether. Judges understand the dynamics of the situation but are not likely to be pleased about their wasted time and effort . . .

2. *Consistency in Similar Cases.* In the same vein, we expect government lawyers to be reasonably consistent about the positions they take in similar cases . . . This is the reason judges often ask government counsel if what they are arguing represents the policy of their office and whether it is being applied consistently to other litigants similarly situated.<sup>1131</sup>

8.39 A Federal Court migration case, in which the Minister's representatives sought to have an application for judicial review of a decision of the IRT struck out on the basis that the applicant had wrongly named the IRT as the respondent rather than the Minister, provides an example of the need for a high standard of conduct from government as a litigant. In rejecting the Minister's objection to competency, the Full Court observed

[W]e are bound to say that we share Hill J's reaction that an injustice was involved as a result of the taking of this point by the Crown. That is the more to be regretted when the point is taken by a party which is expected to act, and to be seen to act, as a model litigant.<sup>1132</sup>

8.40 The AAT has also criticised government representatives on occasion, particularly in social welfare and compensation cases.<sup>1133</sup>

It is very important that representatives of the department should approach their task ... as it were as counsel for the Crown, ensuring only that all the facts are before the Tribunal and not placing emphasis on defeat of the application.<sup>1134</sup>

One tribunal member observed

The reality is that respondent departments and the government solicitor behave in an adversarial way almost indistinguishable from private litigants.<sup>1135</sup>

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<sup>1131</sup>.cf Judicial Conference of the United States. Code of Conduct for United States Judges (1997) note 4, at Canon 3A(3): A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and should require similar conduct of those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process.

<sup>1132</sup>.*Yong Jun Qin v Minister for Immigration and Multicultural Affairs* (1997) 144 ALR 695, 704.

<sup>1133</sup>.M Allars 'Neutrality, the judicial paradigm and tribunal procedure' (1991) 13 *Sydney Law Review* 377, 411.

<sup>1134</sup>.*Re Cimino and Director-General of Social Services* (1982) 4 ALR N106, quoted in J Dwyer 'Overcoming the adversarial bias in tribunal procedures' (1991) 20 *Federal Law Review* 252, 256.

8.41 In the course of this inquiry, the Commission received a number of comments regarding the conduct of government parties within the litigation system. The majority of these comments have been in relation to matters before the AAT, included as additional comments to surveys conducted by the Commission concerning costs and procedures. These comments represent the views of certain practitioners and applicants. The Commission has not evaluated the substance of the comments, nor did questions on the form solicit comment on the government party. A sample of such comments is produced below to indicate there is some dissatisfaction with the conduct of government representatives appearing in AAT matters.

For some as yet unknown reason the respondent would not objectively reconsider an obviously incorrect technical decision on the subject Private Ruling Application and seemed intent on placing as much expense and inconvenience in the way of the applicant (with the temerity to challenge an incorrect decision).<sup>1136</sup>

This was the worst hearing I have attended in 13 years as a solicitor. Comcare's barrister was rude, verbose and excessively adversarial.<sup>1137</sup>

8.42 Other comments noted that the government party in the case hindered resolution of the matter, involved 'plain boneheadedness', or adopted a 'hard line attitude'.

DEETYA's attitude in all cases it ran into the AAT was woeful. No understanding of the Commonwealth as a model litigant and no sense of proportion in the costs of the actions in comparison to the result.<sup>1138</sup>

8.43 The comments indicated varied approaches to negotiation and settlement of claims. A number of agencies were noted as 'not interested' in negotiations.<sup>1139</sup>

From our knowledge and experience it is the Tax Office policy to progress any AAT matter to a full hearing before proper legal opinion is sought. This policy by the Tax Office is used to deter valid claims by genuinely aggrieved taxpayers.<sup>1140</sup>

The Department's negotiator is generally most reasonable however sometimes delays occur whilst he obtains the necessary authority.<sup>1141</sup>

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<sup>1135</sup> T Thawley 'Adversarial and inquisitorial procedures in the Administrative Appeals Tribunal' (1997) 4 *Australian Journal of Administrative Law* 61, 75.

<sup>1136</sup> AAT case file survey response 35 (solicitor for the applicant in a taxation case).

<sup>1137</sup> AAT case file survey response 289 (solicitor for the applicant in a compensation case).

<sup>1138</sup> AAT case file survey response 596 (solicitor for the applicant in a social welfare case).

<sup>1139</sup> See also submissions to the Commission: LANSW *Submission 71*; G Gibson *Submission 141*.

<sup>1140</sup> AAT case file survey response 37 (solicitor for the applicant in a taxation case).

<sup>1141</sup> AAT case file survey response 1464 (solicitor for the applicant in a veterans' entitlements case).



Power to make settlements at DVA [Department of Veterans' Affairs] is held not by a case advocate but by more senior people who do not understand [the] case well and, more importantly, have little or no idea how AAT operates or what realistic prospects DVA has for success.<sup>1142</sup>

8.44 AGS noted that such comments can derive from the practitioners or parties misunderstanding government model litigant obligations.<sup>1143</sup> There is a perception that the government agency should not energetically defend decisions in the AAT. The model litigant rules require fair play, but government should defend decisions they see to be correct. Further discussion of the role of the government party is contained in chapter 12.

8.45 In relation to conduct of matters before courts, the Commission received mixed comments as to the conduct of government representatives. Some practitioners praised the competence and integrity of government representatives (particularly AGS practitioners) and their adherence to model litigant obligations.<sup>1144</sup> There were also criticisms

We have opposed Government as a litigant. Government is often, as a litigant, reticent to settle matters early or at all. In addition, budgetary constraints have the effect that the very best non-government lawyers do not commonly act for the Government on many matters of constitutional and commercial importance. Nor is it unusual for Government to be tardy in complying with court orders and in completing interlocutory steps.<sup>1145</sup>

In complex civil litigation, the commonwealth litigant is, I think, widely perceived as risk averse, uncreative and ideologically driven. Commonwealth lawyers are perceived by many lawyers in private practice to be untimely, under-resourced, focused on process and procedure and overly reliant on external counsel. In view of the broad range of jurisdiction and areas of law in which it is involved, it is inevitable the Commonwealth will attract criticism for the manner in which it conducts litigation and much of the criticism may be unfair. However, it would, I think, be a mistake to regard these perceptions as being wholly inaccurate.<sup>1146</sup>

8.46 The AGS and the Office of Legal Services Coordination noted that their offices rarely receive complaints concerning the conduct of government parties or legal representatives.<sup>1147</sup>

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<sup>1142</sup> AAT case file survey response 69 (solicitor for the applicant in a veterans' entitlements case).

<sup>1143</sup> AGS practitioners *Consultation* Canberra 6 July 1999.

<sup>1144</sup> Federal Court practitioners involved in representative proceedings *Consultation* Sydney 2 June 1999.

<sup>1145</sup> Arthur Robinson *Submission 189*. See also LANSW *Submission 71*; G Gibson *Submission 141*.

<sup>1146</sup> P Meadows 'The Commonwealth government as a litigant' *Paper* The management of disputes involving the Commonwealth. Is litigation always the answer? Conference Canberra 22 April 1999.

<sup>1147</sup> Comments made by I Govey & D Boucher at The management of disputes involving the Commonwealth. Is litigation always the answer? Conference Canberra 22 April 1999.

### *Codifying the model litigant principle*

8.47 In November 1995, the Attorney-General's Legal Practice (now the AGS) launched the Attorney-General's Legal Practice Guidelines on Values, Ethics and Conduct (the Guidelines), which applied to all lawyers employed by the Attorney-General's Legal Practice. The Guidelines were intended to supplement the professional rules of conduct which bind all lawyers. The Guidelines were launched as an ethical code, with aspirational intentions, rather than as a code of conduct with sanctions for non-compliance.<sup>1148</sup> This was the first time the government codified the ideal of acting as a model litigant.

8.48 With the untying of government litigation services, the government sought to ensure that model litigant guidelines were extended to private lawyers representing government clients. The Attorney-General instructed that the federal government should act as a model litigant in litigation and in the handling of claims prior to litigation, and developed the model litigant rules which expanded the Attorney-General's Legal Practice Guidelines.

8.49 The model litigant rules are applied to all legal services provided to the federal government, not merely those provided by the AGS. Under changes to the *Judiciary Act 1903* (Cth), legal services directions made by the Attorney-General can, and are expected to, require that all federal government litigation be conducted in accordance with the model litigant rules.<sup>1149</sup> The model litigant principles will then be expressed as statutory obligations.

8.50 The model litigant rules seek to set down standards of fair play expected of government litigants.

- promptly dealing with claims and not causing unnecessary delay
- not taking advantage of a claimant who lacks the resources to litigate a legitimate claim
- not relying on technical defences unless the Commonwealth's interests would be prejudiced by the failure to comply with a particular requirement
- apologising where the Commonwealth is aware that it or its lawyers have acted wrongfully or improperly.

8.51 If all parties acted as model litigants, the civil justice system would be more effective and efficient. In this regard, the Commission has made proposals in chapter 5 to enhance general professional practice standards in all federal courts and tribunals. The federal government has taken a leading role in promoting model conduct rules. Model conduct does not prevent the government from acting firmly,

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<sup>1148</sup>D Boucher 'An ethical code ... not a code of conduct' (1996) 79 *Canberra Bulletin of Public Administration* 3.

<sup>1149</sup>Other changes to be effected by the *Judiciary Amendment Act 1999* (Cth) (to come into effect 1-September 1999) include establishing the AGS as a statutory authority and opening competition for all government legal services except in relation to litigation of constitutional, Cabinet, national security and most public international law cases.

properly and energetically to protect the federal government's interests. Indeed, it would be improper for the government to neglect to defend such interests.

8.52 To be effective, model litigant rules must be known to all lawyers and non-lawyers representing federal departments and agencies, and the effect of the rules must be understood and applied. This is not so easy to implement in practice. The Office of Legal Services Coordination has given wide publicity to the rules, but several judges and barristers professed not to have heard the term 'model litigant' or seen the text of the rules.<sup>1150</sup> The Commission supports efforts to give wider publicity to the rules.

8.53 To ensure better understanding of professional practice rules, the Commission has proposed, concerning general professional practice rules, that the legal profession adopt a principle-rule-commentary approach combining brief, prescriptive rules with instructive commentary. The commentary provides guidance, and practical examples, as to how the rules should be interpreted in practical situations.<sup>1151</sup>

8.54 Such an approach in the rules gives clear and practical guidance on the working of the rule, which is necessary where the rules are to apply to a variety of government employed and private lawyers and non-lawyers now providing legal services for the federal government.

**Proposal 8.4.** That the model litigant rules explicitly state that they relate to conduct with respect to legal disputes, to matters litigated in courts or reviewed before tribunals, and to prehearing conduct, negotiations and involvement in dispute resolution processes as well as trial and hearing practice.

**Proposal 8.5.** That the text of the model litigant rules include additional commentary explaining required standards of fairness, and giving examples concerning 'unnecessary delay', 'technical defences', and how 'not to take advantage of an under-resourced litigant'.

#### *Strengthening compliance with model litigant rules*

8.55 The Attorney-General has sole power to enforce compliance with the legal services directions.<sup>1152</sup> The Office of Legal Services Coordination has indicated it does not have a 'policeman' role in relation to legal service directions, although it

<sup>1150</sup>.Comments made at 'The management of disputes involving the Commonwealth. Is litigation always the answer? Conference' Canberra 22 April 1999.

<sup>1151</sup>.See para 5.50-5.53.

<sup>1152</sup>.See *Judiciary Act 1903* (Cth) s 55ZG(2) as amended by *Judiciary Amendment Act 1999* (Cth).

does have a 'watchdog' role in monitoring legal services and developing strategies for enhancing enforcement of legal service directions.<sup>1153</sup>

8.56 Non-compliance with the directions can be raised in proceedings only by or on the application of the Commonwealth. As noted in the Explanatory Memorandum to the Judiciary Amendment Bill 1998

Any other approach could give rise to technical arguments and result in additional costs and delay in litigation involving the Commonwealth. For example, it is not intended that a litigant be able to argue that the Commonwealth was making a technical argument in breach of the model litigant obligation (if this were provided in the Legal Services Directions). The alleged breach could, however, be raised by the litigant with the Attorney-General or the Office of Legal Services Coordination.<sup>1154</sup>

8.57 While incorporating model litigant rules within legal service directions will ensure that the rules are expressed as statutory legal obligations, the fact remains that mechanisms for ensuring compliance with the rules are limited. Where such a breach involves a private lawyer, the agency may cease instructing the lawyer or the Attorney-General may direct cessation. Breach of the model litigant rules by an inhouse representative or AGS lawyer would generally be a staff disciplinary and education matter. A formalised system for lodging and investigating complaints as to government conduct would provide an appropriate avenue for airing criticisms and provide more accurate information as to the level of non-compliance with the rules. Such a system would enhance the need for government departments and agencies, and their legal representatives, to adhere to the model litigant policy.

8.58 As the agency responsible for developing schemes for enhancing compliance with model litigant rules, the Commission considers that the Office of Legal Services Coordination is best placed to oversee a formal complaints system relating to government conduct in legal proceedings. The Office of Legal Services Coordination would require appropriate resources to undertake this function. The Office of Legal Services Coordination has indicated that a requirement to report certain cases of non-compliance may be included as a legal service direction when these directions become operational on 1 September 1999. Such a reporting requirement assumes that government agencies and lawyers understand the application of model litigant obligations. The Commission's proposals for enhancing the content of the rules would assist with this.

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<sup>1153</sup>.I Govey 'The Commonwealth as a litigant – How the Commonwealth should behave as a litigant' *Paper* The management of disputes involving the Commonwealth. Is litigation always the answer? Conference Canberra 22 April 1999. The Office of Legal Services Coordination was established as a result of the recommendations of the Logan Report. The Office of Legal Services Coordination is situated within the Attorney-General's Department and has the role of advising the Attorney-General on developing and implementing litigation policies for the Commonwealth, and providing a framework for the delivery of Commonwealth legal services.

<sup>1154</sup>.Judiciary Amendment Bill 1998 Explanatory Memorandum, 9.

8.59 The Commission is reluctant to propose particular sanctions for findings of non-compliance. However, where investigations have led the Office of Legal Services Coordination to conclude that there has been non-compliance, the Office of Legal Services Coordination should be able to respond so as to improve compliance. Such responses may include education and training courses, or a recommendation that a particular firm have their legal services contract terminated or not renewed. Such responses could be included in the legal service directions.

**Proposal 8.6.** The Attorney-General should provide that the Office of Legal Services Coordination has authority to investigate complaints relating to non-compliance with the model litigant rules. The model litigant rules should state that non-compliance with the rules could justify termination of a legal services contract, disciplinary measures in relation to an employed lawyer or agency representative, or a direction that the lawyer or agency representative undertake legal education and training.

#### *Education and training*

8.60 Model litigant rules and dispute avoidance and management plans will be ineffective without appropriate education and training of agency officers involved in managing and resolving disputes. Officers, as well as legal representatives, need to be aware of the existence of the rules, and guided through the content of the rules. Adoption of a principle-rule-commentary structure will assist this process, but specific education and training measures may be necessary to provide guidance relevant to the particular agencies and officers within the agency. Training could be aimed at noting the complementary features of the rules and the agency's individual dispute avoidance and management plan. In some cases, the training could introduce officers to new dispute resolution techniques to be adopted under the dispute management plan. Conferences such as the annual government lawyers' conference offer ideal opportunities for such training and discussion.

**Proposal 8.7.** That appropriate education and training programs are established to support agency dispute avoidance and management plans and the model litigant rules.

## 9. Issues in case management

### Introduction

9.1 All justice systems grapple with systemic problems associated with the cost of proceedings and the time taken to resolve or determine matters. Case management refers to all the processes used by courts and tribunals to manage the progress of cases from commencement to finalisation. Case management aims to control costs and ensure timely resolution of cases.

9.2 The Commission's inquiry was not directed to developing a generic 'best practice' model of case management. Models vary according to the number and types of cases lodged, resolution of cases (for example, the proportion of cases that proceed to a final hearing or are amenable to settlement), the numbers of judges or other decision makers available and the types of litigants and representation. The courts and tribunals considered in the Commission's review deal with very different caseloads, types of case and litigants and operate quite different case management systems. These systems have generally been developed incrementally, often with expert assistance from case management experts from abroad<sup>1155</sup> and are regularly fine-tuned to ensure effective case preparation and resolution.<sup>1156</sup> Case and hearing management in the Federal Court, Family Court of Australia and federal review tribunals are dealt with in separate chapters (see chapters 10–12).<sup>1157</sup>

9.3 Nevertheless, there are certain general themes associated with case management, ADR and the use of technology which are relevant to all federal courts and tribunals. These are the subject of this chapter.

### Caseloads, litigants and types of dispute

9.4 The caseloads of federal courts and tribunals are very different. For example in 1997–8, the Federal Court finalised around 7 000 disputed matters, the Family

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<sup>1155</sup> eg the Family Court of Australia and the Federal Court have on occasions used overseas experts in relation to the design of their case management systems. Maureen Solomon from the United States has been a consultant to the Family Court and to the Federal Court in relation to listing issues and case management systems.

<sup>1156</sup> The Family Court case management system has changed on a number of occasions often after review by committees and internal working parties; for example, see Family Court of Australia *Report of the Simplification of Procedures Committee to the Chief Justice* Family Court Sydney 1994, 5–6. Also see ch 11. The Federal Court introduced its individual docket system throughout the Court on 1 September 1997 after extensive consultation and trialing (see ch 10). The Federal Court has engaged the Justice Research Centre to evaluate its individual docket system (see para 10.46).

<sup>1157</sup> These chapters also deal with specific issues of court and tribunal practice and procedure, for example, the use of ADR, pleadings, discovery, and issues raised by the presence of litigants in person.

Court of Australia (Family Court) around 40000 contested matters and the Administrative Appeals Tribunal (AAT) around 7000 review applications.<sup>1158</sup>

9.5 The case types represented within these caseloads are likewise very different. The Federal Court and the AAT deal with a much more diverse range of cases and issues than does the Family Court. The Federal Court has more complex cases than the Family Court of Australia or the AAT.<sup>1159</sup>

9.6 Cases are processed differently. There are varied models of case resolution. Family cases are mostly resolved consensually. Case management in the Federal Court is largely undertaken by judges who are responsible for cases from filing to completion. There were 1 754 judgments delivered by the Federal Court in 1997–8. Family Court cases are managed and facilitated by registrars, judicial registrars and court counsellors. Judges are largely reserved for duty matters and case determinations. There were 1 099 judgments delivered in the Family Court in 1997–8. In the AAT members and registrars manage cases and members decide applications – delivering 1750 decisions in 1997–8.<sup>1160</sup> The Commission's surveys confirm that proportionately many more cases in the Federal Court and AAT are resolved at hearing than in the Family Court of Australia. The following case processing characteristics were evidenced from the Commission's case samples.

- In the Federal Court, 3% of cases were resolved before any directions hearing, 69% at interlocutory stages and 37% at a final hearing.<sup>1161</sup>
- In the Family Court, 1% were resolved before the first return date, 91% at interlocutory stages and 8% at a final hearing.<sup>1162</sup>
- In the AAT, 15% were resolved before any prehearing case event, 51% at prehearing stages and 34% at a final hearing.<sup>1163</sup>

9.7 The median duration of cases differed between the forums. The surveys revealed the following median times from filing to disposition.

- In the Federal Court, the median time to disposition for the sampled cases was 6.95 months from filing to finalisation.<sup>1164</sup> The time to disposition at the

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<sup>1158</sup> See ch 4 table 4.6.

<sup>1159</sup> For more detailed information about the caseload and case types of each court and the AAT see ch 10–12.

<sup>1160</sup> For more detailed information on case processing in each Court and the AAT see ch 10–12.

<sup>1161</sup> T Matruglio & G McAllister *Part one: Empirical information about the Family Court of Australia* ALRC Sydney February 1999, 28 table 21 (T Matruglio & G McAllister, Family Court Empirical Report PartOne).

<sup>1162</sup> For Form 7 applications for final orders cases see T Matruglio & G McAllister, Family Court Empirical Report Part One, 49, table 28.

<sup>1163</sup> ALRC *Part one: Empirical information about the Administrative Appeals Tribunal* ALRC Sydney June 1999, 22 table 5.3 (ALRC, AAT Empirical Report Part One).

90th percentile was 26.77. That is, 10% of cases took 26.77 months or longer to finalise.<sup>1165</sup>

- In the Family Court, the median time to disposition for the sampled, contested (Form 7 applications for final orders) cases was 5.23 months from filing to finalisation.<sup>1166</sup> The time to disposition at the 90th percentile was 19.80 months.<sup>1167</sup>
- In the AAT, the median time to disposition for the sampled cases was 8.13 months from filing to finalisation. The time to disposition at the 90th percentile was 17.97 months.<sup>1168</sup>

9.8 The mix of litigants involved in proceedings in the Federal Court, the Family Court and the AAT also varies greatly. For example, corporations and government are major litigants in the Federal Court. Thirty nine per cent of applicants and 35% of respondents in the Commission's Federal Court case sample were corporate and 7% of applicants and 47% of respondents were government agencies.<sup>1169</sup> All cases in the Family Court case sample involved individuals.<sup>1170</sup> In the AAT all respondents are government departments or agencies.<sup>1171</sup> Ninety six per cent of sample applicants were individuals and 4% were business entities.<sup>1172</sup>

9.9 Litigants vary in their resources<sup>1173</sup> and their experience of court and tribunal proceedings. Government is probably the most significant repeat player in federal proceedings. The Family Court also has repeat applications, usually relating to children's matters.<sup>1174</sup>

<sup>1164</sup> T Matruglio & G McAllister *Part one: Empirical information about the Federal Court of Australia* ALRC Sydney March 1999, para 6.3 (T Matruglio & G McAllister, Federal Court Empirical Report Part-One).

<sup>1165</sup> T Matruglio *Correspondence* 25 July 1999.

<sup>1166</sup> T Matruglio & G McAllister, Family Court Empirical Report Part One 49, para 6.5.1.

<sup>1167</sup> R Hunter *Family law case profiles* Justice Research Centre Sydney June 1999.

<sup>1168</sup> ALRC, AAT Empirical Report Part One, 18-19, tables 4.7-4.8.

<sup>1169</sup> T Matruglio & G McAllister, Federal Court Empirical Report Part One, 13, table 6 n=678 (applicants) n=672 (respondents).

<sup>1170</sup> The federal Attorney-General or State or Territory child care and protection departments are occasionally parties in family proceedings and certain property disputes concerning businesses.

<sup>1171</sup> In most cases the applicant is an individual citizen or corporate entity and the respondent is a government agency. In some AAT cases the applicant is a government department or agency seeking to set aside or vary a decision made by a first tier merits review tribunal (the Social Security Appeals Tribunal (SSAT) or the Veterans' Review Board (VRB)). These applicants are excluded from the following figures in this chapter.

<sup>1172</sup> ALRC, AAT Empirical Report Part One, 12, table 3.1: n=1 665.

<sup>1173</sup> Some limited information about the income of litigants in federal courts and tribunals appears in ch-4.

<sup>1174</sup> See ch 11.



9.10 The level of representation in proceedings varies in the courts and tribunals and as between the different case types.<sup>1175</sup> The Commission's data showed patterns of representation.

- In the Federal Court sample, 11% of applicants and 1% of respondents were wholly unrepresented.<sup>1176</sup>
- In the Family Court, 6% of applicants and 21% of respondents were wholly unrepresented and a further 10% of applicants and 11% of respondents were represented for only part of their proceedings.<sup>1177</sup>
- In the AAT, 33% of applicants were unrepresented.<sup>1178</sup>

9.11 These factors all influence the model of case management most appropriate for different forums.

## Case management

9.12 Maureen Solomon has described effective case management as follows

“Control” is rejected in favour of “supervision” to avoid any implication that a dictatorial approach by the court is advocated. Court supervision of case progress does not supplant attorney responsibilities. Instead, it should create a system of joint responsibilities wherein the perspectives and judgment of each can be applied in an appropriate manner to decisions concerning the progress of individual cases and the caseload as a whole.<sup>1179</sup>

9.13 Case management is a deliberate transfer of some of the initiative in case preparation from parties to the court. Principles of caseflow management include

- early and continuous judicial control
- short scheduling of events
- management of conflict in lawyers' schedules and

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<sup>1175</sup>For more detailed information on representation in the Federal Court, Family Court and AAT, including on how representation levels differ between case types, see ch 10–12.

<sup>1176</sup>T Matruglio & G McAllister, Federal Court Empirical Report Part One, para 9.1 table 35: n=678- (applicants) n=672 (respondents).

<sup>1177</sup>For Form 7 applications for final orders cases see T Matruglio & G McAllister, Family Court Empirical Report Part One, para 10.1 table 40: n=967 (applicants) n=967 (respondents) and ch 11, table 11.9. Also see ch 11, table 11.7.

<sup>1178</sup>See ALRC, AAT Empirical Report Part One, table 7.1. A small number of applicants recorded as being represented did in fact receive some assistance from a representative (legal or non-legal) at some stage of the AAT proceedings.

<sup>1179</sup>M Solomon & D Somerlot *Caseflow management in the trial court – Now and for the future* American Bar Association Chicago 1987, 13.

- certainty of events.<sup>1180</sup>

9.14 There are two basic models of prehearing caseload management

- the individual list (or 'docket') system, in which each case is randomly assigned at the time of filing to an individual judge who takes responsibility for the progress of the case over its entire course until disposition and
- the master list system, in which all cases are controlled by the court registry and are uniformly assigned to different judicial officers (usually registrars) at different times for different milestone case events.<sup>1181</sup> The master list system has been extensively revised to deal with backlog and delay, due to uncertainties in the system as to continuing judge availability, the ultimate disposition date, the future trial workload and uncertainty of case readiness.<sup>1182</sup>

9.15 Many case management systems adopt features from one or both models. The Family Court, for example, combines a master list system with differential case management, assigning cases to different 'tracks' which are set to progress toward hearing at different speeds according to complexity.<sup>1183</sup> Alternatively, courts may have an individual docket system for the prehearing stages and place cases in a master calendar for trial. Another example has cases assigned to the docket of teams of judges and registrars, with the same registrar managing interlocutory events and the judge employed strategically during the prehearing process and at trial.<sup>1184</sup>

9.16 A court with a large proportion of complex cases could benefit from having a single judge overseeing each case from beginning to end; and, in a court with a large proportion of smaller less varied cases an individual system would be unnecessary. High volume, routine cases benefit from categorising and streaming, such that appropriate procedures are applied to each category of cases. To some extent this describes the ways in which case management in the Federal Court and Family Court have developed.

## The role of the judge

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<sup>1180</sup>F McRae (Honours thesis) 'The adoption of the Individual List System in the Victorian Registry of the Federal Court of Australia ensures quality and expeditious case management in civil litigation' *Unpublished* Melbourne November 1998 quoting I Scott 'Is court control the key to reduction in delays?' (1983) 57 *Australian Law Journal* 16, 22.

<sup>1181</sup>D Ipp 'Reforms to the adversarial process in civil litigation – Part II' (1995) 69 *Australian Law Journal* 790.

<sup>1182</sup>F McRae (Honours thesis) 'The adoption of the Individual List System in the Victorian Registry of the Federal Court of Australia ensures quality and expeditious case management in civil litigation' *Unpublished* Melbourne November 1998 quoting from notes from workshop and presentation by Maureen Solomon for the Federal Court of Australia in Sydney 11 June 1996.

<sup>1183</sup>See also Supreme Court of New South Wales Practice Note 68.

<sup>1184</sup>For a discussion of varied approaches to case management see M Solomon & D Somerlot *Caseflow management in the trial court – Now and for the future* American Bar Association Chicago 1987, 40.

9.17 Case management models differ in the role assigned, and interventions permitted or encouraged by the judge. There is a strong working assumption in much of the case management literature that active judicial management assists to set the timetable for case processing and resolution, reduces lawyer/litigant produced delays and controls lawyer/litigant overservicing of a case which is costly and time consuming. Lord Woolf has formulated his model of reforms on such assumptions.

9.18 The Woolf reforms aim to engender a proportionate approach to litigation – the legal costs proportionate to what is at stake. This is set to be achieved by having ‘the responsibility for case progress’ taken out of the hands of the parties and made ‘a prime function of the Court’.<sup>1185</sup> Judges are directed to ‘run the show’, with pleadings effectively settled by the court, judges given responsibility and the means ‘to ensure that discovery is limited to what is really necessary’ and the calling of expert witnesses subject to the control of the court.<sup>1186</sup> This represents a radical departure from the working assumptions of the adversarial system.

9.19 Our federal court and tribunal case management models, like the Woolf model, are directed to reducing lawyer/litigant delay or overservicing, but as the following chapters demonstrate, none of the federal management models have the judge in charge in the manner envisaged in the Woolf proposals.<sup>1187</sup> In the federal

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<sup>1185</sup>eg the Civil Procedure Rules 1999 (UK) Part 3 Rule 3.1(2)(m): ‘... the court may take any other step or make any other order for the purpose of managing the case and furthering the overriding objective’; Rule 3.3(1) states that ‘[e]xcept where a rule or some other enactment provides otherwise, the court may exercise its powers on an application or of its own initiative and Rule 3.3(4) ‘[t]he court may make an order of its own initiative, without hearing the parties or giving them an opportunity to make representations’. Part 35 Rule 35.1 ‘Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings’ and Rule 35.4(1) ‘No party may call an expert or put in evidence an expert’s report without the court’s permission’.

<sup>1186</sup>G Watson ‘From an adversarial system to a managed system of litigation: A comparative critique of Lord Woolf’s interim report’ in R Smith (ed) *Achieving civil justice: Appropriate dispute resolution for the 1990s* Legal Action Group London 1996, 65.

<sup>1187</sup>The following recommendations of Lord Woolf indicate a ‘judge in charge’ model of case management

- Recommendation 1: There should be a fundamental transfer in the responsibility for management of civil litigation from litigants and their legal advisers to courts.
- Recommendation 2: The management should be provided by a three-tier system: an increased small claims jurisdiction, a new fast track for cases in the lower end of the scale and a new multi-track for the remaining cases.
- Recommendation 3: All cases where a defence is received will be examined by a procedural judge who will allocate the case to the appropriate track.
- Recommendation 8: When allocating a case to the fast track the judge should decide on venue, allocate a ‘trial week’ and set a timetable for the steps to be taken which will ensure that the case can be tried by the date given ; and give directions for preparing the case.
- Recommendation 32: On the multi -track the nature of management required will be decided by the procedural judge as part of the initial scrutiny once the defence is received: Lord Woolf *Access to justice: Final report to the Lord Chancellor on the Civil Justice System in England and Wales* HMSO London 1996 (Woolf final report).

Lord Woolf’s proposals have also been the subject of criticism and support: eg see A Zuckerman & R Cranston (eds) *Reform of civil procedure: Essays on ‘Access to justice’* Clarendon Press Oxford

system, judges, tribunal members and registrars manage cases but do not 'run the show'. They facilitate settlement, but do not broker settlements as do certain US judges and European judges. In most states of the United States, direct judicial involvement in the settlement process is more common than in Australia.<sup>1188</sup> Evidence to the Commission did not support any similar enlarged role or intervention for judges exercising federal civil jurisdiction.

9.20 The Commission's inquiry evidenced wide support for case management<sup>1189</sup> and for active management by judges<sup>1190</sup> but not such as to interfere with the parties 'proper opportunity'<sup>1191</sup> to present evidence and arguments.<sup>1192</sup> Where, as in the Federal Court, there is active judicial management of the interlocutory process, such practice is widely supported. Submissions to the Commission noted of judicial management

Experience suggests that the greater authority that the judicial officer presiding over case management is perceived to possess the more effective is the case management. Accordingly, the involvement of judges in pre-trial case management . . . ought to be encouraged.<sup>1193</sup>

Managerial judging at trial may involve judges also varying the requirements as to compliance with the rules of evidence . . . a cautious approach to decision making which has real effect should be adopted until the parties have had proper opportunity to put their evidence and their arguments . . . Consideration should be given to giving express rights of appeal against managerial judging decisions.<sup>1194</sup>

9.21 Decision making by such activist judges appears more aligned with 'the system of joint responsibilities' described by Maureen Solomon, than the more authoritative style provided for in the new English rules.<sup>1195</sup> Managerial judging

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1995, particularly Part 1; also see I Campbell (ed) 'Introduction [Civil justice reform]' [1997] XIX(1) *The Liverpool Law Review* 3-107.

<sup>1188</sup> S Landsman *Readings on adversarial justice: The American approach to adjudication* American Bar Association West Publishing Co St Paul 1988, 23.

<sup>1189</sup> eg B Beaumont *Submission 24* supplementary to B Beaumont *Submission 17*. See D Ipp 'Judicial intervention in the trial process' (1995) 69 *Australian Law Journal* 365, 371-372; G Davies & S Sheldon 'Some proposed changes in civil procedure: Their practical benefits and ethical rationale' (1993) 3 *Journal of Judicial Administration* 111; The Law Society of WA *Submission 78*; ACLA *Submission 70*; ACCI *Submission 61*; Legalcare Australia *Submission 50*; NRMA *Submission 81*; NSW Bar Assoc *Submission 88*; LCA *Submission 126*.

<sup>1190</sup> ACCC *Submission 67*; ACLA *Submission 70*; Law Society of WA *Submission 78*; ACCI *Submission 61*.

<sup>1191</sup> Law Society of SA *Submission 94*.

<sup>1192</sup> NRMA *Submission 81*; NSW Bar Assoc *Submission 88*. 'Such 'proper' opportunities, by consensus, do not extend to parties ventilating all possible issues in pleading and examination without judicial control': Arthur Robinson & Hedderwicks *Submission 189*.

<sup>1193</sup> Law Society of WA *Submission 78*; ACLA *Submission 70*; ACCC *Submission 67*; ACCI *Submission 61*; Legalcare Australia *Submission 50*.

<sup>1194</sup> Law Society of SA *Submission 94*; NRMA *Submission 81*; NSW Bar Assoc *Submission 88*.

<sup>1195</sup> See fn 31 for examples of the Civil Procedure Rules 1999 (UK). In his final report Lord Woolf set out the essential elements of his proposals for case management: (a) allocating each case to the track

makes heavy demands upon judges and the court generally. General criticisms of the practice of managerial judging note that

- it increases the power of judges and expands the opportunities for judges to exceed their power, particularly in a context where standards and rules are still being devised
- it threatens the impartiality of judges. Judicial intervention in prehearing case management is said to increase the opportunities for judges to be unduly influenced for or against a party through frequent close interlocutory contact<sup>1196</sup>
- it may at the interlocutory stage have the effect of forcing parties to abandon lines of argument before they have had the opportunity to fully explore their merits and the scope for such decisions to be reviewed is limited<sup>1197</sup>
- it may become an end in itself, rather than the means of achieving justice, with the managerial focus on speeding up the process, rather than on improving the quality of decisions<sup>1198</sup> and
- management targets and other statistical goals have the potential to become improper influences in decision making<sup>1199</sup> and an emphasis on case management may lead to judges, courts and tribunals paying more attention to statistics of numbers of settlements and time taken, rather than quality of decisions.<sup>1200</sup>

9.22 These competing views and considerations have informed the Commission's findings and proposals in the following case management chapters.

9.23 The consensus view from the Commission's consultations and submissions was that our legal system requires judicial management to deal with lawyer/litigant delays or overservicing. Case management inevitably shifts costs onto parties. Judge management in particular secures more rigorous case preparation. However, case management also shifts costs back to courts which require judicial resources to meet increased management loads.

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and court at which it can be dealt with most appropriately; (b) encouraging and assisting the parties to settle cases or at least to agree on particular issues; (c) encouraging the use of ADR (d) identifying at an early stage the key issues which need full trial; (e) summarily disposing of weak cases and hopeless issues; (f) achieving transparency and control of costs; (g) increasing the client's knowledge of what the progress and costs of the case will involve; (h) fixing and enforcing strict timetables for procedural steps leading to trial and for the trial itself: Woolf final report 18–19.

<sup>1196</sup> Judicial comments before or during the trial about the credit of witnesses will often raise an inference of bias, as will excessive intervention in the parties' conduct of the litigation: see *Jones v National Coal Board* [1957] 2 QB 55; *Tousek v Bernat* (1959) SR (NSW) 203; see also A Rogers 'The managerial or interventionist judge' (1993) 3 *Journal of Judicial Administration* 96.

<sup>1197</sup> Summarising arguments presented in J Resnik 'Managerial judges' (1982) 96 *Harvard Law Review* 374.

<sup>1198</sup> P Sallmann 'Judicial participation in caseflow management' (1989) 8 *Civil Justice Quarterly* 129, 136–137.

<sup>1199</sup> See D Ipp 'Reforms to the adversarial process in civil litigation – Part I' (1995) 69 *Australian Law Journal* 705, 719.

<sup>1200</sup> J Resnik 'Managerial judges and court delay: The unproven assumptions' (1984) 23 *Judges Journal* 8.

## Costs and case duration

9.24 There is limited data on whether case management or particular management models reduce costs or delay in litigation or review. There are few measures allowing evaluation over time, or before and after the implementation of particular case management systems. In any event, such questions call for consideration of what might have happened in cases, or seek to attribute case resolution to particular facilitative processes. These are necessarily unreliable assessments. Further, practitioners and some litigants cautioned that the real issue was the time and cost-effectiveness of case management processes, not their systemic effects.

9.25 This issue was reflected in lawyer and litigant concerns about case management. Most of them argued that judicial case management almost certainly increases legal costs. Yet they gave consistent endorsement to Federal Court management and to the AAT conferencing system which allow similar management of individual cases. Their complaints concerned time and money wasted by over-managed or prescriptive streaming of cases when cases were assigned to particular or repeat case events which did not advance, clarify or resolve issues in dispute.

9.26 Practitioners also noted the unintended consequences when case management reforms explicitly sought to save legal costs. Attempts to limit the number of expert witnesses may result in experts instructed to 'shadow' court experts.<sup>1201</sup> In the Family Court the simplification of process designed to eliminate expensive pleadings and curtail 'front-end' loading of costs has spawned a legal publishing market in court forms and seen case settlements delayed by late availability of discovery and limited case information.<sup>1202</sup> This is not to say that case costs are not relevant, but that it is difficult for courts and tribunals to engineer particular case outcomes for parties.

## Differential management

9.27 Federal case management systems vary in the way they approach the differential management of individual cases. The Federal Court and AAT case types vary from social security to diesel fuel excise disputes in the AAT; from intellectual property to migration or native title cases in the Federal Court. The Federal Court and AAT facilitate streaming of these case types. The Federal Court has expert panels of judges in particular case types and such cases are randomly allocated to judges on the panel. The proposed Administrative Review Tribunal (ART) is set to have broad divisions which correspond with the particular case types. The Federal Court docket system and the AAT conferencing system allow for differentiated

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<sup>1201</sup> See para 13.106-13.107.

<sup>1202</sup> See para 11.55-11.77.

management of individual cases, with directions and referral to ADR decided for the particular case. As set down in the following chapters, the Commission found wide spread satisfaction with the form, general practice and efficacy of the Federal Court and AAT case management systems.

9.28 The Family Court arguably has the more difficult case management task. It has a high volume case load and its matters are more difficult to differentiate. Family law cases can be broadly streamed into children's matters; mixed property and children; and property matters. The Commission's research indicated that these case 'types' show different patterns of resolution.<sup>1203</sup> Even so, the factors which make for complexity or intractability in the case load often derive from the emotional disposition of the parties, from family violence and child abuse allegations and these factors are not so easy to identify for case streaming and management.<sup>1204</sup>

9.29 The Family Court case management system differentiates cases by reference to the anticipated hearing time needed to determine the case. Many of the Commission's interlocutors criticised such streaming criteria. In any event, the court's 'differential' case management system provides a largely undifferentiated, uniform processing of cases in the direct and standard track. This standardised processing was likewise criticised. The management system was generally said to be focussed on court and not party imperatives, to engender frustration with the process, to contribute to wasted costs for the court and parties and to a lack of compliance with directions.<sup>1205</sup>

9.30 The clear view of the Commission's consultations across each of the federal courts and tribunals was that it was essential in case management to differentiate particular cases or case types. Such differentiation is seen to be best provided if the same judge or registrar manages the case throughout the relevant time, whether interlocutory in the AAT or the Family Court, or until resolution or determination in the Federal Court. The preference was for judge management or judge oversight of management. In high volume jurisdictions like the Family Court, where many of the cases do not warrant judicial intervention<sup>1206</sup> and there are insufficient judges to make a docket system feasible, the preferred arrangement was for registrars to be associated with a particular judge, and be able to refer matters to the judge or seek judicial attention to intractable matters. The description which some practitioners employed to the Commission was 'a modified docket system.'

9.31 Family Court practitioners stressed to the Commission the need for some matters to be exempted from PDR processes and directly tracked for adjudication. The association between registrars, judicial registrars and judges should allow

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<sup>1203</sup> T Matruglio & G McAllister, Family Court Empirical Report Part One, 49, 64.

<sup>1204</sup> See the discussion of the Magellan Project at para 11.124.

<sup>1205</sup> See further ch 11.

<sup>1206</sup> T Matruglio & G McAllister, Family Court Empirical Report Part One, 48–49: eg most Form 7 applications for final orders cases were resolved between the parties (78.7%).

confirmation by the registrar of the need for such referral and direct removal of the file to an appropriate judicial registrar or judge. Similarly, judges have commented that matters coming on for trial sometimes are unprepared, with necessary directions not made or complied with. The management scheme proposed by the Commission allows judges to brief the registrar concerned to ensure focus is on such issues in future cases. The scheme builds in a measure of accountability.

9.32 The consensus was that such consistent judicial management or oversight allows for a form of managerial judging which includes

- an ability to tailor prehearing events, so that cases are listed for appropriate directions hearings or referred to ADR processes at an appropriate time according to the circumstances of each case
- an ability to tailor orders made at directions hearings and other prehearing events to accommodate the requirements of the matter as to discovery, exchange of expert opinion, witness statements, outline statements, pleadings, interrogatories, notices to admit and produce and the like
- prehearing accessibility of the judge to ensure consistency, compliance with directions and overall efficiency
- hearings presided over by judges who are aware of the facts and issues and the development of the case
- input of judges in the range of cases, rather than the small percentage of cases which require a hearing and
- the avoidance of the inefficiencies associated with multiple handling of cases by a variety of judicial officers, all of whom must attempt to grasp the details of each case as it comes before them.<sup>1207</sup>

## ADR and case management

9.33 In federal courts and tribunals examined by the Commission, negotiation between the parties, generally conducted by lawyers, and conciliation conducted by court or tribunal registrars are the ADR processes most commonly used.<sup>1208</sup> Both

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<sup>1207</sup>.LCA *Submission 126* and see for example, B Beaumont 'Managing litigation in the Federal Court' in B Opeskin & F Wheeler (eds) *The Australian federal judicial system* Melbourne University Press 2000 (forthcoming).

<sup>1208</sup>.See LCA *Submission 126*. Research has indicated that while a higher proportion of attempts at settlement were made prior to court contact and at the first court appearance, there were also relatively high proportions of settlement attempts at conciliation conferences: Justice Research Centre *Family Court research part two: The costs of litigation in the Family Court of Australia* ALRC Sydney June 1999 (Justice Research Centre Family Court Research Part Two). The responses to the Family Court survey on the question to solicitors of the most important factors for clients in deciding to settle or withdraw a case were legal costs, that the settlement was close to what would have been achieved at a hearing, and that the client got what they wanted: T Matruglio, Family Court Empirical Report Part Two, 62. Conciliation is an evaluative process in which the conciliator expresses a view on the likely outcome: see, for example, Victorian Attorney-General's Working Party on Alternative Dispute Resolution *Report* Attorney-General's Department Melbourne 1990. Conciliation and mediation can often be blurred or blended and there may be differences in the use of the terms. For example, in the Family Court some research suggests that mediation tends to be



processes seem to be effective in securing consensual outcomes for particular disputes. Conciliation arrangements are integrated into case management processes. To improve settlement prospects, parties may be ordered to attend conciliation.<sup>1209</sup>

9.34 The Federal Court does not have a conciliation program, but in common with the Family Court and the AAT, utilises court annexed and private mediation. A proportion of the parties attending mediation in federal proceedings have been ordered to do so.<sup>1210</sup> Mediation is also said to give effective settlements.<sup>1211</sup> Legislative amendments should see increased use of arbitration in the federal jurisdiction.<sup>1212</sup>

9.35 The Commission received a considerable number of submissions on matters relating to the selection, streaming, referral (including compulsory referral), timing and the evaluation of ADR processes. Submissions ranged between enthusiastic and cautious proponents of ADR.<sup>1213</sup> No submission stated that ADR was suitable for all cases. Opinion was divided as to whether parties should be required to attend ADR processes<sup>1214</sup> and who should select cases suitable for referral to ADR and

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quite directive and, at least in the Victorian registry, have the character of conciliation: S Caspi (PhD thesis) 'Mediation in the Family Court of Australia: Rhetoric versus reality' *Unpublished* Monash University Victoria 1998. PDR mechanisms such as conciliation conferencing and conciliation counselling are often referred to as mediation.

<sup>1209</sup>For the use of conciliation conferences in the AAT see ch 12 and for conciliation processes in the Family Court see ch 11.

<sup>1210</sup>In the Federal Court, parties may be ordered to attend mediation, although in practice this is rare unless the parties indicate a willingness to participate: see para 10.109 -10.111.

<sup>1211</sup>M Black 'The courts, tribunals and ADR: Assisted dispute resolution in the Federal Court of Australia' (1996) 7(2) *Australian Dispute Resolution Journal* 138, 141 & 143. Chief Justice Black has noted that mediation of bills of costs 'can result in substantial savings of time and costs for the Court and for the parties'.

<sup>1212</sup>Provision for arbitration exists under O 72 of the Federal Court Rules and s 19D of the Family Law Rules. Also see D Williams Attorney-General *Speech* 4th National Mediation Conference Melbourne 6 April 1998. See also G Watts *Family Court arbitration – Private arbitration cometh* 97/413 Continuing Legal Education Department of the College of Law Sydney 1997. Arbitration is also widely used by the Australian Industrial Relations Commission to settle industrial disputes and termination of employment claims.

<sup>1213</sup>Submissions which suggested that ADR should have a much more expanded role include the ACCI *Submission 61*; Tyrells Property Inspections NSW *Submission 64*; IAMA *Submission 15*; Legalcare Australia *Submission 50*; J Weingarth *Submission 52*; ICA *Submission 85*; M Redfern *Submission 90*; A Stitt *Submission 32* & NCYLC *Submission 140*. Submissions which suggested more caution in the use of ADR and for example, questioned any mandatory use of ADR, include ACLA *Submission 70*; LCA *Submission 126*; Law Society of SA *Submission 115*; Law Institute of Vic Admin Law Section *Submission 55*.

<sup>1214</sup>Submissions which favoured mandatory referral to ADR include IAMA *Submission 15*; A Stitt *Submission 32*; A Robb *Submission 28* suggested that at least in commercial disputes mediation should be compulsory; Legalcare Australia *Submission 50*; LANSW *Submission 57*. Submissions which rejected or questioned mandatory referral include Vic Bar *Submission 57*; Law Institute of Vic Admin Law Section *Submission 55*; Law Society of WA *Submission 78*; NRMA *Submission 81*; NSW Bar Assoc *Submission 88*; LCA *Submission 126*.

according to what criteria.<sup>1215</sup> Discussion about these issues relevant to particular courts, tribunals and cases is included in the following chapters.

9.36 One important general matter concerns the value assigned to, and the mechanisms for evaluating the efficacy of ADR processes.<sup>1216</sup> The AJAC report listed the following suggested criticisms and concerns

- ADR in practice may be used in certain types of cases mainly for people from disadvantaged groups who cannot afford to litigate their disputes – for example, women may be forced into mediation in family law matters, because they are less likely than men to be able to afford substantial legal costs
- parties with less bargaining power may be forced or persuaded into participating in ADR and thereby lose the protection offered by the rules and procedures of the formal judicial process
- governments may tend to encourage ADR mainly because the process is less costly for the public purse and if this is so, then inappropriate cases may be directed to ADR programs and
- ADR in a sense ‘privatises’ dispute resolution which limits its precedent value and means that issues of public interest can be taken off the public agenda and become, in part immune, from public scrutiny.<sup>1217</sup>

9.37 There was consensus that ADR should not be a substitute for adjudication or for legal representation.<sup>1218</sup> In this regard research from the United States, which has had long term experience with ADR and litigation indicates

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<sup>1215</sup>.Law Society of SA *Submission 115*.

<sup>1216</sup>For discussion of the methodological difficulties in evaluating ADR programs see T Matruglio *Researching alternative dispute resolution* JRC Sydney 1992; S Caspi ‘Mediation in the Supreme Court – Problems with the spring offensive report’ (1994) 5(4) *Australian Dispute Resolution Journal* 250; S-Keilitz (ed) *National symposium on court connected dispute resolution research – A report on current research findings – Implications for courts and research needs* State Justice Institute Washington DC 1994. The Commission’s issues paper on ADR and federal dispute resolution summarises a range of evaluations which have now been conducted into ADR processes: ALRC IP 25 *Review of the adversarial system of litigation ADR – its role in federal dispute resolution* ALRC Sydney June 1998, para 2.64–2.69, 9.50–9.51, Appendix D. For other discussions of evaluating ADR processes see RIngleby *In the ball park: Alternative dispute resolution and the courts* AIJA Inc Carlton South 1991; C Chinkin & MDewdney ‘Settlement week in New South Wales: An evaluation’ (1992) 2 *Australian Dispute Resolution Journal* 93; M Dewdney et al *Contemporary developments in mediation within the legal system and evaluation of the 1992–3 Settlement Week Program* Law Society of New South Wales Sydney 1994.

<sup>1217</sup>.AJAC report, para 11.5.

<sup>1218</sup>For example, the Law Society of NSW Dispute Resolution Centre submitted that the task of asking courts to play a greater role in the implementation of ADR is problematic. It suggested that if courts are engaged increasingly in the resolution of disputes generally, rather than the dispensing of justice, the credibility of the court’s traditional role may be compromised: Law Society of NSW Dispute Resolution Centre *Submission 72*. The NSW Bar Association in its submission was concerned that the two processes – litigation and ADR – should remain very much separate: ‘ADR is a process used by litigants, not courts. It ought not to be regarded as any part of the judicial process’: NSW Bar Assoc *Submission 88*.

that ADR has had too little impact on overcrowded dockets and litigation expenses. Studies show that ADR does not necessarily reduce caseloads. It may be a fairer, more just settlement technique, but generally it replaces ordinary settlement negotiation more than it substitutes for trials.<sup>1219</sup>

9.38 Judith Resnik has further suggested

The assumption of many proponents, that ADR will increase the options available to litigants within the publicly financed system may not be borne out. As the state makes alternative dispute resolution its own, both ADR and adjudication are being reconceptualised. As we proceed into the next century, the commitment to twentieth century style adjudication is waning. In this interaction, we may soon find ourselves with a narrower, not a richer, form or range of forms of dispute resolution.<sup>1220</sup>

9.39 Further, the Utah Family Court Task Force, in discussing ADR within that Court, noted the impact of a party being unrepresented on their ability to settle

Mediation is not a substitute for legal representation. Indeed, representation of each party by independent counsel is preferred. If the mediator represents the interests of either party or offers legal advice to either party, the mediator abandons neutrality. Mediation has the best chance of success when each party is fully informed regarding his or her own legal rights and responsibilities and those of the other party. Mediation has the best chance of success when each party is fully informed regarding real and personal property. Such information is just as important in mediation as in litigation. Representation by counsel can help to provide this information.<sup>1221</sup>

9.40 These issues are significant. ADR generally is utilised within case management in order to facilitate settlement. In the Family Court, in particular, its statements of objectives, 'visions' and charters expressly confirm that adjudication is a last resort.<sup>1222</sup>

9.41 In fact most federal civil disputes are settled and not adjudicated. This is appropriate. The Commission's research data shows that, of cases completed in the Federal Court, the Family Court and the AAT, the majority are resolved by

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<sup>1219</sup>L. Katz 'Compulsory alternative dispute resolution and voluntarism: Two-headed or two sides of the coin' (1993) 1 *Journal of Dispute Resolution* 1, 52.

<sup>1220</sup>According to Resnik, the ultimate result of this process and ideological movement will be to regard a civil trial as a 'pathological event'. She questions the value of this transformation on a number of grounds and contends that the many virtues of adjudication have been little discussed or acknowledged in the face of this embracing of ADR. Those virtues include its attention to individual instance, its effort to announce, explain, and generate public norms, its slowness, its labour intensive and messy activity of attempting to reconstruct events so as to attach the label 'fact' from whence 'law' and judgment' can flow. J Resnik 'Many doors? Closing doors? Alternative dispute resolution and adjudication' (1995) 10(2) *Ohio State Journal on Dispute Resolution* 211, 257-261.

<sup>1221</sup>Utah Family Court Task Force *Final report to the Utah Judicial Council Administrative Office of the Courts Salt Lake City 1994*, 4.

<sup>1222</sup>See para 11.2.

negotiation between the parties, either with or without their engagement in formal ADR procedures.<sup>1223</sup> In the Commission's sampled cases a sizable proportion of matters before the Family Court were 'repeat players' or re-opened cases,<sup>1224</sup> some of which previously had settled the family dispute.

9.42 A number of studies now analyse the process, practice and efficacy of settlement

As the law becomes more voluminous, more complex and more uncertain, costs increase. Virtually every "improvement" in adjudication . . . Increases the need and opportunity for greater expenditures. Greater expenditures for one side lead to greater costs for the other. Yet only a small portion of these disputes are fully adjudicated. As the transaction barriers (time, money, attention, opportunity, costs, uncertainty about recovery and its amount) rise, there is more chance of overlap in the bargaining position of the parties.<sup>1225</sup>

9.43 As adjudication of disputes becomes less feasible for some parties, what disputants demand is an 'adjudication-backed' remedy.<sup>1226</sup> For the majority of cases, settlement is 'intimately bound to' and effectively bargained in 'the shadow' of litigation.<sup>1227</sup>

9.44 Submissions made to the Commission reflected a growing appreciation of the trend towards settlement and ADR as a 'cultural' change within the litigation process, rather than a theoretical shift in dispute resolution methodology away from litigation or adjudication.

There is already a cultural change afoot in the legal profession. The last few years has seen a growing acceptance by the legal profession of alternative dispute resolution, especially mediation, as an adjunct to the court system.<sup>1228</sup>

The congruent system of ADR in harmony with the court system is to be recommended.<sup>1229</sup>

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1223. ALRC research indicated that 5% of family law cases require judgment, 35% of Federal Court cases and 33.7% of AAT cases: T Matruggio & G McAllister, Family Court Empirical Report Part One, para 6.5.2; T Matruggio & G McAllister, Federal Court Empirical Report Part One, para 6.1; ALRC, AAT Empirical Report Part One, table 5.3.

1224. ALRC research indicated that in the sample analysed 19% were repeat players: T Matruggio & G McAllister, Family Court Empirical Report Part One 15.

1225. M Galanter 'The Federal Rules and the quality of settlements: A comment on Rosenberg's, "The Federal Rules of civil procedure in action"' (1989) 137 *University of Pennsylvania Law Review* 2231.

1226. *id.* 2233.

1227. *id.* 2234.

1228. *ACLA Submission 70.*

1229. *ibid.*

The increased use of ADR by parties does not necessarily indicate a dissatisfaction with the judicial process. The time and cost factor in preferring an ADR process does not necessarily equate to a dissatisfaction with the judicial process.<sup>1230</sup>

9.45 In this light, case management should not merely encourage and facilitate alternative dispute resolution, but also utilise ADR processes to seek to ensure effective settlements – that is, settlements that are appropriate and lasting.

If we combine this ‘quality’ problem with the observation that the principal product of the system is settlements, we arrive at the central and most intractable intellectual problem of assessing the quality of settlements.<sup>1231</sup>

9.46 The distinction between ‘efficiency’ and ‘quality’ was made in a number of the submissions to the Commission.

Efficiency cannot be the sole criterion for the success of the trial process . . . In fact fear has already been expressed that ADR may act to promote efficiency at the expense of more fundamental issues such as fairness and justice.<sup>1232</sup>

Clearly, there are different factors which may lead parties to settle. On that basis great care must be taken when evaluating a case management system not to rely on “the extent that it achieves earlier settlement of cases” as a criterion in isolation from the satisfaction of the litigants with the result achieved.<sup>1233</sup>

[A]necdotes abound that structured “mediation” is better, cheaper, faster, fairer and more durable than “court”. These anecdotes must be treated with caution, at least because courts may be handling more entrenched and conflicted disputants (that is, they are “treating” different samples).<sup>1234</sup>

9.47 These issues are addressed in federal courts and tribunals. Federal Court and AAT case management allow particular cases to be referred to ADR processes at appropriate times. The AAT’s compulsory conciliation arrangements for compensation cases do not apply to cases where the applicant is unrepresented and may be in an unequal bargaining position. Within the Family Court where PDR processes are largely provided uniformly for all standard and direct track cases, particular cases involving family violence may be exempt or the parties referred to separate interviews with counsellors. Even where matters are resolved before

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<sup>1230</sup> Law Society of NSW Dispute Resolution Centre *Submission 72*; NSW Bar Assoc *Submission 88*. The Law Society of WA *Submission 78*, also submitted that increased use of ADR does not relate to a dissatisfaction with the judicial process.

<sup>1231</sup> M Galanter “The Federal Rules and the quality of settlements: A comment on Rosenberg’s, “The Federal Rules of civil procedure in action”” (1989) 137 *University of Pennsylvania Law Review* 2231, 2233.

<sup>1232</sup> A McFadzean *Submission 20*, 12.

<sup>1233</sup> NSW Bar Assoc *Submission 88*.

<sup>1234</sup> J Wade *Submission 87*.

counsellors no immediate order is made, to allow parties time to reflect on the agreement.

9.48 The Commission supports such arrangements and makes suggestions to improve the utility of ADR and PDR processes with the aim not simply to secure settlements but effective settlements.

## Unrepresented parties

9.49 As noted above, the level of representation in proceedings varies both as between the Federal Court, the Family Court and the AAT and as between the different case types they deal with.

9.50 Significant numbers of cases in each forum involve at least one unrepresented party. For example, in the Commission's sampled cases around 18% of cases in the Federal Court,<sup>1235</sup> 41% of cases in the Family Court<sup>1236</sup> and 33% of applications in the AAT samples involved one or more unrepresented or partially represented party.<sup>1237</sup> Unrepresented parties tend to be associated with particular case types in the Federal Court and the AAT, notably with migration cases in the Federal Court and social welfare cases in the AAT.<sup>1238</sup>

9.51 There are a number of perceptions relating to unrepresented parties. These include that the number of unrepresented parties involved in litigation is large and significantly increasing, at least in areas such as family law and migration law; that the presence of unrepresented parties generally makes litigation slower, makes settlement more unlikely, and increases the costs of the other party and the court, and that unrepresented parties are likely to be less successful in litigation than represented parties. There has been little empirical research done to test these propositions.<sup>1239</sup>

9.52 The issues relating to unrepresented parties depend on the context of the litigation, and need to be analysed in context. Detailed information about these issues is included in chapters 10–12 which deal with case management in the Federal Court, Family Court and AAT respectively.

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<sup>1235</sup> T Matruglio & G McAllister, Federal Court Empirical Report Part One, table 35: n=678 (applicants) n=672 (respondents).

<sup>1236</sup> For Form 7 applications for final orders cases: T Matruglio & G McAllister, Family Court Empirical Report Part One 49, table 40. n=967 (applicants) n=967 (respondents) and ch 10 table 11.9.

<sup>1237</sup> See ALRC, AAT Empirical Report Part One, table 7.1.

<sup>1238</sup> For more detailed information on representation in the Federal Court, Family Court and AAT, including on how representation levels differ between case types see ch 10–12.

<sup>1239</sup> The Senate Legal and Constitutional References Committee Inquiry into the Legal Aid System recommended that the Government should collect, analyse and publish annual data on unrepresented parties appearing in the Family Court of Australia, Federal Court, State and Territory Supreme Courts and District/County Courts and the appeal courts for all of these: Senate Legal and Constitutional References Committee *Inquiry into the Australian legal aid system – Third report* Senate Printing Unit Canberra June 1998, 30.

9.53 Analysis of the Commission's case file survey results, discussed in those chapters, found that representation does have significant relationships with case outcomes. In particular, unrepresented or partially represented parties are less likely to receive a successful outcome in their cases. However, for a range of reasons it is not possible to say that, simply because unrepresented applicants are less successful, they are necessarily 'disadvantaged' in court or tribunal proceedings. What the Commission's data does reveal, relevant to case management, is that in the AAT and Family Court, cases where both parties were represented were more likely to be resolved by consent. The data suggests that settlement by negotiation, particularly in the 'shadow of the law' is more effective with representation.

## Evaluation of case management systems

9.54 A well directed, efficient case management system should benefit the court, tribunal and parties. Federal courts and tribunals regularly review their case management systems. They monitor and report on time standards for cases finalised. Most recently, the Federal Court has engaged the Justice Research Centre to evaluate its individual docket system<sup>1240</sup> and the Family Court's Future Directions Committee is considering changes to case management, practice directions, and its simplification of procedures.<sup>1241</sup> The Commission supports such evaluations, the results of which should be comprehensively considered by judges, registrars and administrators and the subject of consultation with the legal profession.

9.55 The evaluation of case management systems is one component in setting performance standards and monitoring performance. Within this context, courts and tribunals, like other organisations, set and assess their success in achieving organisational goals and objectives. There are particular difficulties for courts and tribunals in developing such standards. What are the objective measures of court and tribunal central goals – determining disputes according to law<sup>1242</sup> or providing high quality decisions.<sup>1243</sup>

9.56 Court evaluation or performance monitoring requires that a system be

- integral to the operations of the court, so that it is developed by judicial officers, managers and court users who understand its purpose and can use it for further organisational development
- relevant to the core values of courts, so that it makes available information about the most important of the court's activities

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<sup>1240</sup> As discussed at para 10.46.

<sup>1241</sup> Family Court of Australia *Report to the Chief Justice of the Evaluation of Simplified Procedures Committee August 1997* Family Court Sydney 1997.

<sup>1242</sup> One of the Federal Court's stated objectives: *Federal Court Annual report 1997-1998*, 1.

<sup>1243</sup> One of the AAT's stated goals: *AAT Annual report 1997-98*, 13-15.

- capable of collecting data whose relevance to court goals and values is explicit and unambiguous and
- feasibly developed and applied without detracting from the court's availability to achieve its central goals through siphoning off resources.<sup>1244</sup>

## Technology and case management

It will always be the province of old timers, particularly in a hierarchical, traditionalist and historically conscious occupation such as the law to look to the past with more affection than, say, an aeronautical engineer or a computer games salesman. But lawyers too, and their institutions, must move with fast changing times. Technology stimulates rapid change.<sup>1245</sup>

9.57 The cover of the Federal Court *Annual report 1996–97* shows the court in session under a tent at the Rumbulara Aboriginal Cooperative, Mooroopna, demonstrating the flexibility courts can have in going to the litigants.<sup>1246</sup> Advances in technology allow greater portability for the courtroom.<sup>1247</sup>

9.58 New technology is expensive for courts and tribunals. The promise is that technology also should produce cost savings<sup>1248</sup> from

- videoconferencing of proceedings<sup>1249</sup>
- simultaneous access to court files

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<sup>1244</sup>R Mohr 'Performance measurement for Australian courts' (1997) 6(3) *Journal of judicial administration* 156, 158.

<sup>1245</sup>M Kirby 'Legal professional ethics in times of change' (1998) 72 *Reform* 5, 7.

<sup>1246</sup>See also the comments of B McLean *Minutes of evidence* 25 November 1998, 138, submission to the Parliament of Victoria Law Reform Committee *Technology and the law* Government Printer Melbourne May 1999, para 10.23: 'One day a courtroom may well be constituted by a barn in the Wimmera-Mallee region and we will have everything available at our fingertips as we would in a traditional courtroom in Melbourne.'

<sup>1247</sup>F Hock 'Judicial philosophy in information technology strategy' *Paper AIJA Technology for justice conference* Melbourne 23 March 1998.

<sup>1248</sup>Transaction costs are being slashed by the impact of computing and telecommunications on the collection, storage, computing and transmitting of information.

<sup>1249</sup>All Australian federal courts and tribunals have access to videoconferencing facilities either through their own resources or borrowing from one another. The High Court conducts a high proportion of special leave applications through videolink between justices in Canberra and parties in other capital cities: High Court of Australia *Annual report 1997–98*, 9. In the Federal Court in 1997–98 videoconferencing was used in 330 matters, usually in directions hearings (157) or in trial and Full Court hearings (85). There were 15 links though the year to other countries. One limitation of videoconferencing has been that it usually operates over a single channel, only allowing one user to be viewed. Queensland is piloting use by the State Reporting Bureau of a four channel remote recording and transcription that will allow four channels to operate simultaneously for the judge, witness, defence and prosecution: 'Regional courts go hi-tech' *Courier Mail* 14 May 1999, 9. Videoconferencing can use desktop computers or television and can allow multiple users who can jointly edit documents, send messages to one another, switch viewing to different users, make joint notes, or pass notes to one person without the others seeing. For example, see Microsoft NetMeeting, <<http://www.microsoft.com/netmeeting>> (26 March 1999). This technology will probably move to television when internet services become widely available through television.



- electronic delivery of court files – reducing the need to physically transport files to other courts or from registry to judge
- less photocopying and file handling
- reduced time spent on data entry and storing and retrieving documents
- simplified archival and retrieval of files and space saving with fewer paper records<sup>1250</sup>
- improved accuracy in record maintenance
- improved electronic report creation and file searching and
- potential to reduce staff numbers or make them available for other services.<sup>1251</sup>

9.59 In a fully electronic court a registry will receive initiating documents electronically, the computer system will automatically allocate a file number, receive electronic payment, generate necessary correspondence and allocate the matter to a judge or registrar. Minimal intervention will be required to set dates for attendance which will be entered automatically into court and judicial diaries, with diary reminder services for judges and for the parties. The system can inform parties and the judge by email whenever new documents are lodged in the matter. All documents filed and case management tracking and notes will be entered on the electronic case file. At any time the electronic file will show the stage of proceedings, the documents filed and the next steps in the process.

9.60 The same system will incorporate judicial support services such as internet and CDROM access to research, as well as intranet based bench books and other internal court practice information. Real-time court transcript can be part of the case file, whether recorded by stenograph or voice recognition software. Documents and transcript can be electronically marked by judges for their notes and searched using commercial web browsers. Any documents referred to in the course of proceedings will appear on computer screens in front of the judge and the parties. Parties or their representatives unable to be at court can access the proceedings and transcript using the internet and contact their representatives in court by email. Where proceedings or parts of proceedings are conducted using email or videolink, these records can be added to the case file. The use of intranets or prioritised access will allow access by litigants and the public to public information on the case file. The judge's orders can be entered immediately on the file, an endorsed hard copy given to the parties at the time, and an electronic copy emailed to them.

9.61 All of these services are already available. Many of them are part of court practice even without electronic filing. The above description documents the fully coordinated electronic management system.

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<sup>1250</sup>.Administrative Office of the US Courts *Electronic case files in the federal courts: A preliminary examination of goals, issues and the road ahead* March 1997  
<<http://www.uscourts.gov/casefiles/toc.htm>> (8 April 1999).

<sup>1251</sup>.This has been the experience in the District Court for the Northern District of Ohio and the Bankruptcy Court of the Western District of Oklahoma: Administrative Office of the US Courts *Electronic case files in the federal courts: A preliminary examination of goals, issues and the road ahead* March 1997 <<http://www.uscourts.gov/casefiles/toc.htm>> (8 April 1999).

### *Electronic filing*

9.62 The electronic appeals book initiative from the Council of Chief Justices has provided an impetus to test the feasibility for electronic filing, associated management and judgment databases in courts. The High Court has been using its internet site for testing electronic filing. The Federal Court plans to introduce electronic filing with its new electronic document and financial and case management system.<sup>1252</sup> The Family Court is currently developing a new case management system,<sup>1253</sup> which will support electronic filing.<sup>1254</sup>

9.63 Electronic filing of initiating documents by lawyers in a set format or document can trigger the automatic creation of a case file and processes as set out above. When cases are moved between courts, the file can be sent to the registry without the need to re-key any data.

9.64 The electronic support for case management in federal courts and tribunals is of variable sophistication.

### *High Court*

9.65 The case management system of the High Court utilises Lotus Notes to organise the work of the court, allowing access to court information, research, and direct publishing to the internet.<sup>1255</sup> The cases database contains information on every matter before the court,<sup>1256</sup> including the case name, type of case, what the case is about, where and when it commenced, and the location of the file. The progress of the case, documents filed, correspondence, hearings and past and pending events are recorded so users can identify the progress and future events.<sup>1257</sup> Transcripts and documents electronically filed with the court are attached to the designated event in the cases database.<sup>1258</sup> A representatives database contains contact details for representatives and self represented parties.<sup>1259</sup> Much information in the court databases is intended to become available for public internet access.<sup>1260</sup>

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<sup>1252</sup>W Soden *Consultation* 7 April 1999.

<sup>1253</sup>Family Court of Australia *Draft CMS functional analysis version 3.3* Family Court Canberra 8 October 1998.

<sup>1254</sup>.id 8.

<sup>1255</sup>J Popple & T de la Fosse 'Escaping the relational database paradigm: Case management in the High Court of Australia' *Paper AIJA Technology for justice conference Melbourne* 23 March 1998 <<http://www.aija.org.au/conference98>> (3 August 1999).

<sup>1256</sup>.id 2, 4-5.

<sup>1257</sup>.id 9-10.

<sup>1258</sup>.id 12.

<sup>1259</sup>.id 3, 6.

<sup>1260</sup>.id 16.

### *Federal Court*

9.66 The Federal Court FEDCAMS<sup>1261</sup> system is set to be replaced with a new system that will allow electronic filing, electronic case files, simultaneous access to the court file by judges and parties, document imaging, electronic document management and litigation support in a framework of electronic commerce that enables all court fees and other user charges to be electronically transferred to the court's accounts. The system will allow more extensive capture of information and data collection.<sup>1262</sup>

### *Family Court*

9.67 The Family Court has two major, national computerised systems in operation: Blackstone, the case management system, and CRIS, the Counselling Records Information System. It also has a separate financial and reporting system and a human resource management system as well as a number of other databases and tools maintained at individual registries of the court. Blackstone was designed as a case management system, and while statistical data can be extracted from the system, it did not incorporate a built-in management information system.

9.68 The Court's Corporate Information Technology Plan (CITP) is planning a new case management and registry services system that will contain electronic case records, recording all case and PDR events and the management of support tasks.<sup>1263</sup> A single diary will replace the current multiple, manual diaries. There will be reporting and data extraction capabilities, list creation, standard document generation and cash register facilities. The system should assist to establish common practices across all registries.<sup>1264</sup>

### *Administrative Appeals Tribunal*

9.69 The AAT has used AATCAMS for case management tracking since 1986. Initial information is manually recorded from information collected on standardised forms. Hearing Report Forms record information about tribunal processes such as

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<sup>1261</sup>.FEDCAMS

- allocates case to judges who operate under an individual docket system (IDS)
- captures data following the introduction of IDS
- records new matters and updates existing matters
- records and maintain hearing details, including information on ADR events
- records details of judges and update reports
- produces reports of matters and hearing details
- maintains code tables: R Reynolds *FEDCAMS Post implementation review report* Attorney-General's Department Information Management Branch (Cth) Canberra 1991, 12; ALRC IP 23 para 3.15-3.19.

<sup>1262</sup>.W Soden *Consultation* 7 April 1999.

<sup>1263</sup>.Family Court of Australia *Draft CMS functional analysis version 3.3* Family Court Canberra 8 October 1998, 20.

<sup>1264</sup>.id 20-1.

conferences, directions hearings, mediations and hearings. Data relating to duration and result is later entered into the system. The information generated by AATCAMS is used to produce reports by registries on day to day case management and consolidated reports on the operations of the AAT.

9.70 In 1997–98 the functionality of AATCAMS was extended to record demographic information and to take account of the addition of the Small Taxation Claims Tribunal.<sup>1265</sup> Future directions in electronic case management in the AAT are on hold until the finalisation of the development of the new Administrative Review Tribunal.

### *Litigation management*

We have barely begun to discover the benefits which information technology can provide in litigation: filing documents, preparing and transmitting proofs of evidence, plans, photographs, and videos, cross-referencing of subject matter, searching for authorities, citations, principles and annotations and even statistical analysis of prospects of success or failure.<sup>1266</sup>

9.71 Complex cases and government inquiries have demonstrated the benefits of technology in litigation management. The Rothwells trial in Western Australia, the Wood Royal Commission in New South Wales, the Estate Mortgage case<sup>1267</sup> and the Longford Royal Commission<sup>1268</sup> in Victoria all utilised technology for document management and transcription of evidence. Intranets were used to store data and internet access enabled lawyers and parties not in the court to contribute via email.

9.72 In these matters the technology was dismantled at the end of the proceedings. In the Federal Court and certain state Supreme Courts similar technology is now permanently installed.<sup>1269</sup> Parties bring their own computers to the court. The infrastructure, cabling and internet connections are provided.<sup>1270</sup>

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<sup>1265</sup>.AAT *Annual report 1997–98*, 119.

<sup>1266</sup>G Brennan & T Eichelbaum 'Key issues in judicial administration' *Paper 15th AIJA Annual Conference Wellington September 1996*, 14–15.

<sup>1267</sup>.Details about the technology used in these matters is discussed in ALRC IP 23 para 5.42–5.47; Victorian Law Reform Committee *Technology and the law* Government Printer Melbourne May 1999 para 10.11–10.16; T Smith & I Chivers 'The Estate Mortgage court system' *Paper AIJA Technology for Justice Conference Melbourne 23 March 1998* <<http://www.aija.org.au/conference98/papers/estate/index.htm>> (3 August 1999).

<sup>1268</sup>.Details about the technology used at the Longford Royal Commission is discussed in Victorian Law Reform Committee *Technology and the law* Government Printer Melbourne May 1999 para-10.11–10.16. The transcript of the Royal Commission is at <<http://www.vgrs.vic.gov.au/public/longford.html>> (3 August 1999).

<sup>1269</sup>B Howarth 'Digital technology has its day in court' *The Australian* 15 September 1998, 3. 'Transcript recorded using a stenograph machine can be computer translated within seconds of recording. As most courts and tribunals now use stenograph recorded transcript the capacity for instant transcript is available with the appropriate translation software. Transcript by shorthand and audio transcript are becoming less common. Video transcript is also used in the US. Voice recognition technology

*Practice notes*

9.73 The Supreme Court of New South Wales and the Supreme Court of Victoria have recently released similar practice notes encouraging the use of technology in civil litigation.<sup>1271</sup> In particular, parties are encouraged to

- use databases to create lists of discoverable documents
- give discovery by exchanging databases created in accordance with an agreed protocol
- agree on a discovery database protocol and seek directions from the court on the protocol
- exchange electronic versions of documents such as pleadings and statements and
- arrange for inspection of material using imaging.<sup>1272</sup>

9.74 The practice notes encourage parties to exchange electronic versions of all documents and to provide the court, in appropriate cases, with electronic versions of all documents filed in the court, to supplement the hard copies filed in the registry. Parties are to accede to any reasonable request for copies of documents in electronic format, including pleadings, affidavits, statements, list of documents and interrogatories. Parties are also to consider the equipment and services that they and the court may require at the hearing and the arrangements to be made between the parties, the court and any third party service providers to ensure the appropriate equipment and services are available at the hearing.

9.75 Federal courts and tribunals are yet to follow this initiative. The Commission recommends the adoption of standardised rules and processes.<sup>1273</sup>

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needs to be improved in speed and accuracy before it can be used to provide transcript of normal speech': Victorian Law Reform Committee *Technology and the law* Government Printer Melbourne June 1999, 10.49–10.63.

<sup>1270</sup> The recently opened Commonwealth Law Courts building in Melbourne gives the Federal Court computer access points for every lawyer at the bar table, as well as videoconferencing facilities and the capacity for live television broadcasts: M Brown 'A courthouse for the future – opening of new Commonwealth law courts' (1999) 73(4) *Law Institute Journal* 14, 16.

<sup>1271</sup> Chief Justice of New South Wales 'Practice note 105: Use of technology in civil litigation' 15 March 1999 <<http://www.agd.nsw.gov.au/sc.nsf/pages/scpn105>> (5 May 1999), Chief Justice of Victoria 'Practice note 3 of 1999 'Guidelines for the use of technology in litigation in any civil matter' 29 April 1999 <<http://supremecourt.vic.gov.au/pnindex.htm>> (2 June 1999).

<sup>1272</sup> Chief Justice of New South Wales 'Practice note 105: Use of technology in civil litigation' 15 March 1999 <<http://www.agd.nsw.gov.au/sc.nsf/pages/scpn105>> (5 May 1999).

<sup>1273</sup> In Victoria the Law Reform Committee has recommended that all the State's courts and tribunals introduce practice notes, similar to those of the Supreme Court, to encourage the consistent use of technology in courts and tribunals across the State: Victorian Law Reform Committee *Technology and the law* Government Printer Melbourne May 1999, xxvii.

**Proposal 9.1.** Federal courts and tribunals should develop rules to harmonise with the Victorian and NSW Supreme Court rules to facilitate the use of technology in litigated matters.

### *Coordination of technology between courts and tribunals*

9.76 Federal and State courts and tribunals have adopted technology at varying rates and the federal civil justice system has a number of legacy systems<sup>1274</sup> that cannot communicate with one another apart from sending documents via email.<sup>1275</sup> England has national coordination of court technology with consultation with interested stakeholders.<sup>1276</sup> Richard Susskind has commented

the underlying database technology should be the same across all courts and the “front-end” for all judicial users should be similar in design and content. Inevitably different courts and specialist jurisdictions will have some different requirements but there should be a strong common element across all modules of the unified system.<sup>1277</sup>

9.77 In Australia and the United States, court technology has been implemented without this level of coordination although inter court coordination of technology has been facilitated by the Electronic Appeals Project of the Council of Chief Justices.<sup>1278</sup> Notwithstanding such initiatives, not everyone advocates a coordinated court technology approach. One commentator in the United States commented that ‘(i)t is the individual, creative project that has advanced efficiency in civil procedure more than central planning and funding’.<sup>1279</sup>

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<sup>1274</sup>. Legacy systems are systems that have been in use for some time.

<sup>1275</sup>. Victorian Law Reform Committee *Technology and the law* Government Printer Melbourne May 1999, para 9.2.

<sup>1276</sup>. The Society for Computers and the Law established in 1973 has enabled judges, practitioners and others to work together on technological change in court and litigation support technologies. Collaboration and coordination on technology and the law continued with the Information and Technology Courts Committee (ITCC), established by the Lord Chancellor in 1985. ITCC continues to have a valuable role in coordinating technological change in the civil justice system over the next 5–15 years with input from the Lord Chancellor’s Department, Court Service and Legal Aid: R-Susskind, ‘The challenge of the information society: Application of advanced technologies in civil litigation and other procedures – Report on England and Wales’ *Report World Congress on Civil Procedure*, December 1998 <<http://ruessmann.jura.uni-sb.de/wien1999/Reports/england.htm>> (18 March 1999). See also the Information Services Division of the Court Service *Information technology strategy* January 1998 <<http://www.courtservice.gov.uk/itstrat.htm>> (3 June 1999).

<sup>1277</sup>. R Susskind, ‘The challenge of the information society: Application of advanced technologies in civil litigation and other procedures – Report on England and Wales’ *Report World Congress on Civil Procedure*, December 1998 <<http://ruessmann.jura.uni-sb.de/wien1999/Reports/england.htm>> (18 March 1999).

<sup>1278</sup>. J Sherman & A Stanfield *The Council of Chief Justices of Australia and New Zealand. Electronic appeals project – Final report* <[www.ccj.org/reports/Final%20Report.htm](http://www.ccj.org/reports/Final%20Report.htm)> (3 August 1999).

<sup>1279</sup>. B Hills ‘Report USA. The impact of the internet on United States courts and civil procedure’ *Report World Congress on Civil Procedure* <<http://ruessmann.jura.uni-sb.de/wien1999/reports/usa.htm>> (18 March 1999).

9.78 In Western Australia, the Ministry of Justice has begun to develop a generic court information system that focuses on automating the interaction between parties, rather than just automating court processes.<sup>1280</sup> The Victorian Law Reform Committee has recommended the unification of court administration, technology, and registries across State courts and tribunals and the establishment of a new entity to 'coordinate and implement a centralised approach to the introduction and development of new technologies on a whole of government basis.'<sup>1281</sup>

9.79 Certainly a coordinated system would benefit the High Court, the Federal Court and Family Court which receive appeals cases from lower courts or tribunals. Case transcripts and papers could be transferred electronically and used by compatible systems.

9.80 The Victorian Law Reform Committee has recommended a national clearinghouse for information relating to technology and the law with the aim of supporting courts, tribunals and the legal profession in their uptake and use of technology.<sup>1282</sup> Such information sharing has been facilitated at conferences organised by AIJA and AustLII, and through liaison between individual court technology sections. The Commission is reluctant to propose a new entity to deal with these matters but support could be given to AIJA and AustLII to continue their information sharing sessions and for the development of protocols and coordination of exchanges between relevant associations, courts and tribunals.

9.81 In the United States, the State Justice Institute has recently awarded a grant to the RAND Corporation to conduct research and analysis of the varied approaches of the state and federal courts to electronic filing to assist courts to save time and effort developing and implementing electronic filing.<sup>1283</sup> This is not managed coordination but information sharing.

#### *Security and authentication issues*

9.82 The use of electronic case files, electronic filing and other technology in courts and tribunals raise concerns over the security of information being received and stored by the court or tribunal and the authenticity of persons who sign and send documents.<sup>1284</sup> Security concerns have largely been overcome though the use

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<sup>1280</sup> Victorian Law Reform Committee *Technology and the law* Government Printer Melbourne May 1999, para 9.41.

<sup>1281</sup> *id* para 4.30, rec 1, 3–6. The Committee also commented that such an entity would also assist the implementation of their recommendations to amalgamate the administrative and registry functions of all courts and tribunals in the State: *id* 4.28, 4.34–4.35, rec 2.

<sup>1282</sup> *id* para 4.38–4.43 rec 10–11.

<sup>1283</sup> R Miller 'The SJI year in review' (1988) 9(4) *SJI News* 4.

<sup>1284</sup> In the United States, some courts have found that technology is not yet sufficiently advanced or cost effective to impose extensive security. In the states of Washington, Minnesota and Utah digital signatures are legally the equivalent to a traditional signature provided the signature is issued after a personal meeting with the applicant and checking their identification. A further requirement is that the relying party must be able to check the validity of the signature in a public

of firewalls, encryption software and other security measures. National accreditation of authentication service providers is being considered by the National Office for the Information Economy (NOIE) and authentication requirements within the federal government and with government clients established and evaluated by the Government Public Key Authority (GPKA).<sup>1285</sup>

**Proposal 9.2.** Federal courts and tribunals should develop protocols for the compatible use of technology and arrangements for information sharing on technology.

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register – a public key infrastructure system. In Utah the cost of verifying the signature on receipt, a cost borne by the court, was found to be prohibitive. It is expected that the technology will advance and become more cost effective in the near future to provide courts with effective security over electronically transferred documents. Until then

. . . the convenience of filing documents on the internet without security has proven more important than the added security from digital signature. . . The cost savings of sharing information across the Internet is sufficiently attractive to outweigh security concerns.

An alternative approach has been taken by the US District Court for New Mexico focussing on the documents received. Digital signatures are placed by the court on documents received to ensure it remains unchanged once it arrives at the court. Lawyers and litigants are not required to have their own digital signatures: B Hills 'Report USA. The impact of the internet on United States courts and civil procedure' *Report World Congress on Civil Procedure* <<http://ruessmann.jura.uni-sb.de/wien1999/reports/usa.htm>> (18 March 1999).

<sup>1285</sup>. <<http://www.gpka.gov.au/information-sheets/execsum/execsum.htm>> (16 June 1999).



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

### Introduction

10.1 This chapter considers the management of the Federal Court caseload and in particular the operation of the individual docket system (IDS). The Commission discusses practice and procedure issues generally and in relation to specific types of cases – representative proceedings, migration and native title proceedings.

10.2 The Federal Court's implementation of IDS was an important initiative in case management practice in Australia. The change was widely approved by those whom the Commission consulted – although there were suggestions for further fine tuning which are noted in this chapter. This chapter documents the workings of this model.

### Case types and trends

#### *Jurisdiction*

10.3 The Federal Court derives its original jurisdiction from over 120 federal statutes.<sup>1286</sup> The Court hears statutory appeals on questions of law from the Administrative Appeals Tribunal (AAT) which also fall within the original jurisdiction of the Court.<sup>1287</sup> Section 8 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (AD(JR) Act) confers jurisdiction on the Federal Court to review decisions to which the Act applies.<sup>1288</sup> The Federal Court also has jurisdiction to hear any matter, including judicial review cases, on remittal from the High Court under s 44 of the *Judiciary Act 1903* (Cth).<sup>1289</sup> The Court has a broad appellate jurisdiction. It hears appeals from decisions of single judges of the Court, decisions of the Supreme Court of the Australian Capital Territory and Norfolk Island and decisions of State Supreme Courts in intellectual property.

#### *Case types*

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<sup>1286</sup> For a list of the statutes see *Federal Court Annual report 1997-98*, Appendix 5.

<sup>1287</sup> *Administrative Appeals Tribunal Act 1975* (Cth) s 44. The AAT may of its own motion refer a question of law arising in a proceeding to the Federal Court for decision. The Federal Court has jurisdiction to hear and determine that question of law and this jurisdiction must be exercised by the Court constituted as a Full Court: AAT Act s 45.

<sup>1288</sup> The grounds include, amongst others, that a breach of the rules of natural justice occurred, that procedures required by law were not observed and that the tribunal's decision involved an error of law: AD(JR) Act s 5.

<sup>1289</sup> In reviewing decisions made under the *Migration Act 1958* (Cth), the Federal Court is limited to the powers it would have had if the case had been commenced in the Federal Court: *Migration Act 1958* (Cth) s 485(3).

10.4 The following tables provide an overview of the composition of the Federal Court's caseload according to case type. The Commission has not considered the Court's jurisdiction with respect to bankruptcy matters in this chapter. Creditors' petitions under the *Bankruptcy Act 1966* (Cth), most of which are not contested, are generally dealt with outside the Court by the Insolvency and Trustee Service, Australia. Currently the bankruptcy work undertaken by the Court is primarily done by registrars and some matters are referred to the duty judge when a judicial determination is required. When the proposed federal magistracy is established, it is intended that the bankruptcy work will be undertaken exclusively by registrars and federal magistrates.

**Table 10.1. Case types in the Federal Court in 1997-98 and 1998-99**<sup>1290</sup>

Case type	Number of applications filed in 1997-98	% of total caseload in 1997-98	Number of applications filed in 1998-99	% of total caseload in 1998-99
Corporations	826	24%	662	15%
Migration	675	19%	871	19%
Trade practices	336	10%	347	8%
Industrial	251	7%	212	5%
Intellectual property	226	6%	227	5%
AD(JR) (excl migration)	166	5%	197	4%
Taxation	163	5%	193	4%
Admiralty	82	2%	62	1%
Appeals to a Full Court	330	9%	419	9%
Appeals to a single judge	183	5%	164	4%
Other	259	7%	1 169	26%
Total	3 497	100%	4 523	100%

10.5 **Migration.** Migration matters make up a significant part of the Court's caseload (19%).<sup>1291</sup>

10.6 **Trade practices.** A significant workload arises under Part IV and Part V of the *Trade Practices Act 1974* (Cth). The number of trade practices matters filed has declined over the past six years with the number of applications falling from 690 in 1992-93 to 336 in 1997-98.<sup>1292</sup>

10.7 **Corporations Law.** There has been a decline in Corporations Law matters, and in particular winding up applications, notwithstanding the fact that they made

<sup>1290</sup> Figures provided to the Commission by the Federal Court on 23 July 1999. The total caseload figures exclude bankruptcy.

<sup>1291</sup> See discussion at para 10.20 -10.29.

<sup>1292</sup> 1992-93, 690; 1993-94, 527; 1994-95, 554; 1995-96, 515; 1996-97, 426; 1997-98, 336: Federal Court *Annual reports 1992-93 to 1997-98*.

up almost one quarter of the Court's caseload in 1997–98.<sup>1293</sup> The Federal Court states that this decline is probably partly due to the change and increase in some Court fees pursuant to amendments to the Federal Court of Australia Regulations and uncertainty over the validity of cross-vesting arrangements.<sup>1294</sup>

10.8 *Three special case types.* The Commission's consultations identified three particular case types as requiring special procedures and monitoring in the Federal Court – representative proceedings, migration cases and native title cases. In the following discussion the Commission addresses case management and practice and procedure issues in relation to the three identified case types.

### *Representative proceedings*

10.9 For causes of action arising after the commencement of the *Federal Court of Australia Amendment Act 1991* (Cth), representative proceedings may be commenced where seven or more claimants have claims against the same person,<sup>1295</sup> arising out of the same or similar circumstances, and giving rise to a substantial question of law or fact.<sup>1296</sup> Representative actions constitute only a small percentage of actions brought before the Federal Court, with approximately 30 cases commenced between 1992 and 1997.<sup>1297</sup> Representative actions have been utilised in three main areas – consumer matters and small business matters under the Trade Practices Act, and judicial review involving Migration Act matters. With the absence of clear statutory rules concerning such litigation in many Supreme courts, most practitioners opt to bring representative actions within federal jurisdiction wherever possible.

10.10 The representative proceedings procedures generally appear to be working well<sup>1298</sup> and the Federal Court does not view them as being more problematic than other complex cases.<sup>1299</sup> This section does not analyse the substantive issues

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<sup>1293</sup>The number of corporations law matters filed over the past six years is as follows: 1992–93, 799; 1993–94, 1 366; 1994–95, 1 680; 1995–96, 1 946; 1996–97, 1 096; 1997–98, 832; 1998–99, 662: Federal Court *Annual reports* 1992–93 to 1997–98 and information provided by the Federal Court on 23 July 1999.

<sup>1294</sup>Federal Court *Annual report* 1997–98, 38. Until the recent High Court decision in *Re Wakim; Ex parte McNally; Re Wakim; Ex parte Darvall; Re Brown; Ex parte Amann; Spinks v Prentice* [1999] HCA 27 (17–June 1999) the Federal Court exercised concurrent jurisdiction with State Supreme courts in relation to Corporations Law matters pursuant to the cross vesting scheme. The majority in *Re Wakim* held the cross-vesting scheme and the Corporations Law scheme were constitutionally invalid in so far as they purported to give the Federal Court jurisdiction to exercise state judicial power.

<sup>1295</sup>But where it seems there may be less than seven, the Court has discretion to decide whether or not the case may proceed: *Federal Court of Australia Act 1976* (Cth) s 33L.

<sup>1296</sup>Federal Court Act s 33C(2).

<sup>1297</sup>A Cornwall *Representative proceedings: supplement* Public Interest Advocacy Centre for Coalition for Class Actions Sydney 1997, 12. The representative proceedings amendments commenced on 5–March 1992.

<sup>1298</sup>J Kellam and P Long 'Product liability and class actions: a review' (1998) 9(5) *Australian Product Liability Reporter* 61 and Federal Court practitioners *Consultation* Sydney 2 June 1999.

<sup>1299</sup>Federal Court Registrar W Soden *Consultation* Sydney 7 April 1999.

relating to representative proceedings, for example, opt in or opt out models, defining the class and substantial common issues.<sup>1300</sup> This section considers procedural and ethical issues which arise in representative proceedings.

10.11 *Ethical concerns with representative proceedings.* There can be conflicts of interest between multiple parties when the parties do not have identical or similar interests or circumstances.<sup>1301</sup> The numbers of persons within a class can create a situation where the practitioner has considerable authority over the conduct of the litigation, including framing the issues, proceeding with or abandoning particular claims, and making settlement decisions.<sup>1302</sup> With contingency fee arrangements lawyers can have a significant personal interest in the settlement figure reached.

10.12 In its report ALRC 46 *Grouped proceedings in the Federal Court*, the Commission identified potential problems with 'speculative' or 'entrepreneurial' lawyers using representative procedures to initiate claims on behalf of 'straw' applicants in the expectation of large profits, or of seeking out possible claimants more from profit motives than from any need to provide real remedies. The Commission recommended particular costs and fees structures aimed at discouraging abuse and speculation, including enabling the Court to approve an agreement concerning remuneration to be paid to the solicitor after being satisfied that any amount in excess of scale is fair and reasonable.<sup>1303</sup> The Commission has been told that in some cases judges ask to examine cost agreements on a confidential basis. The Commission continues to recommend that judges be required to approve fee agreements in all federal representative actions.<sup>1304</sup>

10.13 Another potential ethical dilemma for practitioners is the duty to unidentified members of a class. While the Federal Court provisions for representative actions feature an 'opt out' provision designed to protect potential class members, in practice, certain judges seek to 'close the class' at some stage of the proceedings in order to provide certainty to unsuccessful respondents liable for damages.<sup>1305</sup> While there is general agreement that the practitioner representing the plaintiffs has a duty to the entire class rather than individual class members, the limits of that duty are unclear. A number of practitioners advised the Commission that, in practice, the duty is generally taken to be fulfilled if appropriate promotion of the action is undertaken to advise potential claimants of their rights. However,

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<sup>1300</sup>.These issues were considered in Australian Law Reform Commission Report 46 *Grouped proceedings in the Federal Court* AGPS Canberra 1988 (ALRC 46).

<sup>1301</sup>J Weinstein 'An introduction to who's who in mass toxic torts' (1995) 80 *Cornell Law Review* 845, 847.

<sup>1302</sup>R Cramton 'Individualized justice, mass torts, and "settlement class action": An introduction' (1995) 80 *Cornell Law Review* 811, 822.

<sup>1303</sup>.The Commission's recommendations in relation to costs and fee structures in ALRC 46, chapter 8 were not adopted when Part IVA of the *Federal Court of Australia Act 1976* (Cth) relating to representative proceedings commenced operation in 1992.

<sup>1304</sup>ALRC 46 para 293.

<sup>1305</sup>.eg *McMullin v ICI Australia Operations Pty Ltd* (1998) 84 FCR 1.

there is no guidance in either professional practice rules or court rules as to how such a duty may be fulfilled.

10.14 While most comment in Australia has focussed on personal injury and product liability cases, some of the potential problems with class actions are evidenced in a number of the migration cases before the Federal Court. Justice Merkel, in a class action case involving 11 persons arriving by boat from Vietnam in 1994, noted

[T]he present matter involves a class action by a group of persons having little command of the English language and, I assume, even less knowledge and understanding of the Australian legal system . . . That fact, together with the additional fact that the action is a class action under Pt IVA, can give rise to a greater responsibility on the part of the Court in relation to the conduct of the hearing. Under Pt IVA, the group members are not strictly parties in the proceedings able to give instructions as such. Yet, group members are bound by the result.<sup>1306</sup>

Justice Merkel's concerns in such a case should be shared by the lawyers acting for the class.

10.15 Class members for representative actions in migration and refugee cases are often solicited through advertisements in the press, including the ethnic press, with applicants invited to pay a fee in return for joining a representative action. One NSW firm representing migration applicants in representative actions has consulted the Law Society of New South Wales to seek a ruling on the appropriateness of its costs agreements for its clients.<sup>1307</sup> The Minister for Immigration has referred a number of advertisements by legal firms and migration agents to the industry watchdog, the Migration Institute of Australia.<sup>1308</sup>

10.16 In the light of all these matters, further consideration should be given to defining appropriate practitioner conduct with respect to representative actions. Judith Resnik recognised the importance of ethical considerations in representative actions when she stated that

one should endeavour to make class action and other large-scale litigation governed by an amalgam of procedural and ethical constraints and obligations imposed on both judges and lawyers . . . In an effort to control not only processes but also professional behaviour.<sup>1309</sup>

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<sup>1306</sup> *Nguyen Thanh Trong v Minister for Immigration, Local Government & Ethnic Affairs* (unreported) No-VG292/94 Federal Court of Australia (17 May 1996).

<sup>1307</sup> Federal Court practitioners *Consultation* Sydney 23 June 1999.

<sup>1308</sup> F Carruthers and B Lane 'Judges in the dock over migrants' *The Australian* 30 November 1998, 5.

<sup>1309</sup> J Resnik 'Litigating and settling class actions: the prerequisites of entry and exit' (1997) *University of California, Davis Law Review* 835, 846-7.

The Commission considers that professional practice rules should address this area of practice to ensure such cases work fairly and effectively for the representative party and all group members and to provide guidance to lawyers.

**Proposal 10.1.** National practice rules for lawyers should include rules relating to representative actions; in particular – rules to define the obligations of lawyers to the representative party and each group member with respect to competing interests of group members and the group, cost liability of named parties, class closure and settlement arrangements, and the development of appropriate cost agreements between group members, the representative party and lawyers.

10.17 Large and complex representative proceedings cases can be difficult cases to manage and adjudicate. Certain judges in the Federal Court have had considerable experience with such cases. Practitioners suggested that a representative proceedings panel should be established to consolidate such expertise<sup>1310</sup> and practice notes be developed to deal with procedural issues.<sup>1311</sup> The Commission supports such proposals.

10.18 **Settlement.**<sup>1312</sup> Under the *Federal Court of Australia Act 1976* (Cth) (The Federal Court Act) any global settlement which disposes of an entire representative claim must be approved by the Court.<sup>1313</sup> There is no mechanism for members of a class to opt out after they have considered individual offers or the global settlement.<sup>1314</sup> Global settlements may favour the weaker claims and the stronger claimants may be better pursuing their own claims alone. If some group members were able to opt out of the global settlement, those cases would have to be resolved individually.<sup>1315</sup> Discussing class actions in the United States, Resnik stated that because the vast majority of representative actions settle<sup>1316</sup> procedural rules should ensure that the following issues are addressed at the time a settlement is proposed in order to promote an open and fair process

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<sup>1310</sup> Federal Court practitioners *Consultation* Sydney 4 June 1999 and Clayton Utz *Submission* 283. Other practitioners noted that it may be more important to have the case heard by a judge with expertise in the area of substantive law on which the representative proceeding is based.

<sup>1311</sup> Federal Court practitioners *Consultation* Sydney 2 June 1999.

<sup>1312</sup> For a discussion of the procedural and ethical issues surrounding settlement processes in representative proceedings and the interests of individual group members versus the interests of the group see J Resnik 'Litigating and settling class actions: the prerequisites of entry and exit' (1997) *University of California, Davis Law Review* 835 and J Resnik et al 'Individuals within the aggregate: relationships, representation, and fees' (1996) 71 *New York University Law Review* 296.

<sup>1313</sup> Federal Court Act s 33V.

<sup>1314</sup> *id* s 33J. J Kellam & P Long in 'Product liability and class actions: a review' (1998) 9(5) *Australian Product Liability Reporter* 61.

<sup>1315</sup> *ibid*.

<sup>1316</sup> As with other federal civil cases, only a very small proportion of representative actions proceed to trial (3%). J Resnik 'Litigating and settling class actions: the prerequisites of entry and exit' (1997) *University of California, Davis Law Review* 835

- the extent of the information provided to participants in a settlement about the proposed remedy
- whether group members are treated equally or distinguished according to appropriate criteria
- the relationship between damages or compensation to group members and fees paid to lawyers
- the cost of administering and financing the remedy
- the degree to which opting out of the settlement is legally or practically feasible and
- the processes for notifying the group members.<sup>1317</sup>

**Proposal 10.2.** The Federal Court should establish a representative proceedings panel and produce practice notes to deal with procedural issues such as

- notification procedures for opting out, closing the class and proposed settlements and
- issues to be considered by a judge before approving a global settlement.

10.19 *Assessment of damages.* The hearing of representative actions will often be split between liability and quantum of damages. Because of the problems identified above with judges approving global settlements, each group member's claim may have to be assessed separately. In *McMullin v ICI Australia Operations Pty Ltd* (the Helix case)<sup>1318</sup> liability was determined first and then arrangements were made for the assessment of damages. As each group member's claim for damages was different each claim has had to be separately determined. With potential classes of hundreds or even thousands, the Court has developed strategies to cope with individual assessment of damages in large representative proceedings. In the Helix case seven test cases were heard before Justice Wilcox in the hope that the resulting judgments would assist other members of the class to settle their claims individually without the need for a hearing. Claims of less than \$100 000 have been referred to judicial registrars of the Court. In other cases individual claims have been referred to panels of barristers for assessment or an assessment process has been incorporated in the deed of settlement so that an assessment process is agreed as opposed to a monetary figure.<sup>1319</sup> This is said to work well.

### *Migration cases*

10.20 The Federal Court has a limited review jurisdiction under the AD(JR) Act and Judiciary Act for decisions made under the Migration Act. The Migration Act contains its own statement of the permissible grounds for review by the Federal

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<sup>1317</sup> .*ibid.*

<sup>1318</sup> (1997) 72 FCR 1.

<sup>1319</sup> J Kellam and P Long 'Product liability and class actions: a review' (1998) 9(5) *Australian Product Liability Reporter* 61.

Court<sup>1320</sup> which exclude some of the traditional grounds for judicial review and restrict the application of others.<sup>1321</sup> Most migration matters in the Federal Court are applications for review of decisions of the Refugee Review Tribunal (RRT) or the Immigration Review Tribunal (IRT) (now Migration Review Tribunal (MRT)) and are heard by single judges. The number and proportion of migration matters filed in the Federal Court over the past six years has steadily increased as shown by the following tables.

**Table 10.2. Migration Act matters filed in the Federal Court 1993–99.**<sup>1322</sup>

Year	1993–94	1994–95	1995–96	1996–97	1997–98	1998–99
Migration matters filed in Federal Court	320	310	507	673	675	871
% of total caseload	9%	7%	12%	17%	19%	19%

10.21 According to the Department of Immigration and Multicultural Affairs (DIMA), since the IRT<sup>1323</sup> and the RRT began operating there has been an almost 2-000% increase in applications to review IRT decisions (five in 1990–91 and 98 in 1997–98) and nearly a 900% increase in applications to review RRT decisions (53 in 1993–94 and 470 in 1997–98).<sup>1324</sup> The following table shows that migration cases are becoming an increasing proportion of the Court's total administrative law caseload from just 28% 10 years ago to 67% in 1997–98.

**Table 10.3. Number of migration cases filed in the Federal Court as a percentage of the number of administrative law cases**

Year	Migration cases <sup>a</sup>	Administrative law cases <sup>b</sup>	Migration as percentage of administrative law cases
1987–88	84	296	28%
1988–89	107	283	38%
1989–90	126	401	31%
1990–91	132	368	36%
1991–92	167	417	40%
1992–93	204	466	44%
1993–94	320	580	55%
1994–95	310	590	53%
1995–96	507	852	60%
1996–97	673	985	68%

<sup>1320</sup>Migration Act s 476.

<sup>1321</sup>Application for review may not be made on the grounds of 'relevant considerations', bad faith or any 'abuse of power' not covered by a specifically allowable ground, unreasonableness or breach of natural justice. Actual bias replaces reasonable apprehension of bias as a ground for review: M-Aronson and B Dyer *Judicial Review of Administrative Action* LBC Information Services Sydney 1996, 212.

<sup>1322</sup>Federal Court *Annual report* 1997–98 and Federal Court *Correspondence* 2 February 1999.

<sup>1323</sup>The MRT replaced the IRT and the Migration Internal Review Office (MIRO) of DIMA from 1 June 1999.

<sup>1324</sup>DIMA Fact Sheet 86 'Litigation involving migration decisions' <<http://www.immi.gov.au/facts.htm>> (22 April 1999).



1997-98	675	1013	67%
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- a Federal Court *Annual reports* and figures provided by the Federal Court.  
 b Federal Court *Annual reports*.

10.22 Although there are increasing numbers of IRT and RRT applications, a fairly small and stable percentage seek judicial review in the Federal Court. DIMA's figures show that only an average of 7% of applicants who were unsuccessful in the IRT between 1990 and 1998 sought judicial review of their decisions in the Federal Court and an average of 8.5% of applicants who were unsuccessful in the RRT between 1993 and 1998 sought judicial review of their decisions in the Federal Court.<sup>1325</sup>

10.23 The Commission's study of cases finalised in the Federal Court in February, March and April 1998 showed

- 23% of the total sample were migration cases<sup>1326</sup>
- 42% of migration cases went to a hearing<sup>1327</sup>
- 41% of migration cases settled at a directions hearings<sup>1328</sup>
- the median duration of all migration cases was 4.8 months<sup>1329</sup>
- the median duration of migration cases that proceeded to judgment was 7.9 months<sup>1330</sup> and
- 95% of migration cases were disposed of within 16.2 months and 85% were disposed of within 11 months.<sup>1331</sup>

10.24 The following figures provided to the Commission by DIMA provide a 'snap-shot' of the outcome of migration cases resolved in the Federal Court during 1997-98.

**Table 10.4. Migration cases outcomes in the Federal Court of 1997-98<sup>1332</sup>**

Outcome	Number of cases	As a percentage of total cases
Withdrawn by applicant	292	36%
MIMA successful	308	38%

<sup>1325</sup> *ibid.*

<sup>1326</sup> T Matruglio & G McAllister *Part one: Empirical information about the Federal Court of Australia* ALRC Sydney March 1999, 6 table 2 (T Matruglio & G McAllister, Federal Court Empirical Report Part One).

<sup>1327</sup> *id.* 33 table 24.

<sup>1328</sup> *id.* 41 table 30.

<sup>1329</sup> *id.* 40 table 29.

<sup>1330</sup> *id.* 40 table 29.

<sup>1331</sup> T Matruglio *Correspondence* 25 July 1999.

<sup>1332</sup> DIMA *Consultation* Canberra on 26 May 1999. It should be noted that the figures provided by DIMA for migration cases in 1997-98 in the Federal Court relate to migration cases *resolved* whereas the Federal Court's annual report figures relate to migration cases *filed*.

Withdrawn by MIMA	138	17%
Applicant successful or remittal in full	69	9%
Total	807	100%

The Commission's data shows that in 17.3% of migration sample cases, Federal Court filing fees were waived or the applicant was exempt. Of all applicants in the Commission's sample cases who paid no Federal Court filing fees, 44.8% of them were migration matters.<sup>1333</sup>

10.25 *Management of the migration case load.* The Federal Court has experimented with various case management arrangements for the migration caseload in different registries. The migration caseload was seen to require special attention because of its increasing size and particular representation characteristics. The Commission's survey of Federal Court cases found that 31% of sampled migration cases involved an unrepresented litigant. The other party, the Minister for Immigration and Multicultural Affairs (MIMA), is a repeat player represented by practitioners experienced in the area. In the Victorian registry a separate list is maintained for migration cases. A judge or registrar hears all migration directions hearings and interlocutory applications. When ready for trial, a case is allocated to a docket judge, placed in a list of cases for hearing at short notice and set down for trial as soon as possible.<sup>1334</sup> This is convenient and saves costs for MIMA and applicant lawyers who specialise in these cases as only one representative needs to attend directions hearings for a number of cases.

10.26 In New South Wales there is no separate migration list. Cases are allocated immediately to a docket judge in the same way that other cases are allocated under IDS. Some judges arrange for registrars to take the first directions hearings of migration cases in their docket. Judges in New South Wales often list two to three migration hearings in one day. This is partly because there is a higher proportion of unrepresented applicants in migration cases in New South Wales than other registries. The hearings are often quite short.

10.27 Practitioners and DIMA in consultations with the Commission have indicated a clear preference for the docket judge model where a migration matter is immediately allocated to a docket judge. Legal officers from DIMA indicated that they prefer the New South Wales registry system because case duration is shorter.<sup>1335</sup> A legal aid migration lawyer in Sydney observed that the shorter

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<sup>1333</sup> The Migration Regulations (Statutory Rules 109 and 185) 1997 includes regulation 4.31B which imposes a \$1 000 post-decision fee on refugee applicants who are unsuccessful in their applications for judicial review of the RRT's decision that they were not a refugee. The stated purpose of this regulation was to deter unmeritorious applicants from lodging claims for refugee status. The Regulation ceases to apply after 1 July 1999. The regulation is currently being reviewed by the Joint Standing Committee on Migration.

<sup>1334</sup> See the Federal Court internet homepage  
<<http://www.fedcourt.gov.au/individual.htm#victoria.htm>> (7 July 1999).

<sup>1335</sup> DIMA *Consultation* Canberra 26 May 1999.

duration means that parties have less incentive to use the review process to buy time in Australia.<sup>1336</sup> In this particular jurisdiction there are good reasons to secure timely disposition of cases. This is not to say that all or a sizeable proportion of such cases are simply delaying departure but the consensus from practitioners is that a proportion are so motivated.<sup>1337</sup> In meritorious cases it is also important that applicants can be assured of their right to remain in the country as soon as possible. Judicial review is a step towards this resolution. In the circumstances the Commission supports a case management model which demonstrably secures speedier determinations.

10.28 Some judges have commented that many unrepresented applicant have little understanding of the nature of judicial review. Justice Wilcox commented on an applicant who was unrepresented, unable to read English, in detention and had not read the RRT's decision because it was in English and had not been interpreted for him

The number of applications filed in the New South Wales District Registry for judicial review of decisions of the Refugee Review Tribunal is running this year at a rate more than twice that of last year. It is the experience of my colleagues, as well as myself, that a large proportion of these matters are commenced by a stereotyped form of application that is uninformative and bears little relationship to what the applicant says at the hearing. It seems the filing of an application for review has become an almost routine reaction to the receipt of an adverse decision from the Tribunal.

He went on to say

The solution is not to deny a right of judicial review. Experience shows a small proportion of cases have merit, in the sense the Court is satisfied the Tribunal fell into an error of law or failed to observe proper procedures or the like. In my view, the better course is to establish a system whereby people whose applications are refused have assured access to proper interpretation services and independent legal advice. If that were done, the number of applications for judicial review would substantially decrease. Those that proceeded would be better focussed and the grounds of review more helpfully stated. If applicants cannot afford legal advice, as is ordinarily the case, it ought to be provided out of public funds. The cost of doing this would be considerably less than the costs incurred by the Minister under the present system, in instructing a solicitor (and usually briefing counsel) to resist all applications, a substantial number of which have no merit and are ill-prepared. That is to say nothing about the desirability of relieving the Court from the burden of finding hearing dates for cases that should not be in the list at all.<sup>1338</sup>

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<sup>1336</sup>Legal Aid NSW *Consultation* Sydney 1 July 1999.

<sup>1337</sup>Federal Court practitioners *Consultation* Sydney 23 June 1999; Federal civil working group *Meeting notes* 7 July 1999.

<sup>1338</sup>*Mbuaby Paulo Muaby v MIMA* [1998] 1093 FCA.

The Court has initiated discussions to secure advice and representation for such unrepresented parties.<sup>1339</sup> Pro bono schemes, organised with the Bar in New South Wales, Victoria and Queensland have been established. It is hoped that this scheme will provide appropriate and effective assistance to such applicants.

**Proposal 10.3.** Migration cases should be allocated to a docket in the same way as other cases, that is, upon being filed in the registry they are given a first directions date before the docket judge.

10.29 In the New South Wales District Registry, the Australian Government Solicitor, on behalf of MIMA prepares, files and serves a bundle of documents (the 'green bundle') before the first directions hearing.<sup>1340</sup> The bundle of documents must contain photocopies of documents in the possession or power of the Minister which appear to be relevant to the review, including a copy of the decision under review but not including the transcript of the tribunal proceedings. DIMA and practitioners have said that the 'green book' system is working well in the New South Wales Registry and in combination with IDS has reduced the duration of migration cases.<sup>1341</sup> It has also facilitated agreed remittal of cases for a re-hearing at an early stage in proceedings.<sup>1342</sup> The Commission supports such arrangements in all Federal Court registries.

**Proposal 10.4.** All Federal Court registries should adopt the NSW registry procedure in migration cases where the Minister for Immigration and Multicultural Affairs is required to prepare, file and serve a bundle of relevant documents before the first directions hearing.

#### *Native title cases*<sup>1343</sup>

10.30 On 30 September 1998 (the 'transfer date') the *Native Title Amendment Act 1998* (Cth) in 'extensive' and 'pervasive'<sup>1344</sup> changes effectively transferred the management of the native title cases from the National Native Title Tribunal (NNTT) to the Federal Court. The amendments to the *Native Title Act 1993* (Cth) have significantly broadened the Federal Court's jurisdiction and increased its caseload. As at the transfer date all claimant, non claimant and compensation

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<sup>1339</sup> Federal Court Registrar W Soden *Consultation* Sydney 7 April 1999.

<sup>1340</sup> This applies to all migration matters filed from 1 July 1998: Federal Court of Australia NSW Registry *Notice to Practitioners* 25 June 1998.T

<sup>1341</sup> DIMA *Consultation* Canberra 26 May 1999 and Federal Court practitioners *Consultation* Sydney 23-June 1999.

<sup>1342</sup> *ibid.*

<sup>1343</sup> The Commission is grateful for the assistance provided by Ms Louise Anderson, National Native Title Coordinator, Federal Court of Australia, with this section of the discussion paper.

<sup>1344</sup> G Neate 'Future directions in native title' *Paper* The Centre for Energy and Resources Law Seminar Melbourne 17 March 1999.

applications had to be filed at the Federal Court and all existing applications with the NNTT transferred to the Federal Court.<sup>1345</sup>

10.31 *Jurisdiction and statistics.* As at 30 September 1998 the 778 native title determination applications before the NNTT (comprising claimant, non claimant and compensation applications) were taken to be filed with the Federal Court. In addition some 58 matters were before the Federal Court having been referred by the NNTT under section 74 of the old *Native Title Act 1993* (Cth). The status of those 58 cases is broken down as follows

- three contested determinations on the existence of native title are on appeal
- six cases where the existence of native title was resolved through mediation and the matters were referred to the Federal Court for a consent determination of native title. This included one non-claimant application where the Court found that native title did not exist in relation to the parcel of land, the subject of the non-claimant application
- nine matters which will be ready for hearing prior to June 2000 (with each case expected to take an average of 4–8 weeks) and
- 40 cases in pre hearing status with no future hearing date.<sup>1346</sup>

10.32 The Court conducts a review hearing for each case which has been transferred from the NNTT. The review hearing is akin to a directions hearing. The primary purpose of the review hearing is for the judge to assess the status and progress of the application. It is not intended that the review hearing results in orders being made or directions issued that affect a party's interest. The Court may make inquiries from those present of the desirability of mediation. It is anticipated that the applicants, their representative, the representative for the State and or Territory government will ordinarily be expected to attend but the attendance of other parties may not be required. Orders or directions are being made by the Court requesting mediation status reports from the NNTT, granting leave to the applicants to amend their application and relisting the matter for review. Of the 778 applications transferred to the Court, the Court has reviewed the status and progress of approximately 400. The 400 reviews which have taken place have occupied a total of 84 sitting days, that is, an average of 4–5 cases per day.<sup>1347</sup>

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<sup>1345</sup>For a discussion of the operation of the NNTT prior to the transfer date see ALRC Issues Paper 25 'Review of the adversarial system of litigation, ADR – its role in federal dispute resolution' (IP 25) June 1998, ch 4.

<sup>1346</sup>L Anderson *Consultation* Melbourne 1 June 1999.

<sup>1347</sup>The review hearings have proceeded slightly differently in each registry due to the culture of the legal community, the nature of the parties and the political landscape in each State. For example in Victoria they have been very 'procedural' with orders often being made by consent whereas in Western Australia it is reported that the Court has been more interventionist and the orders have had a large impact on the NNTT's work: L Anderson, National Native Title Coordinator, Federal Court *Consultation* Melbourne 1 June 1999.

10.33 The Court's jurisdiction in relation to native title matters has expanded beyond that described above. In dealing with native title matters in its jurisdiction, the Court has various specific powers including power to

- make determinations of native title in relation to an area for which there is no approved determination of native title
- revoke or vary an approved determination of native title on specified grounds and
- make a determination of compensation, and orders in relation to the payment of amounts held in trust.

10.34 Currently the key areas for the Court under the *Native Title Act 1993* (Cth) are review hearings, amendment applications,<sup>1348</sup> applications to become a party,<sup>1349</sup> applications to join as a party outside the notification period and appeals against decisions of the NNTT registrar regarding the registration test.

10.35 *Estimate of future workload.* The Federal Court expects native title applications to peak next year with 20–30 new applications each in Western Australia and Queensland. Overall there are expected to be 90–100 new claimants up to June 2001. Twenty five percent of the new claimant applications will be in response to future act activity (section 29 notices) and are likely to be smaller in area and attract fewer number of parties than the larger 'country' applications. As at 1 June 1999 there have been 22 new applications filed in the Federal Court.

10.36 *Federal Court native title initiatives.* The Court has established a Native Title Coordination Committee, presided over by the Chief Justice. The Committee's members include those judges who are the provisional docket judge for each State or Territory, the registrar and senior deputy registrar, the national appeals manager and the national native title coordinator. The terms of reference for the Committee include the development of policy and significant practice and procedure in relation to the Court's enhanced jurisdiction.

10.37 Since September 1998 the Federal Court has created new rules to deal with native title matters.<sup>1350</sup> The Federal Court homepage has a section dedicated to native title matters which provides an outline of the procedures, commentary, forms, links to the relevant legislation, NNTT homepage and other sites. The Court has created a bench book for native title matters in hard copy and electronic form. The bench book is updated monthly and contains information for judges on the management and substantive issues involved in native title matters including past orders, commentary, past judgments, policy discussion, hyper links to related

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<sup>1348</sup>.As at 1 June 1999 more than 130 amendment applications have been filed.

<sup>1349</sup>.eg for one application for a determination of native title, 420 notices of intention to become a party were assessed.

<sup>1350</sup>.See O 78 Fed Ct Rules. It is likely that the Coordination Committee will make recommendations that the Rules provide for withdrawal of applicants, notice and service on issues such as change of address for service and change of agent.

internet sites, commentary on international jurisprudence and practice and procedure issues in relation to Federal Court management.

10.38 *Allocation and management.* The Court has instituted an allocation protocol under which all native title cases filed in a district registry are provisionally docketed to a resident judge (the provisional docket judge) who manages the case up to and including the first directions hearing. A provisional docket judge is used to streamline the management of the native title caseload, and promote consistency and efficiency in the initial stages of the Court's new jurisdiction. The provisional docket judge conducts review hearings and is likely to deal with interlocutory applications, determine who are the parties to the native title application, hear and determine applications to amend, refer the application to the NNTT for mediation<sup>1351</sup> and review the progress of mediation.

10.39 The Court has recruited experienced staff in the positions of Deputy Registrar for native title and native title case managers. These officers assist the provisional docket judges in the review hearing process, assist applicants and unrepresented applicants and parties to a native title proceeding in the practice and procedure of the Court and liaise with the NNTT to foster a strong working relationship. The Federal Court and the NNTT have drafted and agreed to an administrative protocol that provides the basis for the Federal Court and the NNTT's administrative relationship. For example, it contains an in-principle agreement that a new application or a copy of any court order relevant to a native title proceeding is to be given to the NNTT within two working days of it being made.

10.40 Cases will be provisionally allocated while the case is being considered for registration by the NNTT registrar and in active mediation with the NNTT. If the case is regarded as not suitable for mediation, the matter will be listed before the docket judge when the case requires substantive action.<sup>1352</sup> The judge manages the case in his or her own docket in accordance with IDS until completion.

10.41 Cases are allocated to judges across all registries. For example, as at 1 June 1999, 14 Western Australian matters proceeding as three groups of cases, have been allocated to New South Wales registry judges. National allocation relieves the pressure in Queensland and Western Australia where most of the claims are lodged and there are smaller numbers of judges. The registry where the matter is filed remains the controlling registry and the substantive docket judge will be flown in from interstate when required.

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<sup>1351</sup>.The provisional docket judge also refers some matters to registrars of the Federal Court for mediation in relation to determining who the parties are to the case. However, this is quite a separate procedure from the NNTT mediation: L Anderson *Consultation* Melbourne 1 July 1999.

<sup>1352</sup>.That is a notice of motion or application relating to the main application and/or the case is ready for hearing.

10.42 Mediation is a critical part of the NNTT system. The Court is the monitor of mediation undertaken by the NNTT. Status report on mediations in the NNTT are provided to the provisional docket judge at review hearings. These detail the current interests involved, whether mediation has occurred, the number of meetings, the number of parties and when the case was assessed for registration. The mediation report is a statutory requirement under sections 86 and 136 of the *Native Title Act 1993* (Cth) and a template report is being developed by the Federal Court. There is no discretion to the NNTT to provide any details of the substantive content of the mediation. The content of mediation is not disclosed to the docket judge. In most instances the NNTT provides the parties a copy of the mediation status report.

10.43 The Court has stressed that it is mindful that the native title jurisdiction and the body of law developing is new and that the resolution of native title is a matter of national importance. The Court provides continuous judicial education in native title and related areas, like cultural awareness, for its judges. The Commission received favourable comment concerning the arrangements for native title cases in the Court.

### **Individual Docket System (IDS)**

10.44 From its inception in 1977, the Federal Court used a 'fixed date' approach to case management. When initiating documents were filed, parties were given a return date before a judge or registrar to receive directions on the steps to be taken to progress their case to trial. At the end of a directions hearing, another date was set until a judge or registrar was satisfied that the case was ready for listing for trial. A case could be heard by a different judge at each directions hearing and at the trial.<sup>1353</sup> In a number of registries, certain categories of cases, such as intellectual property, industrial relations, taxation and admiralty, were placed in specialist lists to be conducted by judges with specific expertise in those fields.

10.45 During 1995-96 the Court reviewed its practices and procedures, consulted with representatives of the legal profession and engaged a consultant on case management techniques. A pilot scheme of IDS operated in the Victorian registry from 1 January 1997 and was adopted throughout all Federal Court registries on 1-September 1997.

#### ***Analysis and assessment***

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<sup>1353</sup> The South Australian registry of the Court has always assigned a judge to preside over a case from commencement until disposition. The Sydney registry has operated under an informal docket system for a number of years, especially with intellectual property and trade practices cases: Federal Court practitioners *Consultations* Sydney 2 June 1999, 4 June 1999 and 16 June 1999.



10.46 A comprehensive review of IDS operating in the Federal Court is being undertaken by the Justice Research Centre (JRC).<sup>1354</sup> The Commission's empirical data in scope and nature would not permit such review as it relates to case types, litigant types and registries.<sup>1355</sup> The Commission is limiting its discussion of IDS to the issues drawn to its attention by submissions, consultations and to such conclusions as may be drawn from its own data. Overall, submissions and consultations have been overwhelmingly supportive and complimentary of IDS.<sup>1356</sup> The Australian Corporate Lawyers Association observed that

The introduction of the docket system in the Federal Court is to be commended. This is a striking example of how change can be implemented by the leadership of judges.<sup>1357</sup>

### *Functions of IDS*

10.47 Justice Moynihan has commented on the need to focus court resources 'where they will make a difference'.<sup>1358</sup> Practitioners consulted by the Commission commented that the most efficient and productive use of interlocutory procedures is to define issues and exchange information as soon as possible to facilitate settlement and reduce hearing times without increasing the overall cost to the parties.<sup>1359</sup> Justice Lockhart referred to the

necessity in modern litigation to get to the essence of the issues of a case as quickly as possible, discard procedural points that do not lead anywhere and concentrate on the proof of the crucial issues.<sup>1360</sup>

These objectives can only be achieved with an appropriate case management system, judicial control over the selection of appropriate procedures for each case, judicial monitoring of compliance with directions and cooperation by the lawyers. Such principles are generally applauded by the practising profession.

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<sup>1354</sup> The evaluation is in two parts. Part one involves recording how IDS is operating to identify variations in practice. Part two involves an evaluation of the cost (public and private) and the goals of IDS. This evaluation is not expected to be completed until the end of 1999: Federal Court Registrar W Soden *Consultation* 7 April 1999.

<sup>1355</sup> For a description of the Commission's empirical work see para 1.25-1.28.

<sup>1356</sup> NSW Bar Association *Submission* 88; Arthur Robinson *Submission* 189; Law Society of South Australia Civil Law Committee *Submission* 94; Australian Corporate Lawyers Association (ACLA) *Submission* 70; Australian Competition and Consumer Commission (ACCC) *Submission* 67; Law Institute of Victoria Administrative Law Section *Submission* 55; Federal Court practitioners *Consultations* Sydney 2 June 1999, 4 June 1999 and 16 June 1999.

<sup>1357</sup> ACLA *Submission* 70, 5.

<sup>1358</sup> M Moynihan 'Towards a more efficient trial process' (1992) 2 *Journal of Judicial Administration* 39, 40.

<sup>1359</sup> Federal Court practitioners *Consultations* Sydney 2 June 1999, 4 June 1999 and 16 June 1999.

<sup>1360</sup> J Lockhart 'Handling trade practices cases' (1994) 17 *University of New South Wales Law Journal* 298, 313.

10.48 Justice Beaumont of the Federal Court listed 'trial date certainty as a high priority' when describing the essential elements of the caseload management system used by the Federal Court.<sup>1361</sup> Submissions and consultations stressed the importance of a fixed trial date.<sup>1362</sup> The Federal Court's listing practice is such that when a trial date is given the date is fixed. There are no floating lists as in other courts. Federal Court judges are in a position to discuss trial dates with parties early in proceedings as they are familiar with the case, its likely duration and the level of preparation. IDS allows judges to set numerous fixed dates for directions hearings, interlocutory applications and compliance dates for orders.

10.49 The Commission's data does not enable it to measure the direct effect of setting early, fixed trial dates, however, it did reveal that the sampled cases had a very low 'at the door' settlement rate (3.5%).<sup>1363</sup> This suggests that settlements in the Federal Court may be facilitated by fixed trial dates which provide a fixed period for the completion of discovery and other interlocutory processes.

10.50 The key features of IDS as identified by the Federal Court, submissions and consultations are

- a single judge is randomly allocated to a case from commencement to disposition
- cases in areas such as intellectual property, taxation, trade practices (Part IV), human rights, admiralty and industrial law are randomly allocated to a judge on a specialist panel
- increased judicial involvement and management in all stages of proceedings
- an aim to dispose of 98% of most cases within 18 months<sup>1364</sup>
- individually tailored directions, procedures and listings for each case by the judge and continual monitoring by the associate and judge of compliance with orders
- an aim to 'minimise the number of events and maximise the result of each event'<sup>1365</sup> and
- the docket judge's associate becomes the first point of contact at the Court for the parties throughout the case facilitating flexible listings and 'trouble shooting' of case problems as they arise.<sup>1366</sup>

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<sup>1361</sup>.B Beaumont 'Managing litigation in the Federal Court' in B Opeskin & F Wheeler (eds) *The Australian federal judicial system* Melbourne University Press 2000 (forthcoming).

<sup>1362</sup>.Victorian Bar Association (Vic Bar) *Consultation* 24 November 1997; Federal Court practitioners *Consultation* Melbourne 14 August 1997; Federal Court practitioners *Consultation* Brisbane 18 August 1997; Federal Court practitioners *Consultation* Sydney 2 June 1999, 4 June 1999 and 16 June 1999.

<sup>1363</sup>.T Matruglio & G McAllister, Federal Court Empirical Report Part One, 28 table 21.

<sup>1364</sup>.This was adopted from the American Bar Association's (Judicial Division) Processing Time Standard: Federal Court Registrar W Soden *Correspondence* 20 July 1999.

<sup>1365</sup>.See the Federal Court internet homepage <<http://www.fedcourt.gov.au/individual.htm>> (26 July 1999).

<sup>1366</sup>.Federal Court practitioners *Consultations* Sydney 2 June 1999, 4 June 1999 and 16 June 1999. The Law Council of Australia (LCA) supports the development of this relationship to enable the parties to

10.51 Submissions, consultations, the Commission's data and survey responses indicated such key features described have been put into effect although there are some variations between registries and individual judges in relation to monitoring compliance, management styles, procedural practice guidelines and the conduct of directions hearings. In certain registries various features of IDS have been practiced by Federal Court judges over some years.<sup>1367</sup> In the NSW registry, practitioners in trade practices and intellectual property support IDS but noted no significant change in the management of cases since its inception.<sup>1368</sup>

### *Changing role of judges*

10.52 Judges 'manage' their own docket. Each judge's docket contains an average of 80 matters<sup>1369</sup> and the parties' primary contact with the Court from the first directions hearing to disposition is with the judge's associate outside court time<sup>1370</sup> and with the docket judge for almost all court appearances.<sup>1371</sup> Consequently, judges (and their associates) are now undertaking new managerial responsibilities. Associates, who generally serve 12 months with their judge, assist with the management of their judge's docket and are expected to deal with the parties in relation to the history of the case and future listings. The associate maintains a docket database in order to produce information about the docket or individual cases as required by the judge, the registry or the parties. The associate, rather than a registry staff member, is effectively the case officer, responsible for monitoring the progress of the case. However, not all case management functions have moved from the registry to judges and their staff. There is a substantial component of work undertaken by registry staff including initial listing of matters, responding to requests for information from parties and the public concerning the status of particular matters and providing assistance with procedural issues.<sup>1372</sup>

10.53 Practitioners have commented to the Commission that since the advent of IDS, judges appear to have a heavier workload with increased time in court and ongoing docket management responsibilities.<sup>1373</sup> Judges manage their docket to ensure fairness and efficiency for individual cases and the docket as a whole. The Court has acknowledged to the Commission that specific training may assist some judges to develop the skills necessary to perform these functions. Judicial education is discussed in chapter 3. A bench book developed by the Court for use by its judges

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approach the judge on an informal basis at short notice to resolve issues and avoid formal applications and unnecessary costs: *Submission 126*.

<sup>1367</sup>Notably the New South Wales and South Australian registries.

<sup>1368</sup>Federal Court practitioners *Consultations* Sydney 2 June 1999, 4 June 1999 and 16 June 1999.

<sup>1369</sup>Federal Court Registrar W Soden *Consultation* 7 April 1999.

<sup>1370</sup>Federal Court associates *Consultation* Sydney 13 July 1998.

<sup>1371</sup>Return of subpoenas and court appointed mediations are still dealt with by registrars.

<sup>1372</sup>Federal Court Registrar W Soden *Correspondence* 20 July 1999.

<sup>1373</sup>Federal Court practitioners *Consultations* Sydney 2 June 1999, 4 June 1999 and 16 June 1999.

was updated in late 1998 to incorporate IDS changes. The following comment is indicative of the general consensus in submissions and consultations that additional training for judges in the area of case management would be beneficial

Training of judges is to be encouraged and is necessary if case management processes are successfully to be implemented. The prevailing orthodoxy seems to be that such training is for one reason inappropriate. Explicit recognition that case management is a relatively new and evolving process should as a corollary mean that training is seen not only as a beneficial, but in fact quite necessary. . . It is no reflection on judges that concepts of case management are unfamiliar to many of them.<sup>1374</sup>

The Court provides induction training to associates.<sup>1375</sup>

### *IDS theory and practice*

10.54 The Federal Court's principal registry has produced a general guide to IDS to explain its purpose and operation and the Victorian registry has also produced a guide to the operation of IDS in the Victorian registry. All the other registries are in the process of developing their own procedural guides.<sup>1376</sup>

10.55 As described in the general guide to IDS, the management of cases is assisted by four 'key events', timed to achieve the 18 month standard set by the Court for case disposition. These events are not prescriptive as judges retain their discretion to manage their docket as the circumstances of the individual case require.<sup>1377</sup> The 'key events', as described in the Court's general guide to IDS,<sup>1378</sup> are

- *Directions hearing.* Early assessment of cases; wide discretion to give such directions with respect to the conduct of the proceeding as it thinks proper.<sup>1379</sup>

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<sup>1374</sup> Arthur Robinson and Hedderwicks (Arthur Robinson) *Submission 189*, para 50; *LCA Submission 126*. Federal Court practitioners *Consultation* Brisbane 18 August 1997; Federal Court practitioners *Consultations* Sydney 2 June 1999 and 4 June 1999.

<sup>1375</sup> Federal Court Registrar W Soden *Consultation* 7 April 1999; Federal Court Deputy District Registrars *Consultation* Melbourne 1 June 1999 and Federal Court Deputy District Registrars *Consultation* Sydney 10 June 1999.

<sup>1376</sup> The guides are available on the Federal Court internet homepage <<http://www.fedcourt.gov.au/individual.htm>> (28 July 1999) and in hard copy at the registries.

<sup>1377</sup> 'The Court has identified key case management events and has proposed time standards as to when those events should ordinarily occur, although the requirements of each individual case will of course continue to be the paramount consideration.' Federal Court's general guide to the individual docket system <<http://www.fedcourt.gov.au/individual.htm>> (26 July 1999).

<sup>1378</sup> See the Federal Court internet homepage <<http://www.fedcourt.gov.au/individual.htm>> (7 July 1999).

<sup>1379</sup> O 10 r 1(1) Fed Ct Rules. Rule 1(2) provides a lengthy, but non exhaustive, list of the matters in respect to which orders may be made. They include the power to

- make orders with respect to discovery, interrogatories, defining of the issues, joinder of parties, service, amendments, means of presenting evidence, costs

- *Case management conference.* Consider settlement and dispute resolution options; review compliance with directions made previously; set a trial date range and make any necessary further directions.
- *Evaluation conference.* Evaluate the state of preparation of the case, including compliance with earlier directions, dispose of the case if possible, or otherwise allocate a trial date. Mediation conference may be arranged at this point.
- *Trial management conference.* Establish the ground rules for conduct of the trial.

10.56 The Court also proposed that a 'standard case management track' be adopted in most cases. This track was not intended to be prescriptive and it has not been implemented.<sup>1380</sup> It is difficult to envisage its practicability until the Court's case management technology is upgraded in accordance with the Court's information technology plan.<sup>1381</sup>

10.57 There are some variations between IDS in practice and the description of IDS set out in the general guide as procedures have been developed in response to the different circumstances in each registry or in each judge's docket.<sup>1382</sup> The 'key events' were never intended to be prescriptive and they are in fact rarely used to describe the prehearing events.<sup>1383</sup>

10.58 Practitioners have commented that basic procedures and the operation of IDS should be consistent across the registries to reflect the fact that the Federal Court is a

- 
- order that evidence of a particular fact or facts be given at the hearing and in what form
  - restrict the number of expert witnesses, order that the reports of experts be exchanged, specify the form in which expert evidence should be received, appoint a court expert
  - order that proceedings, part of proceedings or a matter arising out of proceedings be referred to a mediator or arbitrator.

<sup>1380</sup>F McRae (Honours thesis) 'The adoption of the Individual List System in the Victorian Registry of the Federal Court of Australia ensures quality and expeditious case management in civil litigation' *Unpublished* Melbourne November 1998, 18. See also J Baird 'The new case management system' in CLE seminar papers *A day in the Federal Court* College of Law Sydney 12 June 1998, 53 (98/32); Federal Court associates *Consultation* Sydney 13 July 1998. The fact that the standard case management track is not followed is indicative of one of the greatest strengths of IDS, that is, its flexibility and ability to tailor processes for each case. Justice Moynihan has commented: 'the timing of successful intervention is set not by the calendar but according to need': M Moynihan 'Towards a more efficient trial process' (1992) 2 *Journal of Judicial Administration* 39, 45.

<sup>1381</sup>See para 9.66 for a discussion of the Court's information technology plan.

<sup>1382</sup>'All of the guides produced have been general. They have not been intended to be prescriptive and, at the very heart of the docket system, is a variation in approach . . . The procedure guides will of necessity be general and . . . differences are likely to occur in approach between Judges and possibly Registries.' Federal Court Registrar W Soden *Correspondence* 20 July 1999.

<sup>1383</sup>Federal Court associates *Consultation* Sydney 13 July 1998; Registrar W Soden *Consultation* Sydney 7-April 1999 and *Correspondence* 20 July 1999.

national court.<sup>1384</sup> Differences in procedures between registries was of particular concern to firms who practised frequently in the Federal Court and litigants, such as government litigants, who were often involved in Federal Court litigation. They stated it was difficult to be familiar with procedures in all the registries.

**Proposal 10.5.** The Federal Court's general guide and the registry procedural guides to the individual docket system should be regularly revised to correspond with the current practice of the court.

**Proposal 10.6.** The Federal Court should develop a national procedures guide to the individual docket system. Registry differences should be kept to a minimum.

### *Individual docket management*

10.59 Consultations with practitioners confirmed the benefit of having the same judge from commencement to disposition in a variety of case types. In intellectual property and trade practices cases interlocutory issues can be critical and under IDS, judges are able to deal with them more efficiently as they know the background to the matter.<sup>1385</sup> In representative proceedings and complex cases practitioners said that the active management of a case by a judge who knows the background was vital.

On the positive side there is a measure of consistency where the decision maker is effectively 'on board' from the early stages of the case . . . The parties are likely to be more responsible with respect to interlocutory applications where their conduct is being scrutinised by the judge who will ultimately try the matter.<sup>1386</sup>

10.60 Within the framework of IDS judges naturally manage their docket in different ways.<sup>1387</sup> For example, judges may have different expectations and procedures for first directions hearings, use of discovery, use of mediation and listings. Currently under IDS, compliance with directions and readiness for trial is monitored by the docket judge. The Court's guide to IDS states that 'between key nominated events in the timeline the Court sends reminders to facilitate compliance with directions'.<sup>1388</sup> Individual judges have different practices in relation to monitoring parties' compliance with orders between directions hearings. Some judges direct their associates to follow up on the orders made in

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<sup>1384</sup> Federal civil working group *Meeting notes* Sydney 7 July 1999; AGS senior practitioners *Consultation* Canberra 6 July 1999; Federal Court practitioners *Consultation* Sydney 2 June 1999; Clayton Utz *Submission* 283.

<sup>1385</sup> Federal Court practitioners *Consultations* Sydney 4 June 1999 and 16 June 1999.

<sup>1386</sup> Law Society of WA *Submission* 78.

<sup>1387</sup> Federal Court associates *Consultation* Sydney 13 July 1998; Federal Court Registrar W Soden *Consultation* 7 April 1999; Federal Court practitioners *Consultations* Sydney 2 June 1999, 4 June 1999 and 16 June 1999.

<sup>1388</sup> <<http://www.fedcourt.gov.au/individual.htm>> (26 July 1999).

each case and contact the parties when there is a delay, whereas other judges expect the parties to raise any difficulties concerning compliance.<sup>1389</sup> Parties are expected to keep in contact with the judge and to advise the judge of any developments which may prevent the parties from meeting the timetable set by the judge.

10.61 Although the flexibility and innovation allowed by IDS in the management of a judge's docket necessarily means there will be policies and practices which differ as between judges,<sup>1390</sup> practitioners in consultations with the Commission indicated concern at the differentiation in practice as between individual judges.<sup>1391</sup> As one practitioner stated, '[t]he docket system works well so long as you get the right judge'.<sup>1392</sup> Practitioners commented that because of variations in judges' practices it was helpful to be conversant with those practices.<sup>1393</sup>

10.62 Practitioners noted that it was now even more important to have an understanding of what each judge expects.<sup>1394</sup> Several judges have dealt with practical variations in their case management by explaining their approach to the parties at the first directions hearing or taking it step by step with the parties as events arise. Some judges have developed practitioners' guides for matters in their docket.<sup>1395</sup> Consultations with practitioners have indicated that these are helpful to assist in the smooth and efficient running of the case.<sup>1396</sup>

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<sup>1389</sup> Federal Court associates *Consultation* Sydney 13 July 1998; Federal Court Registrar W Soden *Consultation* 7 April 1999.

<sup>1390</sup> LCA *Submission 126* and Federal Court Registrar W Soden *Correspondence* 20 July 1999.

<sup>1391</sup> Federal Court practitioners *Consultations* Sydney 2 June 1999 and 4 June 1999; Federal Civil Working Group *Meeting notes* 7 July 1999.

<sup>1392</sup> This was a common view expressed in consultations with practitioners: Federal Court practitioners *Consultations* Sydney 2 June 1999 and 4 June 1999.

<sup>1393</sup> Federal Court practitioners *Consultations* Sydney 2 June 1999 and 4 June 1999; Federal Civil Working Group *Meeting notes* 7 July 1999.

<sup>1394</sup> In discussing implementation of case management systems, Justice Moynihan observed

[t]hose involved in the processes—judges, court officers, legal advisers and clients—should know what is expected of them, and why, and appreciate the consequences of failed actions: M Moynihan 'Towards a more efficient trial process'

(1992) 2 *Journal of Judicial Administration* 39, 45.

<sup>1395</sup> F McRae (Honours thesis) 'The adoption of the Individual List System in the Victorian Registry of the Federal Court of Australia ensures quality and expeditious case management in civil litigation' *Unpublished* Melbourne November 1998, 23 and Federal Court associates *Consultation* Sydney 13 July 1998.

<sup>1396</sup> Federal Court practitioners *Consultations* Sydney 2 June 1999 and 4 June 1999.

**Proposal 10.7.** To the extent that particular judges have different practices they should produce a guide to cases in their docket including what is expected of parties at the first directions hearing and their general approach to discovery and pretrial preparation. Such a guide should be sent to the parties when a case is assigned to a docket judge.

**Proposal 10.8.** As part of its assessment of the individual docket system the Federal Court should

- review the individual judges' docket guides to ensure they are consistent with the overall aims of the Federal Court and the individual docket system. This review should not discourage judges' particular management styles.
- consider whether variations between judges and registries may contribute to a level of disadvantage for litigants in person or lawyers less experienced in the Federal Court or the particular jurisdiction. This is not set to produce uniform procedures but to monitor variations and their effect.

### *Database management*

10.63 A related issue is the loose classification of key events by staff responsible for recording information about cases. Most key management events are entered by the judge's associate and simply classified as a 'directions hearing' rather than the 'key events' described in the general guide.<sup>1397</sup> The Commission's data collection found that no evaluation conferences or trial management conferences were *recorded* as having taken place.<sup>1398</sup> This limitation on data recording may be of no consequence. It can be difficult to characterise the purpose of particular hearings as they may serve varied functions. However, the characterisation of the hearings may be a quality control issue which has implications for the Court's proposed evaluation of IDS.<sup>1399</sup>

10.64 A customised computer system is essential for the effective operation of IDS because judges and their associates need to have the resources to enable them to effectively manage the docket. The computer system should be able to record the status of a case, past and future listings, orders made and compliance with orders. A new computer system is expected to be in operation from July 2000.<sup>1400</sup> In the meantime associates have developed their

<sup>1397</sup> Federal Court associates *Consultations* Sydney 13 July 1998; Federal Court Registrar W Soden *Consultation* Sydney 7 April 1999.

<sup>1398</sup> T Matruglio & G McAllister, Federal Court Empirical Report Part One 21 table 15.

<sup>1399</sup> See also T Matruglio & G McAllister *Part one: The status of data collection and evaluation research in the Federal Court, the Family Court and the Administrative Appeals Tribunal* ALRC Sydney January 1998.

<sup>1400</sup> Federal Court Registrar W Soden *Consultation* Sydney 7 April 1999.



own databases and management systems in chambers to enable efficient management of dockets. This may increase differences between judges in management practices and data collection.

**Proposal 10.9.** There should be consistency between the description of 'key events' in the guides to the individual docket system and the description of information collected and entered by associates and registry staff about cases.

### *Bias*

10.65 Some earlier submissions to and consultations with the Commission expressed concern that IDS could lead to a perception that a judge's impartiality was being compromised.<sup>1401</sup> The Court confirmed that such concerns have not been a problem.<sup>1402</sup> A number of the Commission's submissions and consultations concurred that there is no concern about an additional risk of judicial bias.<sup>1403</sup> As noted by the Victorian Bar

[t]he temperament and character of the Australian judiciary go a long way to ensuring that managerial judging does not have an adverse effect on the impartiality of adjudication.<sup>1404</sup>

### *Stage of resolution*

10.66 The table below illustrates that in the sampled Federal Court cases a large number of settlements were secured early in the process (57%) and a high proportion of cases proceeded to a final hearing and judgment (35%). This is in stark contrast to the United States where only 3% of federal civil cases were reported as proceeding to trial.<sup>1405</sup> As Resnik comments, in relation to the United States

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<sup>1401</sup>.LCA Submission 126.

<sup>1402</sup>J Richards 'Jeanette Richards interviews Merkel J on the "Docket System"' (1998) 106 *Victorian Bar News* 35, 36; Federal Court Registrar W Soden *Consultation* 7 April 1999; Federal Court Deputy District Registrars *Consultation* Melbourne 1 June 1999 and Federal Court Deputy District Registrars *Consultation* Sydney 10 June 1999.

<sup>1403</sup>.ACLA Submission 70; Federal Court practitioners *Consultations* Sydney 2 June 1999, 4 June 1999 and 16 June 1999.

<sup>1404</sup>.Victorian Bar Submission 57.

<sup>1405</sup>.Administrative Office of the United States Courts *Statistical tables for the federal judiciary* (1995) 36, table C-4. This does not mean that the balance of 97% of cases settle as it has been estimated that about one third of these cases would have been resolved by summary judgments and judgments on motions to dismiss and injunctions: J Resnik 'Litigating and settling class actions: the prerequisites of entry and exit' (1997) Vol 30 *University of California, Davis Law Review* 835, 839.

the shared understanding [of lawyers commencing cases and judges presiding over them is] that commencing a lawsuit is a plan to litigate or to settle a case but is rarely a plan to try a case.<sup>1406</sup>

**Table 10.5. Stage of resolution in Federal Court (ALRC case samples)<sup>1407</sup>**

Stage of Resolution	Federal Court % (n)
Before first directions hearing	3% (23)
At/after a directions hearing or other pre-hearing event (non-ADR)	54% (366)
At/after ADR	3% (21)
After interim hearing/judgment	1% (6)
After listed for hearing	4% (24)
Judgment	35% (241)
Total	100% (681)

### *Case duration*

10.67 The Court's annual report shows improvements in court processing times since the introduction of IDS.<sup>1408</sup> Other factors may have contributed to the improvement – such as the Court's power to order compulsory mediation, the decrease in the number of applications filed<sup>1409</sup> and the changing nature of the case mix – however, the Court reports that IDS was probably the most significant factor.<sup>1410</sup> Practitioners confirmed to the Commission that case resolution is now more efficient and effective and likewise credit IDS.<sup>1411</sup>

10.68 The Commission's study of the sampled cases showed

- the median period for cases from commencement to disposition was seven-months<sup>1412</sup>
- 85% of cases were resolved within 20 months<sup>1413</sup>

<sup>1406</sup>J Resnik 'Litigating and settling class actions: the prerequisites of entry and exit' (1997) Vol 30 *University of California, Davis Law Review* 835, 840.

<sup>1407</sup>T Matruggio & G McAllister, Federal Court Empirical Report Part One, 41 table 30.

<sup>1408</sup>In conjunction with the commitment to IDS the Court set a goal of finalising 98% cases within 18-months of commencement. Between 1 July 1993 and 30 June 1998, 86% of cases were completed within 18 months, 78% were completed within 12 months and 62% were completed within six months. There has been a small but steady increase in the number of matters finalised within 18-months. In 1995–96, 83% of matters were completed within 18 months. This figure rose to 85% in 1996–97, and to 87% in 1997–98: Federal Court *Annual report 1997–98* appendix 6 figure 6.4a.

<sup>1409</sup>The number of applications filed have decreased as follows: 1994–95, 4155; 1995–96, 4307; 1996–97, 3855; 1997–98, 3497. These figures exclude bankruptcy matters: Federal Court *Annual reports 1994–95 to 1997–98*.

<sup>1410</sup>Federal Court *Annual report 1997–98*, 36.

<sup>1411</sup>Federal Court practitioners *Consultations* Sydney 2, 4 and 16 June 1999.

<sup>1412</sup>T Matruggio & G McAllister, Federal Court Empirical Report Part One, 28 table 21.

- 95% of cases were resolved within 34.5 months<sup>1414</sup> and
- the median period for disposition for those that proceeded through to judgment was 8.4 months, compared with a median of 5.3 months for cases resolved by the parties<sup>1415</sup> and 5.7 months for cases that were withdrawn or discontinued.<sup>1416</sup>

There is a gap between the Court's goal of disposing of 98% of cases within 18-months and the Commission's findings where 82% of sampled cases were disposed of within 18 months<sup>1417</sup> and 95% of sampled cases were resolved within 34.5-months.<sup>1418</sup>

10.69 Some practitioners consulted by the Commission cited hearing delays as one of the main problem areas with IDS.<sup>1419</sup> The Commission was told by practitioners that IDS has created greater flexibility within a docket but less flexibility across the Court.<sup>1420</sup> Practitioners said that while the listing manager can arrange for urgent matters to be heard by the duty judge, problems arose when one or two day matters, not strictly urgent, were ready for hearing but were unable to be heard for several months.<sup>1421</sup> Delays occurred when the judge had a full docket and was unable to give a timely hearing date.<sup>1422</sup> This problem was also referred to in the submission from the law firm Arthur Robinson & Hedderwicks as follows

The docket of a particular judge is likely to be full at such a time and not able to accommodate the fixing of trials in all matters. It will therefore be necessary for some matters to float, or for certain matters to be allocated to a new judge if the docket judge becomes involved in a long-running case.<sup>1423</sup>

Sydney practitioners stated that certain judges were reluctant to transfer cases between dockets in order to facilitate earlier hearing dates.<sup>1424</sup> This problem may be partially alleviated by more effective listing practices. Certain Federal Court judges have told the Commission that they have found IDS works most efficiently and

<sup>1413</sup>.T Matruglio *Correspondence* 25 July 1999.

<sup>1414</sup>.*ibid.*

<sup>1415</sup>.With a mean of 11.7 months: T Matruglio & G McAllister, *Federal Court Empirical Report Part One*, 31 table 23.

<sup>1416</sup>.T Matruglio & G McAllister, *Federal Court Empirical Report Part One*, 31 table 23. Comments by the Federal Court have indicated that the majority of those cases that are withdrawn or discontinued are in fact the result of a settlement between the parties: *Federal Court Deputy District Registrars Consultation* Sydney 10 June 1999.

<sup>1417</sup>.T Matruglio *Correspondence* 25 July 1999.

<sup>1418</sup>.*ibid.*

<sup>1419</sup>.Federal Court practitioners *Consultations* Sydney 2 June 1999 and 4 June 1999.

<sup>1420</sup>.Federal Court practitioners *Consultation* Sydney 16 June 1999.

<sup>1421</sup>.*ibid.*

<sup>1422</sup>.Federal Court practitioners *Consultations* Sydney 2 June 1999 and 16 June 1999.

<sup>1423</sup>.Arthur Robinson *Submission* 189, para 125.

<sup>1424</sup>.Federal Court practitioners *Consultation* Sydney 4 June 1999.

flexibly if one week blocks are left vacant for hearings between long cases or every two to three months to allow for urgent matters and judgment writing.<sup>1425</sup> This prevents a docket becoming jammed.

10.70 One practitioner noted that although it was beneficial to have consistent judicial oversight, in some matters this is outweighed by the need for speedy adjudication of the issues. Some practitioners noted that there did not appear to be Court oversight of the allocation of hearing dates for interlocutory hearings, or at least not a transparent Court listing system. Sydney practitioners supported monitoring of hearing date allocation in judges' dockets to ensure that cases were not delayed because the docket judge could not provide an earlier hearing date. They also suggested the establishment of a system that enabled parties to notify a nominated person at the Court (such as the listings manager) of any problems with the allocation of hearing dates, so that the Court was aware of all listing problems and was able to address them in a consistent manner. The Court has listing managers and publicises their functions. The Commission's consultations appear to indicate practitioners are not fully aware of the listing managers' role.

**Proposal 10.10.** The listing manager in each Federal Court registry should be responsible for

- monitoring hearing date allocations for interlocutory matters and final hearings in each docket
- recording and responding to queries and comments from parties who have problems with the allocation of hearing dates and
- training and assisting judges and/or their associates in effective listing practices.

### *Judicial management*

10.71 Most submissions and consultations have supported judicial management of cases.<sup>1426</sup> Judges appear to spend more pretrial time in court as a result of IDS due to an increased involvement in directions hearings. This is said to be effective because with a judge 'in charge', directions hearings are more productive. Practices in this regard vary somewhat. Melbourne judges appear to make more use of registrars to conduct certain directions hearings and interlocutory matters.<sup>1427</sup> One of the stated aims of IDS is to 'minimise the number of events and maximise the result of each event'. Each time the matter is before the Court, it is an occasion to advance or resolve the case. IDS appears to have resulted in counsel becoming

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<sup>1425</sup> Federal Court judges *Consultations* Sydney 13 and 23 July 1999.

<sup>1426</sup> AGS *Consultation* Brisbane 19 August 1997; Federal Court practitioners *Consultation* Brisbane 18-August 1997; Law Society of SA *Consultation* Adelaide 1 September 1997; Federal Court practitioners *Consultations* Sydney 2 June 1999; 4 June 1999 and 16 June 1999.

<sup>1427</sup> Federal Court Deputy District Registrars *Consultation* Melbourne 1 June 1999; Federal Court Deputy District Registrars *Consultation* Sydney 10 June 1999.

involved in cases at an earlier stage.<sup>1428</sup> Unnecessary court appearances are discouraged with parties frequently faxing consent orders to the docket judge for approval before listed directions hearings, and many directions hearings conducted by telephone.<sup>1429</sup> Some judges have also expressed interest in conducting directions hearings by email. Such initiatives are generally supported by practitioners although they did state that there is more pressure for parties to comply with orders if they have to attend court and are compelled to directly account to the judge.<sup>1430</sup> Where non compliance is an issue in a case, the cost of additional directions hearings is minimal for the parties, compared with the cost of non compliance.

### Appeals

10.72 The Full Federal Court has a diverse appellate jurisdiction to hear and determine

- appeals from judgments of the Federal Court constituted by a single judge
- appeals from judgments of the Supreme Court of a Territory<sup>1431</sup> and
- in such cases as are provided for by any Act, appeals from judgments of a court of a State (other than a Full Court of a State Supreme court) exercising federal jurisdiction.

**Table 10.6. Sources of Full Federal Court appeals**<sup>1432</sup>

Source of decision on appeal	1995-96 % (n)	1996-97 % (n)	1997-98 % (n)
Federal Court (single judge)	84% (240)	83% (248)	87% (287)
Supreme Court	13% (38)	12% (34)	11% (35)
Other	3% (7)	5% (16)	2% (8)
Total	100% (285)	100% (298)	100% (330)

10.73 The Court has a substantial appellate workload. The number of appeals to the Full Court general division over the past seven years has increased from 265 in

<sup>1428</sup> Federal Court associates *Consultations* Sydney 13 July 1998; Registrar W Soden *Consultation* Sydney 7 April 1999; Federal Court practitioners *Consultation* Sydney 4 and 16 June 1999. The Commission's survey responses from 111 applicant solicitors and 79 respondent solicitors who used counsel showed that counsel were briefed for directions hearings by applicant solicitors in 37% of cases and by respondent solicitors in 24% of cases: T Matruglio, *Federal Court Empirical Report Part Two*, 42-table 5.

<sup>1429</sup> P Heerey *Submission 49*; Federal Court practitioners *Consultations* Sydney 2 June 1999 and 4 June 1999.

<sup>1430</sup> Federal Court practitioners *Consultations* Sydney 2 and 4 June 1999.

<sup>1431</sup> That is, decisions of the Supreme Court of the Australian Capital Territory and the Supreme Court of Norfolk Island. 'Supreme Court of a Territory' does not include the Supreme Court of the Northern Territory: Federal Court Act s 24(6).

<sup>1432</sup> Supreme Court figures relate to civil appeals from the Supreme Court of the Australian Capital Territory and the Supreme Court of Norfolk Island. The 'Other' category includes appeals from decision of the AAT, the Family Court and the Federal Police Disciplinary Tribunal: Federal Court *Correspondence* 8 October 1998.

1992–93 to 419 in 1998–99.<sup>1433</sup> The management of cases in the Federal Court’s appellate jurisdiction raises important issues. Consultations with the Federal Court have suggested that the management of the appellate caseload is a particular concern to the Court.<sup>1434</sup>

10.74 The Chief Justice is responsible for the establishment of appeals benches. Unlike the Family Court of Australia, the Federal Court does not operate an appeal division — all Federal Court judges hear appeals. Full Federal Court sittings are scheduled periodically through the year. The challenge is to reserve periods of time for Full Court sittings and writing appeal judgements and manage and determine individual docket cases.

10.75 The Court has recently developed a new Full Court rostering system to provide for four national Full Court sittings in 1999, compared to the three scheduled for 1998. These sittings are each of four weeks duration.<sup>1435</sup>

One of the purposes of the new system is to provide greater uninterrupted periods of time for individual docket work for judges allocated to Full Courts, and to enable judges not required for Full Courts to list individual docket cases during the Full Court sittings period.<sup>1436</sup>

10.76 The administration of appeals by the Court, such as the processing of appeal notices, the settling of appeals indexes and the organisation of the initial meeting between the parties is undertaken by the registrars and the staff of the Court. In general, the progress of appeals to hearing is managed by Federal Court registrars.<sup>1437</sup> Appeal cases require less intensive case management than matters at first instance. The interlocutory steps in appellate proceedings focus on the preparation of appeal books and other written material.

10.77 The Federal Court has an appeals management project, which has identified a range of issues for consideration by the Court. Some of the options for reform of appeal management include the following

- limits on the length of appeal hearings
- limits on oral advocacy and evidence in appeals
- more active involvement by appeal court judges in pre-trial preparation in order to shorten hearings

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<sup>1433</sup>.Federal Court *Annual reports* 1996–97 and 1997–98 and Federal Court *Correspondence* 23 July 1999.

<sup>1434</sup>.Federal Court Registrar W Soden *Consultation* Sydney 7 April 1999.

<sup>1435</sup>.Federal Court *Annual report* 1997–98, 12.

<sup>1436</sup>.*ibid.*

<sup>1437</sup>.Where an interlocutory matter arises before call over, the judge who is to conduct the call-over will normally deal with it on a notice of motion. Alternatively, the matter may be dealt with by the duty judge or the senior judge of a registry. Where a date for hearing has been set, interlocutory proceedings will be dealt with by one of the judges on the panel to hear the matter.

- the use of staff lawyers to summarise appeals, highlighting issues of fact and law, for judges
- the use of ADR processes to encourage settlement, to assist in defining issues on appeal and other case management purposes
- the introduction of electronic appeals books
- the issuing of memorandum reasons for judgment in appropriate cases
- the use of one or two judge courts in particular categories of case that presently require at least three judges.

10.78 There is limited information available on the nature of case management or caseload problems faced by federal appellate courts. While the Commission has not conducted a detailed survey of issues and options for reform of appellate court appeal processes in the Federal Court, proposals are made below in relation to the last two of these issues.

10.79 *Memorandum reasons for judgment.* In the United States, courts in particular categories of case issue 'memorandum decisions' instead of full reasons for judgment, where the court determines that full judgments would have no precedential value.<sup>1438</sup> The United States Court of Appeals for the Third Circuit has adopted a policy which provides that full reasons for judgment are appropriate when any one of the following circumstances is present

- in deciding the appeal the court enunciates a new rule of law or modifies an existing rule
- in deciding the appeal the court resolves a conflict or apparent conflict of authority
- the court is not unanimous in its decision
- the decision relates to a matter of public interest.<sup>1439</sup>

10.80 The policy provides that a memorandum opinion (ordinarily no more than a page in length) will otherwise be employed, especially in cases in which

- the issues involve the application of well settled rules of law
- the issue asserted is whether the evidence is sufficient and it clearly is
- the disposition of the appeal is clearly controlled by a settled rule of law where no good reason exists for reviewing that rule
- the decision of the court or the agency being reviewed identifies and discusses all the issues being presented and the appellate court approves of the conclusions and reasons.<sup>1440</sup>

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<sup>1438</sup>D Ipp 'Reforms to the adversarial process in civil litigation - Part II' (1995) 69 *Australian Law Journal* 811, 818-819.

<sup>1439</sup>.ibid.

<sup>1440</sup>D Meador et al *Appellate courts: Structures, functions, processes and personnel* Michie Co Charlottesville Virginia 1994, 1-5 as cited in D Ipp 'Reforms to the adversarial process in civil litigation - Part II' (1995) 69 *Australian Law Journal* 811, 818-819.

Justice Ipp has observed that

A memorandum decision may be sufficient to explain the decision, while at the same time it will avoid the expenditure of undue energy and time in trying to lay out a full exposition of the facts and the law.<sup>1441</sup>

10.81 The proposed amendment in the Federal Magistrates Bill, Schedule 12 to section 28 of the *Federal Court of Australia Act 1976* (Cth) allows short form judgments to be used in appropriate cases.

10.82 *Two judge panels.* Another measure to alleviate caseload pressures on appellate courts involves the use of two judge courts in particular categories of case that presently require at least three judges. Justice Ipp notes that two judge panels are used in many United States jurisdictions and in South Africa.<sup>1442</sup>

10.83 The Bowman Report recommended that consideration be given to the greater use of two judge courts in the English Court of Appeal, where no fundamental point of principle or practice is involved.<sup>1443</sup> More recently the Lord Chancellor has proposed that legislative provisions prescribing the constitution of courts in appeal hearings<sup>1444</sup> should be removed and replaced with a provision that the Court of Appeal may sit for the purpose of exercising any of its jurisdiction in constitutions of one, two or more judges.<sup>1445</sup>

The principle behind this proposal is that of proportionality. Valuable resources should not be devoted to cases which have no real need of them. A move towards allowing judicial discretion to determine the constitution of the court according to the individual nature of the case sits well with the general principle of introducing greater case management, which runs through the whole of the civil justice reforms.<sup>1446</sup>

10.84 *Powers to dismiss proceedings.* In 1998, the Federal Court case *D'Ortenzio v Telstra*<sup>1447</sup> raised the question whether a single judge may, in an appeal, exercise the powers of the Court to stay or dismiss any proceeding where

- no reasonable cause of action is disclosed
- the proceeding is frivolous or vexatious or

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<sup>1441</sup>Justice Ipp claims that research in the United States indicates that deciding cases without full reasons greatly enhances judicial productivity: D Ipp 'Reforms to the adversarial process in civil litigation - Part II' (1995) 69 *Australian Law Journal* 811, 813-819.

<sup>1442</sup>id 11, 819.

<sup>1443</sup>G Bowman *Review of the Court of Appeal (Civil Division) - Report to the Lord Chancellor* Lord Chancellor's Dept London 1997 Recommendation 36.

<sup>1444</sup>s 54 *Supreme Court Act 1981* (UK).

<sup>1445</sup>Lord Chancellor's Department (Consultation paper) *The Court of Appeal (Civil Division): Proposal for change to constitution and jurisdiction* Lord Chancellor's Dept London July 1998, ch 2 para 3.

<sup>1446</sup>id para 2.

<sup>1447</sup>(1998) 154 ALR 577.



- the proceeding is an abuse of the process of the Court.<sup>1448</sup>

Justice O’Loughlin concluded that as the power to stay or strike out proceedings was not included in s 25 of the Federal Court Act,<sup>1449</sup> he was not empowered to dismiss the appeal. The judge said

I regard this question as one of practical and increasing importance. The number of self-represented litigants who are approaching the Full Court is increasing and if a single judge is empowered to deal with inadequate documents or deficiencies in documents by using the powers that are contained in Order 20, r 2(1), it would greatly assist the expeditious handling of the Court’s business.<sup>1450</sup>

**Proposal 10.11.** The Federal Court should promulgate rules permitting appeal courts to issue memorandum reasons for judgment instead of full reasons for judgment, where the Court determines that full judgments would have no precedential value.

**Proposal 10.12.** The Federal Court Act should be amended to permit the use of two or more judge courts in appeals at the discretion of the Chief Justice of the Federal Court.

**Proposal 10.13.** The Federal Court Act should be amended to permit a single judge in an appeal to exercise the powers of the Federal Court to stay or dismiss any proceeding where

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

## Practice and procedure

### *Harmonisation of civil procedure*

10.85 Harmonisation of procedural rules should promote a more efficient and less costly process for parties through the courts. Parties and practitioners would no longer have to spend time and resources familiarising themselves on a variety of procedural rules in different jurisdictions. The call for harmonised procedures is not new. Reform and professional bodies have made numerous recommendations for uniformity and harmonisation of procedural rules.<sup>1451</sup>

<sup>1448</sup>O 20 r 2(1) Federal Court Rules.

<sup>1449</sup>Which sets out powers of a single judge in exercising the Federal Court’s appellate jurisdiction.

<sup>1450</sup>*D’Ortenzio v Telstra* (1998) 154 ALR 577, 583.

<sup>1451</sup>In 1992 the Law Society Access to Justice report recommended uniform procedures. In Access to Justice Advisory Committee *Access to justice – an action plan* AGPS Canberra 1994 (AJAC) Action-22.1 recommended the harmonisation of civil procedures. Recommendation 144 in Lord Woolf *Access to justice: Final report to the Lord Chancellor on the civil justice system in England and Wales* HMSO London 1996 involved the introduction of a single claim form (Woolf final report). The

10.86 The Federal Court and State Supreme Courts have worked together to ensure harmonised procedures for Corporations Law matters. Justices Santow and Austin reported the following developments

Through the Council of Chief Justices, a committee comprising State, Territory and Federal Court judges has recently finalised recommendations for harmonised rules of court for proceedings under the Corporations Law. The harmonised rules will simplify litigation, especially where legal practitioners conduct litigation in a court outside their State of residence. This will mean, say, that a lawyer in Perth will be able to conduct winding-up or takeover litigation in Brisbane using standard documentation.

The judges involved in Corporations Law matters in all States and Territories and the Federal Court have recently established more formal arrangements for regular communication to exchange experience and views to enhance consistency in Corporations Law matters.<sup>1452</sup>

10.87 The Commission sees considerable merit in harmonised or uniform rules and originating processes and commends the recent initiatives in relation to Corporations Law matters as well as the introduction of the *Uniform Civil Procedure Rules* (Queensland) and the *Civil Procedures Rules* (UK) to the extent they promote harmonisation of procedural rules in litigation. A standard originating process, whether a statement of claim or application, would reduce complexity and therefore cost. Electronic filing and legal publishing will facilitate such changes.<sup>1453</sup>

10.88 Harmonisation of procedures should not create inflexible procedures. The Law Council of Australia stated that

uniformity is not valuable for its own sake, but only if unnecessary variations are eliminated. The themes of case management and judicial involvement in litigation necessarily require that there will be various specific procedures for particular kinds of cases. The uniformity that the Law Council argues for has to do with rules and standard forms, rather than flexible case management. . . It could be dangerous to impose too much uniformity, because. . . variations in approach which may reveal a better way of doing things may be eliminated.<sup>1454</sup>

**Proposal 10.14.** The Council of Chief Justices should further develop recommendations for harmonised rules of court for all civil matters and a

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*Uniform Civil Procedure Rules* (Queensland) commenced on 1 July 1999; they apply to civil proceedings in the Supreme Court, District Court and Magistrates Courts in Queensland. See also para 9.75 which discusses the harmonisation of rules relating to the use of technology in litigation.

<sup>1452</sup>G Santow and R Austin 'No doubts in Wakim wake' 26 July 1999, *Australian Financial Review* 20.

<sup>1453</sup>See J Sherman and A Stanfield *Electronic appeals project – Final report* Council of Chief Justices of Australia and New Zealand 25 May 1998 <<http://www.ccj.org/reports.htm>> (29 July 1999) and para 9.62-9.64 for a discussion of the progress of implementing electronic filing in Australian courts.

<sup>1454</sup>LCA *Submission 126*, para 7.32.1.

standard originating document and process for civil matters in the Federal Court and all State and Territory Supreme Courts.

### *Pleadings*

10.89 *Pleadings in the Federal Court*. A number of submissions expressed support for the current use of pleadings in the Federal Court and did not see any need for a change in practice.<sup>1455</sup> The Federal Court Rules allow parties to plead points of law<sup>1456</sup> and pleadings may be supplanted or supplemented by statements of facts, issues and contentions.<sup>1457</sup>

10.90 In the recent case of *State of Queensland v Pioneer Concrete (Qld) Pty Ltd*,<sup>1458</sup> Justice Drummond discussed the Federal Court's approach to pleadings. He stated that

. . . judges of this Court have dealt with challenges to the adequacy of pleadings in a more flexible way than would be required by a strict application of those rules. This is an approach that reflects the discretionary nature of the Court's power to control pleadings and the objective of the Court's case management system, provided for by O10 r 1, of achieving efficient and economical use of the resources of all the parties, as well as those of the Court.<sup>1459</sup>

Justice Drummond cited *Beech Petroleum NL v Johnson* (1991) where Justice von Doussa referred to the tendency now

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<sup>1455</sup> ACLA *Submission 70*; Law Society of NSW *Submission 48*; SA Bar Association *Consultation Adelaide* 1 September 1997; Federal Court practitioners *Consultation Sydney* 16 June 1999.

Criticisms levelled by the Issues Paper at the civil litigation practises and procedures, particularly at the system of pleadings and the discovery procedure are overstated. Those procedures are and have been the subject of ongoing reform: Vic Bar *Submission 57*.

There is no evidence of which the Law Council is aware that the current rules [on pleadings] lead to undue costs, delay or unfairness in litigation. Nor is there any clear evidence that any change would result in an improvement in the specific respects suggested . . . The Law Council's assessment is that pleadings have generally, in the large majority of cases, served the purpose for which they were intended . . . [however] there are some aspects which could be improved, particularly in larger cases. In such cases pleadings may have the potential to add to costs, delay or unfairness. The Law Council suggests this could be largely ameliorated by early judicial case management and, if necessary, as part of this case management, by sensible and skilful managerial judging . . . The Law Council suggest that there is now a greater number of complex cases and therefore it is going to be more difficult to define the issues now, by whatever pleading rules or other device, than before: LCA *Submission 126*.

<sup>1456</sup> O 11 r 9 Fed Ct Rules.

<sup>1457</sup> B Beaumont 'Managing litigation in the Federal Court' in B Opeskin & F Wheeler (eds) *The Australian federal judicial system* Melbourne University Press 2000 (forthcoming). P Heerey *Submission 49*. However, practitioners in trade practices cases said that in practice there is no real difference between issues of fact/notices of contention and pleadings: Federal Court practitioners *Consultation Sydney* 4 June 1999.

<sup>1458</sup> [1999] FCA 499.

<sup>1459</sup> *id* at [18].

towards narrative pleading as there is a growing concern that pleadings according to traditional rules do not adequately make known to the court and to the parties the nature of the opposing cases in complex matters.<sup>1460</sup>

In that case Justice von Doussa also commented that '[t]echnical objections raised to pleadings on the ground of alleged want of form will be received with less enthusiasm today than in times past'.<sup>1461</sup>

10.91 *Criticisms of pleadings.* The following general criticisms were made about pleadings in consultations, submissions and published articles

- pleadings are often too general in scope and inadequately particularised<sup>1462</sup> so that there is no narrowing of issues<sup>1463</sup>
- inexact pleadings or inadequate particularisation is said to be part of a culture in which parties commence proceedings too early, without attempting other, non-litigious means of resolution such as negotiation<sup>1464</sup>
- inexact pleading and frequent amendment of pleadings is allowed by courts and there is no incentive for respondents to define the issues too closely as they are entitled to put the applicant to proof on each matter pleaded<sup>1465</sup>

Such ease [in amending pleadings] permits and indeed encourages inexact pleadings; an applicant is aware that pleadings can be developed, reformulated and 'tidied up' in due course, and as a consequence less care and less specificity than would otherwise be the case ensues.<sup>1466</sup>

- the barrier that the system of pleadings and its complex rules present to the unrepresented litigant<sup>1467</sup>

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<sup>1460</sup>.105 ALR 456, 466.

<sup>1461</sup>.ibid.

<sup>1462</sup>.Arthur Robinson *Submission 189*. It was noted by practitioners that this often occurs in migration cases with the result that the AGS are often unaware of the substance of the applicant's case until a day before the hearing if a barrister is briefed by the applicant or the day of the hearing if the applicant is unrepresented. Therefore if the case has merit and DIMA decides to concede or remit the decision to the tribunal, the hearing date will often be vacated at a very late stage: Federal Court practitioners *Consultation Sydney* 23 June 1999.

<sup>1463</sup>.Arthur Robinson *Submission 189*. B Lander 'Pleadings' *Paper Queensland Litigation Reform Commission Conference Brisbane 6-8 March 1996*; GL Davies 'A blueprint for reform: Some proposals of the Litigation Reform Commission and their rationale' (1996) 5 *Journal of Judicial Administration* 201.

<sup>1464</sup>.P Meadows 'Civil litigation reform' *Paper 1998 Corporate Law Conference Melbourne* 24 September 1998, 46.

<sup>1465</sup>.Arthur Robinson *Submission 189*; trial judges often allow amendments of pleadings due to the influence of appeal court rulings such as *The State of Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146: Federal civil working group *Meeting notes* 21 October 1996.

<sup>1466</sup>.Arthur Robinson *Submission 189*.

<sup>1467</sup>.C Pincus 'Pleadings' *Paper Queensland Litigation Reform Commission Conference Brisbane 6-8-March 1996*.

- lawyers frequently use pleadings in counter-productive ways: for example, by failing to admit matters pleaded that they know to be true or making allegations that they know they cannot prove at a hearing<sup>1468</sup>
- applicants may plead with an eye on causes of action, rather than restricting themselves to material facts.<sup>1469</sup>

10.92 *Suggested solutions.* The following solutions have been suggested in submissions, consultations and articles.

- requiring lawyers to certify that they have made all reasonable enquiries to ensure the facts asserted are true; or that they know of evidence supporting the facts, and do not know of evidence disproving them<sup>1470</sup>
- greater rigour by judges to ensure that pleadings provide adequate particulars<sup>1471</sup>
- greater use of notices to admit to restrict the range of issues raised in pleadings<sup>1472</sup>
- greater use of statements of issues once pleadings are closed to narrow the issues in dispute<sup>1473</sup>
- broader and less technical rules for pleadings – in particular, removing the prohibition on pleading conclusions of law<sup>1474</sup> and a stricter application of the test for strike out applications.<sup>1475</sup> Justice Heerey has argued that parties

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<sup>1468</sup> M Aronson and J Hunter *Litigation evidence and procedure* 5th ed Butterworths Sydney 1995, 102; M-Wilson 'Pleadings' *Paper* Queensland Litigation Reform Commission Conference Brisbane 6–8-March 1996; Arthur Robinson *Submission 189*.

<sup>1469</sup> Arthur Robinson *Submission 189*; M Moynihan 'Towards a more efficient trial process' (1992) 2-*Journal of Judicial Administration* 39, 54.

<sup>1470</sup> Arthur Robinson *Submission 189*; P Meadows 'Civil litigation reform' *Paper* 1998 Corporate Law Conference Melbourne 24 September 1998, 46. Federal Court judges have approved in principle a rule for the verification of pleadings and it will be put to the judges for formal approval at the next Judges' meeting in September 1999. Verification of pleadings is already required in the Supreme Court of NSW. The Law Council of Australia believes that this 'has had some limited success in limiting abuse of pleadings as a litigation tactic': LCA *Submission 126*.

<sup>1471</sup> Arthur Robinson *Submission 189*; P Meadows 'Civil litigation reform' *Paper* 1998 Corporate Law Conference Melbourne 24 September 1998, 47. See Fed Ct Rules O 12 r 5 which gives the Court power to order a party to file and serve particulars of any claim.

<sup>1472</sup> Arthur Robinson *Submission 189*; C Hodgekiss 'The conduct of trade practices litigation' *Paper* presented at Continuing Legal Education, Committee for Postgraduate Studies Faculty of Law University of Sydney 16 March 1997, 7.

<sup>1473</sup> M Moynihan 'Towards a more efficient trial process' (1992) 2 *Journal of Judicial Administration* 39, 51; C Hodgekiss 'The conduct of trade practices litigation' *Paper* presented at Continuing Legal Education, Committee for Postgraduate studies Faculty of Law University of Sydney 16 March 1997, 3; JS Lockhart 'Handling trade practice cases' (1994) 17 *University of NSW Law Journal* 298, 301.

<sup>1474</sup> The Uniform Civil Procedure Rules 1999 (Queensland) allow parties to plead conclusions of law: s-149(2).

<sup>1475</sup> ACCC *Submission 67*. The Law Society of WA states

The taking of 'technical' objections to pleadings simply because such points may be taken results in undue cost and delay and unfairness in litigation. This requires a more robust approach by judges, masters and registrars, along with the promulgation of a rule which effectively states that the failure of a pleading to strictly comply with rules

should be able to plead 'anything that notifies the opposing party of what the real dispute is about' including conclusions of law<sup>1476</sup>

- encouraging greater truth in pleading by requiring parties to plead with greater specificity, and particularly to admit facts they know to be true.<sup>1477</sup>
- discourage early commencement of proceedings<sup>1478</sup>
- stricter sanctions on late amendment of pleadings<sup>1479</sup>
- better use of sanctions against parties and their lawyers if they make tactical denials or seek amendments supported by inadequate affidavit material, or file pleadings that are defamatory, speculative or not based on any factual substance<sup>1480</sup>
- Federal Court rules should require the respondent to indicate precisely how its case on any issue differs from the case of the applicant. It is common for a docket judge to impose such a requirement by direction although the rules do not require it.<sup>1481</sup>

on pleading will not render it liable to be struck out unless the court is satisfied that the defect in question brings about a real prospect of prejudice to the opposing party: Law Society of WA *Submission* 78.

<sup>1476</sup> P Heerey *Submission* 49.

<sup>1477</sup> Arthur Robinson *Submission* 189; P Meadows 'Civil litigation reform' *Paper* 1998 Corporate Law Conference Melbourne 24 September 1998, 46; A Kwong 'A year in Santos: Litigation under Part IV of the Trade Practices Act' *Unpublished* Federal Court of Australia Melbourne 1994, 12; the Law Council supported the abolition of all bare denials and commented that 'this is a practical step which is unlikely to increase costs to any appreciable degree, but it will help pleading refine issues': LCA *Submission* 126; the recently enacted Civil Procedure Rules (UK) and the Uniform Civil Procedure Rules 1999 (Queensland) do not allow bare denials in defences. Section 166(4) of the Uniform Civil Procedure Rules 1999 (Queensland) states that a party's denial or non admission of an allegation of fact must be accompanied by a direct explanation. Under Part 16.5 CPR (UK) a defendant must state his reason for denying any matter and must state his own version of events if they differ from the version of the claimant. Order 11 Rule 18 of the Federal Court Rules states that when a party is denying an allegation of fact he or she must not do so evasively or generally but must answer the point of substance.

<sup>1478</sup> Arthur Robinson submitted:

In our view, judges must impose cost sanctions upon lawyers who commence proceedings prematurely, and thereby cause costs to be wasted by parties and cause the system as a whole to function inefficiently. In addition, ethical requirements need to be put in place by relevant professional bodies: *Submission* 189.

See also Clayton Utz *Submission* 283.

<sup>1479</sup> Arthur Robinson submitted

Courts seem willing to allow amendments without any proper consideration being given to the commercial consequences of this (in the context of the dispute as a whole). Parties regulate business and commercial affairs by reference to matters pleaded and the imminence of a trial in a dispute. Permitting amendments, particularly at a late stage in the dispute, will often have commercial consequences necessarily unseen to the courts. Perhaps precisely because the consequences are unseen, courts seem to pay scant regard to them: Arthur Robinson *Submission* 189.

<sup>1480</sup> Arthur Robinson *Submission* 189; M Moynihan 'Towards a more efficient trial process' (1992) 2-*Journal of Judicial Administration* 39, 54. Under s 167 of the Uniform Civil Procedure Rules (Queensland) the Court may order the party who denied or did not admit an allegation of fact to pay costs if it is found that the allegation of fact should have been admitted.

<sup>1481</sup> A Kwong 'A year in Santos: Litigation under Part IV of the Trade Practices Act' *Unpublished* Federal Court of Australia Melbourne 1994, 12. See O 13 r 12(3) of Victorian Sup Ct rules which

**Question 10.1.** Should the Federal Court adopt a stricter application of the test or a stricter test for strike out applications?

**Proposal 10.15.** Federal Court rules should

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

### *Discovery*

10.93 Badly managed discovery is widely regarded as a cause of significant cost, delay and unfairness to parties. Critics point to the abuse of discovery by litigants and their legal representatives, particularly in complex cases where discovery may be used as a delaying tactic, a fishing expedition or as a process to add to the other side's litigation costs.<sup>1482</sup> In the majority of cases where there are few documents, the rules and practices work well and discovery is not a problem.<sup>1483</sup> The concerns relate to large cases where there are significant documents and costs and the few cases where discovery may be used tactically.<sup>1484</sup>

10.94 Some judges believe that discovery requires urgent major reform.<sup>1485</sup> For instance, even if commercial parties can afford extensive discovery it may be unnecessarily costly, occupy much of the court's time and over-burden judges, parties and the hearing process. Commentators have observed that reforms to discovery practices are only likely to succeed if the profession generally is convinced that an improvement is needed.<sup>1486</sup>

10.95 The Federal Court's Practice Note on discovery<sup>1487</sup> states that the Court will not as a matter of course order general discovery even where the parties have

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requires a party to plead the facts the party intends to prove that are different from those pleaded by the opponent.

<sup>1482</sup> Federal Court practitioners *Consultation* Sydney 4 June 1999.

<sup>1483</sup> LCA *Submission 126* noted that 'the English, American and Australian Institute of Judicial Administration studies have found that discovery is not a problem in the vast majority of cases'.

<sup>1484</sup> D Abernethy 'Discovery (disclosure) and interrogatories' *Paper Queensland Litigation Reform Commission Conference Brisbane 6-8 March 1996*; GL Davies 'A blueprint for reform: Some proposals of the Litigation Reform Commission and their Rationale' (1996) 5 *Journal of Judicial Administration* 201.

<sup>1485</sup> J Moynihan 'Towards a more efficient trial process' (1992) 2 *Journal of Judicial Administration* 39; GL-Davies and JS Leiboff 'Reforming the civil litigation system: Streaming the adversarial framework' (1995) 25(2) *Queensland Law Society Journal* 111; D Ipp 'Where are we heading with the adversarial system of civil litigation' *Paper 14th Annual Australian Institute of Judicial Administration Conference August 1995* and K Marks 'The interventionist court and procedure' (1992) 18 *Monash Law Review* 1.

<sup>1486</sup> See conclusions reached in Australian Institute of Judicial Administration *The use of discovery and interrogatories in civil litigation* AIJA Melbourne 1990.

<sup>1487</sup> Practice Note 14.

consented to it and that it will mould discovery to suit the facts of the particular case. When making an application for discovery the parties are asked to consider the following questions

- Is discovery necessary at all, and if so for what purpose?
- Can those purposes be achieved
  - by a means less expensive than discovery?
  - by discovery only in relation to particular issues?
  - by discovery of defined categories of documents?
- In cases where there are many documents, should discovery be given in stages? For example, initially on a limited basis, with liberty to apply later for particular discovery or discovery on a broader basis?
- Should discovery be given in the list of documents by general description rather than by identification of individual documents?

The Court places the onus on practitioners to carefully consider any applications for discovery with the aim of narrowing the scope of discovery. Practitioners have stated that parties generally are requested to define and disclose categories of documents.

10.96 From the varied submissions and comments on this issue, it appears there is no consensus as to a standard rule for best practice discovery which will suit all cases or even all cases of a particular type. The advantage of IDS for discovery is that directions are made by the judge who is familiar with the case and can tailor the process of discovery for the particular case. As Justice Heerey said in his submission

the docket system will promote (and already has, in my experience) a more interventionist and practical approach to discovery, tailored to the individual case and the real issues in dispute.<sup>1488</sup>

10.97 The Federal Court is currently giving consideration to an amendment of Order 15 and Practice Note 14 to reflect the 'direct relevance' test<sup>1489</sup> as recommended in the Woolf final report.<sup>1490</sup> The 'direct relevance' test replaces the *Peruvian Guano* test<sup>1491</sup> and entails the discovery of documents in the following categories

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<sup>1488</sup> P Heerey *Submission 49*.

<sup>1489</sup> The Uniform Civil Procedures Rules (Qld) impose an ongoing duty on parties to disclose documents that are 'directly relevant to an allegation in issue in the pleadings': r 211(1)(b).

<sup>1490</sup> B Beaumont 'Managing litigation in the Federal Court' in B Opeskin & F Wheeler (eds) *The Australian federal judicial system* Melbourne University Press 2000 (forthcoming).

<sup>1491</sup> *Companie Financiere et Commerciale du Pacifique v The Peruvian Guano Co* (1882) 11 QBD 55.



- the party's documents on which the party relies in the proceedings to support its contentions
- documents which the party is aware of and which
  - adversely affect their case
  - adversely affect another party's case or
  - support another party's case.

10.98 The proposed amendments also state that a party must make a 'reasonable search' for documents. Factors relevant to the reasonableness of a search include

- the number of documents involved
- the nature and complexity of the proceedings
- the ease and expense of retrieval of any particular document and
- the significance of any document which is likely to be located during the search.<sup>1492</sup>

The proposed amendments to Practice Note 14 include the following paragraph

In determining whether to order discovery, the Court will have regard to the issues in the case and the order in which they are likely to be resolved, the resources and circumstances of the parties, the likely cost of the discovery and its likely benefit.

10.99 The existing rules on discovery and the proposed amendments to the Federal Court Rules are consistent with the objectives of the Civil Procedure Rules 1999 (UK) enacted after the Woolf final report<sup>1493</sup> and they address most of the issues relating to discovery which were raised in submissions and consultations with the Commission including the following

- the obligation to make discovery in large matters should be proportionate to the matter in dispute and the likelihood that the discovery process will shed light on the issues in dispute<sup>1494</sup>
- restricting the circumstances in which discovery is permitted (by the amount at issue, or the subject matter in dispute)<sup>1495</sup>

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<sup>1492</sup>.Proposed Fed Ct Rule O 15 r 2C.

<sup>1493</sup>.Part 1, Rule 1.1 'Overriding Objectives'

- (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
- (2) Dealing with a case justly includes, so far as is practicable
- a. ensuring that the parties are on an equal footing;
  - b. saving expense;
  - c. dealing with the case in ways which are proportionate
    - i. to the amount of money involved;
    - ii. to the importance of the case;
    - iii. to the complexity of the issues; and
    - iv. to the financial position of each party;
  - d. ensuring that it is dealt with expeditiously and fairly; and
  - e. allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

<sup>1494</sup>.Arthur Robinson *Submission 189*.

- the cost of executive and management time involved in complying with discovery can be significant.<sup>1496</sup> Where the cost of discovery is disproportionate to the claim the scope of discovery can be controlled by the judge
- automatic discovery has been abolished and each party is required to set out the classes and categories of documents required to be discovered, allowing some scope for subsequent applications<sup>1497</sup>
- encouraging more informal discovery, or in large matters encouraging discovery in stages or waves<sup>1498</sup> without the need for verification of lists of documents<sup>1499</sup>
- pre action discovery is allowed in circumstances where a party suspects it may have a cause of action but is otherwise without relevant documentary evidence<sup>1500</sup>
- multiple copies of the same documents are not be required to be disclosed, unless there is a material difference between the copies<sup>1501</sup>
- mandatory discovery conferences in which parties confer on the scope of discovery. The judge has the power to order such a conferences where it is appropriate
- greater precision in the description of documents to be discovered by reference to their nature, date or relevance to a particular issue.<sup>1502</sup>

10.100 Compliance with orders for discovery and sanctions for non-compliance cannot be dealt with by a blanket rule as judges need to exercise their discretion in this area. Submissions and consultations observed that parties often to fail to comply with directions relating to discovery, sometimes without explanation of the failure.<sup>1503</sup> Part of the solution to discovery problems may be for timetables,

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<sup>1495</sup>.ibid.

<sup>1496</sup>.ibid.

<sup>1497</sup>.Arthur Robinson *Submission 189*; LCA *Submission 126*; C Hodgekiss 'The conduct of trade practices litigation' 16 March 1999, paper at Continuing Legal Education, Committee for Postgraduate Studies Faculty of Law, University of Sydney. See Fed Ct Rules O 15 r 3 which gives the Court power to limit discovery to classes of documents. However, note that practitioners commented that often the use of categories simply delays the process as parties argue about the different categories and categories often fail to reduce the scope of discovery, rather it just gets sorted into different categories. Parties can abuse the process of categories being ordered: Federal Court practitioners *Consultation* Sydney 16 June 1999.

<sup>1498</sup>.Arthur Robinson *Submission 189*.

<sup>1499</sup>.Fed Ct Rules O 15 r 15 provides that the Court shall only make an order for a verified lists of documents if it is satisfied that the order is necessary at the time.

<sup>1500</sup>.Fed Ct Rules O 15a r 6.

<sup>1501</sup>.Fed Ct Rules O 15 r 6a.

<sup>1502</sup>.LCA *Submission 126* supporting the amendments made to the NSW Supreme Court Rules by the Discovery Subcommittee of the Rule Committee of the Supreme Court of New South Wales.

<sup>1503</sup>.Federal Court practitioners *Consultations* Sydney 4 June 1999 and 16 June 1999; also, Arthur Robinson submitted  
The views of many of the corporations with whom we have spoken is that parties seeking indulgences are favoured, and that such treatment is inequitable and penalises a

including those agreed to by the parties, to be more strictly enforced.<sup>1504</sup> Courts rarely preclude reliance on documents not properly discovered.<sup>1505</sup>

Monetary sanctions are inadequate in deterring this behaviour [‘discovery abuse’] where the stakes involved are infinitely greater than any monetary sanction handed out. Thus in complex cases ‘preclusionary’ sanctions offer the most potent remedy against the abuse.<sup>1506</sup>

10.101 Sydney practitioners consulted by the Commission referred to the emerging problem of discovering electronic documents.<sup>1507</sup> They said that under the Federal Court Rules electronic documents are discoverable but parties and their lawyers are struggling with how to retrieve, discover and inspect them in accordance with their obligations. The main problems identified were the need to fix the documents in time, disclosure of search terms and the potentially vast numbers of electronic documents which are discoverable. A common example referred to by practitioners was discovery of email. Email is now commonly used in corporations for work and non-work related purposes. The proliferation of email and the fact that it is not stored in any particular order, other than date order, means the task of discovering and inspecting an email system is potentially overwhelming in terms of cost and time.

**Proposal 10.16.** The Federal Court should draft a practice note for discovery of electronic documents. It should deal with general procedures and problems encountered by parties in electronic discovery, including mutability of documents and search mechanisms.

### *Subpoenas*

10.102 The costs of filing subpoenas are usually comparatively low (\$40 in the Federal Court). However, the costs of complying with a subpoena may be high. To some extent, the cost is determined by the dispute and the type and extent of the material required in the subpoena. The Federal Court has provision for conduct money to be paid to the recipient of the subpoena to ‘meet his reasonable expenses of complying with the subpoena’.<sup>1508</sup> Order 27 Rule 4A of the Federal Court Rules gives the Court the discretion to order the party who requests the issue of the subpoena, to pay the recipient of the subpoena compensation for expenses or loss reasonably incurred or lost in complying with the subpoena.

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party which makes the sacrifice to comply with directions imposed: Arthur Robinson *Submission 189*.

<sup>1504</sup>.D Ipp ‘Reforms to the adversarial process in civil litigation – Part II’ (1995) 69 *Australian Law Journal* 790, 796. See also Arthur Robinson *Submission 189* and A Jack ‘Radical surgery for civil procedure’ (1993) 143(6605) *New Law Journal* 891.

<sup>1505</sup>.Arthur Robinson *Submission 189*.

<sup>1506</sup>.Allen Consulting Group *Submission 219*.

<sup>1507</sup>.Federal Court practitioners *Consultations* Sydney 2 June 1999; 4 June 1999 and 16 June 1999.

<sup>1508</sup>.Fed Ct Rules O 27 r 3.

10.103 Order 27 Rule 6 of the Federal Court Rules states that

on request of a party, the Registrar shall, unless the Court otherwise orders, issue a subpoena . . . [and] if the Registrar is of the opinion that the issue of a subpoena may be an abuse of the process of the Court or be frivolous or vexatious, he or she may refer the request to a Judge for direction.

As the ACCC stated in its submission

there is scope for greater Court control and discipline over a party's use of subpoenas, which after all are Court documents, so as to at least eliminate the seemingly indiscriminate way in which some parties use this process.<sup>1509</sup>

10.104 In some circumstances the use of subpoenas and notices to produce may result in undue cost, delay or unfairness in litigation.<sup>1510</sup> The cost may be attributed to the time spent in responding to the subpoena or in interlocutory applications contesting the validity of the subpoena. The Commission's view is that the current Federal Court Rules are adequate to address these problems.

10.105 Reform suggestions made to the Commission include

- requiring that leave be obtained to issue a subpoena.<sup>1511</sup> This is already under review by the Federal Court, and docket judges in some matters do impose restrictions on the issue of subpoenas, particularly subpoenas for the return of documents. Practitioners stated to the Commission that a leave requirement for subpoenas would increase costs and unduly restrict the use of an important tool in litigation<sup>1512</sup>
- limiting the maximum number of documents which a party may require another to produce for inspection<sup>1513</sup>
- imposing sanctions against solicitors who issue oppressive or unreasonable subpoenas<sup>1514</sup> and
- limiting the circumstances where subpoenas can be used.

The Commission is not disposed on present evidence to make any proposals in relation to subpoenas but welcomes comment.

### *Interrogatories*

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<sup>1509</sup>.ACCC *Submission 67*.

<sup>1510</sup>.AGS *Consultations* Melbourne 14 August 1997 and Brisbane 19 August 1997.

<sup>1511</sup>.ACCC *Submission 67*; ACLA *Submission 70*; AGS *Consultation* Melbourne 14 August 1997.

<sup>1512</sup>.Federal Court practitioners *Consultations* Sydney 4 June 1999 and 16 June 1999.

<sup>1513</sup>.For example, the Supreme Court of NSW has recently introduced a new regime which limits the maximum number of specific documents which a party may require another to produce for inspection to 50: SCR (NSW) Part 23 r 2.

<sup>1514</sup>.ACCC *Submission 67*; AGS *Consultation* Melbourne 14 August 1997.

10.106 Interrogatories have been seen as an unnecessary source of delay, a potential source of oppression and duplication of information obtained in other ways.<sup>1515</sup> Interrogatories are costly to administer. Generally their formulation is easier to draft than their response.

10.107 While acknowledging that the courts must control the use and abuse of interrogatories, interrogatories can have an important and useful part to play in pre-hearing procedures in aid of settlement.<sup>1516</sup> They are particularly useful where the information in issue is in the exclusive possession of the opponent.<sup>1517</sup> Justice Heerey has suggested that while interrogatories are 'generally regarded today with some scepticism' and not allowed without leave in many commercial jurisdictions in Australia, in some cases there may be a place for them as a partial substitute for discovery.<sup>1518</sup>

10.108 The Commission is not disposed to recommend any change to practices concerning interrogatories in the Federal Court. They serve a limited purpose and appear to be little used but may be appropriate in a particular case.

### *Mediation*

10.109 Since 17 April 1997, judges have had the power to order parties to mediate under section 53A of the Federal Court Act. In practice it is very rare for a judge to order a mediation unless both parties consent. At times, practitioners noted, such consent was given so as not to appear obstructionist before the judge.<sup>1519</sup>

10.110 The Federal Court has had a court-annexed mediation program since 1987. Mediations are conducted by registrars of the Court, who are trained mediators, in the court-annexed mediation program or by private mediators. Between 1993-94 and 1997-98 an average of 162 matters were referred to court-annexed mediation each year with 212 matters being referred to court-annexed mediation in 1997-98.<sup>1520</sup> The Court reports that since the commencement of the court-annexed mediation program the settlement rate has been between 55% and 68%. The number of cases undergoing private mediations is unclear. The parties are not required to inform the Court of a private mediation.<sup>1521</sup> The Court reports that the following numbers of matters are noted as having been referred to private mediators since

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<sup>1515</sup>.K Marks 'The interventionist court and procedure' (1992) 18 *Monash Law Review* 1, 10.

<sup>1516</sup>.D Bailey 'Are interrogatories necessary?' (1995) 69(6) *Law Institute Journal* 522, 523 referring to *Barbarian Motorcycle Club Incorporated v Koithan* [1984] SASR 481.

<sup>1517</sup>.D Bailey 'Are interrogatories necessary?' (1995) 69(6) *Law Institute Journal* 522, 524.

<sup>1518</sup>.P Heerey 'Some lessons from Santos' (1994) 29(4) *Australian Lawyer* 24, 29.

<sup>1519</sup>.Federal Court practitioners *Consultations* Sydney 2 June 1999; 4 June 1999 and 10 June 1999.

<sup>1520</sup>.Federal Court *Annual report 1997-98*.

<sup>1521</sup>.Federal Court associates *Consultation* Sydney 13 July 1998; Federal Court Deputy District Registrars *Consultation* Melbourne 1 June 1999; Sydney 10 June 1999; Federal Court practitioners *Consultations* Sydney 2 June 1999 and 4 June 1999.

1995: eight in 1995–96; 70 in 1996–97 and 28 in 1997–98.<sup>1522</sup> The Court states that since IDS was introduced a greater emphasis has been placed on identifying cases suitable for mediation at an early stage. Also, under IDS there is no penalty for going to mediation as the case does not lose its position in a hearing list. If the judge has fixed a hearing date and subsequently refers the matter to mediation the hearing date remains fixed so long as it falls after the mediation date. The Commission's empirical data from the Federal Court found that 19% of the litigants in trade practices sample cases and 20% in the taxation sample cases attended mediation.<sup>1523</sup>

10.111 Most practitioners consulted by the Commission regarded mediation as a valuable resolution process for appropriate cases although they opposed the concept of compulsory mediation.<sup>1524</sup> There was some suggestion that inappropriate cases were sent to mediation and were unsuccessful because parties felt obliged to concur with the judge's suggestion for the matter to be mediated. In such cases the Court can hardly be blamed for party timidity. However, the Court should continue to monitor the use and outcomes of mediations, private and court-annexed, to ensure that mediation is used only when appropriate and appears to offer a prospect of full or partial resolution of the case.

**Proposal 10.17.** The Federal Court should continue to monitor the use and outcomes of mediations, private and annexed, to assist in ensuring appropriate referrals to mediation are made.

#### *Witness statements*

10.112 Orders for exchange of witness statements are frequently made in the Federal Court in trade practices cases and intellectual property cases. The most common criticism of early disclosure of information by exchange of witness statements is their cost. The 'front end loading' of such costs may have an adverse effect on settlement opportunities. Consultations with Sydney trade practices practitioners suggests that these criticisms were unfounded.<sup>1525</sup> These practitioners commented that overall witness statements provided a saving in costs and did not inhibit settlement options.

10.113 The Commission's data shows that the intellectual property and trade practices sample cases either settled early in proceedings or went through to a hearing. The early exchange of information, including witness statements, in

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<sup>1522</sup> Federal Court *Annual report 1997–98*.

<sup>1523</sup> Migration cases were not included in this analysis as they are not amenable to mediation. Similarly AD(JR) cases are not often referred to mediation as the issues in review proceedings are not conducive to mediation. Intellectual property cases are often finalised at the interlocutory stage and therefore they are rarely referred to court annexed mediation.

<sup>1524</sup> Federal Court practitioners *Consultation* Brisbane 18 August 1997; Law Society of SA *Consultation* Adelaide 1 September 1997; Federal Court practitioners *Consultations* Sydney 2 June 1999 and 4 June 1999.

<sup>1525</sup> Federal Court practitioners *Consultation* Sydney 4 June 1999.

intellectual property and trade practices cases appears to contribute to this high, early settlement rate.<sup>1526</sup>

10.114 The following proposals in relation to the use of witness statements have been made in submissions, consultations and papers

- courts should reduce the level of formality required in witness statements to encourage their earlier exchange. However such change might impact on the utility of the witness statements as a replacement for evidence in chief
- supplementary witness statements and additional oral evidence given at the hearing should only be permitted by leave to reduce costs and delays and ensure parties adequately prepare witness statements before the hearing
- courts should restrict cross examination on the contents of witness statements.<sup>1527</sup>

The provision of witness statements in Federal Court matters was seen to be cost effective.<sup>1528</sup>

**Proposal 10.18.** Supplementary witness statements and additional oral evidence given at the hearing should only be permitted by leave.

#### *Single issue determination and summary judgment*

10.115 *Single issue determination.* The Federal Court has the power to determine discrete issues pursuant to Order 29 of the Rules. This power is often used to separate the determination of liability from quantum in intellectual property and trade practices cases.

10.116 Submissions have shown support for the use of single issue determinations in complex, multi-party and representative cases where the determination of discrete issues can aid in the resolution of the case as a whole or in the narrowing of issues for trial.<sup>1529</sup>

10.117 Justice Davies argued that judges should be encouraged to provide early determination of discrete issues, for example, by giving judgment on part of a claim

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<sup>1526</sup> Arthur Robinson *Submission 180*; NSW Bar Assoc *Submission 88*.

<sup>1527</sup> Woolf final report, 312 recommendations 144–146, 151.

<sup>1528</sup> Federal Court practitioners *Consultations* Sydney 2 and 16 June 1999.

<sup>1529</sup> See *Ryan v Great Lakes Council & Ors* [1999] FCA 177 at [9–10] (Wilcox J), P Meadows 'Civil litigation reform' *Paper 1998 Corporate Law Conference Melbourne* 24 September 1998, para 61; P Heerey *Submission 49*. The perils of such proceedings are illustrated by *Bass v Permanent Trustee Co Ltd*, *Conca v Permanent Trustee Co Ltd*, *Woodlands v Permanent Trustee Co Ltd* [1999] HCA 9 (24 March 1999) in which the High Court noted it was 'contrary to the judicial process and no part of judicial power' to give advisory judgments or respond to hypothetical situations. The High Court discussed the purpose of judicial determination and distinguished declaratory judgments from advisory judgments or responses to hypotheticals.

where judgment cannot be given on the whole issue, on liability notwithstanding that damages still remain in issue and on any question of law or fact notwithstanding that the decision will not result in judgment.<sup>1530</sup> Submissions and consultations suggest that the early determination of single issues does not necessarily shorten the duration of a case. As the Law Council of Australia said in its submission, 'preliminary points are notoriously dubious — it is problematical as to whether the early determination of discrete issues can lead to savings in time or money'.<sup>1531</sup>

10.118 It has also been suggested that the judge should have the power to make a summary determination of facts in dispute without the consent of the parties.<sup>1532</sup> Justice Beaumont has suggested that in complex civil cases the judge should deal with and determine the facts of the case first and then once that is done allow the parties to address the court on the legal issues. This provides an incentive for settlement, the case is dealt with in manageable proportions, legal argument is reduced as facts have already been determined and therefore costs are reduced.<sup>1533</sup>

10.119 Order 29 of the Federal Court Rules provides judges with a broad discretion to determine single issues in cases where they consider it is appropriate. The Commission is not disposed on present evidence to make any proposals relating to single issue determinations.

10.120 *Summary judgment.* The Federal Court may dispose of a matter by summary judgment pursuant to Order 20 of the Rules. The leading authority on summary judgment in Australia is *Dey v Victoria Railways Commissioner*.<sup>1534</sup> The various formulations of the test for summary judgment were summarised in *General Steel Industries Inc v Commissioner for Railways (NSW)*.<sup>1535</sup>

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<sup>1530</sup>GL Davies 'A blueprint for reform: Some proposals of the Litigation Reform Commission and their rationale' (1996) 5 *Journal of Judicial Administration* 201.

<sup>1531</sup>LCA *Submission* 126.

<sup>1532</sup>Law Reform Commission of WA *Review of the civil and criminal justice system – Consultation Paper: Summary judgment, preliminary issues and written and oral submissions* LRC of WA Perth February 1999 (Project No 92); B A Beaumont 'The conduct of complex civil litigation' *Paper* Australian Bar Association Conference Darwin July 1990.

<sup>1533</sup>BA Beaumont 'The conduct of complex civil litigation' *Paper* Australian Bar Association Conference Darwin July 1990.

<sup>1534</sup>(1949) 78 CLR 62, 91. In that case Dixon J stated the test as follows  
once it appears that there is a real question to be determined whether of fact or law and that the rights of the parties depend upon it, then it is not competent for the court to dismiss the action as frivolous and vexatious and an abuse of process.

<sup>1535</sup>(1964) 112 CLR 125, 129 Barwick CJ stated that  
The test to be applied has been variously expressed; 'so obviously untenable that it cannot possibly succeed'; 'manifestly groundless'; 'so manifestly faulty that it does not admit of argument'; 'discloses a case which the court is satisfied cannot succeed'; 'under no possibility can there be a good cause of action'; 'be manifest that to allow them '(the pleadings)' to stand would involve useless expense'.



10.121 Order 20 has been interpreted to mean that the Court must be satisfied that 'it is clear that there is no arguable defence to the claim' before summary judgment can be entered.<sup>1536</sup> In *Caterpillar Inc v Sun Forward Pty Ltd* Justice Drummond held that the function of Order 20 was 'limited to providing an expeditious means of resolving litigation where the applicant can clearly demonstrate that there is no real defence to the particular claims made by it'.<sup>1537</sup>

10.122 Suggestions have been made that the grounds on which summary judgment may be entered are too restrictive and that summary judgment or dismissal should be able to be used more frequently to quickly dispose of weak cases.<sup>1538</sup> Chief Justice Gleeson said

There should be an increased emphasis on summary disposal of proceedings which are amenable to such treatment. I suggest that one of the major differences between litigation in continental European countries and litigation in common law jurisdictions may be that in continental countries many more cases are disposed of in what we would regard as a summary fashion. I agree with some judges of [the Supreme Court of New South Wales], (Rolfe J, for one) who have expressed the view that our current rules about summary disposal of proceedings are unduly inflexible and restrictive.<sup>1539</sup>

Suggestions for reform of summary judgment procedures have included the following

- weak or simple cases should be decided on the papers or by way of affidavit evidence alone<sup>1540</sup> or with limited time for cross examination, re examination and oral argument.<sup>1541</sup> If access to the court system is to be equitable a decrease in the system's attention to each case is required, that is, procedure should be rationed rather than access to the court system.<sup>1542</sup> Justice Ipp has commented that this radical approach may not be acceptable to litigants who continue to see access to a hearing as a right. The Law Council of Australia submits that

it would be unjustified to seek to make more liberal the test for striking out or summarily dismissing a case or entering summary judgment against a

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<sup>1536</sup>. *CLC Corporation v Cambridge Gulf Holdings NL* [1997] 236 FCA (9 April 1997) Carr J quoting from *Express Newspapers Plc v News (UK) Ltd* [1990] 3 All ER 376, 379.

<sup>1537</sup>. (1996) 36 IPR 411.

<sup>1538</sup>. P Meadows 'Civil litigation reform' *Paper* 1998 Corporate Law Conference Melbourne 24 September 1998, para 59; Federal Court practitioners *Consultations* Sydney 4 June 1999 and 10 June 1999.

<sup>1539</sup>. M Gleeson 'Commentary on paper by Lord Browne-Wilkinson' *Paper* Supreme Court of NSW Judges' Conference Sydney 11 September 1998.

<sup>1540</sup>. A Zuckerman 'A reform of civil procedure – Rationing procedure rather than access to justice' (1995) 22 *Journal of Law and Society* 155.

<sup>1541</sup>. Ontario Civil Justice Review *Civil justice review: First report* Ontario Court of Justice & Ministry of the Attorney-General Toronto 1995.

<sup>1542</sup>. A Zuckerman 'A reform of civil procedure – Rationing procedure rather than access to justice' (1995) 22 *Journal of Law and Society* 155.

defendant. This is because the current test is couched in terms which ask the question whether the case is fit to go to a full trial. Any test which is more liberal than that, poses the real danger that courts will be abdicating their proper role of adjudicating disputes by hearing both sides . . . It is very difficult for that test to be relaxed, without the system overtly embracing the possibility of some meritorious cases or defences being ignored, in the interests of supposed systemic efficiency. That is the antithesis of individual justice.<sup>1543</sup>

- redrafting the test to make it less restrictive so that summary judgment can only be given against a party if that party has no 'reasonable prospect of success'. The focus of the test is then on the probability of success rather than the possibility.<sup>1544</sup> Rule 24.2 of the Civil Procedure Rules (UK) states

The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –

- (a) it considers that –
  - (i) that claimant has no real prospect of succeeding on the claim or issue; or
  - (ii) that defendant has no real prospect of successfully defending the claim or issue; and
- (b) there is no other reason why the case or issue should be disposed of at trial.

- limiting and simplifying procedures for smaller and simpler cases.<sup>1545</sup> This would affect everything from discovery to trial management
- expanding the ambit of summary judgment to allow judgment to be given for either party<sup>1546</sup>
- increasing the use of summary judgment for resolving questions of law. In *Addstead Pty Ltd (In Liq) v Liddan Pty Ltd* Justice Perry of the Supreme Court of South Australia held that

A case may involve a complex question of law but no dispute as to the facts. In such a circumstance, it may be more convenient to dispose of it

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<sup>1543</sup>.LCA Submission 126.

<sup>1544</sup>.Law Reform Commission of WA *Review of the civil and criminal justice system – Consultation Paper: Summary judgment, preliminary issues and written and oral submissions* February 1999, 12–14 (Project No92).

<sup>1545</sup>.Canadian Bar Association *Systems of civil justice task force report* CBA Toronto August 1996; Ontario Civil Justice Review *Civil justice review: First report* Ontario Court of Justice & Ministry of the Attorney-General Toronto 1995; Woolf final report.

<sup>1546</sup>.Woolf final report para 32 and Civil Procedure Rules 1999 (UK) Rule 24.2; Law Reform Commission of WA *Review of the civil and criminal justice system – Consultation Paper: Summary judgment, preliminary issues and written and oral submissions* LRC of WA Perth February 1999, 10 (Project No92); GL Davies 'A blueprint for reform: Some proposals of the Litigation Reform Commission and their rationale' (1996) 5 *Journal of Judicial Administration* 201. The Federal Court Rules provide only for summary judgment in favour of an applicant: O 20 r 1.

summarily than to direct it into the trial list. A summary trial may be just as convenient a procedure within which to determine a question of law as trial in the ordinary way.<sup>1547</sup>

10.123 Justice Davies commented that where the only question is one of law, the judge should be required to decide it and give judgement unless that is impracticable.<sup>1548</sup>

10.124 There are competing claims with respect to summary judgment procedures but the Commission considers that judges should have appropriate powers to deal with weak cases. This is not simply a question of efficiency, but to enhance the proper administration of justice.

**Proposal 10.19.** The Federal Court Rules should be amended to allow summary judgment to be applied more flexibly.

### *Sanctions*

10.125 The Federal Court has the power to sanction non-compliance by costs orders, preclusionary sanctions, striking out or refusing to allow amendments.<sup>1549</sup> The Commission received comments that judges could use these sanctions more rigorously.<sup>1550</sup> Many commentators have stressed that for case management to be effective its principles, orders and directions need to be complied with.<sup>1551</sup> The law firm Arthur Robinson and Hedderwicks stated in its submission

Nothing is more important to the implementation of successful case management principles than the ability and willingness of courts to support processes and timetables with appropriate sanctions.<sup>1552</sup>

10.126 Submissions and consultations suggested that costs orders should be used by judges to sanction a wider variety of inappropriate practices.<sup>1553</sup> A number of submissions to the Commission also warned against the use of preclusionary

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<sup>1547</sup>.(1998) 70(1) SASR 21.

<sup>1548</sup>.GL Davies 'A blueprint for reform: Some proposals of the Litigation Reform Commission and their rationale' (1996) 5 *Journal of Judicial Administration* 201.

<sup>1549</sup>.eg Fed Ct Rules O 62 r 9; O 62 r 36A; O 20 r 2; O 11 r 16

<sup>1550</sup>.P Meadows 'Civil litigation reform' *Paper* 1998 Corporate Law Conference Melbourne 24 September 1998, para 25–26, 31; Federal Court practitioners *Consultation* Sydney 2 June 1999 and 4 June 1999; Federal civil working group *Meeting notes* 7 July 1999; Clayton Utz *Submission* 283.

<sup>1551</sup>.P Meadows 'Civil litigation reform' *Paper* 1998 Corporate Law Conference Melbourne 24 September 1998, para 34.

<sup>1552</sup>.Arthur Robinson *Submission* 189, para 60.

<sup>1553</sup>.Arthur Robinson *Submission* 189; ACLA *Submission* 70; P Meadows 'Civil litigation reform' *Paper* 1998 Corporate Law Conference Melbourne 24 September 1998, para 42. Federal Court practitioners *Consultations* Sydney 2 and 4 June 1999.

sanctions and sanctions against lawyers.<sup>1554</sup> The danger with preclusionary sanctions is the risk of prejudicing a party when the non-compliance is the fault of the lawyer. The Court could correspond directly with the parties in some circumstances to ensure that they are aware of the effect of non-compliance with specified orders or to inform them of non-compliance by their lawyer. Others suggested the use of self-executing costs orders.<sup>1555</sup> The Civil Procedure Rules 1999 (UK) have self-executing sanctions so that the onus is on the party in default to seek relief from a sanction rather than the innocent party having to move the court to enforce the sanction.<sup>1556</sup> The Civil Procedure Rules set out the following relevant factors for the court to consider if a party applies for relief from a sanction

- a. the interests of the administration of justice;
- b. whether the application for relief has been made promptly;
- c. whether the failure to comply was intentional;
- d. whether there is a good explanation for the failure;
- e. the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol;
- f. whether the failure to comply was caused by the party or his legal representative;
- g. whether the trial date or the likely trial date can still be met if relief is granted;
- h. the effect which the failure to comply had on each party; and
- i. the effect which the granting of relief would have on each party.<sup>1557</sup>

Self-executing orders are not used in the Federal Court. The Commission sees merit in the adoption of such orders.

**Proposal 10.20.** The Federal Court should monitor compliance with directions and the manner in which non-compliance is dealt with by judges to ensure sanctions are being used both effectively and to sanction a wider variety of inappropriate practices, for example, denials by respondents which unnecessarily lengthen trials.

**Proposal 10.21.** The Federal Court Rules should be amended to include self-executing costs sanctions in terms similar to the Civil Procedure Rules 1999 (UK).

### *Hearing management*

10.127 The requirement that all trials be fair and impartial is 'deeply rooted in our system of law'.<sup>1558</sup> Judges possess 'all the necessary powers' to ensure that a trial is

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<sup>1554</sup>LCA *Submission 189*; ACLA *Submission 70*; Vic Bar *Submission 57* and see O 62 r 9 Fed Ct Rules.

<sup>1555</sup>A Jack 'Radical surgery for civil procedure' (1993) 143(6605) *New Law Journal* 891; ACCC *Submission-67*.

<sup>1556</sup>Rules 3.8 & 3.9 CPR (UK).

<sup>1557</sup>Part 3 Rule 3.9 CPR (UK).

<sup>1558</sup>*Dietrich v R* (1992) 177 CLR 29 (Deane J).

fair.<sup>1559</sup> The *Evidence Act 1994* (Cth) provides that the court has, in respect of trial practice, general wide-ranging powers for the court to grant leave, permission or direction 'on such terms as the court thinks fit'.<sup>1560</sup> The legislation lists five considerations on such powers (length of hearing, fairness to a party or a witness, importance of the evidence, nature of the proceeding and alternative powers). Federal Court judges have wide powers to control and manage hearings.

10.128 Justice Beaumont has commented on the 'difficulties in drawing a line between a 'managerial' judge and an unduly 'interventionist' one. He referred to *Fondfield Pty Limited v Van Trinh Pham*<sup>1561</sup> as an example of a case which 'shows, the real, and fundamental, ingredient at stake can be perceived as impartiality'.<sup>1562</sup>

10.129 As of 15 July 1998, the Federal Court has had express powers, at any time before or during a hearing, to limit

- the time for examining, the time for cross-examining or re-examining a witness
- the number of witnesses (including expert witnesses) that a party may call
- the time for making oral submissions
- the time for a party to present the party's case or
- the time to hear the hearing.<sup>1563</sup>

10.130 There is some support for judges setting timetables for the order of witnesses and the structure of the trial.

The Law Council is aware that in some large cases (ie in terms of trial duration or number of witnesses), the scale of the proceedings is properly restricted by a timetable established by the judge. This is done at the directions hearing which may establish the order of witnesses or may set time limits on examination or cross-examination.<sup>1564</sup>

Justice Heerey said in his submission to the Commission

I think there is room for an approach, particularly in cases with some urgency, to impose limits, be it limits of time or limits of paper, or both, within which the parties have to constrain themselves. It is then a matter for the judgment of the parties and their lawyers as to what is important. They fix their own priorities . . . The mere existence of some constraints, even if they are not going to be rigidly and

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<sup>1559</sup>*Barton v R* (1980) 147 CLR 75, 96 (Gibbs ACJ & Mason J).

<sup>1560</sup>s 192.

<sup>1561</sup>Unreported, Supreme Court of NSW, Court of Appeal 12 July 1996 (Handley, Sheller & BeazleyJJ).

<sup>1562</sup>BA Beaumont *Submission 24*.

<sup>1563</sup>Fed Ct Rules O 32 r 4A inserted by No 224 of 1998. See also SCR (WA) O 34 r 5A(1).

<sup>1564</sup>LCA *Submission 126*.

inflexibly enforced, can have a beneficial effect . . . I believe the existence of [a] known timetable [has] an important psychological effect.<sup>1565</sup>

10.131 Support for the use of the Court's power to restrict the length of cross-examination and submissions is muted. Some positively oppose such powers.<sup>1566</sup> The following comments were made in submissions to the Commission.

At trial, judges fail properly to balance all interests relevant in the system preferring to let parties ventilate all possible issues without control. In particular, many judges fail to control examination in chief and cross-examination, fail to require parties to prioritise their stronger and weaker points and fail to require proper use of written submissions, particularly for opening and closing argument.<sup>1567</sup>

The Victorian Bar opposes arbitrary mechanism such as the imposition of arbitrary time limits as a method to solving question of efficiency and cost.<sup>1568</sup>

**Question 10.2.** The Commission seeks further comment on Federal Court hearing management.

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<sup>1565</sup>P Heerey *Submission 49*.

<sup>1566</sup>Clayton Utz *Submission 283*.

<sup>1567</sup>Arthur Robinson *Submission 189*.

<sup>1568</sup>Vic Bar *Submission 57*.

## 11. Case and hearing management in the Family Court of Australia

### Introduction

11.1 This chapter is concerned with the Family Court of Australia (Family Court), and not the Family Court of Western Australia. Practitioners and litigants were very critical of the case management practices of the Family Court. Such criticisms generally<sup>1569</sup> did not include adverse comments on the quality of decision making. Comments made to the Commission and repeated in evaluations commissioned by the Court, attest to the 'caring, helpful and respectful' Court staff.<sup>1570</sup> The Commission's attention was focussed on the arrangements for case management.

11.2 The essential criticism concerned the way the Court views its functions and the organisation of primary dispute resolution (PDR) processes and adjudication. The *Family Law Act 1975* (Cth) (Family Law Act) and the Court give considerable emphasis to PDR. In this context, the ordering of objectives in the Court's most recent strategic plan 'Our vision (What we want to be known for)' is significant. The objectives are as follows

- Putting children and families first in the design and delivery of services
- Providing cost-effective dispute resolution for families
- Being at the forefront of the development of innovative services for families in conflict
- Promoting functional family relationships after separation
- Having an independent and impartial judicial process.<sup>1571</sup>

The Court's annual report for 1997–98 confirms that

[t]he focus of the Court is on helping families to resolve their disputes by agreement rather than proceeding to a formal hearing by a judge *which is regarded as the last resort*. (emphasis added)<sup>1572</sup>

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<sup>1569</sup>Note the many allegations by men's groups of anti-male bias within the Court. See M Kaye & J-Tolmie 'Fathers' rights groups in Australia and their engagement with issues in family law' (1998) 12 (1) *Australian Journal of Family Law* 19. Such allegations were repeated in submissions to the Commission.

<sup>1570</sup>KPMG 'Survey of family client perceptions of service quality' *Unpublished* Family Court of Australia Canberra March 1999, 30.

<sup>1571</sup>Family Court of Australia *Draft strategic plan* <[www.family.court.gov.au/court/html/plan.htm](http://www.family.court.gov.au/court/html/plan.htm)> (6-April 1999).

<sup>1572</sup>Family Court of Australia *Annual report 1997–98* 133. Contrast the Federal Court's statement of its objectives which is to decide disputes according to law – promptly, courteously and effectively; and in so doing to interpret the statutory law and develop the general law of the Commonwealth, so as to fulfil the role of a court exercising the judicial power of the Commonwealth under the Constitution: Federal Court *Annual report 1997–98*, 1

11.3 In consultations and submissions to the Commission, litigants, practitioners, court officers and judges generally regarded the PDR services provided by the Court as beneficial. Many, however, were critical of the arrangements for PDR within case management and the workings of the case management system – the design that, in the name of ‘uniformity’ and ‘standardised practices and procedures’,<sup>1573</sup> requires parties to go through set procedures with little differentiation according to the needs of their particular case, and reserves judges to the back of the process. One judge commented ‘we have become a conglomerate instead of a court.’<sup>1574</sup> Many judges and practitioners commented to the Commission that under the current system judicial determination is ‘almost held in reserve’ and only available to those who have exhausted the possibilities of PDR first. Some expressed the view that PDR should be organised to fit in with the Court’s role of hearing and determining disputes.<sup>1575</sup> Others observed that they no longer have an understanding of the range of cases in the Family Court, as they see only the most intractable cases.

All the simple cases get out of the way early. Trial judges are having a distorted experience of what is happening in the Court – they are seeing the group who just do not move on.<sup>1576</sup>

11.4 The published aims of the Court were said to raise parties’ expectations concerning the help available from the Court. The design of the case management system was said to add unnecessarily to costs and delays for many cases, contribute to poor compliance with directions and orders and to diminish the efficacy of adjudication. The Commission was repeatedly told that the case management was ‘too bureaucratic’, insufficiently directed to the needs of particular cases, and wasteful of Court and party resources. The details of such criticisms and evaluation are set out in this chapter.

## Issues in family litigation

11.5 It is generally recognised that family litigation has a different character from other kinds of litigation. These differences arise from the kinds of issues brought before the court and the approaches which a court can use to resolve such matters.

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and the objectives of the Administrative Appeals Tribunal (AAT), set out in its Corporate Plan

To be accessible and responsive. To provide effective procedures for the resolution of applications. To provide quality decisions. To provide leadership in administrative review: *AAT Annual report 1997–98*, 13.

<sup>1573</sup>Family Court of Australia *Case management guidelines: Practice Direction 97/1* (Family Court case management guidelines) para I(c).

<sup>1574</sup>Family Court judges *Consultation* Sydney 23 September 1998.

<sup>1575</sup>*ibid*; Law Society of NSW *Consultation* Sydney 22 September 1999; Family law practitioner *Consultation* Sydney 25 August 1999; A Rowlands *Submission 35*; Family Court judges *Consultation* Adelaide 2 September 1997.

<sup>1576</sup>Family Court judges *Consultation* Sydney 23 September 1998.



11.6 The resolution and adjudication of family law disputes is complicated by social, economic and legislative changes, which affect the issues that arise in family disputes and people's expectations of family relationships, and of the resolution of family disputes.

11.7 Family disputes arise from interpersonal issues which sometimes require therapeutic as much as legal intervention. Family law decisions concerning children relate to future needs and interests, not simply to past acts. Certain family disputes are 'extensive and on-going disputes about the children which can drag on for years. There is none of the finality of other jurisdictions.'<sup>1577</sup>

11.8 Family litigation is profoundly affected by non-legal factors, such as immature or short-lived relationships; lack of trust between the parties; family violence; allegations of child abuse; controlling behaviour by one of the parties; the involvement of grandparents, friends or relatives; children's alienation from one or both parents; and psychiatric or substance abuse problems.<sup>1578</sup>

11.9 A New Zealand report noted in relation to their own family law jurisdiction that

[m]any problems which are deposited in the Family Court and which come before a Judge are not legal but human behaviour problems requiring therapeutic intervention. Perhaps because of increasing inaccessibility to other avenues of expert assistance, human behaviour which ordinarily would be seen as a mental health issue becomes a Family Court issue. Deep and on-going parental conflict not related to welfare of children but rather more to personal unfinished business of the parental litigants, results in Judges spending too much time intervening [in] and resolving disputes.<sup>1579</sup>

11.10 The Commission was given an equivalent description of Australian family law matters.

There is no simplistic or easy way to deal with these disputes. The causes are often rooted in the dysfunctional family backgrounds of the parties, psychiatric problems experienced by the parties or the children and changing social and cultural norms in our society. It is also clear that a large underclass with financial, educational and social disadvantages has developed. Many of the people in this group have little or no appropriate parenting skills and may never be able to acquire them without massive assistance. These are all social problems which cannot be solved by the judicial system alone or quick fix solutions.<sup>1580</sup>

11.11 In this context, Family Court judges noted to the Commission

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<sup>1577</sup> Family Court judges *Consultation* Sydney 23 September 1998.

<sup>1578</sup> L Nicholls *Submission 244*.

<sup>1579</sup> P Boshier et al *A review of the Family Court: A report for the principal Family Court Judge New Zealand* Family Court Auckland NZ April 1993, 68 (Boshier Committee).

<sup>1580</sup> L Nicholls *Submission 244*.

Litigants have an unreal expectation of the Court. They use it as a crutch and refuse to get on with their lives. The Court is here to resolve disputes, not to provide lifetime therapy.<sup>1581</sup>

Justice Warnick noted that child matters now have 'a different flavour'.

The matters that do proceed to trial frequently border on the level at which state child welfare concerns would be expected to arise. The families are frequently dysfunctional, the matters are virtually beyond satisfactory solution and are questions of where the least harm is likely to be done. I often feel that the Court these days in child matters is acting almost as an arm of the public child welfare system.<sup>1582</sup>

11.12 In these circumstances, the litigation process and the presentation of relevant evidence raise particular problems.

The 'relevant facts' frequently span events over many years. What is relevant and to what degree in any particular case depends upon the entire context of the matter, and is thus difficult of prediction. Many of the 'facts' will be known only to the parties and will not be capable of external ratification. They are therefore easily placed in issue. Many of the 'facts' are of the nature of assertions as to the quality of a person's behaviour and/or the motivations for such behaviour. Again, such 'facts' are easily disputed.<sup>1583</sup>

If there was one area in the whole panoply of the law in which new ideas about adjudication should be tried it is children's disputes. The problem with our established legal processes is that lawyers have a tendency to change the question because the one which they are required to answer is not a factual or legal question ... Thus the question becomes rewritten into one which lawyers can answer. It is meant to be a positive inquiry about the child's best interests, not a faultfinding process where flaws in one parent lead the court to the conclusion that the other is to be preferred. Yet it is remarkable how many cases concerning children either involve allegations of 'fault' or focus attention on incidents or events which show one or other parent in a bad light. A study in 1990 showed that 45 per cent of a sample of 294 cases had such allegations. Even where there is no allegation such as child abuse or drug-taking, incidents or events in the course of the marriage can be blown out of proportion because courts are much better at finding facts about events than making judgments about parenting capacity.<sup>1584</sup>

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<sup>1581</sup> Family Court judges *Consultation* Sydney 23 September 1998.

<sup>1582</sup> B Warnick *Submission* 147.

<sup>1583</sup> *ibid.*

<sup>1584</sup> P Parkinson *Submission* 149.

11.13 Recent inquiries into family litigation in various common law jurisdictions<sup>1585</sup> detail the core problems associated with the adjudication and resolution of family disputes, including

- the fragmentation of jurisdiction, such that related problems cannot be litigated in the same court (especially for jurisdictions within federal systems)<sup>1586</sup>
- continuing changes in legislation, and family litigation practices<sup>1587</sup>
- the potential for repeat litigation
- increasing numbers of unrepresented litigants
- the design of effective case management systems, and the incorporation and utilisation of appropriate PDR
- case streaming to distinguish 'routine' cases from those needing intensive case management
- the implementation of effective litigation procedures relating to pleadings, discovery and the presentation of evidence and
- the enforcement of court directions and orders.

11.14 These are likewise issues for the Family Court of Australia. Discussion of these problems and the changing social context of family law disputes has prompted debate on the role, design and 'services' of family courts, including

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<sup>1585</sup> See eg Report of the Special Joint Committee on Child Custody and Access (Canada) *For the sake of the children* Parliament of Canada Ottawa December 1998; Alberta Law Reform Institute *Family law project overview* ALRI Edmonton Alberta 1998 (ALRI RFD No. 18.1); American Bar Association *Unified family courts: A progress report* ABA Washington DC 1998; Papers from the 'Symposium on Unified Family Courts' (1998) 32(1) *Family Law Quarterly* 1; Law Reform Commission (Ireland) *Report on family courts* LRC Dublin Ireland 1996 (LRC 52-1996); Ontario Civil Justice Review *Civil justice review: First report* Ontario Court of Justice & Ministry of the Attorney-General Toronto 1995; Utah Family Court Task Force *Final report to the Utah Judicial Council* Administrative Office of the Courts Salt Lake City 1994; P Boshier et al *A review of the Family Court: A report for the principal Family Court Judge* New Zealand Family Court Auckland NZ April 1993; S Katz & J Kuhn *Recommendations for a model family court: A report from the National Court Symposium* National Council of Juvenile and Family Court Judges Reno Nevada 1991.

<sup>1586</sup> These issues were discussed in ALRC & HREOC *Seen and heard: Priority for children in the legal process* ALRC Sydney 1997 (ALRC 84), ch 15. See also the High Court's decision in *Re Wakim; Ex parte McNally; Re Wakim; Ex parte Darvall; Re Brown; Ex parte Amann; Spinks v Prentice* [1999] HCA 27 (17-June 1999).

<sup>1587</sup> See R Abella 'The challenge of change' edited version of speech to 8th National Law Conference Hobart 24-28 October 1998 published in (1999) 13(3) *Australian Family Lawyer* 5. Justice Warnick of the Family Court, noting the increasing complexity of child matters, has referred to the assumptions operating in the recent past

When the grounds of divorce involved fault, the sense of blame, disqualification, assumptiveness and stereotyping also permeated the disposition of ancillary issues, such as child matters and division of property. The disposition of a child matter can be far more prompt if one relies on assumptions such as 'young children (or girls) are better raised by mothers than fathers: B Warnick *Submission 147*.

The *Family Law Reform Act 1995* (Cth) has altered the law on what were previously known as custody, guardianship and access. It has been claimed that this has increased the number of cases and of issues per case in the Family Court: See H Rhoades et al Interim Report *The Family Law Reform Act 1995: Can changing legislation change legal culture, legal practice and community expectations?* University of Sydney & Family Court of Australia Sydney April 1999.

emphasising the benefits of alternative dispute resolution as against adjudication.<sup>1588</sup>

## Information on case management

### *Caseload of the Court*

11.15 In the Family Court, the number of family matters before the Court can be estimated using the number of applications for final orders (Form 7) and applications for consent orders (Form 12A) filed.<sup>1589</sup> The following table shows the numbers of these forms filed and the increases over the past few years.

**Table 11.1. Number of applications for final (Form 7) and consent orders (Form-12A)<sup>1590</sup>**

Year	Final order application (Form 7)	Consent order application (Form 12A)	Total	Increase
1997-98	22 192	13 914	36 106	1 448 (4%)
1996-97	21 424	13 234	34 658	730 (2%)
1995-96	20 818	13 110	33 928	205 (0.6%)
1994-95	20 852	12 871	33 723	699 (2%)

11.16 There was an increase in applications for orders following the introduction of the *Family Law Reform Act 1995* (Cth), most of which took effect in June 1996. A

<sup>1588</sup> The Law Reform Commission of Ireland, in developing its proposal for an Irish Family Court, expanded on this theme

[i]nstead of concentrating on the empowerment of individuals to resolve their own family disputes, by encouraging negotiation and agreement, the emphasis of our system, with its concentration on adjudication, is on solutions which take control away from the participants. A humane system of family law, it is argued, is one which encourages the responsible resolution and management of disputes wherever possible by members of the families themselves. Judicial intervention is of course necessary to prevent exploitation or abuse between family members. The ideal of empowerment should not blind us to problems of inequality which may arise in a system of private ordering. This apart, it is perhaps time to consider how reforms in our legal processes may help in the process of personal and family empowerment: Law Reform Commission (Ireland) *Report on Family Courts* LRC Dublin Ireland 1996 (LRC 52-1996).

<sup>1589</sup> Applications for final orders (Form 7) are for disputed matters 'ancillary' to a dissolution of marriage. Applications for consent orders (Form 12A) are filed once a case has been resolved, generally through negotiation or pre-filing PDR. These two are the initiating documents for the matters forming the bulk of the Court's workload. Applications for interim and procedural orders are made on Form 8, but are not available unless final orders have also been sought (and therefore do not represent additional cases).

<sup>1590</sup> Family Court of Australia *Annual report 1997-98*, 67; Family Court of Australia *Annual report 1995-96*, 66, 69; Family Court of Australia *Annual report 1994-95*, 73, 76. These numbers differ from those shown in the annual reports, as prior to the 1997-98 year, the total for Form 7 applications included Form 12A applications, which are also reported separately. The numbers in this table show Forms 7 separately from Forms 12A.

study of the effects of the *Family Law Reform Act 1995* (Cth) noted an increase both in the number of children's orders sought, and their proportion of total orders sought.<sup>1591</sup>

11.17 As the following tables demonstrate, there have been increases in the number of children's orders sought, while the number of property orders sought has not changed.<sup>1592</sup> There have also been increases in the number of residence and contact orders sought, although these have not changed as a proportion of all orders. The increase in children's orders sought derives in part from the new category of 'specific issues' orders, dealing with issues previously subsumed in custody and guardianship orders.<sup>1593</sup>

**Table 11.2. Changes in number of orders sought**<sup>1594</sup>

Orders sought	1997-98	1996-97	1995-96	1994-95
Residence/custody	19 042	16 884	11 430	12 125
Specific issues	16 756	14 253	n/a	n/a
Contact/access	21 690	19 720	12 464	13 006
Property	12 326	12 111	10 261	12 477
Other	36 646	33 732	27 340	24 899
Total	106 460	96 700	61 495	62 507

**Table 11.3. Changes in proportions of orders sought**<sup>1595</sup>

<sup>1591</sup> H Rhoades et al Interim Report *The Family Law Reform Act 1995: Can changing legislation change legal culture, legal practice and community expectations?* University of Sydney & Family Court of Australia Sydney April 1999.

<sup>1592</sup> The lower numbers of each kind of order sought in the 1995-96 year, which seem inconsistent with those of the surrounding years, are not explained in the Family Court's annual reports, but may result from parties holding off filing applications until the coming into effect of parts of the *Family Law Reform Act 1995* (Cth) in June 1996.

<sup>1593</sup> Exaggerated claims have been made regarding the size of the increase in children's cases. eg Adele Horin, citing findings from the Rhoades report (see 24) at 45, claimed that applications for custody/residence orders have tripled: A Horin 'Custody cases triple since reforms' *Sydney Morning Herald* 20 June 1999, 3. The report compares the number of custody/guardianship orders sought in 1995-96 (11 430 for the Family Court of Australia; 12 595 if the Family Court of Western Australia is included) with the number of residence orders sought plus the number of specific issues orders sought in 1997-98. This is not a true comparison – specific issues orders should not be counted as additional to residence orders, as noted. As can be seen from table 11.2, there were fewer applications of all kinds filed in 95-96 than in the previous years. The 1997-98 applications for residence showed an increase of approximately 66% compared with applications for custody orders in 1995-96, or 57% compared with 1994-95.

<sup>1594</sup> This and the following table use information published in Family Court of Australia *Annual report 1997-98*, 67; Family Court of Australia *Annual report 1996-97*, 71; Family Court of Australia *Annual report 1995-96*, 66. 'Other' orders include applications for spouse & child maintenance, injunctions, costs, discharge of previous orders and other orders. All are included here for comparison as the annual reports do not categorise them consistently in different years.

<sup>1595</sup> The report on the *Family Law Reform Act 1995* (Cth) found a steady increase in the number of Form 49 applications (relating to alleged contravention of a child order) since the Act came into effect, from 786 applications in 1995-96 to 1 659 in 1997-98. The anecdotal information in the report suggests that there is a new tendency for contact parents to make applications relating to 'trivial or

Orders sought	1997-98	1996-97	1995-96	1994-95
Residence/custody as % of all orders	18 %	18 %	19 %	19 %
Specific issues as % of all orders	16 %	15 %	n/a	n/a
Contact/access as % of all orders	20 %	20 %	20 %	21 %
Property as % of all orders	12 %	13 %	17 %	20 %
Other orders as % of all orders	34 %	35 %	45 %	40 %
Total	100 %	100 %	100 %	100 %

### *Complex cases*

11.18 A number of factors may make a family dispute difficult to resolve, or cause it to require substantial resources or court time. One indication that resources will be required is the number of major issues, or orders sought, per case. The Family Court's annual report for 1997-98 calculated 1.8 orders sought per file opened, with an approximate figure per application for final orders filed in 1997-98 of 2.0.<sup>1596</sup> The highest mean was 2.44, in the Dandenong registry, and the lowest was 1.7, in the Sydney and Newcastle registries.<sup>1597</sup> The Justice Research Centre's recent study found that the mean number of issues per case across all its samples was around 2.5.<sup>1598</sup> The highest number of issues per case was in the Parramatta office of Legal Aid NSW, where the mean was 3.09 issues per case and 41% of cases had four or more issues per case, and the lowest in community legal centre cases.<sup>1599</sup>

11.19 The term 'complex' cases in the family law context commonly refers to cases that are intractable, or difficult to resolve. A previous report by the Commission defined complex cases, in the context of contact matters, as cases which

- involve repeat applications<sup>1600</sup>
- use considerable Court and legal aid resources or

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"technical" breaches of orders' and that such orders are predominantly sought by fathers without legal representation. As a consequence of this development, some solicitors and judges interviewed by the researchers mentioned an increasing need for solicitors to draft more detailed orders, leaving less scope for applications for breach of an order: H Rhoades et al Interim Report *The Family Law Reform Act 1995: Can changing legislation change legal culture, legal practice and community expectations?* University of Sydney & Family Court of Australia April 1999, 51-2.

<sup>1596</sup> The total residence, contact, specific issues and property orders sought, divided by the total applications for final orders (Form 7) and responses to applications for final orders (Form 7A). Form 7A applications are included to avoid double counting of orders sought per case, and maintenance is excluded since it will frequently be sought using a Form 12 application for maintenance.

<sup>1597</sup> This number has increased since the *Family Law Reform Act 1995* (Cth) came into effect.

<sup>1598</sup> R Hunter *Family law case profiles* JRC Sydney 1999, para 389. This study used the same case sample as the Commission's study, but for 6 registries only; and information obtained from Legal Aid Commissions (LACs), legal practitioners and Community Legal Centres (CLCs).

<sup>1599</sup> *ibid.*

<sup>1600</sup> Previous reports by the Commission discuss issues related to repeated applications, contact and domestic violence: ALRC *For the sake of the kids: Complex contact cases and the Family Court* ALRC Sydney 1995 (ALRC 73); ALRC *Equality before the law: Justice for women* ALRC Sydney 1994, para 9.25 (ALRC 63).

- in which at least one of the parties has significant difficulties in making and observing contact arrangements that are in the best interests of the child.<sup>1601</sup>

11.20 Such complexity may arise from the presence of violence or abuse, or the social, financial and psychological circumstances of the parties. A study<sup>1602</sup> analysing cases involving child abuse noted of its sample

[t]he most distinctive characteristics of the parents were the high rates of criminal convictions among the men, especially for crimes of violence, and less high, but still high, rates of criminal convictions among the women . . . Violence was fundamentally the problem that the families presented to the Court.<sup>1603</sup>

11.21 Professor Brown found that child abuse cases constituted ‘core business of the Court’, in other words, the cases that remain in the Court.<sup>1604</sup> Allegations of child abuse were made in 3% of all applications filed in the Melbourne registry in this time period, or 5% of all children’s matters, but were more likely than other cases to go to a hearing.<sup>1605</sup> They constituted half the custody and access cases listed for a prehearing conference. At trial they constituted one quarter of the custody and access cases.<sup>1606</sup> Resolution at this stage was thought to be assisted by the use of family reports and a child representative: when both were available at a prehearing conference, 50% of these cases were settled.<sup>1607</sup>

11.22 The Justice Research Centre (JRC) study of family law cases found that in their sample cases there were allegations of violence in around 60% of the cases

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<sup>1601</sup>.ALRC 73, 12.

<sup>1602</sup>.Professor Thea Brown’s research studied cases involving allegations of child abuse which had been activated or re-activated between January 1994 and June 1995, in Melbourne (149 cases, of which 20 were control cases without allegations of child abuse) and Canberra (38 cases). Sources of information were case files; interviews with counselling staff, judges, and registry staff in the two registries; observations of prehearing conferences in Melbourne; and interviews with State child protection staff: T Brown et al *Violence in families – Report number one: The management of child abuse allegations in custody and access disputes before the Family Court of Australia* The Family Violence and Family Court Research Program Monash University Clayton & the Australian Catholic University Canberra February 1998, 33–6.

<sup>1603</sup>.id 64–5. The profile of abuse in the sample studied was unlike that of cases seen by the State child protection services: almost no emotional abuse or neglect was reported to the Court, although these are the most common allegations reported by the Victorian child protection service. Almost half the abuse reported to the Court involved multiple forms of abuse. Sexual abuse and physical abuse – alone or in combination – were both more common in the Court than in the State protection service cases: id 102.

<sup>1604</sup>.id 87.

<sup>1605</sup>.In consultations conducted by the Commission, Registrars in the Family Court also referred to the difficulty of settling cases involving allegations of child abuse: Family Court staff *Consultation* Sydney 14 September 1998.

<sup>1606</sup>.T Brown et al *Violence in families – Report number one: The management of child abuse allegations in custody and access disputes before the Family Court of Australia* The Family Violence and Family Court Research Program Monash University Clayton & the Australian Catholic University Canberra February 1998, 87.

<sup>1607</sup>.ibid. See also para 11.86–11.93.

handled by community legal centres (CLCs) and private solicitors with legal aid funding; 40% of inhouse legal aid commission (LAC) cases; and 25% of self-funded cases. In the majority of these cases there was evidence of a history of violence, or that at least one of the parties had obtained a State domestic violence order. In 25% of the LAC cases and 15% of the private solicitors' cases, the files recorded that criminal charges had been brought in relation to the violence.<sup>1608</sup>

### *Repeat cases*

11.23 Of the cases analysed by the Commission, 217 (17%) had previously had matters before the Court. Of the cases in the sample, 19% of those commenced by applications for final orders (Form 7) and 9% of those commenced by applications for consent orders (Form 12A) were reopened cases. This is quite a high proportion, if representative across all Court filings. In 183 of the repeat cases (84%), the previous matter had been initially contested and in 29 cases (13%), they had previously commenced as applications for consent orders.<sup>1609</sup>

11.24 Such repeat cases were more likely than other cases to have had their initial matter commenced within a short time of separation (median 7.3 months for Form 7 repeat cases, compared with 14.4 months for all Form 7 cases),<sup>1610</sup> to be unrepresented,<sup>1611</sup> to relate to children only rather than to property or both children and property, regardless of the matters in issue in the previous proceedings,<sup>1612</sup> to seek interim orders,<sup>1613</sup> and to proceed to a final hearing.<sup>1614</sup>

### *Case duration*<sup>1615</sup>

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<sup>1608</sup>. There were considerable State-based differences in the number of domestic violence orders and criminal charges, reflecting different police practices: R Hunter *Family law case profiles* JRC Sydney June 1999, para 390.

<sup>1609</sup>. Justice Research Centre *Family Court Research Part One: Empirical information about the Family Court of Australia* ALRC Sydney June 1999, 4 (Justice Research Centre Family Court Research Part One).

<sup>1610</sup>.id 11.

<sup>1611</sup>.id 9.

<sup>1612</sup>.id 7. The Family Law Council (FLC) has also noted that child contact issues frequently give rise to repeat applications: FLC Interim report *Penalties and enforcement* AGPS Canberra 1998; FLC Final report *Child contact orders: Enforcement and penalties* AGPS Canberra 1998; FLC *Submission 226*.

<sup>1613</sup>. Justice Research Centre Family Court Research Part One, 6.

<sup>1614</sup>.id 5–6.

<sup>1615</sup>. Duration is the more appropriate term rather than the term 'delay', which assumes a problem. It is not always clear what people mean by delay: it could refer to the overall time taken from commencement to finalisation, or to time lags between interlocutory events, or between completing interlocutory procedures and being listed for, or receiving a hearing. The Law Council of Australia (LCA) draws a distinction between 'short-term delay' resulting in postponement of a particular step in proceedings; and 'long-term delay', or waiting time before listing of an event such as a prehearing conference, which is outside the control of the parties: LCA *Submission 197*. A pause between interlocutory events is not necessarily problematic for parties; one practitioner consulted by the Commission pointed out that a pause may be needed in order for parties to pursue negotiation: Family law practitioner *Consultation* Sydney 25 August 1998. A further issue is the duration between hearing and the handing down of a judgment. One submission to the



11.25 In the Commission's study, just over 50% of applications for final orders (Forms 7) were resolved in less than six months.<sup>1616</sup> The median case duration for applications for consent orders (Forms 12A) was eight days.<sup>1617</sup> The following discussion deals with applications for final orders only.

11.26 The median duration of applications for final orders in the sample was 5.23-months from filing to finalisation.<sup>1618</sup> The JRC study showed that for each case track, the median case duration for the sampled cases was within the Court's performance standards. The targets were exceeded in 25% of the sample cases, and in 10% of the cases duration times were at least twice the performance standards.<sup>1619</sup>

11.27 For children's matters, the median time from filing to finalisation was 4.5-months, and for financial matters 6.9 months. Of the applications for final orders, 74% of property cases, 76% of children's cases and 81% of cases involving both issues were finalised within one year. About 20% of cases lasted more than 12 months; a very small number (two property cases, four children's cases and 2 involving both property and children's issues) took over three years to resolve.<sup>1620</sup>

**Table 11.4. Case duration by case type – Applications for final orders (Form 7)**<sup>1621</sup>

Case duration	Property		Children		Both		All cases
	n	%	n	%	n	%	n
1–5 months	109	46 %	266	54 %	50	52 %	425
6–12 months	65	28 %	111	22 %	28	29 %	204
13–24 months	48	20 %	98	20 %	12	13 %	158
25–36 months	12	5 %	15	3 %	4	4 %	31
37–48 months	1	0.5 %	4	1 %	1	1 %	6
49+ months	1	0.5%	0	0 %	1	1 %	2

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Commission related to a child residence appeal in which 8 months had elapsed since the hearing, and the parties were still awaiting a judgment: Confidential *Submission 238*.

<sup>1616</sup> T Matruglio & G McAllister *Part one: Empirical information about the Family Court of Australia* ALRC Sydney February 1999, 48 table 27 (T Matruglio & G McAllister, Family Court Empirical Report PartOne). Some Family Court staff consulted by the Commission queried whether there was a problem of delay in finalising cases, stating that in their experience cases were resolved reasonably quickly, some within days of filing: Family Court staff *Consultation* Sydney 14 September 1998.

<sup>1617</sup> T Matruglio & G McAllister, Family Court Empirical Report Part One, 42.

<sup>1618</sup> T Matruglio & G McAllister, Family Court Empirical Report Part One, 42.

<sup>1619</sup> This finding was modified by the existence of a number of cases whose case track was not specified, apparently because they were resolved quickly and early in the litigation process. The median disposition time for these cases was three months, and 90% were finalised in 9.6 months – still higher than the performance standard for direct track cases of six months. R Hunter *Family law case profiles* JRC Sydney 1999, para 340.

<sup>1620</sup> T Matruglio & G McAllister, Family Court Empirical Report Part One, 48 table 27.

<sup>1621</sup> T Matruglio & G McAllister, Family Court Empirical Report Part One, 48.

Total	236	100	494	100	96	100	826
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11.28 The JRC, analysing the same cases but only for six registries, found that cases that were resolved by negotiated agreement were not necessarily quicker than those receiving a hearing. In fact, the median case duration for cases receiving a final hearing was 11 months, as against 13 months for cases finalised at prehearing conferences.<sup>1622</sup> For cases resolved before directions hearings, at or after directions hearings, and at or after conciliation conferences, the median case duration was six months or less; but the duration for 90% of cases was over 15 months. The following table shows that duration was longer for cases reaching a prehearing conference, whether or not they subsequently went to a hearing.

**Table 11.5. Case duration by stage of disposal – Applications for final orders (Form 7) – JRC study<sup>1623</sup>**

Stage	Median	90th percentile
Before directions hearing	5.0 months	15.3 months
At/after directions hearing(s)	4.0 months	16.0 months
At interim hearing	6.0 months	19.2 months
At/after conciliation conference(s)	6.0 months	15.5 months
At/after prehearing conference(s)	13.0 months	26.3 months
At final hearing	11.0 months	25.3 months
All cases	5.0 months	21.0 months

11.29 Duration times varied substantially between registries. As the following table indicates, the longest median case durations were recorded in Townsville, Brisbane, Canberra, Parramatta and Darwin; the shortest were in Adelaide and Dandenong. However, a different pattern is seen by looking at the disposition time for the 90th percentile. While case duration in the Canberra registry was relatively long on all measures, the Adelaide and Melbourne registries had among the shortest durations for 50% of their cases, but among the longest at the 90th percentile. This may be explained by the fact that some of the files sampled in the Melbourne, Brisbane and Adelaide registries had been through a 'callover' process in previous months, to identify and dispose of the older cases in the registry.<sup>1624</sup>

**Table 11.6. Case duration by registry – Applications for final orders (Form 7)<sup>1625</sup>**

Registry	Number of cases	Median	90th percentile
Adelaide	127	7.71	21.99
Brisbane	216	9.68	21.20
Canberra	25	9.16	25.45
Dandenong	53	5.76	17.64

<sup>1622</sup>R Hunter *Family law case profiles* JRC Sydney 1999, para 339.

<sup>1623</sup>R Hunter *Family law case profiles* JRC Sydney 1999, para 339, table 5.9.

<sup>1624</sup>G McAllister *Correspondence* 12 February 1999.

<sup>1625</sup>Justice Research Centre *Family Court Research Part One*, 33.

Melbourne	142	8.27	23.80
Parramatta	130	8.83	18.81
Sydney	137	6.69	12.81
Townsville	26	7.25	16.31
Newcastle	53	7.43	19.81
Hobart	44	7.77	18.21
Darwin	18	8.20	16.10

11.30 The Commission also measured the duration between commencement and hearing in each registry. The registry with the longest duration to hearing was Adelaide, with a median duration of 21.8 months and 90% of cases reaching a hearing within 33.2 months. Melbourne was also relatively slow, with a median of 13.5 months and 90% of cases reaching a hearing within 26.3 months. Newcastle had a relatively fast median duration (7.6 months) but a 90% figure of 28.3. The registries in which duration from commencement to hearing was shortest were Dandenong (median 3.3 months, 90% within 17.2 months) and Hobart (median 7.4 months, 90% within 17.6 months).<sup>1626</sup>

11.31 The JRC found, on similar Court data to that used by the Commission, that where the following factors were present, the disposition time of applications for final orders (Form 7) increased

- the case commenced in a State court and was transferred to the Family Court
- spouse maintenance was an issue in the case
- the applicant was older and
- the respondent was represented at finalisation.

When the following factors were present, disposition time of applications for final orders (Form 7) decreased

- there was no child representative
- the respondent was unrepresented at commencement and
- there was no Family Court counselling.<sup>1627</sup>

11.32 Care must be taken in drawing conclusions from these findings: for example, the fact that cases are processed faster if the respondent is unrepresented may indicate that they were unable to put their case effectively or at all.<sup>1628</sup> The presence of a child representative is an indication of complexity, not of relative efficiency of case processing. The finding that duration increased where cases received Family Court counselling may simply reflect this as an extra step in the process.

### *Stage of finalisation of cases*

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<sup>1626</sup>.id 34.

<sup>1627</sup>.R Hunter *Family law case profiles* JRC Sydney 1999, para 347. This data only recorded court-ordered counselling.

<sup>1628</sup>.Family Court staff *Consultation* Sydney 14 September 1998.

11.33 The following table shows the stages at which applications for final orders (Form 7) in the Commission's study were finalised. It can be seen that 89% of disputed cases in the Commission's sample were resolved without a hearing. Over 50% of the sampled cases settled at a first or subsequent directions hearing,<sup>1629</sup> and a further 40% were finalised at or after further case events, prior to listing for hearing. Of the sampled cases, 78% were resolved by the end of the prehearing conference, 2% before the first return date or at a compliance conference, and 1% at an interim hearing. The remaining 19% constituted the defended trial list – the cases on which the Court's published figures are based. Approximately 11% of the applications for final orders sampled (57% of the listed cases) settled between the prehearing conference and the hearing day, or during the hearing.<sup>1630</sup> The remaining 8% of the sample received a decision from a judge; 5% after a defended hearing.<sup>1631</sup>

**Table 11.7. Applications for final orders (Form 7) – Stage of disposal<sup>1632</sup>**

Event	No of cases attending event (at least once)	No of cases finalised at or following event	% of all applications for final orders finalised at or following event
First directions hearing	885	137	14 %
Subsequent directions hearing	525	359	37 %
Chambers conference (consent orders)	257	136	14 %
Interim hearing	488	14	1 %
Conciliation conference (property cases)	251	70	7 %
Pre-hearing conference	216	60	6 %
After listing	n/a	104	11 %
Judgment: defended hearing	51	51	5 %
Judgment: undefended hearing	27	27	3 %
Other stages <sup>a</sup>	n/a	19	2 %
Total	n/a	977	100 %

- a Other stages are: before the first return date; at case conferences (in Parramatta registry); and compliance conferences.

<sup>1629</sup> 90% of the sampled cases attended at least one directions hearing 3% of the finalised cases settled before the first return date, 14% at the first directions hearing, and 37% at a subsequent directions hearing: T Matruglio & G McAllister, Family Court Empirical Report Part One, 37.

<sup>1630</sup> This is consistent with the Court's defended hearing statistics for 1997–98, which show that in that year 1 882 cases (33% of the listed cases) were settled prior to judgment and a further 1 337 cases (24% of the listed cases) were removed from the list.

<sup>1631</sup> T Matruglio & G McAllister, Family Court Empirical Report Part One, 37, 49 table 28. See also table 11.8.

<sup>1632</sup> id 49 table 28; 39 table 22.

***Factors affecting resolution and listing for hearing***

11.34 The Family Court has consistently stated that only 5% of its cases receive a judgment. The Commission's data confirms this figure. Some 19% of cases in the sample were listed for hearing. Over half of these were settled before receiving a judgment. The cases most likely to require a judgment were cases involving children's matters only. While children's matters formed 58% of the applications for final orders, they formed 63% of the cases listed for hearing, and 72% of the cases receiving a judgment.<sup>1633</sup>

11.35 Based on the Commission's sample and on other current research, factors statistically related to a greater likelihood of a case being listed for hearing were

- case involves children's issues only<sup>1634</sup>
- there are allegations of child abuse<sup>1635</sup>
- children are older<sup>1636</sup>
- a child representative has been appointed<sup>1637</sup>
- the parties have had previous proceedings in the Family Court<sup>1638</sup>
- the applicant is unrepresented, or partially unrepresented<sup>1639</sup> and
- parties were born in non-English-speaking countries.<sup>1640</sup>

Some of these indicators are relevant in case streaming decisions.

***Case resolution: patterns of settlement***

11.36 The Commission's research documented the resolution of 1 288 cases finalised during May–June 1998, noting when in the process such cases were resolved, whether the outcome was by consent, the application dismissed or determined. It provides a useful overview of case outcomes. The Commission's research also documents whether cases settled at or soon after particular processes. Such analysis does not of itself attribute consent outcomes to particular processes. It is very difficult to state with any precision why cases settle or whether a particular dispute resolution process effected or contributed to the settlement. The Commission sought some evaluation of the processes or factors assisting or

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<sup>1633</sup>.id 53.

<sup>1634</sup>.id 53.

<sup>1635</sup>.id 50; T Brown et al *Violence in families – Report number one: The management of child abuse allegations in custody and access disputes before the Family Court of Australia* The Family Violence and Family Court Research Program Monash University Clayton & the Australian Catholic University Canberra February 1998, 87; R Hunter *Family law case profiles* JRC Sydney 1999, para 331.

<sup>1636</sup>.Justice Research Centre Family Court Research Part One, 27.

<sup>1637</sup>.R Hunter *Family law case profiles* JRC Sydney 1999, para 331.

<sup>1638</sup>.Justice Research Centre Family Court Research Part One, 6.

<sup>1639</sup>.id 26.

<sup>1640</sup>.R Hunter *Family law case profiles* JRC Sydney 1999, para 331.

retarding settlement from the solicitors or the unrepresented parties in these cases. While the comments are interesting and provide some suggestion of the efficacy or otherwise of particular processes, the numbers responding were relatively small and can not provide a definitive evaluation. Care should be exercised with any conclusions.

#### *Stage and means of settlement*

11.37 Of the Commission's sample of 1 288 cases, 307 (24%) were settled before filing at the Court and were commenced as applications for consent orders (Form-12A). The remaining 981 cases (76%) were commenced by applications for final orders (Form 7); 701 (72%) of these contested applications were then resolved by consent, representing 55% of the total sample. The following table shows the means by which applications for final orders were resolved.

**Table 11.8. Means of resolution of applications for final orders (Form 7)<sup>1641</sup>**

Means of resolution	Applications for final orders (n)	Percentage of all Forms 7 n = 973	Percentage of total sample n = 1 288
<b>Without determination</b>			
Negotiated settlement & consent orders	701	72 %	55 %
Withdrawn/discontinued	42	4 %	3 %
<b>By determination</b>			
Stood over/struck out	23	3 %	2 %
Dismissed	61	6 %	5 %
Default	74	8 %	6 %
Judgment (including interim)	72	7 %	5 %
Total Forms 7	973	100 %	76 %

11.38 Property cases commenced by applications for final orders were more likely than cases involving only children's issues to be resolved by consent. They were also more likely to be commenced as applications for consent orders.<sup>1642</sup>

#### *Representation and case resolution*

11.39 In the Commission's survey of unrepresented litigants, over one-third (16 of 45 applicants, 17 of 57 respondents) indicated that they had received some legal advice or assistance, short of representation with respect to their matter.<sup>1643</sup> In the

<sup>1641</sup> Derived from Justice Research Centre Family Court Research Part One, 6. The number of Forms 7 in this table does not match the sample figure (981) as information was missing from some files.

<sup>1642</sup> Of Form 12A applications, 62% concerned property, 14% children, and 25% both property and children. By contrast, of cases initiated by an application for final orders (Form 7), 29% concerned property, 59% children, and 12% both property and children: T Matruggio & G McAllister, Family Court Empirical Report Part One, 64.

<sup>1643</sup> Many parties also sought advice or assistance from friends and family and men's or women's organisations.

Commission's Family Court study, most litigants had full legal representation throughout, but respondents were less likely than applicants to be represented. A number of parties had representation for part of their case.<sup>1644</sup>

11.40 The Commission's study matched the applicants and respondents, and in 59% of applications for final orders and 69% of applications for consent orders in the sample, both parties in the same case were legally represented throughout.<sup>1645</sup> Thus, in 41% of cases, one or both parties was unrepresented at least for part of the time. The data obtained from the sampled cases is set out in the table below.

**Table 11.9. Representation status of parties in the Commission's sample**<sup>1646</sup>

Representation status	Applications for final orders				Applications for consent orders			
	Applicants		Respondents		Applicants		Respondents	
	n	%	n	%	n	%	n	%
Fully represented	810	84%	659	68%	277	93%	209	70%
Partially represented	93	10%	107	11%	4	1%	6	2%
Unrepresented	64	6%	201	21%	18	6%	84	28%
Total	967	100%	967	100%	299	100%	299	100%

11.41 Most parties in the sampled cases attempted negotiation with the other party. While the numbers are small,<sup>1647</sup> responses to the Commission's surveys indicate that most parties, whether represented<sup>1648</sup> or unrepresented,<sup>1649</sup> sought to resolve

<sup>1644</sup> The JRC report found that 10% of LAC clients had previously had other representation; and 46% of LAC cases were not resolved when the file was closed: R Hunter *Family law case profiles* JRC Sydney 1999, para 102. Very few parties in Form 12A cases studied by the Commission changed their representation status, as applications for consent orders are finalised very shortly after filing – a median of eight days.

<sup>1645</sup> The JRC study found that the representation status of litigants tended to be 'mirrored': if one party was unrepresented or partially unrepresented, or a legal aid client, the other party was likely to be unrepresented or partially represented. A represented party usually had a represented party as their opponent: R Hunter *Family law case profiles* JRC Sydney 1999, para 442. Applicants for final orders who had been involved in previous proceedings were more likely to be unrepresented than those who had not had previous proceedings. The same relationship was found for respondents, but this fell just short of statistical significance. When applications for final orders and for consent orders were taken together, all cases with previous proceedings were found to be more likely to have an unrepresented respondent: Justice Research Centre Family Court Research Part One, 9–10.

<sup>1646</sup> These figures are derived from T Matruggio & G McAllister, Family Court Empirical Report Part One, 69.

<sup>1647</sup> Response rates for litigants in person were 25% for applicants and 14% for respondents. For represented parties, the response rate of solicitors was 32% for those representing applicants and 28% from those representing respondents: T Matruggio *Part two: The costs of litigation in the Family Court of Australia* ALRC Sydney June 1999 (T Matruggio, Family Court Empirical Report PartTwo)2.

<sup>1648</sup> Where parties were represented, their solicitors were surveyed. Of those representing applicants 294 (76%) and of those representing respondents 197 (78%) reported they had attempted settlement prior to court contact. Of the solicitors representing applicants, 171 (44%) and of those representing respondents 118 (43%) reported they had attempted settlement at the first court appearance: T-Matruggio, Family Court Empirical Report Part Two, 50.

their dispute prior to or very early in proceedings in the Family Court.<sup>1650</sup> A major difference between represented and unrepresented parties concerned the extent to which they engaged in, and were able to resolve their case by negotiation. Represented parties were more likely to negotiate and, as the following table shows, to negotiate successfully, than unrepresented parties. Where either party was unrepresented or partially represented, the case was more likely to be finalised by default or to be dismissed.

11.42 Cases in which applicants were unrepresented, or had partial representation, were more likely to be listed for hearing. Of the 787 cases finalised before listing for hearing, 14% of the applicants had no or partial representation. Of the 189 cases removed after listing for hearing, 22% of the applicants had no or partial representation. No such relationship was found where respondents were unrepresented.<sup>1651</sup>

**Table 11.10. Representation by process used to resolve the case**<sup>1652</sup>

Process used to resolve case	Applicant representation			Respondent representation		
	None	Partial	Full	None	Partial	Full
Consent orders	0 (0%)	1 (1%)	26 (3%)	5 (3%)	2 (2%)	19 (3%)
Negotiation	27 (44%)	49 (53%)	622 (76%)	105 (52%)	80 (6%)	510 (80%)
Default	12 (19%)	9 (10%)	53 (6%)	45 (22%)	12 (10%)	15 (2%)
Judgment	8 (13%)	14 (15%)	52 (6%)	11 (5%)	10 (8%)	52 (8%)
Dismissed	11 (18%)	15 (16%)	34 (4%)	24 (12%)	15 (12%)	16 (3%)
Discontinued	4 (7%)	4 (4%)	35 (4%)	12 (6%)	3 (3%)	27 (4%)
Total	62 (100%)	92 (100%)	822 (100%)	202 (100%)	122 (100%)	639 (100%)

Note: Percentages relate to the total in each column.

### *PDR and case resolution*

11.43 The legislation governing PDR in the Family Court is outlined below at para 11.140–11.142. In addition to ‘information sessions’,<sup>1653</sup> the Family Court provides or encourages a variety of PDR processes.<sup>1654</sup>

<sup>1649</sup>Of the 45 unrepresented applicants, 21 (47%) and of the 57 unrepresented respondents 26 (46%) reported that they had attempted settlement prior to court contact. Of the unrepresented applicants, 11 (24%) and of the unrepresented respondents 13 (21%) reported they had attempted settlement at the first court appearance: T Matruglio, Family Court Empirical Report Part Two, 29.

<sup>1650</sup>See also R Hunter *Family Law Case Profiles* JRC June 1999, para 402.

<sup>1651</sup>In the sample, 202 respondents were recorded as having no representation. 68% of these cases were finalised at a directions hearing, 1% at a conciliation conference, and 8% at a chambers conference. For the 121 partially represented respondents, the figures were 58% at directions hearings, 3% at conciliation conference and 10% by consent (recorded as a chambers conference). For the 640 fully represented respondents, the figures were 44% at directions hearing, 10% at conciliation conference, and 17% at chambers conference. Justice Research Centre Family Court Research Part One, 26, 31.

<sup>1652</sup>Justice Research Centre Family Court Research Part One, para 10.5.1, tables 43A, 43B.

<sup>1653</sup>These sessions are provided at or before filing, to provide information about Court processes and PDR services. Parties are normally required to attend an information session. See Family Court case management guidelines, para 13.



- Conciliation counselling – conducted in children's disputes by Court counsellors, prefiling and postfiling.
- Conciliation conferencing – conducted in financial disputes by registrars.
- Joint conciliation conferences – conducted by registrars and counsellors where children's and property issues are enmeshed.
- Mediation – conducted at the Family Court and by private and community based agencies.<sup>1655</sup>
- Joint prehearing conferences<sup>1656</sup> – sometimes held in registrars' chambers for settlement discussions.

11.44 The Family Court Counselling Service provides counselling to the parties in children's matters, and family reports to the Court.<sup>1657</sup> Conciliation counselling is divided into two categories: prefiling (voluntary) counselling and postfiling (usually court-ordered) counselling.

11.45 The Family Court has conducted a number of research projects to evaluate the effectiveness of counselling and other PDR services.<sup>1658</sup> Statistics and estimates

<sup>1654</sup>. These are described in detail in ALRC IP 22 para 7.33–7.69.

<sup>1655</sup>. Court-based mediation is offered in the Brisbane, Melbourne, Parramatta and Sydney registries: Family Court of Australia *Annual report 1997–98*, 31. The Family Court's 1997–98 report recorded that 406 cases attended mediation in 1997–98, that 60% of these fully settled and a further 10% 'settled in at least one substantive issue': Family Court of Australia *Annual report 1997–98*, 31. The Chief Justice has acknowledged some confusion arising from the terminology used for PDR services, and noted in the Court's most recent annual report

I have for some time been concerned that the Court's narrow definition of 'mediation' and broad use of 'counselling' fail to describe accurately the services it provides. Both here and overseas 'mediation' is used as an all embracing term, which includes a number of processes ranging from the purist non-directive model to dispute resolution which falls short of litigation. 'Counselling' is a rarely used term and 'conciliation counselling' is also not commonly understood . . . There is some evidence to suggest that customers are confused by the nature of the different services and that men in particular are reluctant to attend counselling sessions because they see them as being intrusive and biased in favour of women: Family Court of Australia *Annual report 1997–98*, 19–20. His Honour went on to indicate that a change in the terminology might be considered in the future.

<sup>1656</sup>. Strictly, this is not a PDR process: Family Court case management guidelines, ch 8 states that settlement prospects are to be exhausted before the prehearing conference.

<sup>1657</sup>. Family reports are discussed at para 11.80–11.108.

<sup>1658</sup>. C Brown et al *A survey of outcomes after conciliation counselling* Family Court of Australia Sydney 1998 (forthcoming); C Brown & W Ibbs *Comparison of voluntary and court-ordered counselling clients* Family Court of Australia Sydney 1997 (Research Report No. 16); J Gibson et al *Client attitudes to the Counselling Service of the Family Court of Australia* Family Court Sydney 1996 (Research Report No. 15). A recent study evaluated satisfaction with the range of services provided by the Court: KPMG 'Survey of family client perceptions of service quality' *Unpublished* Family Court of Australia March 1999. See also para 11.145–11.146.

published by the Court attribute high rates of settlement to PDR. Court figures show some 30% to 40% of cases attending conciliation conferences are settled at this stage;<sup>1659</sup> and from a 1994 Court study, that 73% of the cases for custody or contact, referred to the Counselling Service prior to their first day in Court, were settled.<sup>1660</sup> The Court's 1997-98 annual report recorded that 78% of cases attending pre-filing counselling 'reach agreement on at least one of the substantive issues in dispute.' Of the postfiling counselling cases, the Court reported that 66% of those attending before the first directions hearing, and 67% of those attending after the first directions hearing, 'reached full or partial agreement'.<sup>1661</sup>

11.46 Finalisation of a case is not the only measure of the efficacy of counselling. Counselling may help parties to become better disposed to settle, even if the case is not finalised at that point.<sup>1662</sup> Empirical studies such as that conducted by the Commission are unable to quantify such benefits. The Commission's data provides some information on the relationship in time between counselling and finalisation of the case, but did not set out to evaluate counselling services.<sup>1663</sup> The figures cannot be taken to endorse or discredit the efficacy of the service.<sup>1664</sup>

11.47 In the samples studied by the JRC, Family Court counselling was the major form of PDR used. Counselling was used in 24% of LAC cases, 27% of cases conducted by private solicitors with self-funded parties, 58% of cases by private solicitors with legally-aided parties, and 13% of CLC cases.<sup>1665</sup> Analysis by the JRC of the Commission's sample showed that, where parties were represented at commencement and counselling was ordered at commencement, resolution was not so close in time to the counselling session as when, in such cases, counselling was ordered later in proceedings.<sup>1666</sup> The pattern for unrepresented applicants was similar, although the figures were too small to provide a statistically significant result.<sup>1667</sup> This appears to support the view expressed in consultations and submissions to the Commission, that counselling assists settlement where parties attend to sort out the details, having secured information on the case, and achieved broad agreement or a disposition to settle.<sup>1668</sup> For unrepresented respondents, although the numbers were very small, a different pattern was shown: counselling

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<sup>1659</sup>Family Court staff *Consultation* Sydney 1 April 1999.

<sup>1660</sup>C Brown 'Working with families in conflict' *Paper* Australian Psychological Society August 1994.

<sup>1661</sup>Family Court of Australia *Annual report 1997-98*, 28.

<sup>1662</sup>National Legal Aid *Submission 217*; Family Court of Australia *Response of the Family Court of Australia to the Attorney-General's Department paper on Primary dispute resolution services in family law* Family Court of Australia Canberra 1997, 22-23. See para 11.147.

<sup>1663</sup>This area was explicitly excluded from the terms of reference.

<sup>1664</sup>Justice Research Centre *Family Court Research Part One*, 27.

<sup>1665</sup>R Hunter *Family law case profiles* Justice Research Centre June 1999, 190, table 6.4. These figures include voluntary counselling as well as court-ordered counselling.

<sup>1666</sup>Justice Research Centre *Family Court Research Part One*, 28-29.

<sup>1667</sup>id 28.

<sup>1668</sup>Law Society of NSW *Submission 240*; WLRG Vic *Submission 162*; WLS Brisbane *Submission 218*.

ordered at a directions hearing was more likely to result in settlement soon afterwards than counselling ordered later.<sup>1669</sup> Again such information is useful in referral criteria for counselling.

### *Conciliation conferences*

11.48 In 1997–98, the Court reported that 6 812 conciliation conferences were held and 2 881 were resolved<sup>1670</sup> — a success rate of 42%.<sup>1671</sup> The figure was consistent over the three years 1994–95 to 1996–97, with small variations between regions.<sup>1672</sup> A number of cases were also said to have settled shortly after the conciliation conference.<sup>1673</sup>

11.49 In the Commission's sample, the conciliation conference was less successful than might be expected from such figures. In the sample, 250 cases attended at least one conciliation conference (61% of the 409 cases concerning property or both property and children),<sup>1674</sup> and 70 cases were finalised at this stage<sup>1675</sup> — 28% of those attending a conciliation conference, and 17% of all disputed cases which included property issues. It was suggested to the Commission that a lack of information available at this stage inhibits settlement.<sup>1676</sup>

### *Prehearing conferences*

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<sup>1669</sup>Justice Research Centre Family Court Research Part One, 29. This may be related to the disadvantage experienced by unrepresented parties in relation to information on the process and likely outcomes: counselling may be their first opportunity to receive such information. See para 11.165–11.169.

<sup>1670</sup>Family Court of Australia *Annual report 1997–98*, 69. The report lists the number of conciliation conferences 'held', 'resolved' and 'adjourned' and does not make clear whether its figures are intended to show that 2 881 of the 6 812 conciliation conferences held resulted in full resolution of all issues in the case. The same applies to its figures for prehearing conferences.

<sup>1671</sup>Family Court of Australia *Annual report 1997–98*, 69. This figure is derived by taking the figure 'conciliation conferences resolved' as a percentage of the figure for 'conciliation conferences held'. The Evaluation Committee report claims that 42% of property cases and 59% of children's cases were resolved at this stage in both 1995 and 1996: Family Court of Australia *Report to the Chief Justice of the Evaluation of Simplified Procedures Committee August 1997* Family Court Sydney 1997, 64–65. Note there may be some cases involving both property and children's issues in which the issues are resolved at a joint conciliation conference, but the case is formally finalised through an application for consent orders.

<sup>1672</sup>The rates of cases settling at the conciliation conference as noted by 10 major family law firms surveyed in Melbourne, Brisbane and Parramatta, showed 35% (of cases going to a conciliation conference) for Melbourne, 58% for Parramatta and 60% for Brisbane: Family Court of Australia *Report to the Chief Justice of the Evaluation of Simplified Procedures Committee August 1997* Family Court Sydney 1997, 46–7.

<sup>1673</sup>When these cases were included, the settlement rates were said to be 50% in Melbourne, 66% in Parramatta and 80% in Brisbane. Family Court of Australia *Report to the Chief Justice of the Evaluation of Simplified Procedures Committee August 1997* Family Court Sydney 1997, 48.

<sup>1674</sup>Justice Research Centre Family Court Research Part One, 17.

<sup>1675</sup>T Matruglio & G McAllister, Family Court Empirical Report Part One, 49.

<sup>1676</sup>This issue is discussed at para 11.73–11.74.

11.50 The Court reported that in 1997–98, 6 782 prehearing conferences were held, and 1 686 matters were resolved at this stage (25%).<sup>1677</sup> The proportion of cases attending a prehearing conference (22%) and settling at this stage in the Commission’s study (6% of the sample, 28% of those attending) was similar to the settlement figure derived from the Court’s annual report (25%).<sup>1678</sup> The prehearing conference is not designed as a dispute resolution event, but the relatively high settlement rate reflects the experience in other courts where the imminent prospect of a hearing promotes compromise.

## Simplified procedures

11.51 In 1975, the initiating process in the Family Court was an application form and, according to the type of matter, a short affidavit or a statement of financial circumstances. In 1989, the Court introduced pleadings, and interlocutory relief was claimed by application supported by an affidavit.<sup>1679</sup>

11.52 The current procedural requirements, known as the Simplified Procedures, were introduced in January 1996, following a lengthy review and extensive consultations by the Simplification of Procedures Committee (Simplification Committee), set up by the Chief Justice in 1992.<sup>1680</sup> The procedures have since been extensively revised and reviewed.<sup>1681</sup>

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<sup>1677</sup> Family Court of Australia *Annual report 1997–98*, 69.

<sup>1678</sup> The Court’s annual report for 1997–98 shows 6 782 prehearing conferences were held and 1 686 were resolved. Assuming that ‘prehearing conferences resolved’ means the case was finalised, the Court’s figures show that 25% of cases were finalised at this stage: Family Court of Australia *Annual report 1997–98*, 69. The Evaluation Committee’s report showed a settlement rate at prehearing conferences of 21% in 1995 and 23% in 1996: Family Court of Australia *Report to the Chief Justice of the Evaluation of Simplified Procedures Committee August 1997* Family Court Sydney 1997, 64–65.

<sup>1679</sup> The following summary of the background to Simplification of Procedures is drawn from the Family Court of Australia *Report of the Simplification of Procedures Committee to the Chief Justice May 1994* Family Court Sydney 1994, 5–6.

<sup>1680</sup> As part of the review and consultation process, the Committee published a series of five reports in 1993 & 1994: *Report of the Simplification of Procedures Committee* (‘The Grey Book’) AGPS Canberra January 1993; *Mark II* (date not given); *Mark III* Family Court Sydney 17 December 1993; *Overview for the Attorney-General’s Department* Family Court Sydney 22 December 1993; *Report of the Simplification of Procedures Committee to the Chief Justice May 1994* Family Court Sydney 1994. An implementation committee oversaw the introduction of the new procedures, and an Evaluation Committee was formed in early 1996 to evaluate the first 12 months of the new procedures. The initial guidelines were substantially revised and were reissued in April 1997 as Practice Direction No.1 of 1997 (Family Court case management guidelines). This practice direction is still in operation.

<sup>1681</sup> These changes were implemented in Practice Direction No 3 of 1995 and subsequently revised in the current Family Court case management guidelines. Major changes included: Introduction of Information Sessions (introduced at the time the Committee was set up), and amending the rules to make it a requirement that parties attend an Information Session; abolition of pleadings; revision of the initiating applications for final orders (Form 7) and interim orders (Form 8) to provide only basic information on the parties and the orders sought; requirement that no documents be filed with the initiating form except a Form 17 ‘Financial statement’ in applications for financial relief; revision of Form 17 and other forms and applications; restriction of the right to apply for discovery, subpoenas or a request to answer specific questions until after a conciliation conference (unless a

11.53 The Simplification Committee was concerned to structure a set of procedures which met the needs of the majority of cases that settled. Pleadings and affidavits, which were required to be produced in the early stages, were seen to be appropriate only for the few cases which proceeded to trial.<sup>1682</sup> The new procedures were intended to introduce a standard set of steps ensuring that parties utilised PDR, with minimal filed information, to minimise the cost and difficulty of resolving these cases. Evidential procedures for a contested hearing were reserved for later in the process.

11.54 It is a truism that case resolution and adjudication require information. Full and accurate disclosure of financial data and access to reliable information concerning children can present real difficulties in family matters. The provision of such information via discovery, subpoenas and in affidavit form can be protracted and expensive. The Family Court's simplified procedures were intended to secure relevant information in a timely, cost-effective way.

11.55 The introduction of Simplified Procedures caused considerable concern in the legal profession.<sup>1683</sup> Most of the comments made to the Commission on this subject repeated such concerns. The Commission was told that these procedures do not supply sufficient information to the Court or the parties in the early PDR stages. The limited information available in the interlocutory stages is said to be insufficient for deciding on appropriate allocation of a case to the appropriate track or PDR process.<sup>1684</sup>

Since the simplification of proceedings, there have been a number of new layers added to the Court process in terms of the number of attendances and processes which parties to litigation must attend.<sup>1685</sup>

Although procedures have been 'simplified' they are still quite complex for non-lawyers and parties are still shell-shocked by the system.<sup>1686</sup>

Court procedures are too bureaucratic. The simplification process succeeded only in abolishing pleadings. It achieved nothing else.<sup>1687</sup>

Anecdotal reports suggest that simplified procedures have assisted litigants in person in that it is now easier for them to commence proceedings by issuing an

registrar gives leave to apply); requirement that parties and their representatives attend directions hearings and conciliation conferences: Family Court of Australia *Report of the Simplification of Procedures Committee to the Chief Justice May 1994* Family Court Sydney 1994, 95-103.

<sup>1682</sup> Family Court of Australia *Report of the Simplification of Procedures Committee to the Chief Justice May 1994* Family Court Sydney 1994, 6-7.

<sup>1683</sup> id 11.

<sup>1684</sup> Family Court staff *Consultation* Sydney 14 September 1998.

<sup>1685</sup> National Legal Aid *Submission 217*.

<sup>1686</sup> LANSW *Submission 242*.

<sup>1687</sup> Family Court judges *Consultation* Sydney 23 September 1998.

application. However, it has also had a negative impact. For example, simplified procedures and forms have resulted in litigants in person:

- Commencing proceedings with applications that are incorrect. Applications are not checked until the first return date.
- Commencing proceedings seeking orders that are nonsensical or unrealistic.
- Commencing proceedings more frequently – for example multiple Applications for Interim Orders (Form 8), multiple Applications for Contravention of Child’s Orders (Form 49).
- Commencing proceedings without seeking legal advice.
- Commencing proceedings without considering NJD [non-judicial determination] methods.
- Commencing proceedings without any understanding of the difficulties in running a defended hearing. The relative simplicity of the application form belies the complexity of litigation.<sup>1688</sup>

11.56 The Evaluation of Simplified Procedures Committee (Evaluation Committee) noted such concerns in its own submissions and consultations. The Evaluation Committee’s report detailed research undertaken to test some of these issues, as discussed in para 11.75. Further research has analysed the impact of simplified procedures on costs to parties in the Family Court.<sup>1689</sup>

11.57 In August 1998, the Evaluation Committee recommended

- A requirement on both parties to file further information in relation to spouse maintenance applications (Form 12).<sup>1690</sup>
- Revision of the ‘Outline of Case’ document into a three-part document<sup>1691</sup>
  - Part One containing key issues and a chronology, to be part of or filed with the Form 7 ‘Application for final orders’ document and the Form 7A ‘Reply to the application for final orders’ document
  - Part Two containing expanded information necessary for the Conciliation conference, to be filed with Part One *before* the conciliation conference – replacing the current Form 17A ‘Conciliation conference particulars’ and

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<sup>1688</sup>.LCA Submission 197.

<sup>1689</sup>.The study used survey data collected as part of the Attorney-General’s ‘Review of Scales of Legal Professional Fees in Federal Jurisdictions’ and noted the response rate to this survey was small. The study found no significant changes in average costs for direct track cases, cases involving children or children and financial issues, for standard track cases resolved at instructions, directions or conciliation stages, or for complex track cases. The study found average costs were less for standard track cases reaching the prehearing or hearing stage; cases involving financial issues only; and to a lesser degree, for all cases reaching the hearing stage: T Fry ‘Costs of actions in the Family Court of Australia: A study of the impact of simplified court procedures upon the costs of actions in the courts’ *Unpublished* October 1998.

<sup>1690</sup>.Family Court of Australia *Report to the Chief Justice of the Evaluation of Simplified Procedures Committee August 1997* Family Court Sydney 1998, para 32.6.

<sup>1691</sup>.id para 32.16.1; 32.27.

- Part Three containing, among others, details of the parties; the children (if any); any property, liability and/or financial resources of the parties; the orders sought and the statement of facts. All three parts to be filed *prior* to final hearing.
- A standard form affidavit to be prepared for filing in support of an application for interim parenting orders (Form 8).<sup>1692</sup>
- A document to be prepared for the registrar to complete following an unsuccessful conciliation conference, showing any directions made and identifying the disputed issues – copies of this document to be provided to both parties and kept on file by the Court.<sup>1693</sup>
- Registrars at directions hearings be given a discretion to direct the production of specific documents and particular information if necessary for parties to negotiate on an informed basis.<sup>1694</sup>

11.58 Some of these recommendations have now been implemented.<sup>1695</sup> The Court has established a Future Directions Committee whose brief includes areas addressed by the Evaluation Committee.<sup>1696</sup>

#### *Forms and documentation*

11.59 The current application for final orders, known as Form 7, contains no allegations of fact, and was intended to make it easier and cheaper for parties to engage in PDR. Form 7 simply gives details of the parties and orders sought, and, in financial cases, a standard form financial statement (Form 17) is attached.

11.60 Form 7 was said by the Simplification Committee to be inexpensive and simple to prepare; an encouragement to parties settle their disputes themselves; and appropriate for the many cases in which the Committee assumed parties have a simple financial situation and good knowledge of each others' parenting skills and financial situation.<sup>1697</sup>

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<sup>1692</sup>.id para 32.20.

<sup>1693</sup>.id para 32.16.2.

<sup>1694</sup>.id para 32.25.

<sup>1695</sup>.The Court has produced a revised application for spouse maintenance (Form 12), and a revised form Conciliation Conference Particulars (Form 17A), available on the Court's website at <<http://www.familycourt.gov.au/forms/index.html> > (27 July 1999). A standard form affidavit for applications for interim parenting orders was published in Practice Direction No 1 of 1998 (PD 98/1).

<sup>1696</sup>.The first, second and fourth dot points above have been referred to the Future Directions Committee: Family Court of Australia *Correspondence* 21 July 1999.

<sup>1697</sup>.Family Court of Australia *Report of the Simplification of Procedures Committee to the Chief Justice May 1994* Family Court Sydney 1994, 28.

11.61 In general no documentation is filed with applications for consent orders beyond the Form 12A. In applications for final orders (Form 7), the median number of documents filed by applicants in disputed matters, in addition to the Form 7 or 7A ('Response to application for final orders'), was two documents for applicants and one for respondents. The range was up to 66 documents for applicants and up to 57 for respondents.<sup>1698</sup> Both applicants and respondents filed more documents if represented than if unrepresented.<sup>1699</sup>

11.62 The Law Council of Australia outlined a number of concerns relating to the simplified initiating process, which in summary are as follows.

[T]he initiating proceedings do not enable the parties to negotiate or to prepare for trial knowing what is at issue, do not inform the court at the pre-trial stage of the matters at issue and do not form a permanent record of the issues in the case.

Although the process of defining the issues in dispute may appear laborious to the outsider, it is necessary. The Law Council suggests that this ultimately shortens trials and promotes settlement. There is no inducement to settle if one is in the dark about the strengths and weaknesses of the opponent's case because the opponent's case has not been identified in sufficient detail. Currently, people can start proceedings easily and quickly without a thorough understanding of the strengths or weaknesses of even their own case . . .

The Law Council is firmly of the view that the lack of information available at the commencement of family law proceedings delays the settlement of the dispute. Parties are often unsure what are the key issues in dispute or the major areas of disagreement until the Conciliation Conference. The Law Council's view is reinforced by other commentators who have noted that the Form 7 is particularly inadequate when an application is made to set aside orders altering property interests, pursuant to s 79A, because the respondent has no information as to the grounds relied on. Similar problems occur with applications for leave to issue property proceedings out of time pursuant to s 44(4).<sup>1700</sup>

11.63 The Law Council noted that even the simplified forms require a level of literacy that some litigants in person do not have.<sup>1701</sup> A submission to the Commission expressed a similar view more robustly.

Whilst you have a largely uneducated population due to illiteracy endemic in our education system simplified procedures cannot reduce costs because people cannot understand even the simplified procedures. These procedures have been designed by the legal profession for the legal profession, not the lay person. Why cannot you people get real and go spend time in the real world.<sup>1702</sup>

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<sup>1698</sup>Based on 199 applicants and 108 respondents for whom this information could be quantified: T-Matruglio & G McAllister, *Family Court Empirical Report Part One*, 60-61.

<sup>1699</sup>*id.* 63.

<sup>1700</sup>*LCA Submission 197*.

<sup>1701</sup>*ibid.*

<sup>1702</sup>*FLRAA Submission 157*.



11.64 In consultations, some practitioners made specific criticisms of the forms and other documentation required as cumbersome and of limited use. Some practitioners claimed that simplification had led to an increase in the amount of paperwork needed.<sup>1703</sup> Certainly the use of standard, Family Court forms is a new enterprise for legal publishers supplying regularly updated software packages devoted to such forms.<sup>1704</sup> Updating the packages is expensive for community organisations.<sup>1705</sup>

The forms try to cover too many bases. The Form 17 [statement of financial circumstances] requires detailed information that is not necessary and takes a long time to complete. Where financial circumstances are in a state of flux, which is the case for most clients, such circumstances can be better explained in an affidavit. Also, the form focuses on the details, for example, how much the client spends on a haircut, which has the effect of bogging the dispute down in details.

. . . Most forms filed prehearing are never used again (for example, Form 17A [Conciliation Conference particulars]). Some aren't used by the Court at all – for example the Outline of Case document, which can take up to a day to prepare in complex cases, is not looked at by the judges in Parramatta registry. In contrast, a judge in the Sydney registry may delay the hearing if there is a minor defect in the Outline of Case.<sup>1706</sup>

Depending on whether you are an applicant or respondent, the simplified forms may or may not be useful. For example, as an applicant, the new Form 7 is much better than the old one because it is easy to complete and does not require too much detail. However, if you are the respondent or a separate representative, the form tells you nothing about why the applicant has applied for these orders or any other issues that are in dispute.<sup>1707</sup>

Both by telephone and in person we regularly assist women with completion of family law documents. This highlights the difficulties women experience with the system. A simple example is the difficulty with framing consent orders acceptable to the Court. Even with, for example, the revised Form 4 ['Application for divorce'] applications, women are uncertain as to the correct completion of forms and the procedure to [be] followed. The need could perhaps be identified as a need to have a personal verbal explanation addressing their particular inquiry . . . Whilst the forms are simpler to understand and complete, litigants in person still appear to have difficulty where their matter does not fall within the normal process. For example, where the other party cannot be located in a divorce application. Also,

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<sup>1703</sup>Family proceedings working group *Consultation* Sydney 10 April 1999; Family law practitioners *Consultation* Sydney 25 August 1999; National Legal Aid *Submission* 217.

<sup>1704</sup>For example 'Family Court Forms that work – without the hassles' and other advertising material for Bing! Software Pty Ltd Brisbane December 1998.

<sup>1705</sup>FLRAA *Submission* 157.

<sup>1706</sup>Family law practitioner *Consultation* Sydney 25 August 1999. Note a new version of the Form 17A has now been produced: see para 11.58.

<sup>1707</sup>*ibid.* Similar comments were offered by the Law Society of NSW Family Law Committee *Consultation* Sydney 22 September 1998.

litigants in person often do not use acceptable wording in consent orders and the orders are rejected on this basis.<sup>1708</sup>

Even though the forms themselves have simplified procedures, there is still a general lack of knowledge within the community as to what is actually involved. We are constantly amazed to find that many people lack a rudimentary knowledge of just how to fill in forms and in some cases, do not know how to refer to a dictionary to explain words they do not understand.<sup>1709</sup>

The current method of initiating Family proceedings by forms does cost less than the previous system of pleadings. . . These forms do not indicate the matters at issue. They certainly do not enable the parties to prepare for trial, knowing what is at issue. The advantage of the forms is that they are relatively straight forward and simple to complete and allow people to commence their own proceedings without necessarily engaging a lawyer. During the first Directions Hearing the parties should become aware of what the issues are.

In relation to financial matters, however, the complexity of the Form 17 [statement of financial circumstances] perhaps offsets the simplicity of the Form 7. . . The Form 17 is difficult for parties, particularly unrepresented parties, to comprehend. A short Form 17 for people with little or no income and assets should be available . . .

The Outline of Case Document is very detailed and time consuming to complete. A simplified version, setting out the documents on which a party relies, a chronology and brief outline of the case would be less costly to the parties and of as much assistance to the Court as the full version.<sup>1710</sup>

An example of the Court's bureaucratisation is that practitioners and staff refer to the form number rather than the function the form is meant to serve. For example, saying 'a Form 8' instead of 'an application for interim orders.'<sup>1711</sup>

11.65 The Evaluation Committee received some comments that counselling sessions took longer after the change to the Simplified Procedures, with counsellors getting details of the case from the parties during the session.<sup>1712</sup> In submissions to the Evaluation Committee, practitioners criticised the abolition of pleadings and the unavailability of discovery early in proceedings, as 'the two major hurdles to the simplified procedures achieving their objectives'.<sup>1713</sup>

11.66 In consultations conducted by the Commission, while some approved of the format of the present 'Outline of Case' document and considered it an example of

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<sup>1708</sup>.WLRC *Submission 153*.

<sup>1709</sup>.FLRAA *Submission 157*.

<sup>1710</sup>.LANSW *Submission 242*.

<sup>1711</sup>.Family Court judges *Consultation Sydney 23 September 1998*.

<sup>1712</sup>.Family Court of Australia *Report to the Chief Justice of the Evaluation of Simplified Procedures Committee August 1997* Family Court Sydney 1997, 30.

<sup>1713</sup>.*ibid.*

what good counsel should routinely do to prepare for a hearing,<sup>1714</sup> several critical comments were made about the Evaluation Committee's proposed changes to the document. The first concerned the introduction of another new document for parties to file — 'reform fatigue' has set in for many practitioners.<sup>1715</sup> Secondly, practitioners and others stated that many judges currently do not look at the 'Outline of Case' document<sup>1716</sup> — producing a more elaborate document may simply increase preparation time and costs for the parties, for no useful purpose. Thirdly, it was said that, like the current forms, the proposed forms would not necessarily produce information that is needed to resolve the dispute.<sup>1717</sup> The proposed reorganisation of the forms needs to address these problems.

11.67 The Family Court has also developed a pro forma affidavit for use with the application for interim orders (Form 8) in children's matters.<sup>1718</sup> This development was greeted with approval by the Law Council, which also suggested the Family Court develop pro forma affidavits in property applications and maintenance orders; and pro forma children's orders.<sup>1719</sup> Other commentators have expressed less favourable views.<sup>1720</sup>

Although the pro-forma Affidavit ensures that the basic facts are addressed by all litigants, most practitioners find it difficult, within the format of that document, to set out the complexities and context of many interim parenting matters. The result is that many practitioners annex a long narrative to the pro-forma Affidavit, making for a lengthy and quite cumbersome document.<sup>1721</sup>

**Proposal 11.1.** The Family Court of Australia should revise the initiating process document to include an indication of the issues in dispute. In doing so, the Court should consult extensively with members of the legal profession, including representatives of the Law Council of Australia, legal aid commissions and community legal centres working in family law. The Court should ensure that the forms it produces are adaptable to an appropriate range of individual cases.

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<sup>1714</sup>Family Court staff *Consultation* Sydney 1 April 1999.

<sup>1715</sup>Family law practitioner *Consultation* Sydney 25 August 1998; Law Society of NSW Family Law Committee *Consultation* Sydney 22 September 1998; Family Court judge *Consultation* Sydney 23-April 1999.

<sup>1716</sup>Family law practitioners *Consultation* Sydney 14 September 1998; Family law practitioner *Consultation* Sydney 25 August 1998; Law Society of NSW *Consultation* Sydney 22 September 1998.

<sup>1717</sup>Family law practitioner *Consultation* Sydney 25 August 1998; and see comments quoted at para 11.64.

<sup>1718</sup>Family Court of Australia *Practice Direction 1 of 98: Applications for interim parenting orders* (PD 98/1).

<sup>1719</sup>LCA *Submission* 197.

<sup>1720</sup>Some practitioners have claimed that parties are confused by the appearance of the form, and use the affidavit as a 'substitute for pleadings': M Hauptmann speaking at session on 'Preparing a defended case for hearing in the Family Court' *Comment* A State Legal Conference '99 Sydney 31-March 1999.

<sup>1721</sup>A Wearne 'Recent developments in parenting cases' *Paper* College of Law Sydney March 1999.

***Information-gathering in financial matters: Discovery and subpoenas***

11.68 Discovery, subpoenas and requests for specific questions may be negotiated between the parties informally at any time,<sup>1722</sup> but are not available as of right until after the conciliation conference. Parties seeking any of these processes at an earlier time must obtain leave from the Court, which can only be granted if there are 'special circumstances' to justify it.<sup>1723</sup> Registrars consulted by the Commission stated that they do grant leave for early discovery if needed, but only in rare circumstances.<sup>1724</sup> However, informal discovery agreed between the parties is said to be widely used among experienced practitioners, and encouraged by registrars.<sup>1725</sup>

11.69 The decision to restrict availability of these procedures was made by the Simplification Committee, taking the view that 'discovery is a very costly procedure and in some cases can be oppressive'.<sup>1726</sup> There is no doubt, as noted by the Evaluation Committee, that subpoenas and discovery are used for oppressive reasons in some cases.<sup>1727</sup>

11.70 At or before the conciliation conference, parties should have produced or filed documents outlining their financial circumstances, including

- Form 17 'Financial statement'
- Valuations and documents relating to financial matters under O 24 r 2(2)(A)
- Form 17A 'Conciliation conference particulars'<sup>1728</sup> and
- Tax returns and other statements under O 17 r 4.

11.71 The Simplification Committee stated that in most cases, parties will already be aware of the relevant information before commencing litigation, as most parties have a simple financial situation and have 'an idea of the . . . income, assets and liabilities of the other'.<sup>1729</sup> However, sometimes, even in simple property cases, one party is unaware of the full financial dealings of the other. In cases where the

<sup>1722</sup>Family Law Rules O 20 r 1.

<sup>1723</sup>id O 20 r 2.

<sup>1724</sup>Family Court staff *Consultation* Sydney 17 September 1998; Family Court staff *Consultation* Sydney 14 September 1998.

<sup>1725</sup>LCA *Submission* 197.

<sup>1726</sup>Family Court of Australia *Report of the Simplification of Procedures Committee January 1993* AGPS Canberra 1993, 50. However, the Commission was told that discovery is not necessarily expensive in family law proceedings: Law Society of SA *Consultation* Adelaide 2 September 1997.

<sup>1727</sup>In one case reported to the Commission, a litigant was said to have subpoenaed various members of his former wife's family seeking financial and banking records going back a number of years in what appeared to be a 'fishing expedition', without having to demonstrate any potential relevance to his case: Confidential *Submission* 268. See also I Serisier 'Preparing a defended case for hearing in the Family Court' *Paper A State Legal Conference '99* Sydney 31 March 1999.

<sup>1728</sup>A revised version of this form is now being used: See note 126.

<sup>1729</sup>Family Court of Australia *Report to the Chief Justice of the Evaluation of Simplified Procedures Committee August 1997* Family Court Sydney 1997, 28–29.

financial situation involves elements such as ownership of a business, shares, or a family trust, it cannot be assumed that the parties are familiar with each others' financial affairs. The Women's Legal Resources Centre (WLRC) noted

It is the experience of WLRC that many women do not have access to financial information at the time of separation. Many have not had access to financial information during the course of the marriage... In these situations women cannot be advised to settle or even to participate in PDR processes as they may be compromising their entitlements. Forced disclosure by way of Statements of Financial Circumstances including company accounts, family trusts and so on is a vital procedure provided by the Court.<sup>1730</sup>

11.72 Submissions, consultations and the Evaluation Committee's report, indicated that compliance with the above requirements is poor. It is said to be common for a conciliation conference to proceed without information completed or available.<sup>1731</sup> The Evaluation Committee itself found, via a survey of five major registries, that in 40% of cases both parties fully complied with the Rules; and in 21% of cases, no party complied. In 35% of cases, parties produced the Form 17A at the conciliation conference, rather than prior to it as required by the Rules.<sup>1732</sup>

11.73 The restriction of the discovery process caused disquiet among practitioners. Some stated that it would be negligent for lawyers to recommend settlement without formal discovery.<sup>1733</sup> The Law Council argued that in this regard Simplified Procedures actually cause delay since

the lack of information 'upfront' causes parties to resolve their disputes *by agreement* further down the litigation pathway than would otherwise be the case or to resolve on the basis of inadequate or inaccurate information, increasing the likelihood of an application to have the orders set aside when the full picture emerges later.<sup>1734</sup>

11.74 The comments made in submissions and by practitioners whose cases were surveyed by the Commission, consistently reported that a lack of reliable information available to the parties and the Court rendered conciliation conferences less effective.<sup>1735</sup>

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<sup>1730</sup>.WLRC *Submission 153*.

<sup>1731</sup>.The Law Council's submission noted that requirements in relation to documents that must be produced, set out in Order 17, are rarely adhered to or enforced; and there are also problems with proper completion of Form 17: LCA *Submission 197*.

<sup>1732</sup>.Family Court of Australia *Report to the Chief Justice of the Evaluation of Simplified Procedures Committee August 1997* Family Court Sydney 1997, 44-45.

<sup>1733</sup>.id 41; Law Society of NSW Family Law Committee *Consultation* Sydney 22 September 1999.

<sup>1734</sup>.LCA *Submission 197*.

<sup>1735</sup>.Practitioners commenting to the Commission in consultations, submissions and surveys, universally made this complaint where the issue of discovery and conciliation conferences arose.

If there were proper disclosure, practitioners would be prepared for the Order 24 conference and would expect to be able to settle.<sup>1736</sup>

Matters could settle earlier if affidavits were filed between first mention date and Conciliation Conference—so that the parties' legal reps would acquaint themselves with financial history and parties' allegations, strengths and weakness of each other's cases so as not be "ambushed" after pre hearing conference by other parties. Registrars [should] acquaint themselves with the files earlier than conference date—so often registrars claim "that they have only just read the files". If affidavits were before the registrars then they could understand the whole of the issues and proactively participate in reaching a resolution. Often they know very little about the case and they attempt to "crash" a settlement without knowing the issues.<sup>1737</sup> Lack of subpoena power before Conciliation Conference adds to the cost. In many cases, one party doesn't trust the other (surprise surprise!). Accordingly, they don't accept what the other says is their bank balance, super balance etc, until these details have been independently supplied. Although parties are required to supply documents to the other side, these are often not complied with (again surprise surprise!). Now, all these cases are forced to go to conciliation stage. The legal profession needn't think about ways to increase their costs when family court (sic) continually brings in directions forcing this upon the parties.<sup>1738</sup>

[I]t is a disadvantage not be able to issue subpoena before Conciliation Conferences and means that often the conference is a waste of time, if practitioners can't advise whether a proposal for settlement is fair or not.<sup>1739</sup>

In my view discovery being unavailable before the Conciliation Conference is often a factor which hinders settlement. This is especially so in property matters.<sup>1740</sup>

[T]he registrar who conducted the case conference was faced with widely conflicting allegations of [a] general nature and the conference was simply a waste of time for everyone involved. The old forms of application and response provided some detail both to the parties and the registrar conducting a case conference. The form 17A does not entirely overcome these difficulties . . . In the example I have mentioned, my own client will have incurred quite substantial costs up to and including the Conciliation Conference, still without basic matters of fact having been determined with reasonable accuracy.<sup>1741</sup>

People won't settle prior to the Conciliation Conference because they have no opportunity before this to test the other party's claims regarding their financial position. In the past, Conciliation Conferences succeeded in getting settlements

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<sup>1736</sup>.Law Society of NSW Family Law Committee *Consultation* Sydney 22 September 1999.

<sup>1737</sup>.Family Court file survey response 82 (solicitor for applicant).

<sup>1738</sup>.Family Court file survey response 220 (solicitor for applicant).

<sup>1739</sup>.Family Court file survey response 833 (solicitor for respondent).

<sup>1740</sup>.Family Court file survey response 837 (solicitor for applicant).

<sup>1741</sup>.Family Court file survey response 312 (solicitor for respondent).

because there was full disclosure prior to the conference. The reason for its success has been taken away without consultation with the profession.<sup>1742</sup>

The Law Council believes that settlements are being delayed until discovery can occur. Anecdotal reports suggest that it is not uncommon for a basic settlement to be agreed upon prior to or at the Conciliation Conference, but not finalised until discovery has occurred verifying the required details. Anecdotal reports also suggest that there has been an increase in the number of parties settling under pressure, without proper information because of the delay in discovery. This usually disadvantages the party who had limited understanding and control of the parties' finances during the marriage.<sup>1743</sup>

Limiting discovery until after the Conciliation Conference encourages the parties to agree to informal discovery. Solicitors are, however, inherently and justifiably cautious about advising clients to settle without formal discovery or some verification, on oath, that the information provided is a full and frank disclosure . . . It appears, anecdotally, that some settlements are being delayed until a second Conciliation Conference, following formal disclosure . . . In cases where it is clear, in advance, that the matter will not settle at the Conciliation Conference without formal discovery, the discretion ought to be exercised to allow discovery to occur prior to the Conciliation Conference so that the resources of the Court and the parties are not wasted.<sup>1744</sup>

11.75 The Evaluation Committee acknowledged overwhelming dissatisfaction with the change to the procedures for discovery. To test the impact of the changes, the Evaluation Committee surveyed firms with substantial practices in the Melbourne, Brisbane and Parramatta registries on the results of their 10 most recent conciliation conferences. The Evaluation Committee noted that the reasons put forward by the practitioners for failing to settle particular cases varied according to the area

Of the 52 Melbourne cases which did not resolve all financial issues at a conference (12 of which settled later) practitioners attributed the failure to resolve to the lack of discovery in 26 cases and to personal issues unique to the case or client in 23 cases. Practitioners in the Parramatta Registry attributed only 2 failures to resolve to the lack of discovery, but 19 (out of a potential 45) to personal issues, and Brisbane practitioners attributed 26 failures to the lack of discovery and 13 to personal issues.<sup>1745</sup>

11.76 The Evaluation Committee recommended, rather than amending order 20 and order 28 that the documents required to be filed for a conciliation conference be altered, as noted at paragraph 11.57, and in relation to discovery, that

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<sup>1742</sup> Law Society of NSW Family Law Committee *Consultation* Sydney 22 September 1998.

<sup>1743</sup> LCA *Submission* 197.

<sup>1744</sup> LANSW *Submission* 242.

<sup>1745</sup> Family Court of Australia *Report to the Chief Justice of the Evaluation of Simplified Procedures Committee August 1997* Family Court Sydney 1997, 49.

a registrar at a directions hearing should have a discretion to direct the production of specific documents and information if satisfied that this would materially improve the capacity of one or all parties to negotiate on an informed basis.<sup>1746</sup>

This recommendation has not been implemented to date.<sup>1747</sup>

11.77 In a submission to the Commission, the Law Council recommended that formal discovery should be more widely available prior to the conciliation conference and directions for preliminary discovery could be made at directions hearings. Other suggestions included greater use of limited, 'tailor-made' discovery; the use of discovery conferences; and a limited timeframe for complying with discovery orders.<sup>1748</sup>

In property matters, there being no pleadings, the questions in the proceedings are seldom properly identified. Thus discovery is requested in relation to 'all matters in question in the proceedings' which often seem to be taken as requiring the listing of documents in relation to any financial transaction in the history of a marriage.

This breadth of discovery cannot be permitted.

A request for discovery should nominate the issue(s) to which it relates e.g. inheritance received from husband's mother during cohabitation – bank statements, letters from solicitors for the executor.

There should be power in the Court to award costs if discovery is sought in respect of matters not genuinely in issue and/or to disallow requests on that basis.<sup>1749</sup>

11.78 In the Commission's view, the practices concerning discovery and subpoenas should be modified. The current practice appears to be directed to problem cases where the processes are abused, but also limits the availability of necessary and appropriate information in other cases. Problem cases are not 'cured', simply delayed, by the restriction of the availability of discovery and subpoenas until after the conciliation conference. The lower settlement rate in conciliation conferences in the Commission's sample, as compared with rates found by the Court in earlier years, appears to confirm that such PDR processes can only work effectively if the parties are informed on major issues.

11.79 The Commission's proposal aims to ensure discovery and subpoenas are available to the extent required for informed negotiation, without a rigid restriction as to timing. As noted, the Commission accepts that where parties comply fully with the disclosure requirements, there will be no need for formal discovery in most

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<sup>1746</sup>.id 42–43.

<sup>1747</sup>.The discretion of registrars or the court to make discovery generally or in relation to specific documents under O 20 r 4 continues to be subject to O 20 r 2: such directions are not available prior to the conciliation conference unless 'special circumstances' apply.

<sup>1748</sup>.LCA *Submission* 197.

<sup>1749</sup>.B Warnick *Submission* 147.



cases. Where formal discovery or subpoenas are needed, it will normally be possible to limit their scope to particular documents, categories of documents, or narrowly defined issues. The Commission's proposal regarding consistent management of cases by particular registrars should allow appropriate and timely directions concerning discovery to be made (See Proposal 11.8).

**Proposal 11.2.** The Family Court of Australia should revise the Family Law Rules to give registrars or the Court discretion to grant discovery and subpoenas as a routine matter prior to the conciliation conference, where this will assist the parties to conciliate on an informed basis.

**Proposal 11.3.** The Family Court of Australia should revise the Family Law Rules to provide that registrars or the Court, in considering whether to grant discovery, consider whether discovery of particular documents or categories of documents should be permitted, or whether discovery should be granted in stages without the need to verify lists of documents.

**Proposal 11.4.** The Family Law Rules should provide that, in considering whether to grant discovery or subpoenas, the registrar or the Court should have regard to the issues in the case, the resources and circumstances of the parties, the likely cost of the discovery or subpoenas to the parties and third parties concerned, and the likely effect of making the order on the parties; including their ability to negotiate on an informed basis.

#### *Information gathering in children's matters: Family reports*<sup>1750</sup>

11.80 The Family Law Act and rules make provision for the Court to order family reports to be prepared by a family and child counsellor or welfare officer in any proceedings where the care, welfare and development of a child under 18 is relevant.<sup>1751</sup> In particular, the Court may order a family report to satisfy itself that proper arrangements have been made for the care, welfare and development of children before a decree nisi is made absolute,<sup>1752</sup> or before making residence or specific issues orders in favour of a person not the parent of the child.<sup>1753</sup> The report may be received in evidence in any proceedings under the Family Law Act;<sup>1754</sup> copies may be released to the parties or their lawyers, or the child representative; and the Court may permit oral examination of the person making

<sup>1750</sup> See ch 13 for discussion on the Court's use of expert evidence and social science research.

<sup>1751</sup> Family Law Act s 62G; Family Law Rules O 25 r 5.

<sup>1752</sup> Family Law Act s 55A(2).

<sup>1753</sup> Family Law Act s 65G(2)(a)(ii). In these circumstances the Court is required to order a family report unless satisfied there are circumstances that make it appropriate to make the residence or specific issues orders without it. Family Law Act s 65G(2)(b).

<sup>1754</sup> Family Law Act s 62G (8); Family Law Rules O 25 r 5 (2)(b).

the report.<sup>1755</sup> The counsellor or welfare officer who prepared the report is generally required to be available for cross-examination on it.<sup>1756</sup>

11.81 Under the Court's case management guidelines, the standard time for ordering family reports is after the prehearing conference.<sup>1757</sup> Prehearing conferences are usually held no earlier than 14 weeks before a hearing is scheduled,<sup>1758</sup> so that the family report is normally produced at the earliest three weeks prior to the hearing. The reports can be ordered earlier in cases where there are exceptional circumstances or allegations of child abuse.<sup>1759</sup> Early ordering does not necessarily result in earlier delivery of the report, but may allow a more detailed investigation, and more time for preparation of the report.

11.82 In the Commission's study, family reports were sought in 85 of the sampled files (13% of all children's matters) and in 45 cases listed for hearing (47% of listed children's matters), reflecting the focus on ordering family reports for the purposes of a final hearing. Of these reports, 49 (58%) were ordered prior to the prehearing conference – as noted, this is allowable under the case management guidelines only in exceptional circumstances or in cases where child abuse is alleged. Of the listed cases receiving family reports, 23 settled following listing (51%, compared with 57% of all listed cases) and 22 received a judgment.<sup>1760</sup>

11.83 To prepare family reports, counsellors hold interviews with the parties and the children, and observe the interaction between the children and the parties.<sup>1761</sup> The report makes factual findings regarding these issues, and where practicable includes recommendations in relation to the issues of residence, contact or specific issues before the Court. Justice Warnick, discussing the framework within family reports are produced, noted

Often enough a report will deal with an issue without making any attempt to determine the truth of matters in context and will make alternative recommendations, depending upon the trial judge's conclusions as to the truth. As well, parties attending for a family report do so in the knowledge that any claims

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<sup>1755</sup> Family Law Rules O 25 r 5(2).

<sup>1756</sup> I Coleman 'Children and the law: The Family Court experience and the criminal law experience' *Paper NSW Bar Association Seminar Sydney 9 September 1996*, 12.

<sup>1757</sup> Family Court case management guidelines 8.14.

<sup>1758</sup> The time standard under the guidelines for standard track child matters is for the prehearing conference to be held 14 weeks after filing and for the hearing to be held 14 weeks after the prehearing conference: Family Court case management guidelines 15.8.

<sup>1759</sup> Family Court case management guidelines para 2.13.

<sup>1760</sup> T Matruglio & G McAllister, Family Court Empirical Report Part One, 55, 58.

<sup>1761</sup> The method of preparing family reports, and issues taken into account, are discussed in C Brown 'Custody evaluations: Presenting the evidence to Court' (1995) 33(4) *Family and Conciliation Courts Review* 446.

they make to the counsellor will be compared with those they make in material before the Court and subject to examination.<sup>1762</sup>

11.84 Substantial resources may be required for the preparation of family reports, although the Commission has been unable to obtain exact figures. A Family Court judge has told the Commission that reports may take up to 12 hours to prepare.<sup>1763</sup> In a submission to the Attorney-General in 1997, the Court stated that the average report involves five to eight times more counsellor hours than a conciliation conference.<sup>1764</sup> In a submission, the Court stated that reports may require 20 hours or more of a counsellor's time.<sup>1765</sup> Further correspondence from the Court states that family reports can take 'up to (24–40) hours' to prepare, and that this is at least 12 times more counsellor hours than a conciliation counselling intervention.<sup>1766</sup>

11.85 Whereas the comments received by the Commission in relation to conciliation counselling stressed that parties were being ordered to counselling in circumstances where it was not beneficial,<sup>1767</sup> the majority of comments relating to family reports expressed the view that reports were not being ordered in all the cases where they would be helpful or necessary.<sup>1768</sup>

There should be a change in case management guidelines which allow for a report to be prepared and released when matter is in a pre trial list. It is the writer's view that the production of a report helps early resolution of most cases where a report has been prepared.<sup>1769</sup>

Family reports should be available for the assistance of the parties in resolving their disputes early in the proceedings. At the present time in South Australia the private psychosocial professionals are being utilised to provide timely and efficient reports as this service is not being provided by the Family Court counselling service. This 'local use' of early family reports greatly assists in dispute resolution. It also allows the parties to focus on the needs of children early in the proceedings before litigation becomes entrenched and protracted.<sup>1770</sup>

### *Functions of family reports*

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<sup>1762</sup>.B Warnick *Submission 147*.

<sup>1763</sup>.Family Court judge *Consultation*, Sydney 22 July 1999.

<sup>1764</sup>.Family Court of Australia *Response of the Family Court of Australia to the Attorney-General's Department paper on 'Primary dispute resolution services in family law'* Family Court of Australia 1997, 27. This was possibly a misprint for a conciliation counselling session, since conciliation conferences are normally held in property matters.

<sup>1765</sup>.Family Court of Australia *Submission 264*.

<sup>1766</sup>.Family Court of Australia *Correspondence* 21 July 1999.

<sup>1767</sup>.See para 11.149.

<sup>1768</sup>.Family law practitioner *Consultation* Sydney 30 March 1999; Family Court judges *Consultation* Sydney 23 September 1998; Law Society of SA *Consultation* Adelaide 2 September 1997; CIBB *Submission 170*.

<sup>1769</sup>.Family Court file survey response 430 (solicitor for applicant).

<sup>1770</sup>.CIBB *Submission 170*.

11.86 An article by Dr Carole Brown, noting that reports 'must address three audiences simultaneously',<sup>1771</sup> described the roles of reporting to the Court, providing a document for use in evidence and independent information to parents

On reading the evaluation report, the parents should not be surprised by its contents. Just as important as writing the report is giving parents feedback about what conclusions and recommendations will be made. This can be linked with educating them about any professional assistance that may be required for their children after the hearing . . .

In presenting the data, the evaluator will be mindful of the impact of his or her assessment on the parents and the children and will be concerned that the protective functions that assist the children and the parents to adjust to the divorce are preserved. The lawyers, on the other hand, will be concerned with the biases, ambiguities or imprecise language, and the validity of the evidence.<sup>1772</sup>

11.87 The case management guidelines, under which reports are generally ordered late in the process, direct family reports primarily to provide independent information to the Court at a final hearing. The central utility of the report for the Court is provision of information to judges, to identify the issues and provide independent information on the facts in issue. Justice Warnick has noted

without 'running a trial' and generally after interviews measured in terms of hours, rather than days, most family reports show a great deal of perception and far more often than not, any recommendations in the report accord with the views which I have reached after a trial over some time, often days.<sup>1773</sup>

11.88 In the child abuse cases analysed by Professor Thea Brown, the recommendations or findings in family reports were followed by judges in 76% of the cases for which they were prepared.<sup>1774</sup> This study stated

the most frequent reference of the judge and judicial registrar in reasons for the decision, apart from the individual's circumstance and credibility, was to the findings of the family report.<sup>1775</sup>

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<sup>1771</sup>.C Brown 'Custody evaluations: Presenting the data to Court' (1995) 33(4) *Family and Conciliation Courts Review* 446, 459, quoting D Skafta *Child custody evaluations* Sage Beverley Hills CA 1985, 200.

<sup>1772</sup>.C Brown 'Custody evaluations: Presenting the data to Court' (1995) 33(4) *Family and Conciliation Courts Review* 446, 457, 459.

<sup>1773</sup>.B Warnick *Submission* 147.

<sup>1774</sup>.T Brown et al 'Mandated co-ordination: aspects of the interface between the Family Court of Australia and the Victorian State Child Protection Service' *Paper Children at Risk: Now and in the Future* Australian Association of Family Lawyers and Conciliators Seminar Melbourne April 1997, 15.

<sup>1775</sup>.T Brown et al 'Mandated co-ordination: aspects of the interface between the Family Court of Australia and the Victorian State Child Protection Service' *Paper Children at Risk: Now and in the Future* Australian Association of Family Lawyers and Conciliators Seminar Melbourne April 1997. See also ALRC 84 para 16.36.

11.89 The report *Seen and heard: Children in the legal process* recommended that, wherever the issues in contention are appropriately within the areas of expertise of court counsellors, family reports should be used to provide the court with evidence about family functioning and dynamics and the wishes of the children concerned.<sup>1776</sup>

11.90 Comments to the Commission emphasised the importance of the family report as a source of independent information on the children. Where one or both parties are unrepresented, it may be the only source of such information.<sup>1777</sup>

11.91 Family reports are also said to assist in settlement, because they can clarify issues and facts of concern to the parties.<sup>1778</sup> As noted, applications concerning children's issues only are the most likely to proceed to a hearing.<sup>1779</sup>

11.92 Professor Brown's research on the management of cases involving allegations of child abuse found that reports by the Court counsellors and by State child protection services were helpful in resolving these cases. Family reports were ordered in 34% of the cases, and in 39% of these were accepted as the basis of settlement.<sup>1780</sup> Reports by the State child protection service resulted in resolution in 86% of the cases where they clearly substantiated abuse—18% of the sample cases—because the parties agreed to accept the report.<sup>1781</sup>

11.93 A sub-study investigating the high number of sampled cases settling at prehearing conferences found that where a family report and a child representative were ordered, 50% of the child abuse cases attending a prehearing conference were settled at this stage.<sup>1782</sup> The study recommended that in child abuse cases, where the family was not already known to the State child protection system, a family report should be ordered at an initial hearing at the outset.<sup>1783</sup>

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<sup>1776</sup>.ALRC 84 para 16.43. It should be noted that information on children's wishes can be obtained by other means if not required to be admitted into evidence. children may attend counselling, and parents can be told of their wishes either directly or through the counsellor: Family Court of Australia *Correspondence* 21 July 1999.

<sup>1777</sup>.Family Court judges *Consultation* Sydney 23 September 1999; Family law practitioner *Consultation* Sydney 30 March 1999; LCA *Submission* 197.

<sup>1778</sup>.Family Court judges *Consultation* Sydney 23 September 1998; Family law practitioners *Consultation* Sydney 14 September 1998; Law Society of SA *Consultation* Adelaide 2 September 1997; Family Court judges *Consultation* Adelaide 2 September 1997.

<sup>1779</sup>.See para 11.34.

<sup>1780</sup>.In a further 25% of cases receiving family reports, the reports were explicitly accepted by the judge.

<sup>1781</sup>.T Brown et al *Violence in families – Report Number One: The management of child abuse allegations in custody and access disputes before the Family Court of Australia* The Family Violence and Family Court Research Program Monash University Clayton & the Australian Catholic University Canberra February 1998, 92.

<sup>1782</sup>.*ibid.*

<sup>1783</sup>.*id.* 93.

***Family reports in interim matters***

11.94 The Full Court has held that interim hearings should promote stability in the child's life pending a full hearing of all relevant issues. Stability will normally be achieved by a child continuing to live in the environment in which he or she is settled, unless there are strong or overriding contraindications such as convincing proof that this course would endanger the child's welfare.<sup>1784</sup> Delays in hearing times, or perceptions of such delays, have increased the number and importance of interim hearings in the Family Court, as discussed at para 11.177–11.178.

11.95 As noted, comments made to the Commission stressed the need for the independent information provided by a family report. Some saw a particular need to have the reports available for interim hearings.<sup>1785</sup> A report on the effects of the *Family Law Reform Act 1995* (Cth) noted that orders relating to residence and contact made at interim hearings were frequently overturned at final hearings.<sup>1786</sup> A reason for this was said to be the lack of information available to the Court at the time of the interim hearing.<sup>1787</sup>

Many of the solicitors who were interviewed agreed that demonstrating a risk of 'serious violence' at an interim hearing is 'dependent on your affidavit drafting ability'. As the allegations are not tested at an interim hearing, and there is no Court-ordered Family Report to assist the decision maker, solicitors said the assessment of whether contact poses a risk to the child will often hinge on the nature, and the details, of the allegations raised in the resident parent's affidavit material.<sup>1788</sup>

Judges/judicial registrars generally noted that their principal concern in interim hearings is to ensure the safety of the parent and child, and to obtain enough material to assess the allegations, the effect of the violence upon the resident parent, and the quality of the relationship between the child and contact parent. Most noted that such allegations present a 'real problem' at the interim stage, where there is little material upon which to base those assessments. Like the solicitors, judges admitted that the affidavit material is 'pretty important' at an interim hearing. One judge . . . indicated his dissatisfaction with these hearings by saying,

'What we do in interim matters is highly artificial. We present it as a judicial exercise but it's more artful dodging'.

11.96 In relation to applications for relocation, the authors noted

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<sup>1784</sup>. *Cowling and Cowling* [1998] Fam CA 19; *Cilento and Cilento* (1980) FLC 90–847.

<sup>1785</sup>. LCA Submission 197; Family Court judges Consultation Adelaide 10 September 1997; Law Society of SA Consultation Adelaide 2 September 1997; R Neill Submission 118.

<sup>1786</sup>. H Rhoades et al Interim Report *The Family Law Reform Act 1995: Can changing legislation change legal culture, legal practice and community expectations?* University of Sydney & Family Court of Australia Sydney April 1999 60–61.

<sup>1787</sup>.id 40; 55.

<sup>1788</sup>.id 55.

The presence of a report about the children, and the ability to test the parties' evidence, appeared to have been the factors which made the difference between the outcomes of final hearings and interim applications where violence was an issue.<sup>1789</sup>

11.97 The Family Court, reviewing interim hearings in 143 cases handled by a child's representative, found that 17 cases settled or dropped out without receiving a family report. In the 126 cases in which a report was ordered, 22 settled by the next interim hearing; 45 settled before the prehearing conference, 46 (in 4 of which the report was prepared following the prehearing conference) settled before trial, and 13 went to trial. The Court concluded that

it is appropriate to have a Family Report as early as possible only in certain cases such as where there are sexual abuse allegations or where they [sic] may be a risk to children. Otherwise the normal options for dispute resolution should be pursued first.<sup>1790</sup>

11.98 In consultations Family Court judges and others made reference to the past practice of ordering what were known as 'duty reports'<sup>1791</sup> or 'short reports' early in proceedings. A full family report would then be ordered if the matter went to trial. Some support for reintroduction of such a system was expressed in the submissions and consultations, to ensure that at least some information is available,<sup>1792</sup> although it was noted that such a practice would have the potential to duplicate work.<sup>1793</sup> However, a study on the effects of the *Family Law Reform Act 1995* (Cth) noted concerns about the reliability of duty reports, and a preference for (written) interim family reports.<sup>1794</sup>

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<sup>1789</sup>.id 66.

<sup>1790</sup>.Family Court of Australia *Submission 264*.

<sup>1791</sup>.'Duty reports' are ordered for cases in judges' duty lists, and the counsellor makes an oral report at an adjourned hearing shortly afterwards. Typically the reports are made on the basis of a single interview with the parties, usually on the same day the report is ordered. The *Report of the Working Party on the Review of the Family Court* recommended that the practice of ordering these reports be discontinued unless exceptional circumstances applied: Family Court of Australia *Correspondence 21 July 1999*.

<sup>1792</sup>.Family law practitioner *Consultation Sydney 25 August 1998*; Family Court judges *Consultation Adelaide 10 September 1997*; Law Society of SA *Consultation Adelaide 2 September 1997*.

<sup>1793</sup>.Family Court judge *Correspondence 12 February 1999*. The Commission understands that, in South Australia, the Legal Services Commission, family law related experts and legal practitioners have considered the development of a new protocol for obtaining early interviews and reports. This protocol would involve a less detailed report being available earlier in the decision making process. A broader based family assessment would still be required if cases went to final hearing: *Consultation Adelaide 10 September 1997*. The English Law Commission's court welfare officer 'checklist' may provide a template for such abbreviated reports: Law Commission *Family Law: Review of child law guardianship and custody* HMSO London 1988, para 3.17. (Law Com No. 172).

<sup>1794</sup>.H Rhoades et al *Interim Report The Family Law Reform Act 1995: Can changing legislation change legal culture, legal practice and community expectations?* University of Sydney & Family Court of Australia Sydney April 1999, 57.

[M]any of the solicitors who were interviewed said they would like to see a return to the use of interim family reports in cases involving allegations of violence and abuse.<sup>1795</sup>

One judge commented that she is often assisted by the counsellor's assessment of the mother's level of fear and ability to cope with contact. Several judges remarked that they would like to see a return to the use of interim Family Reports to assist with determinations of contact.<sup>1796</sup>

### *Issues in reform of practice on family reports*

11.99 The Family Court has noted that there is growing support for reports to be provided earlier, for reasons including the following.

- Long waiting times for hearings, resulting in interim arrangements remaining in place for extended periods of time.
- An increasing proportion of self-represented parties; in such cases an expert's report assists by providing an objective assessment of the family and the likely impact of particular parenting options.
- Evidence supports the view that family reports lead to settlement, particularly in 'special sittings' designed to deal with large numbers of matters in the Pending Cases List,<sup>1797</sup> and in cases where violence or child abuse are alleged and conciliation is regarded as therefore unlikely to succeed.<sup>1798</sup>

11.100 The Court has stated that, while there are benefits in having family reports available earlier in proceedings, routine ordering of very early family reports would not be likely to be more successful in promoting settlements than processes such as conciliation and mediation, adding

[w]hile there are sound reasons for receiving reports earlier in particular cases, it is difficult to find evidence for the general success of the family report as an early settlement mechanism.<sup>1799</sup>

The Court expressed concern that, while the availability of reports assists settlement, 'what is not clear is the extent to which such settlements are coerced'.<sup>1800</sup>

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<sup>1795</sup>.id 56.

<sup>1796</sup>.id 57.

<sup>1797</sup>.The Court described a 'special sittings' held in Brisbane in late 1998 in which the availability of Family Reports in children's matters and valuations in property matters prior to the callover was regarded as a significant factor in the resolution of 36% of matters called over. There were savings to the parties and to the Court from this process, as affidavits were not required, and a significant number of sitting days were not required: Family Court of Australia *Submission 264*.

<sup>1798</sup>.Family Court of Australia *Submission 264*.

<sup>1799</sup>.ibid.



11.101 Some members of the Court have expressed concern that if family reports were made available early for purposes of settlement a problem could arise with 'counsellor decided outcomes', or counsellors may feel pressure to make their statements more guarded if they perceive that legal aid funding may depend on what they say.<sup>1801</sup> These concerns are to some extent allayed where the preparation of the report involves the parties as described above,<sup>1802</sup> and the parties receiving the report understand its status. A further concern is that the preparation of family reports is intrusive for families, and the production of multiple or updated reports could constitute systems abuse of children.<sup>1803</sup>

11.102 The Commission understands that the Court's Future Directions Committee is considering the viability of earlier family reports targeted at key issues.<sup>1804</sup>

11.103 The Commission accepts that preparation of family reports can be distressing for families, can require significant resources, and is not justified in all children's matters; and that a marked increase in the production of family reports could reduce the availability of conciliation counselling.<sup>1805</sup> On evidence presented to the Commission the provision of family reports is sufficiently important to warrant such a shift in resources.

11.104 The Commission's view is that case management guidelines should be amended to allow earlier ordering of the reports in cases where there is a particular need for independent information on matters in issue. Factors indicating a need for such reports are

- presence of unrepresented parties
- allegations of child abuse and
- allegations of family violence (especially where supported by evidence such as a State domestic violence order or criminal convictions).

11.105 The Commission does not recommend ordering family reports specifically for the purposes of settlement.

<sup>1800</sup>Family Court of Australia *Correspondence* 21 July 1999.

<sup>1801</sup>Family Court staff *Consultation* Sydney 30 June 1999; Family Court of Australia *Correspondence* 21 July 1999.

<sup>1802</sup>See passage quoted at para 11.86.

<sup>1803</sup>Family Court of Australia *Correspondence* 21 July 1999.

<sup>1804</sup>Family Court staff *Consultations* 1 April 1999 and 18 May 1999; Family Court of Australia *Correspondence* 21 July 1999.

<sup>1805</sup>The Commission received some comments that the resources of the Court are already insufficient to provide the counselling and mediation services needed to ensure the Court's emphasis on PDR is maintained: Family Court judges *Consultation* Sydney 23 September 1998; CIBB *Submission* 170, and that resources are insufficient to provide an appropriate number of family reports in some registries: LANSW *Submission* 242.

11.106 It has been the practice that a person providing conciliation counselling does not prepare a family report in that case, to ensure that the report is not tainted by impressions received in conciliation counselling subject to privilege.

Conciliation is a privileged process, it is conducted according to the professional practices of counselling, and relies on the active participation of the parents for its success. the Family Report, on the other hand, is prepared at the direction of a judicial officer for presentation to court to be considered with the other evidence in the proceedings. . . . The process of preparing the report is not 'owned' by the clients, the clients are subjected to an intrusive assessment, not because they have requested it, but by order of the court, and the report is necessarily written in a manner that addresses the evidentiary requirements of the court and not as an exercise in communication with clients.<sup>1806</sup>

11.107 In the course of family litigation, parties may have to explain their case to a number of different registrars, judicial registrars, and lawyers. The continual repetition of case facts and issues can be frustrating and upsetting.<sup>1807</sup> The use of the conciliation counsellor may be a way to reduce this distress, as discussed by an English court welfare officer in response to a recent survey

I do not agree that the people doing conciliation should not go on to prepare the report. I wonder if the learned judge who stated this realises:  
(1) how much time and emotion are involved in conciliation, all of which is wasted when it has to be started again by another person;  
(2) that the parties concerned already under strain are subject to yet another scrutiny by an unknown person when old wounds are re-opened and all to no purpose other than to meet a legal requirement.  
When the parties are asked if they object to one of the conciliators preparing the report and confidentiality is explained, I have never known them to be other than relieved that they do not have to face yet another stranger, and the answer has been an unequivocal 'No'.<sup>1808</sup>

11.108 The Commission considers that in most cases, provided the parties consent, the gain in efficiency and in reduced stress to the parties from using the same counsellor for report and counselling outweighs the risk of a breach of confidence. The Commission considers that professionally trained counsellors should be capable of distinguishing between information provided under privilege in confidential counselling and the information that may be used in preparing a family report.

**Proposal 11.5.** The Family Court of Australia should review its practice on the ordering of family reports prior to the prehearing conference. The

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<sup>1806</sup>Family Court of Australia *Correspondence* 21 July 1999.

<sup>1807</sup>APS *Submission* 163.

<sup>1808</sup>D Price 'Mediation and welfare reports' [1996] *Family Law* 573, 574. In England and Wales, 'welfare reports' (ordered under s 7 of the *Children Act 1989* (UK)) are prepared by court welfare officers: Home Office *National standards for probation service Family Court welfare work* Home Office London 1995, para 3.5. Note that the circumstances are not directly comparable, as family litigation in the UK does not have the same emphasis on pre-filing PDR as the Australian system.

Court should ensure that family reports are prioritised for cases where both parties are unrepresented and where there are allegations of family violence or child abuse.

**Proposal 11.6.** The Family Court of Australia should use the same counsellor to conciliate and prepare the family report for trial if this last is required. The parties should be asked if they agree to the counsellor conducting the conciliation counselling and preparing the family reports, and unless there is strong objection from one or both parties, the same counsellor should undertake both tasks. The legislation should be amended accordingly.

## Differential case management

In our view, . . . it is not necessarily the ‘system’ itself that requires review, but rather the implementation of that system. It seems that the system currently embodies the essential components which should enable it to meet the needs of each individual litigant, but it continues to be implemented in a way that means some individual litigants are pushed down particular avenues which do not suit their circumstances.<sup>1809</sup>

11.109 Case management systems for family law disputes need to make effective use of judicial time and expertise and facilitate screening of cases — to make what has been described as ‘the most important case assessment — that the case is routine’.<sup>1810</sup> The screening process should ensure that Court processes are appropriate to the case and effective in advancing case preparation or facilitating case resolution.

11.110 The principles to guide case management are set out in a practice direction, which states

- (a) The Court has a responsibility and duty to those who approach it to facilitate the just resolution of disputes in a manner which is prompt and economical.
- (b) To do justice and to ensure promptness and economy . . . the court accepts responsibility for the pace of proceedings rather than allowing the parties or their legal representatives to undertake that responsibility.
- (c) The court’s intervention, whether by conciliation, mediation or judicial determination, must be timely from the perspective of the needs of clients. The disposition should be consistent with the circumstances of the individual case . . .
- (d) Parties are entitled to a judicial determination. However, the resolution of disputes achieved by informed parties through negotiation has the advantage that negotiated agreements can be achieved at an early stage and may better meet the needs of the parties . . .

<sup>1809</sup>WLS Brisbane *Submission 218*.

<sup>1810</sup>Utah Family Court Task Force *Final report to the Utah Judicial Council Administrative Office of the Courts Salt Lake City 1994*, 4.

- (e) Whilst accepting its responsibility for the pace of proceedings, the court is also committed to ensuring uniform accessibility to its services through standardised practices and procedure. This will mean that particular practices arising out of local legal culture must give way to uniform practices.
- (f) The court, having regard to the interests of individual parties and, where relevant, the interests of their children, must set realistic time limits for case preparation, monitor the progress of cases against those limits, be prepared to enforce those time limits, and ensure credibility for all scheduled events, including the listing of contested hearings.
- (g) . . . Prospective parties and parties to proceedings should be informed [that the overwhelming majority of cases are resolved by agreement between the parties] and encouraged to believe that settlement of their matter is the likely outcome.<sup>1811</sup>

11.111 The Family Court uses a system of Differential Case Management (DCM), under which cases are allocated to different tracks which largely determine the steps to be taken in the interlocutory process.<sup>1812</sup> The timetable, set events and number of cases listed in the tracks used in the Family Court are set out in the table below. Allocation to case tracks, or 'streaming', broadly distinguishes between cases requiring minimal and those needing additional court intervention to clarify or resolve case issues.

11.112 Cases are allocated to the direct, standard or complex tracks at the first directions hearing (six weeks after filing)<sup>1813</sup> by a registrar, primarily on the estimates provided by the parties of the number of days' hearing time that will ultimately be required to determine the case.<sup>1814</sup> If the estimate is up to one day of hearing time, the case is allocated to the direct track; if one to five days, the standard track; if more than five days, the complex track.<sup>1815</sup> Standard and direct tracks follow a set series of processes, and are managed by registrars; complex track cases are set to receive individual management by a judge. The Commission has been told that in practice, at least in some registries, complex track cases receive little individual attention but follow the same set of steps as Standard Track cases.<sup>1816</sup>

11.113 The basic elements of the Court's case management system to be evaluated here are the means by which cases are allocated to a track, the factors taken into account in the allocation, and the means by which cases are managed in a track.

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<sup>1811</sup>Family Court case management guidelines 1 'Statement of case management principles'.

<sup>1812</sup>See also para 9.27-9.32.

<sup>1813</sup>According to the Family Court, only one registry meets this standard – the mean waiting time varies from six weeks in Adelaide to 10.2 weeks in Brisbane: Family Court of Australia *Annual report 1997-98*, 32 table 3.1.

<sup>1814</sup>Family Court case management guidelines ch 6.

<sup>1815</sup>See Family Court case management guidelines ch 15; Family Court of Australia 'Simplified Procedures' *Unpublished Family Court Canberra 1995*, 4.

<sup>1816</sup>Family law practitioners *Consultation* Sydney 30 March 1999; Family Court judge *Consultation* Sydney 23 April 1999.

**Table 11.11: Case tracks in the Family Court of Australia<sup>1817</sup>**

	<b>Direct Track</b>	<b>Standard Track (children)</b>	<b>Standard Track (financial)</b>	<b>Complex Track</b>
Pattern of interlocutory events	Up to 5 events	Up to 5 events (some > once)	Up to 5 events (some > once)	No set pattern
Timeframe for completion (cases going to hearing)	6 months	9 months	10 months	12 months
No of cases as shown in Family Court Annual report 1997-98	1382	3035 (both financial & children's matters)		114

*Allocation of cases to tracks*

11.114 The allocation of cases to tracks, like the pattern of case types, is not uniform across Family Court registries. In 1997-98, in the four largest registries, Sydney and Melbourne had comparatively high proportions of standard track matters (over 70%) and the lowest proportion of direct track cases (under 25%) while in Parramatta (63% standard track and 36% direct track cases) and Brisbane (53% standard track and 42% direct track cases) the proportions were more even. All registries had few cases in the complex track, ranging from no cases (Hobart and Townsville) to 7% in Adelaide.<sup>1818</sup>

11.115 The purpose of differential case management in the Family Court, as noted above, is to facilitate dispute resolution without the need for a hearing. A major difficulty with allocating cases to different processes is, as described to the Commission, is as follows.

The heart of the matter is that we don't know why people settle, why they settle appropriately, or when they settle or at what stage. We know the profile of the cases, but not which are the cases that will or won't settle.<sup>1819</sup>

11.116 While streaming to tracks or processes may be difficult, judges, practitioners and registrars were confident they could generally predict cases which required adjudication.<sup>1820</sup>

11.117 A scheme in the Parramatta Registry called Integrated Client Services (ICS) has attempted, among other things, to improve the process of initial assessment of

<sup>1817</sup>. Derived from Family Court of Australia *Simplified Procedures* Family Court of Australia Canberra 1995; Family Court of Australia *Annual report 1997-98*, 68.

<sup>1818</sup>. *ibid.* These figures only relate to the cases listed for hearing; figures are not provided for the cases that were settled before this stage.

<sup>1819</sup>. Family Court staff *Consultation* Sydney 1 April 1999.

<sup>1820</sup>. Family Court of Australia *Consultation* Sydney 17 September 1998; Family law practitioner *Consultation* Sydney 26 August 1998; Family Court judges *Consultation* Sydney 23 September 1998 LNicholls *Submission 244*; WLS Brisbane *Submission 218*.

cases and allocation to case tracks. Key features of ICS are: a single contact point is provided within the court and by telephone for parties to get information, file documents, and make appointments; and a case conference is held immediately after the postfiling information session.<sup>1821</sup> The main purpose of the case conference is to explore the possibility of settlement and to consider what PDR procedures might be useful. The conference is managed by a registrar and counsellor, and may be resource intensive. The case conference provides an opportunity to assist the parties to identify issues, settle the case or make directions to enable it to progress, and is also a means of deciding on the appropriate case track.<sup>1822</sup> The Court has conducted reviews of the scheme, which gave it qualified support,<sup>1823</sup> and has said it intends to introduce this system in all registries.<sup>1824</sup> The Commission received few comments<sup>1825</sup> relating to this scheme and is unable to evaluate its effectiveness.

11.118 The means of allocating cases to particular tracks and setting standardised processes for cases in the direct and standard tracks was criticised to the Commission. While determination of a case by a judge is stated to be 'a last resort',<sup>1826</sup> allocation to a case management track is on the basis of an estimate of the likely requirements of the case at a hearing. This was said to be an unreliable indicator of the complexity of the issues or the appropriate dispute resolution processes. The Commission was told that certain cases regarded as 'complex'<sup>1827</sup> can be identified in advance as unlikely to settle, and therefore should receive an expeditious hearing rather than referral to extensive PDR. It is often impossible to be sure at the outset how many days might be needed for a hearing, or whether one is likely to be needed; and such estimates will often change in the interlocutory process, as further issues arise and the parties' relationship alters.

### *Management of cases*

11.119 Registrars preside over most of the formal events of case management.<sup>1828</sup> They do not have continuing responsibility for particular cases.<sup>1829</sup> Judges have

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<sup>1821</sup> Family Court of Australia *Annual reports 1996–8*.

<sup>1822</sup> Comments were made to the Commission that the 30 minute case conference procedure may not be sufficient to identify the presence of issues such as domestic violence and where this is present, identify the most appropriate processes and ensure the safety of those affected by it; also that it does not provide for those cases in which urgent matters will arise after the initial assessment. The group expressed concern that the case conference is largely a means for directing parties into tracks, which may still fail to address the needs of specific cases: WLS Brisbane *Submission 218*.

<sup>1823</sup> Kearney McKenzie & Associates Final Report 'Evaluation of Integrated Client Services Pilot' *Unpublished Family Court of Australia Canberra March 1998*.

<sup>1824</sup> Family Court of Australia *Annual report 1997–98*, 21.

<sup>1825</sup> Some practitioners said the scheme increased parties' costs: Law Society of NSW *Submission 240*.

<sup>1826</sup> 'Service Charter' in Family Court of Australia *Annual report 1997–98*, 133.

<sup>1827</sup> See para 11.19–11.22.

<sup>1828</sup> The Court is entitled to delegate any or all of its powers, with certain exceptions, to registrars under Family Law Act s 37A. The Court has delegated a number of powers to make procedural and other orders under O 36A r 2 Family Law Rules and has delegated these and further powers to judicial registrars under O 36A r 3. A further category of registrars specialising in children's matters has

limited involvement in interlocutory case management, except in certain complex track cases.<sup>1830</sup>

11.120 Primary dispute resolution (PDR) is amalgamated into the Court's standard case management procedures. The Court may direct parties to attend counselling, and must do so before making final orders in disputed parenting cases.<sup>1831</sup> Case management guidelines therefore require parties to attend counselling in most children's matters, and allow referral of a matter to mediation with the consent of the parties.<sup>1832</sup>

11.121 Although the system is termed 'differential case management', most cases across the range are sent through virtually the same set of steps. This is the 'procedure tailored to the 95% of applications which will settle'.<sup>1833</sup> It is questionable whether a procedure to cover 95% of applications is 'tailored' in any meaningful way. In submissions and consultations with the Commission, practitioners criticised the Court's case management system as bureaucratic and rigid, with little scope for individual decisions on a case.<sup>1834</sup>

Under this tracking procedure cases are defined as standard, direct or complex and it is our view that these categories have no real impact on the procedures adopted for the resolution of matters.<sup>1835</sup>

11.122 The Law Council noted 'the perception of over servicing' deriving from 'the number of interlocutory processes and the degree of case management'.<sup>1836</sup>

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recently been created. Judicial registrars have the same immunity as judges and magistrates: Family Law Rules O 36A r 4. The Family Law Act provides that registrars are subject to the control of the Chief Judge and other judges and the Principal Registrar; and deputy registrars are in addition subject to the direction and control of registrars.

<sup>1829</sup>As a brief summary, the division of case management responsibilities within the Court is as follows. Registrars are responsible for the high volume work and most of the interlocutory case management, including directions hearings, subpoenas and discovery, and divorces. Deputy registrars, using powers delegated from the Chief Registrar, conduct conciliation conferences (for financial matters) and prehearing conferences, grant consent orders, do taxation of costs, and grant short service. Conciliation counselling (for children's cases) and other counselling, and family reports, are provided by counsellors. Judicial registrars make interim orders and have power to deal with urgent matters such as child abduction cases, make property orders up to a set limit, or with consent of the parties, and make contempt orders. Judges are mainly engaged in final hearings. The Court has recently delegated further powers to 'a new class' of registrars to make interim and other orders relating to children: Family Court of Australia *Correspondence* 7 August 1998.

<sup>1830</sup>As noted, even these cases do not necessarily receive individual management. See para 11.112.

<sup>1831</sup>See para 11.140-11.142.

<sup>1832</sup>Family Law Act s 19B.

<sup>1833</sup>Family Court of Australia *Report to the Chief Justice of the Evaluation of Simplified Procedures Committee August 1997* Family Court Sydney 1997, 1.

<sup>1834</sup>See para 11.133 and 11.149.

<sup>1835</sup>WLS Brisbane *Submission 218*.

<sup>1836</sup>LCA *Submission 197*.

The dilemma has always been and no doubt will continue to be that once proceedings are filed in the Family Court, apart from the streaming into the direct track, standard track and complex track, there is no ongoing analysis of the nature of the proceedings such that all cases are managed as if they will proceed to a hearing rather than as is the current position ninety five percent of matters settled..-<sup>1837</sup>

Now the Court must be involved at every stage and this has made the process less flexible. It seems the matters are fitted to the Court and not the Court to the matters.<sup>1838</sup>

Procedures are very bureaucratic. Even in urgent cases, to get an ex parte order you have to get past the filing clerk and the duty registrar, who sits at 2 pm. To get through the screening process I write on the form 'I insist on seeing a judge.'<sup>1839</sup>

Requiring a party to go to: information session, first directions hearing, Conciliation Conference, counselling (if ordered), pre-hearing conference – these cause enormous inconvenience and cost to a party. Simple solutions are ignored by the court. For example, why isn't an information session video available for parties to watch? Most parties take a day off work to attend court. Most are now saying that they will lose their jobs if they take more time off.<sup>1840</sup>

11.123 A major issue raised by many practitioners and parties is the lack of continuity in the management of cases. Members of the Court commented to the Commission that neither judges nor registrars feel they have control over cases under the current system.<sup>1841</sup> One commented that the current system 'is stressful for judges because they have limited control over the production line delivering cases to them'.<sup>1842</sup> Parties encounter a number of different Court officers presiding at successive appearances.

Every time you go to court there is a different judge. We have had the same judge a couple of times, but most of the time we have a different judge or magistrate, or registrar . . . If I had a judge who knew the history and knew what the girls had been through for the last three years and what I had been through for the last three years and all the rest of it, maybe [it] would have been easier for me . . . to get final orders and not just pending orders.<sup>1843</sup>

It . . . may be an advantage if the Judge who is to hear the matter were available for a pre-hearing conference with the parties and their solicitors approximately two

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<sup>1837</sup>.LANSW *Submission* 242.

<sup>1838</sup>.Family law practitioners *Consultation* Sydney 25 August 1998.

<sup>1839</sup>.Law Society of NSW Family Law Committee *Consultation* Sydney 22 September 1998.

<sup>1840</sup>.Family Court case file survey response 220 (solicitor for the applicant).

<sup>1841</sup>.Family Court judges *Consultation* Sydney 23 September 1998; Family Court staff *Consultation* Sydney 14 September 1998 & 1 April 1999.

<sup>1842</sup>.Family Court staff *Consultation* Sydney 1 April 1999.

<sup>1843</sup>.Confidential interview *Consultation* Macquarie Legal Centre Sydney 6 July 1998.



months prior to the hearing. At this time, the Judge could define his or her expectations and identify the issues which will be the subject of the hearing. It is possible that this may result in even more settlements and more efficient use of the court time once the matter actually comes before the Judge for hearing.<sup>1844</sup>

### *The Magellan project*

11.124 The Court is currently examining the feasibility and benefits of having particular complex cases managed by the same judge. Following the recommendations of Professor Brown,<sup>1845</sup> the 'Magellan project' has been established in the Melbourne registry.<sup>1846</sup> For this project a group of 100 cases involving allegations of child abuse are being managed by Justice Linda Dessau. The Court has secured the cooperation of Victoria Legal Aid and the Victorian child protection service to expedite provision of the necessary information and assistance. The Commission understands that preliminary information on this scheme shows encouraging results,<sup>1847</sup> but that implementation of such a regime in other registries will depend on the availability of resources within the Family Court and within the organisations whose cooperation is needed.<sup>1848</sup>

### *Number of case events*<sup>1849</sup>

11.125 On the Commission's data, the median number of interlocutory case events attended by parties in all applications for final orders (Form 7) was three.<sup>1850</sup> Of all applications for final orders, 23% experienced more than five case events. The maximum number of case events attended by cases in the sample was 28 for a property case; 41 for a children's case; and 18 for a children and property case.<sup>1851</sup> As the following table shows, cases involving children experienced more case events than those concerning property – related to the greater likelihood of children's matters proceeding to a hearing.

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<sup>1844</sup>.LANSW Submission 242.

<sup>1845</sup>.T Brown et al *Violence in families – Report Number One: The management of child abuse allegations in custody and access disputes before the Family Court of Australia* The Family Violence and Family Court Research Program Monash University Clayton & the Australian Catholic University Canberra February 1998.

<sup>1846</sup>.Family Court of Australia *Annual report 1997–98*, 23.

<sup>1847</sup>.Family Court staff *Consultation* Sydney 30 June 1999.

<sup>1848</sup>.Note that the relationship between the State services and the Family Court, and the profile of referred cases, varies from State to State. The Commission has been told that in NSW, the Department of Community Services generally takes responsibility for the cases involving older children and allegations of abuse, but younger children, aged 4–5, are more likely to be in the Family Court: Family law practitioner *Consultation* Sydney 30 March 1999.

<sup>1849</sup>.'Case events' are here defined as the formal interlocutory court events which parties or their representatives must attend: directions hearings, interim hearings, conciliation conferences, prehearing conferences and compliance conferences. These figures also include what are described as 'chambers conferences', at which consent orders are made, although parties do not attend these.

<sup>1850</sup>.T Matruglio & G McAllister, *Family Court Empirical Report Part One*, 37.

<sup>1851</sup>.Family Court survey datafile, additional Commission analysis.

**Table 11.12. Number of case events per case – Applications for final orders (Form 7)**<sup>1852</sup>

Case type	Median	90th percentile	No with 5 ≥ events	Total cases
Property	2	5	59 (16%)	367
Children	3	7	129 (29%)	449
Property & children	2	6	34 (21%)	163

11.126 The following table shows the number of each type of prehearing case event attended. Of the 492 cases attending at least one interim hearing, 300 (61%) attended at least two, and 101 (21%) attended more than three interim hearings in relation to that application for final orders (Form 7). Of the 884 cases attending at least one directions hearing, 18% attended more than three directions hearings in relation to that application. Of the 492 cases in the sample attending at least one interim hearing, half attended more than one, and 20% attended more than three interim hearings in relation to that application.<sup>1853</sup>

11.127 A prehearing conference is set to be held shortly before hearing to prepare the case for trial, yet 48 cases (23% of those attending at least one) attended two or more prehearing conferences. Compliance conferences are held, where there has been some indication that directions have not been complied with, 14 weeks before the hearing, as a final check that the matter is ready.<sup>1854</sup> Yet in the Commission's sample, 21 cases (33% of those attending at least one) attended two or more compliance conferences.

**Table 11.13. Number of each type of pre-hearing event attended – Applications for final orders (Form 7)**<sup>1855</sup>

No. of events	Chambers conferences (Consent orders)	Interim hearings	Directions hearings	Conciliation conferences	Prehearing conferences	Compliance conferences
1	222 (85.4%)	192 (39.0%)	359 (40.6%)	205 (82.0%)	168 (77.8%)	43 (67.2%)
2-3	31 (11.9%)	199 (40.5%)	364 (41.2%)	44 (17.6%)	45 (20.9%)	18 (28.1%)
4-6	-	77 (15.6%)	132 (14.9%)	1 (0.4%)	3 (1.4%)	3 (4.7%)
7-10	7 (2.7%)	15 (3.0%)	24 (2.7%)	-	-	-
≥ 11	-	9 (1.8%)	5 (0.6%)	-	-	-
Total	260 (100%)	492 (100%)	884 (100%)	250 (100%)	216 (100%)	64 (100%)

<sup>1852</sup> *ibid.*

<sup>1853</sup> See also discussion of interim hearings at para 11.174–11.178.

<sup>1854</sup> Family Court case management guidelines para 8.9; 6.21A(x),(xi); Family Court of Australia *Report to the Chief Justice of the Evaluation of Simplified Procedures Committee August 1997* Family Court Sydney 1997, 52.

<sup>1855</sup> Justice Research Centre Family Court Research Part One, 17.

11.128 These figures show that for the majority of cases in the sample, resolution was achieved without repeating the same case management processes. However, it is clear that in some cases, particular interlocutory or PDR processes were repeated a number of times. The pattern bears some extended study by the Court. Litigants and lawyers frequently spoke of their frustration at court processes,<sup>1856</sup> that the Court provided repeated opportunities for all other processes, except the one they wanted – determination by a judge. These figures give a sense of this issue. The pattern may indicate the level of intractable cases, it may be indicative of ineffective management by particular registrars, of poor compliance or party or lawyer-initiated events. Certainly, if such pattern is representative of the full Court caseload, it constitutes a considerable, and perhaps unnecessary, cost to the Court and parties.

11.129 In response to these figures, the Court stated to the Commission that there may be benefits of repeated prehearing events.

For example there are situations where it is more cost effective for court and litigant to repeat a low cost event such as a directions hearing and avoid the preparation costs for the next event if a matter might settle.<sup>1857</sup>

11.130 However, for those cases with intractable problems or seeking adjudication, the 'low cost' events may simply add to cumulative costs if the matter requires determination by a judge.

#### *Compliance with rules and directions*<sup>1858</sup>

The community in general and parties in particular need to see that the body which made the orders sees itself as having a stake in the outcome. At the level of enforcement, the community, through the Court, is a 'party' to proceedings. It can even be said that, at this point, its inherent stake is larger than that of the individual parties for the issues concern one particular matter, while the repercussions, over repeated instances, may be system-wide.<sup>1859</sup>

11.131 The Family Law Rules give judges and registrars considerable discretion to deal with breaches of procedure or failures to fulfil requirements within the set time frame. Registrars are entitled to refuse to accept a document for filing if it is not in the proper form, not properly executed, is filed in the wrong registry, or if it appears

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<sup>1856</sup>In the Commission's survey, while response numbers were small, 'frustration at the Court process' was one of the most common reasons given by unrepresented parties for settling their case (15 of 45 applicants, 33%, and 15 of 57 respondents, 26%). It was cited less often by lawyers for represented parties: 25 applicants' solicitors, 7%; 27 respondents' solicitors, 10%). See also comments quoted at para 11.122–11.123.

<sup>1857</sup>Family Court of Australia *Correspondence* 21 July 1999.

<sup>1858</sup>The issue of compliance with substantive orders has been discussed in detail elsewhere, and is not covered in this paper: ALRC 73; Family Law Council *Child contact orders: Enforcement and penalties* AGPS Canberra 1998.

<sup>1859</sup>N Pasqua *Submission* 132.

on its face to be an abuse of process or frivolous, scandalous or vexatious.<sup>1860</sup> The Court's rules give discretion to judges and registrars concerning directions hearings,<sup>1861</sup> and to amend documents at any time.<sup>1862</sup> They may dispense with compliance with any of the requirements set out in the rules,<sup>1863</sup> dismiss or stay proceedings, or make any other order, if a party does not do all the things required by the rules or by a court order.<sup>1864</sup>

11.132 While the general rule in the Family Court is that parties pay their own costs,<sup>1865</sup> the Court has the power to sanction failure to comply with the rules, or abusive use of the processes, through costs orders.<sup>1866</sup> However, for several reasons, including the restricted means of many Family Court litigants, and the need for a continuing working relationship between the parties, judges and registrars make few costs orders.<sup>1867</sup> Preclusionary sanctions are difficult to justify in many family law cases, especially in children's matters.

11.133 Many practitioners and parties complained to the Commission that the court did not effectively enforce compliance with rules and directions and was inconsistent in its approach to compliance.<sup>1868</sup> Practitioners have commented that some judges, registrars and counter staff will refuse to accept documents with even minor technical defects, while in other cases blatant disregard of directions or orders will not be sanctioned in any way. It was noted that rigid or inflexible enforcement of compliance with rules is unhelpful; directions, rules and procedures, and enforcement of them, should focus on what is necessary to progress the case, not on whether the rules have been followed to the letter.<sup>1869</sup> Some practitioners have

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<sup>1860</sup> Family Law Rules O 2 r 4A.

<sup>1861</sup> *id* O 9 r 2.

<sup>1862</sup> *id* O 9 r 6.

<sup>1863</sup> *id* O 4 r 1.

<sup>1864</sup> *id* O 4 r 1A.

<sup>1865</sup> *id* s 117(1).

<sup>1866</sup> In considering whether to make such orders, the Court must have regard to a number of factors, including the conduct of the parties in relation to the processes of the litigation, their compliance with previous orders of the Court, and their financial circumstances: Family Law Act s 117(2A).

<sup>1867</sup> One reason for this, according to a Family Court judge, is that parties rarely ask for costs orders. Family Court staff *Consultation* Sydney 14 September 1998. Another reason is that there is no point in making the orders if the party cannot pay: 'There is a strong relationship between unmeritorious applications and impecunious parties': Family Court staff *Consultation* Sydney 14 September 1998. 'Because it's a discretionary system there is no consistency of approach on costs orders. We need better application of the existing rules. But there's no clear answer': Law Society of NSW Family Law Committee *Consultation* Sydney 22 September 1998. Although figures are not available, practitioners, judges and registrars consulted by the Commission said that costs orders are rarely made by the Family Court: Family Court staff *Consultations* Sydney 14 September 1998; 17 September 1998 & 23 September 1998.

<sup>1868</sup> Family law practitioners *Consultation* Sydney 14 September 1998; Law Society of NSW *Consultation* Sydney 22 September 1998; I Russell *Submission* 237 and see comments quoted at para 11.136.

<sup>1869</sup> Family Court judge *Consultation* Sydney 23 April 1999; Law Society NSW *Submission* 240.

commented that registry staff are exacting on procedural matters, and see it as their duty to require strict compliance with the Court rules, but judges are more flexible.

Insecurity at the bottom level makes it difficult to deal with the Court.<sup>1870</sup>

11.134 Some judges, judicial registrars and registrars consulted expressed the view that practitioners consistently flout directions and rules regardless of steps taken to enforce them.<sup>1871</sup> It has been suggested that this is a result of the perception that registrars lack the authority of a judge; and for parties, the role of registrars is not clear.<sup>1872</sup>

Registrars are perceived not to have the experience or clout to tell litigants to settle or try something else other than litigation.<sup>1873</sup>

11.135 Some practitioners claimed that, rather than enforcing the existing rules, the Court reacts to perceived abuses of procedure by changing rules and procedures, developing increasingly rigid requirements, forcing practitioners and parties to conform to a preordained set of procedures and timelines.<sup>1874</sup> Some practitioners stated that the Court mistrusted practitioners, and was reluctant to trust lawyers' judgment of how to proceed with a case.<sup>1875</sup>

11.136 Litigants expressed bewilderment to the Commission that the Court did not sanction behaviour they saw as abusive, or actively enforce its own orders.

I was advised by my lawyer that in order to prevent a paper war only three affidavits were allowed. However, each time we had a scheduled hearing I would be given new affidavits, minutes prior to the hearing, necessitating a new hearing and contributing to escalating legal costs, for both parties. To date my legal bills have amounted to \$29 000. The value of the property settlement was \$120,000, and the amount of my former wife's legal bills must be at least \$30 000 . . . Where are the interests and welfare of the children in such a waste of money?<sup>1876</sup>

Parties often use legal proceedings as an occasion to harass or intimidate the other party through the use of protracted proceedings. A greater level of procedural intervention on the part of the court is needed to ensure that requests for additional affidavits or evidence, further calling of witnesses or additional documents are

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<sup>1870</sup>Family law practitioners *Consultation* Sydney 14 September 1998.

<sup>1871</sup>Family Court staff *Consultations* Sydney 17 September 1998, 1 April 1999 & 23 April 1999.

<sup>1872</sup>Family Proceedings Working Group *Meeting* Sydney 17 February 1997; Family Court judge *Consultation* 23 April 1999.

<sup>1873</sup>Family Court judges *Consultation* Sydney 23 September 1998.

<sup>1874</sup>Family law practitioners *Consultation* Sydney 14 September 1998; Law Society of NSW Family Law Committee *Consultation* Sydney 22 September 1998; Family Court judges Sydney *Consultation* 23-September 1998.

<sup>1875</sup>Family law practitioner *Consultation* Sydney 26 August 1998; Law Society of NSW *Consultation* 22-September 1998.

<sup>1876</sup>A Mclean *Submission* 131.

crucial to the decision making process and not simply an opportunity for one of the parties to demand further costs or cause harassment. Protracted proceedings are of particular concern in the current situation where legal aid is limited. Parties are drawing out proceedings in an attempt to force the other party to reach their legal aid cap so they can only proceed without legal representation or have to withdraw their case.<sup>1877</sup>

11.137 Similar comments were made in a survey conducted by the Court.<sup>1878</sup> A number of people suggested that the Court could improve compliance in procedural matters by providing for some form of individual case management by a judge or registrar allocated to the case.

The problems of unsanctioned abuse of process might be solved by having a hearing at the start by a judicial registrar to make interim orders, and have that registrar carry the case throughout, rather than the current system of having half a dozen different court officers involved in the succession of case steps.<sup>1879</sup>

Cases heard in the Family Court appear to be fragmented in that there is no continuity before the same person on the bench at each appearance, the person presiding has no knowledge of the nuances of the particular proceedings, has not read the material placed before them in affidavits, and conflicting rulings in the same matter can and have been handed down . . . Users of family law proceedings expect that their dispute will be heard in front of the same judicial registrar each time. Repeatedly we hear complaints that for each appearance there was a different person on the bench. Another regular complaint is that the person on the bench does not read the material which has been presented in the case. This fragmentation rankles many litigants . . . Surely a person can expect a matter to proceed and all evidence be heard with continuity, which does not currently occur.<sup>1880</sup>

11.138 Judges noted to the Commission, concerning non-compliance

It was much easier [to control cases] when there were duty judges, because then you could see what was happening or likely to happen and you could stop it boiling over by having a word to the parties. Now judges, the people with the skills and authority to do this, never see cases until it's too late.<sup>1881</sup>

11.139 The Commission has been told that the Court is currently considering a proposal to ensure that the same registrar has responsibility for the management of cases throughout the interlocutory stages.<sup>1882</sup> The Commission supports such a proposal.

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<sup>1877</sup>WLRG *Vic Submission* 162.

<sup>1878</sup>KPMG 'Survey of family client perceptions of service quality' *Unpublished* Family Court of Australia March 1999, 12.

<sup>1879</sup>Family law practitioners *Consultation* Sydney 14 September 1998.

<sup>1880</sup>Family Law Reform and Assistance Association Inc *Submission* 157.

<sup>1881</sup>Family Court judges *Consultation* Sydney 23 September 1998. The practice relating to duty lists varies from one registry to another: in some registries, duty lists are still operated.

<sup>1882</sup>Family Court staff *Consultation* Sydney 1 April 1999 & 18 May 1999.

## Primary dispute resolution<sup>1883</sup>

11.140 The term PDR, used in the Family Law Act,<sup>1884</sup> reflects the fact that 'for the vast majority of clients PDR is the first, and often the last, intervention process they encounter with the Family Court'<sup>1885</sup> and an integral part of the interlocutory process. Judges and legal practitioners are required to consider, from time to time, the possibility of reconciliation between the parties,<sup>1886</sup> and in some circumstances the Court must also advise or direct parties to attend family and child counselling.<sup>1887</sup> The Court, and legal practitioners, have a duty to consider whether or not to advise parties, or people contemplating instituting proceedings, about PDR methods.<sup>1888</sup> Parties are entitled to make use of the counselling facilities of the Court without first filing an application.<sup>1889</sup> Parties contemplating instituting proceedings must be provided with information about the Court's counselling service.<sup>1890</sup>

11.141 Parties can participate in counselling voluntarily before filing an application. After filing, the Court may order parties to attend conciliation counselling pursuant to s 62F of the Family Law Act. Statements made in the course of Family Court counselling are not admissible in court.<sup>1891</sup>

11.142 The Court must not make final orders in a disputed parenting case, or consent orders for residence or specific issues in favour of a parent of the child, unless the parties have attended counselling.<sup>1892</sup>

11.143 In 1997-98, the Family Court reported that its counselling service provided 59678 interviews in person in 25 297 cases (93% of them for conciliation counselling and 7% for family reports) and 34 116 telephone cases, crisis calls and intake assessments in 14 086 cases. These figures show that some parties are attending multiple counselling sessions: an average of 2.4 sessions per in-person case and 2.4 sessions per case for the other interventions. Of the cases receiving interviews in person, 40% voluntarily attended pre-filing counselling, 20% were referred to

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<sup>1883</sup> See also para 11.43-11.47 & 11.68-11.79.

<sup>1884</sup> Family Law Act s 14E.

<sup>1885</sup> A Filippello 'Simplifying forms and procedures to meet client needs' *Paper AIJA Court Administrators' Conference Sydney 21 August 1997*.

<sup>1886</sup> Family Law Act s 14C, 14D.

<sup>1887</sup> Family Law Act s 16A, 16B, 16C.

<sup>1888</sup> Family Law Act s 14F, 14G.

<sup>1889</sup> Family Law Act s 15.

<sup>1890</sup> Family Law Act s 17.

<sup>1891</sup> Family Law Act s 62F(8).

<sup>1892</sup> Family Law Act s 65F, s 65G.

counselling by the Court between filing and the first directions hearing, and 33% were referred after the first directions hearing.<sup>1893</sup>

11.144 In 1997–98, the Counselling Section opened files for 7 501 new counselling cases ordered by the Court at the first directions hearing.<sup>1894</sup> In cases where one party fears violence from the other party, alternative arrangements are made for counselling such as separate interviews, or teleconferences.<sup>1895</sup> These were held in 34% of new cases.<sup>1896</sup>

11.145 Unrepresented parties surveyed by the Commission were divided in their assessment of Court counselling. Of those who responded to the Commission's survey, 28 of the 45 applicants and 27 of the 57 respondents had attended counselling. Six applicants and 12 respondents indicated that it had assisted their understanding of the matters in dispute.<sup>1897</sup>

11.146 Family Court research completed in 1996 (using figures from 1994) found that 38% of clients attending counselling reported that they had reached full agreement on all of the important conflicts. The report noted this 'leaves a high proportion of clients with some outstanding issues unresolved'. Seventy two per cent said counselling had helped them reach a settlement and they could not have reached a more favourable solution by adjudication. Eighty two per cent of clients said that they would highly recommend counselling to a friend if the friend were going through a divorce. However, 77% of clients stated that they were afraid their spouse would not live up to all aspects of the agreement.<sup>1898</sup>

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<sup>1893</sup>Family Court of Australia *Annual report 1997–98*, 30. These figures apparently include figures for the Family Court of Western Australia.

<sup>1894</sup>id 72.

<sup>1895</sup>Family Court case management guidelines para 1.11. The JRC study noted that the proportion of separate counselling sessions held is commensurate with the proportion of cases in its sample attending counselling which had evidence of a history of violence and/or a current domestic violence order: R Hunter *Family law case profiles* JRC Sydney June 1999, para 407.

<sup>1896</sup>Family Court of Australia *Annual report 1997–98*, 72.

<sup>1897</sup>T Matruglio, Family Court Empirical Report Part Two, 34. Of the 322 solicitors representing applicants who responded to the survey, only six considered conciliation counselling to be the primary factor in the client's decision to settle or withdraw the case. Conciliation conferencing was credited in only one case, legal aid conferencing in two cases and mediation in one case. Of the 108 solicitors representing respondents who responded to the survey, only one identified legal aid conferencing and one conciliation conferencing as the primary factor in resolution. The majority of lawyers surveyed responded that settlement or withdrawal was attributable to legal advice and achievement of a reasonable settlement agreement.

<sup>1898</sup>J Gibson et al Research Report No. 15 *Client attitudes to the counselling service of the Family Court of Australia* Family Court of Australia Canberra 1996, 12–13. Recent research into conciliation counselling outcomes is currently being undertaken by the Court and may provide an updated statistical picture of these issues: C Brown et al 'Survey of outcomes after conciliation counselling' *forthcoming* Family Court of Australia Canberra (No. 98/01).



11.147 The Commission received a range of comments concerning the PDR services in the Family Court. As the comments quoted indicate, many comments were supportive of the quality of PDR services provided in the Court.

It is the view of National Legal Aid that traditional Court based Primary Dispute Resolution Services, such as Family Court counselling, are used effectively by the Courts, and contribute enormously to the very high settlement rate. . . . The Court's PDR services accelerate the whole dispute resolution process.<sup>1899</sup>

. . . It is our experience that a woman has almost no chance of reaching a mediated agreement at the Family Court or Legal Aid that denied the father contact with his children – no matter what she alleged in respect of violence and lack of care-giver experience before the separation. . . . However, the Court is bound to take violence into account and it is possible that safer orders would be made if more of these cases were judicially determined rather than mediated.<sup>1900</sup>

The deputy registrar effectively conducted a Conciliation Conference at the PHC [prehearing conference]; was very firm with the unrepresented husband and effected a reasonable settlement. It could not have been done without the DR's input.<sup>1901</sup>

A greater input by deputy registrars at Conciliation Conference level [would be helpful] particularly in simple matters. It is our experience that the more assertive the deputy registrar the more likely the matter will settle – as the deputy registrar represents the 'voice' of the court has in the eyes of the client considerable influence and can often highlight the stupidity of an argument preventing settlement.<sup>1902</sup>

The registrar on the first date was realistic and assisted both parties to be more realistic.<sup>1903</sup>

There is often a significant therapeutic part to counselling which should be recognised and encouraged. Counselling is of great assistance to parties who would otherwise have settled in any event. The counsellor can provide strategies to facilitate the continued non-adversarial approach and provide a point of contact where parties can go should a need arise.<sup>1904</sup>

The available data on PDR and case resolution are set out at para 11.43–11.47.

11.148 There has been considerable debate as to the appropriate criteria for allocating cases to PDR.<sup>1905</sup> Such issues were dealt with extensively in submissions to the Commission. It was noted that the existence of a power imbalance between

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<sup>1899</sup>.LANSW *Submission 242*.

<sup>1900</sup>.WLS Brisbane *Submission 218*. 'Mediation' in this submission appears to cover all forms of PDR.

<sup>1901</sup>.Family Court case file survey response 58 (solicitor for the applicant).

<sup>1902</sup>.Family Court case file survey response 1069 (solicitor for the applicant).

<sup>1903</sup>.Family Court case file survey response 357 (solicitor for the applicant).

<sup>1904</sup>.Law Society of NSW *Submission 240*.

<sup>1905</sup>.For a general discussion on referral criteria see ALRC IP 25 para 5.66–5.67.

the parties should not of itself render PDR inappropriate if the facilitator is skilled.<sup>1906</sup> Exclusion of categories of case from PDR may cause additional expense and difficulty for parties.<sup>1907</sup>

11.149 A number of comments to the Commission expressed concerns at what was described as 'the lack of real choice whether to engage in PDR processes'.<sup>1908</sup>

I do not believe there is much more room for diversion [to PDR] . . . There are a certain number of cases which require adjudication.<sup>1909</sup>

Although we accept some of the difficulties with adversarial proceedings, we believe that the tide has now turned the other way. In other words, there is such emphasis on diverting parties away from a litigious course, that this now occurs in instances where litigation and a judicial decision would have been appropriate.<sup>1910</sup>

Determining the suitability of a dispute for PDR cannot be achieved by the Court without considerable information about the parties and their dispute. Simplified Court documents do not contain sufficient information for the Court to determine suitability for PDR referral . . . Mandatory PDR referral without an intake enquiry will create a barrier to litigation based solutions and could in some cases, put at risk the best interests of parents and their children.<sup>1911</sup>

The assumption that PDR is better than litigation in every case is not necessarily correct. In some cases litigation may be the only alternative and can create a more lasting resolution than one which is negotiated or mediated. The issue is to identify these cases and expeditiously hear and determine them without expending resources on case management designed to produce a non litigious solution.<sup>1912</sup>

This [system] is just bullying clients into settling.<sup>1913</sup>

I had arranged on three occasions for both of us to undergo Court Counselling via phone link-up from my end. The Court then on one occasion Ordered us to undergo Court Counselling prior to any orders being made for contact, however, on all four occasions my ex-wife was unwilling to undergo such counselling . . . therefore counselling was unsuccessful in every sense . . . I believe Court Counselling, or Dispute Resolution, should be compulsory prior to court hearings

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<sup>1906</sup> FLPA of WA *Submission 81*; LANSW *Submission 228*; NCSMC *Submission 137*; WLRC *Submission 153*; WLRG *Submission 162*; WLS Brisbane *Submission 218*; CIBB *Submission 170*; National Legal Aid *Submission 217* and others.

<sup>1907</sup> NCYLC *Submission 140*; A Stitt *Submission 32*; National Legal Aid *Submission 217*.

<sup>1908</sup> WLS Brisbane *Submission 218*. Such comments were made by almost all practitioners or legal assistance bodies dealing with the Family Court of Australia.

<sup>1909</sup> P Parkinson *Submission 149*.

<sup>1910</sup> WLS Brisbane *Submission 218*.

<sup>1911</sup> FLPA of WA *Submission 181*.

<sup>1912</sup> LANSW *Submission 242*.

<sup>1913</sup> Law Society of NSW Family Law Committee *Consultation* Sydney 22 September 1998.

in the Family Court, however, how do you get someone, like my ex-wife, to talk and be fair at any such counselling?<sup>1914</sup>

Why waste the clients' time with more PDR [after one or two unsuccessful sessions]? They need a decision.<sup>1915</sup>

It was not a matter of, 'do you want mediation?' It was, 'This is what you do now.' We were not given a choice. Given a choice I would probably still have made and attended the first appointment. I can see the reasoning behind it, if you get two normal people in a room with someone that is trained for mediation I can see what benefits would flow from that, so under normal circumstances, it is probably right that the court does it.<sup>1916</sup>

If the applicant is too important to attend all counselling sessions why did his application even warrant consideration. As he wasted a lot of the court's time and mine and expense to drive to solicitor and child minding fees but didn't reimburse.<sup>1917</sup>

Feedback from many of the Court's clients has been that each time they attended a court hearing (even if it was only for procedural directions) they received a new referral to PDR. In practice this can mean that time and time again the same family sit through another 'first session' approach without appropriate follow-up. Effective PDR requires time, no matter how skilled the practitioner is. Rushed agreements without in-depth assessment and the opportunity of appropriate follow-up may not last.<sup>1918</sup>

It is the view of National Legal Aid that to a significant degree, parties are well able to [assess] their own suitability for PDR processes . . . It is considered desirable to make the referral to the Primary Dispute Resolution Process at the earliest opportunity in the Court process. If the Court were to undertake this, then there are numerous options available, and one would include a pre-filing information questionnaire to be completed by possibly counter staff at the Family Court, or by solicitors acting for parties filing applications, and this assessment could be based on a standard interview or questionnaire . . . It is considered possible to have a set of referral principles and standards, and suitability criteria developed, but again National Legal Aid would suggest that such a referral criteria should contain some flexibility in all cases, other than ones where there is a history which would suggest that a child is at risk of abuse or harm.<sup>1919</sup>

A balance must surely be found to meet the needs of those cases that can settle (and will always be conducive to settlement) and those that will not. This balance must incorporate a balance of funding, staffing and other resources to ensure that PDR

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<sup>1914</sup>J McCallum *Submission 187*.

<sup>1915</sup>Law Society of NSW Family Law Committee *Consultation* Sydney 22 September 1998.

<sup>1916</sup>Confidential interview *Consultation* Macquarie Legal Centre Sydney 6 July 1998. In this comment 'mediation' appears to refer to Family Court of Australia counselling.

<sup>1917</sup>Family Court file survey response 1130 (unrepresented respondent).

<sup>1918</sup>APS *Submission 163*.

<sup>1919</sup>National Legal Aid *Submission 217*.

processes are tailored to those matters that are able to respond to the processes, and to ensure that sufficient resources are available for trials to be likewise tailored. Effective trials must be made available to those parties that can not and will not resolve their disputes by any other means. . . we hold concerns that [the Court's current PDR procedures] primarily assist those litigants and disputes which would settle anyway. The Court does not employ sufficient assessment mechanisms to determine those cases for which PDR should not be an option (or even to determine which PDR process is best suited to a particular case).<sup>1920</sup>

For those parties for whom PDR processes are appropriate PDR processes should be encouraged through the provision of information that clearly explains the process, benefits and down sides of PDR processes. Applicants should be in a position to make informed decisions about whether or not they participate in PDR processes . . . Those parties whose circumstances render PDR processes as inappropriate should not be penalised or disadvantaged by virtue of their inability to participate in PDR processes.<sup>1921</sup>

11.150 It was suggested to the Commission that allocation to PDR should be arranged in consultation with parties or their lawyers, for example by asking them to tick boxes on the initiating forms to indicate whether they consider PDR would be helpful in their case or whether certain factors are present that could contraindicate use of PDR.<sup>1922</sup> Another suggestion was that parties and registrars cooperatively decide whether to concentrate on one or two resource intensive events such as conciliation conferences, or on a larger number of relatively less resource intensive case management events such as directions hearings.<sup>1923</sup>

There are special factors that will not allow people to settle. The Court behaves as if parties are there waiting to settle but prevented by practitioners – often it's the other way around.<sup>1924</sup>

The Court's hierarchy seems to see solicitors as the enemy wanting only to drag out cases to increase their billing. The Court does not give enough credence to solicitors' knowledge about their clients' readiness to settle.<sup>1925</sup>

11.151 There is wellpublicised debate over the appropriate location of counselling, in particular whether conciliation counselling should be courtbased.<sup>1926</sup> The

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<sup>1920</sup>.WLS Brisbane *Submission* 218.

<sup>1921</sup>.FCLC (Vic) Inc *Submission* 155.

<sup>1922</sup>.Family Court staff *Consultation* Sydney 14 September 1998.

<sup>1923</sup>.Family Court staff *Consultation* Sydney 1 April 1999.

<sup>1924</sup>.Family law practitioner *Consultation* Sydney 30 March 1999.

<sup>1925</sup>.Family law practitioner *Consultation* Sydney 26 August 1999.

<sup>1926</sup>.eg D Williams Attorney-General 'Primary Dispute Resolution in Family Law: Next Steps' *Press Release* 26 July 1998; Editorial 'Community or court dilemma' *Canberra Times* 29 July 1998, 8; P-Conroy 'Government pushes Family Court change' *Age* 13 March 1997, 6; P Germani 'Family Court under threat' *Sunday Telegraph* 13 October 1996, 162; M Denholm 'Family law more attached' *The Advertiser* 3 October 1996, 5.

Commission's terms of reference exclude consideration of this issue.<sup>1927</sup> A related issue, relevant to this inquiry, is not so much where counselling should be located as how it should be oriented.

11.152 The Commission considers that continuous oversight of cases by the same person, as described in proposal 11.8, will facilitate consideration of which form of PDR, if any, is appropriate to a particular case.

11.153 The Commission considers that many of the problems relating to case management in the Family Court arise from the lack of consistent overview of cases, and the related lack of attention to the particular needs and circumstances of the case. As noted, the Commission's empirical data shows that a minority of cases experience repeat case events and take significant time to be resolved. The longest case durations were for property cases resolved within the interlocutory process. This supports anecdotal information which suggests that parties in some cases are attending PDR and other processes which do not progress the case.<sup>1928</sup> Because there is no continuity in the counsellor or registrar assigned to a particular case, some parties are required to explain their circumstances a number of times to different court officers. Other related issues include claims that inconsistent decisions are made by successive court officers, and related to this, compliance with Court rules and directions is said to be poor and to be inconsistently sanctioned.

11.154 As noted, members of the Court have stated that it is impossible to predict at the outset whether, or at what point, a particular case will settle.<sup>1929</sup> On the Commission's proposal, outlined below, no such judgment is required.

11.155 The Commission considers that consistent overview of cases by the same registrar will enable assessments to be made during the interlocutory process which will ensure that effective intervention is promoted and the number of non-productive case events is minimised. The Commission considers that continuous oversight of a case by one Court officer with knowledge of previous appearances should promote consistent decisionmaking and appropriate enforcement of compliance with directions and rules. But, on the comments made to the Commission, the solution is not simply to ensure consistent registrar oversight and accountability with respect to particular cases. Registrars must be provided with 'clout'. This derives from close association with a particular judicial registrar and a particular judge. Registrars should be able to refer cases to a particular judicial registrar or judge for urgent or interim decisions or where compliance is identified as a continuing problem. Under this system, cases can be identified as 'complex' at any point in the process and managed appropriately.

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<sup>1927</sup> See p 7-8 for amended terms of reference.

<sup>1928</sup> See para 11.74, 11.149.

<sup>1929</sup> See para 11.115-11.116.

11.156 The Commission proposes earlier and priority cases for family reports. This will affect the resources available for counselling. As the Commission also recommends that counselling be provided as appropriate, not uniformly, in children's cases, the demands on counselling should not continue at the present high rate.

11.157 Under this proposal, case procedures should not noticeably change. The purpose of the proposal is to provide a means by which the Court can monitor the progress of routine cases, identify management issues as they emerge, and provide appropriate individual management where this is required. It is directed at more flexible, appropriate allocation of cases to case events, including to adjudication. It allows a better integration of PDR and adjudication, and more flexible utilisation of court counselling functions – whether family reports or counselling.

11.158 The Commission anticipates that judges, judicial registrars and registrars may work as a 'team' to manage, facilitate and/or adjudicate cases assigned as their 'docket'. This will allow the appropriate referral described above. It will introduce appropriate but rough equities in cases managed, resolved and adjudicated. It allows judges to make optimal and effective use of their time, to ameliorate the stress of 'back to back' hearings with some compliance hearings as might be required for intractable cases in the docket. It allows appropriate oversight of the management practices of registrars so that all cases presenting for hearing are in fact prepared for hearing. Judges indicated this was sometimes a problem in some cases under the present scheme.<sup>1930</sup> In cases where a registrar's cases are repeatedly under-prepared or there is repeat non-compliance, the judge can give advice or directions or the Court can arrange appropriate training.

11.159 For such a system to work effectively, the roles of some of the administrative and support staff will need to be reviewed. Judges may need individual support staff to assist them with administration of the cases needing close attention, such as is provided by associates.

**Proposal 11.7.** The Family Court of Australia should review the arrangements for primary dispute resolution to ensure that, once legislative requirements are satisfied, parties are referred to further PDR events only in appropriate cases: for example, where there is sufficient information to enable effective negotiation; and the parties are disposed to, or appear to have the capacity to settle their dispute. Allocation to PDR should wherever possible be arranged in consultation with parties and their lawyers.

**Proposal 11.8.** The Family Court of Australia should introduce a case management system in which each case is allocated to particular judges and registrars who sequentially take responsibility for the allocated cases from commencement to finalisation. This proposal is not intended to place

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<sup>1930</sup> Family Court judge *Consultation* Sydney 23 April 1999; Family Court judges *Consultation* Sydney 23 September 1998.

judges in charge of procedures such as directions hearings, or the daily details of case management. Under this proposal, registrars would retain responsibility for these matters.

**Proposal 11.9.** In order to implement the above system, the Family Court of Australia should review the roles of support staff such as secretaries and associates assigned to judges.

## Representation

### *Reasons for parties being unrepresented*

11.160 As noted, 41% of cases in the Commission's Family Court case file survey sample involved at least one unrepresented or partially represented party. Both parties were unrepresented, or partially represented, in 6% of the cases.<sup>1931</sup> It is widely stated that the number of unrepresented parties is increasing in the Family Court, although no statistical information confirming this is available.

11.161 Cuts to legal aid are widely assumed to have caused an increase in the number of unrepresented parties.<sup>1932</sup> Again, this is not demonstrated by empirical information. Other factors may have contributed to an increase in unrepresented parties in the Family Court, notably the introduction of the Simplified Procedures, and the activities of some fathers' groups.

11.162 In some areas, self-representation is regarded as appropriate: an increase in the number of unrepresented parties applying for divorce is regarded as a success by the Court.<sup>1933</sup> One of the reasons for introducing the simplified application for final orders in ancillary matters (Form 7) was that the form could 'be prepared and filed without legal assistance'.<sup>1934</sup> The presence of numbers of unrepresented parties in contested matters is regarded as more problematic. The Court has stated that an increase in unrepresented parties is causing serious problems for the court and its ability to administer justice.<sup>1935</sup> The Chief Justice has said

I do not believe this to be a jurisdiction where self-represented persons can do adequate justice to the case that they wish to present. Apart from the normal difficulties that such persons would have in an ordinary court, the nature of family

<sup>1931</sup> See para 11.39–11.42.

<sup>1932</sup> For example, A Nicholson 'The State of the Court' (1998) 13 (2) *Australian Family Lawyer* 9; B Smith 1998 *Study of the effects of legal aid cuts on the Family Court of Australia and its litigants* Family Court of Australia Sydney 1998 (Research Report No.19); D Murphy 'Legal aid cut sparks amateur lawyer rise' *Sydney Morning Herald* 17 September 1998, 5; M Kingston 'Legal aid cuts branded deadly' *Sydney Morning Herald* 22 April 1999.

<sup>1933</sup> Family Court of Australia *Annual report 1996–97*, 21.

<sup>1934</sup> *Report of the Simplification of Procedures Committee to the Chief Justice May 1994* Family Court Sydney 1994, 28.

<sup>1935</sup> Family Court of Australia *Annual report 1997–98*, 21.

law is such that it is almost impossible for persons to examine or cross-examine their former partner in an objective, effective or meaningful way.

In the area of case preparation, the court's carefully crafted case management guidelines become useless because of the inability of lay persons to prepare written material that satisfies the guidelines, and affidavits often contain a mish mash of irrelevant material - often of a scandalous nature.

Settlement negotiations become almost impossible as neither party has access to independent and skilled advice. This in turn prolongs litigation and further clogs the court lists.<sup>1936</sup>

11.163 The Commission surveyed unrepresented parties in the sampled cases on a number of issues, including their reasons for not having a lawyer. While the numbers responding to the survey were small, just over half of those replying stated that the main reason they did not have a lawyer was either their inability to pay for representation or the unavailability or cessation of legal aid.<sup>1937</sup> Of the remainder, a few dismissed their lawyer;<sup>1938</sup> did not feel representation was necessary; had agreed the issues; or for one, the lawyer refused to continue to act.

11.164 The following comments to the Commission illustrate reasons given for lack of representation.

Due to previous family court case where outcome was not as expected and 2 years later even with law firm agreeing to reduce costs I am still paying off the legal fees.<sup>1939</sup>

My solicitor made the application to legal aid I [was] refused on the grounds that it was believed that I would not make an effort to resolve the issue. I was most distraught about this comment and had made every effort to come to a reasonable resolution with the other party so I found I had to represent myself.<sup>1940</sup>

[I] thought it would be a simple procedure (as my ex has no contact) How wrong I was.<sup>1941</sup>

[I chose to proceed without a lawyer because of] the stalling tactics of solicitors, who I see very money & hr concentrated. It was when I had no [representative]

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<sup>1936</sup>.A Nicholson 'The state of the Court' (1998) 13(2) *Australian Family Lawyer* 9.

<sup>1937</sup>.In the survey, 27 applicants (56%) and 29 (54%) respondents stated they either ceased being represented or never were represented for these reasons. T Matruglio, Family Court Empirical Report Part Two, 28-29 Part C, table 2. Note that legal aid may be denied or may cease because of the operation of the merit test or because some issues have been settled and the remainder are not regarded as having merit, or involving a substantial matter in dispute.

<sup>1938</sup>.Four applicants and five respondents: T Matruglio, Family Court Empirical Report Part Two, 26-27.

<sup>1939</sup>.Family Court file survey response 664 (unrepresented respondent).

<sup>1940</sup>.Family Court file survey response 1170 (unrepresented respondent).

<sup>1941</sup>.Family Court file survey response 522 (unrepresented applicant).



that things moved because I stuck to the real issues of abuse and not putting out little insignificant matters ie: photos or school reports.<sup>1942</sup>

In 1993/94 I spent several thousand dollars on legal fees/court costs etc arranging access orders to regularly see my son. The custodial parent then continued to deny my access on many occasions in recent times to suit her own needs . . . I therefore commenced my own proceedings in the court process by completing all the relevant documents myself without any legal help. The reason for not obtaining legal assistance was lawyers are very costly and try to obtain results that they think will benefit you and don't listen to your instructions!<sup>1943</sup>

Before me and my wife separate we had many difficulty and we try to work out and find out what was the wrong. . . . I did not have any idea about all the law system . . . Few time she came to me and ask for sign few paper. I did so. Few weeks later I received some paper from Family Court. I didn't understand all that and I didn't know what is going on? . . . I don't know what to do how to do? So hopefully you will understand that in this case I didn't had any lawyer or solicitor or didn't go to Court.<sup>1944</sup>

### *Needs of unrepresented parties*

11.165 In the Commission's sample, unrepresented or partially represented parties were less likely to resolve their case by negotiation, and more likely to have their case dismissed, resolved by default or resolved by judgment, than parties with full representation.<sup>1945</sup> Litigants and lawyers told the Commission of difficulties experienced by unrepresented parties.

People don't realise they will get virtually no assistance from the Court with solving their problem. Information sessions cannot solve this: people need advice that is addressed to their specific situation.<sup>1946</sup>

I found it very difficult in even finding out which forms to obtain, which direction to follow and what was expected from me. This was from counter staff or duty solicitor. When conducting my own case, the judge was not the slight bit interested in my situation.<sup>1947</sup>

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<sup>1942</sup>Family Court file survey response 577(unrepresented respondent)

<sup>1943</sup>Family Court file survey response 1283 (unrepresented respondent).

<sup>1944</sup>Family Court file survey response 506 (unrepresented respondent).

<sup>1945</sup>Justice Research Centre Family Court Research Part One, 300. See also para 11.39-11.42.

Because of the Legal Aid cuts, people are forced to settle when their funding expires. Since the cuts took effect, there are hardly any matters not reached in the lists [in Parramatta], because cases all just drop out, even though there are very serious issues to litigate, and no way of knowing whether they are really solved: Family Court of Australia *Consultation* Sydney 14 September 1998.

A similar observation was made in LANSW *Submission* 242.

<sup>1946</sup>Family law practitioners *Consultation* Sydney 14 September 1998.

<sup>1947</sup>Family Court file survey response 1292 (unrepresented applicant).

[Assistance I would like to see provided by the Family Court is] someone to take each case through its process with you when there is an obvious formula followed like property settlement. The people on the desk “are not allowed to advise.” There should be someone who is allowed to advise available also at the Family Court.<sup>1948</sup>

It is the experience of the legal aid duty lawyers in the Melbourne registry that unrepresented parties have great difficulty in completing the paper work necessary for a Form 7/8 application and need intensive assistance with their applications and do not have the necessary skills or knowledge to conduct their own litigation. .

The availability of a Chamber Magistrate (as in the New South Wales local courts) would be valuable in assisting people with documentation. Alternatively, Legal Aid Commissions could be specifically funded to provide a duty service at the court, specifically for this purpose.<sup>1949</sup>

My documents were lost – supposedly in the post and the lady on the telephone could only suggest I do it all again – then I received them back unopened and had to send them again. Most frustrating.

For someone who is not from Canberra to have to run around town looking for solicitors and Legal Aid and finding somewhere to sit and fill out forms – and for people who don’t have much money – photocopying, lunches, parking, all adds up on top of petrol money and sometimes accommodation. Surely something or someone can make life easier at such a traumatic and daunting affair.<sup>1950</sup>

Living in Dalby I was unable to personally talk to anyone with regards to what was expected from me and at no time was any form of mediation attempted by the other party. If you live outside the coastal region no-one wants to know you and there is no services provided.<sup>1951</sup>

11.166 The Griffith Legal Aid Report stated that unrepresented parties in family law matters are frequently disadvantaged by their inability to prepare documents; limited understanding of the law and the legal system; emotional difficulties with cross-examining, or being cross-examined by, the former partner; and limited ability to negotiate with the other party or other party’s lawyer.<sup>1952</sup>

#### *Assistance available*

11.167 The Family Court provides general information sessions outlining its processes, which all parties are required to attend. The Court also provides general information through its internet home page and through public education about the

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<sup>1948</sup>Family Court file survey response 867 (unrepresented respondent).

<sup>1949</sup>LANSW *Submission* 242.

<sup>1950</sup>Family Court file survey response 867 (unrepresented respondent).

<sup>1951</sup>Family Court file survey response 1000 (unrepresented respondent).

<sup>1952</sup>J Dewar et al *The impact of changes in legal aid on criminal and family law practice in Queensland* Faculty of Law Griffith University 1998, 96 (Griffith Legal Aid Report).

Court, including public seminars, video and audio tapes, audio tapes in community languages and brochures in community languages.<sup>1953</sup> The Court has introduced free kits for consent orders, parenting plans, divorce, and for unrepresented parties preparing for a contested hearing.

11.168 Registry staff assist parties with procedural requirements. The Commission has received comments that the Court provides insufficient assistance to litigants in person,<sup>1954</sup> also that the assistance provided by the Court is seen as unfairly advantaging the unrepresented party when the other party is paying for representation.<sup>1955</sup>

11.169 The major problem faced by unrepresented parties, and by the Court in trying to assist them, is a difficulty in identifying the issues in dispute and a lack of access to relevant, independent information.<sup>1956</sup> In some cases, the information may be provided by a family report, as discussed above. Other assistance to unrepresented parties, such as including assistance from community groups and legal advice and assistance from CLCs and legal aid commissions, is discussed in Chapter 7.

#### *Other issues for the Court*

11.170 Where one party is represented and the other unrepresented, the Court faces particular problems in ensuring both parties are fairly treated. This is a particularly difficult balance to maintain in family law proceedings, and is an important issue in interlocutory proceedings, as well as at hearings. While the Court must ensure as far as possible that an unrepresented party is not unfairly disadvantaged through procedural complexity, it must also ensure that any concessions made to the unrepresented party, for example, in excusing failures to comply with technical requirements, or in permitting adjournments, do not unfairly disadvantage the represented party. Represented parties will sometimes perceive that the unrepresented party is receiving favourable treatment if they are permitted some leeway in relation to procedural issues, or argue issues that the represented person has been told are irrelevant.

11.171 There is anecdotal evidence that in some cases, unrepresented parties deliberately extend and adjourn proceedings until the other party has run out of funds for representation or has reached the legal aid cap for that stage of

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<sup>1953</sup>.It was noted that these services are difficult to obtain outside the major metropolitan areas: FLRAA *Submission 157*.

<sup>1954</sup>.Confidential *Submission 233*; FLRAA *Submission 157* and see comments quoted at para 11.165.

<sup>1955</sup>.Law Society of NSW *Submission 240*; Family law practitioner *Consultation* Sydney 26 August 1998.

<sup>1956</sup>.WLRC *Submission 153*; Family Court staff *Consultation* Sydney 14 September 1998. The issue was discussed by Deane J in the context of a criminal case in *Dietrich v the Queen* (1992) 177 CLR 292, 334-5.

proceedings.<sup>1957</sup> Some unrepresented parties are said to engage in tactics such as making repeated applications in order to harass their former partner.<sup>1958</sup>

11.172 The Commission considers that consistent overview of interlocutory procedures, as outlined in proposal 11.8, will provide greater flexibility for the Court in dealing with unrepresented parties, to ensure that they receive appropriate information and assistance with procedures but that the other party is also treated fairly.

11.173 A 1997 Full Family Court case set out the obligations placed on a judge in conducting a trial where one of the parties is unrepresented. In summary these are to: outline the procedures of the trial; assist by taking basic information from witnesses; explain the possible effect of requests for changes to normal procedure such as calling witnesses out of turn, and the party's right to object; advise the party of his or her right to object to inadmissible material; inform the party of his or her right to claim privilege if this may exist; to ensure as far as possible that a level playing field is maintained at all times; and to attempt to clarify the substance of the submissions of unrepresented parties'.<sup>1959</sup>

## Hearings

### *Interim hearings*

11.174 A party may only seek an interim hearing if they have also filed an application for final orders.<sup>1960</sup> The application for interim or procedural orders (Form 8) is accompanied by an affidavit.<sup>1961</sup> Applications for interim orders should be determined on the first return date, as soon as practicable after 28 days from the date of filing.<sup>1962</sup>

11.175 The Simplification Committee introduced the requirement that separate applications be made for interim orders, in the hope that this would stop 'the common practice of automatically seeking interim orders in every case where final orders were sought'.<sup>1963</sup> The Evaluation Committee noted that this result did not

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<sup>1957</sup> See para 7.59.

<sup>1958</sup> See para 11.200.

<sup>1959</sup> *Johnson v Johnson* (1997) FLC ¶92-764; 22 Fam LR 141, 163. Some of these principles may be difficult for a judge to act on without greater knowledge of a party's case than a judge would normally have, or without stepping into more of an advocate's role. Note that this case involved a dispute over contact, and thus these principles were formulated in the context of concern for the best interests of the child. It is possible, although this was not explicitly stated by the Full Court, that these principles would be modified in a case that did not involve children.

<sup>1960</sup> Family Law Rules O 8 r 3A.

<sup>1961</sup> *id* O 8 r 7.

<sup>1962</sup> Family Court case management guidelines ch 4; Family Law Rules O 8 r 9.

<sup>1963</sup> Family Court of Australia *Report to the Chief Justice of the Evaluation of Simplified Procedures Committee August 1997* Family Court Sydney 1997, 34.

appear to have been achieved, that some applications for interim orders were adjourned a number of times, and that some, involving lengthy and numerous affidavits, were being referred to the direct track, sometimes for tactical advantage, raising 'an expectation in the parties of a fully contested hearing'.<sup>1964</sup> The Evaluation Committee noted a number of concerns relating to the frequency of filing Forms 8 in some registries, and made the following recommendations.

- Case management guidelines be amended to allocate a maximum of two-hours for the hearing of an interim or procedural application.
- Judicial officers, registrars and legal practitioners be reminded that under paragraph 4.3 of the case management guidelines, if a Form 8 matter (application for interim orders) is adjourned due to lack of time, it should be adjourned to the judicial duty list or registrars' list rather than the direct track.
- Order 9 r 3 be amended to allow administrative adjournment of a Form 8 hearing date.
- A standard form affidavit in support of a Form 8 application for interim parenting orders be developed and adopted nationally through prescription in the Family Law Rules.<sup>1965</sup>

11.176 In the Commission's sample, 535 of the 981 cases commenced by an application for final orders (46%) also filed an application for interim or procedural orders (Form 8). Of these, 380 were filed on the same day as the application for final orders.<sup>1966</sup> As noted, 300 cases (61% of those who filed an application for interim orders) attended more than one interim hearing, and 101 (21%) attended more than three.<sup>1967</sup> The number of parties seeking or attending interim hearings may indicate the proportions seeking adjudication over PDR processes.

11.177 Demand for interim hearings appears to be driven by the perception that there will be very long delays in listing a case for hearing. Practitioners consulted by the Commission have said that in many cases they file proceedings to reserve the parties' place in a queue, and consider applying for interim orders because they expect to wait up to two years for a hearing.<sup>1968</sup>

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<sup>1964</sup>.id 35.

<sup>1965</sup>.id 37. The first, third and fourth of these recommendations have been implemented. See discussion of the standard form affidavit at para 11.67.

<sup>1966</sup>.T Matruglio & G McAllister, Family Court Empirical Report Part One, 41.

<sup>1967</sup>.See table 11.13.

<sup>1968</sup>.LCA *Submission 224*; WLS Brisbane *Consultation 29 October 1997*; Family law practitioner *Consultation Sydney 30 March 1999*.

There is a dilemma whether to advise clients to seek interim orders: in Parramatta you can't overturn an interim order, but even expedited final hearings take 6 months.<sup>1969</sup>

Lengthy delay between interim residence argument and final hearing led to a substantial 'status quo' argument in favour of other party.<sup>1970</sup>

11.178 In 1998, the Family Court stated concerning this issue

[t]here is an increasing workload of interim matters requiring determination and in the larger registries that workload is met by Judges sitting in the duty list. Those Judges are then unavailable to sit in the Contested List and delays in final hearing are compounded.<sup>1971</sup>

The Court has now delegated powers to registrars in relation to interim parenting orders.<sup>1972</sup> Provisions are to be made for expeditious hearing of any requests for review of the registrars' decisions.

11.179 The Commission's empirical study suggests that the waiting time to reach a hearing is not as extensive as has been claimed. The practice appears to be driven by the perception and the publicity given to delay in the Court.<sup>1973</sup>

11.180 The Commission considers that appropriate expedition of hearings for cases needing a determination, and effective management of interlocutory events with continuous oversight by the same registrar should, to a large extent, avert the need for interim hearings.

### *Listing of final hearings*

11.181 Listing of cases to ensure efficient use of court resources and minimum disruption to parties is a difficult task in all courts. Some overlisting is necessary to allow for cases settling 'at the door of the court'; yet if none of the cases listed on a

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<sup>1969</sup>Family law practitioner *Consultation* Sydney 7 September 1999.

<sup>1970</sup>Family Court file survey response 1300 (solicitor for respondent).

<sup>1971</sup>Family Court of Australia *Correspondence* 11 August 1998.

<sup>1972</sup>The Court has recently appointed senior executive service (SES) registrars who preside at interim hearings. The initial findings of the Court are that this move appears to be succeeding in reducing congestion in the Court: Family Court staff *Consultation* Sydney 30 June 1999.

<sup>1973</sup>For example, M Taussig 'Charting a course – where to from here?' (1998) 13 (2) *Australian Family Lawyer* 19; I Kennedy 'Family Court delay crisis' (1998) 13 (1) *Australian Family Lawyer* 1; R McClelland 'Family Court delays getting worse' *Press release* 20 April 1999; A Nicholson 'The State of the Court' Speech delivered at the Third National Family Court Conference, Sofitel Hotel Melbourne, 20 October 1998; A Crabb 'Children in limbo' *Advertiser (Adelaide)* 5 January 1999 9; G Warner 'Spouse wars crisis' *Hobart Mercury* 25 November 1998, 3; 'Family Court delay threatens children' *Courier Mail (Brisbane)* 27 October 1998, 14; J Fife-Yeomans 'Plea for truce at Family Court' *The Australian* 27 October 1998, 4; D Murphy 'Court "creaking" for lack of judges' *Sydney Morning Herald* 26 October 1998, 3; F Metcalf 'Sharp increase in work overloads Family Court' *Courier Mail* 24 October 1998, 14.

given day settle, it will not be possible to hear them all.<sup>1974</sup> The case management guidelines prescribe listing guidelines, although the Judge Administrator of each registry is entitled to exempt the registry from compliance.<sup>1975</sup>

11.182 Under the guidelines, where possible, hearings are listed before a judicial registrar, and all applications filed in the same matter given the same return date. Cases are to be overlisted (that is, more cases to be listed than could be heard on the day,) according to ratios set down in each registry. Complex track cases are listed separately and should not be overlisted.<sup>1976</sup>

11.183 Matters are allocated either to a 'specific judge list' or a 'reserve list', and given a date or a 'not before' commencement date. Cases needing a certain hearing date, for reasons such as urgency or the need to travel long distances to get to the hearing are to be given priority in the list to ensure they are heard on the listed day. The practice of adjourning hearings part-heard is to be avoided, and should be done only in exceptional circumstances. Listed cases not reached are to be referred to the Case Management Judge for relisting.<sup>1977</sup>

11.184 In practice, the system of listing varies considerably from one registry to another. Some practitioners told the Commission they found the listing practices confusing or unpredictable.<sup>1978</sup>

11.185 A short term adjournment may not add greatly to the duration of a case, but may cause considerable cost and distress to the parties. Several practitioners told the Commission of cases in which hardship was caused by the adjournment of a hearing.<sup>1979</sup>

I had a case recently [September 1998] which was scheduled for 5 days and was never reached on the list because there was no judge available to hear it. It has been held over till next February. The clients have to bear the costs of my work, the barristers' cancellation fees, all the witness fees and their own time lost from work as well as the emotional strain. Because of the constant increase in house prices in Sydney, they will need new valuations before the adjourned hearing. All these costs add up to much more than the cost of the judge's time.<sup>1980</sup>

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<sup>1974</sup>For a discussion of listing issues see M Solomon & D Somerlot 'Caseflow management in the trial court – now and in the future' American Bar Association Chicago, Illinois 1987.

<sup>1975</sup>Family Court case management guidelines ch 11.

<sup>1976</sup>.ibid.

<sup>1977</sup>.ibid.

<sup>1978</sup>.Albury Law Society *Consultation* Albury 2 December 1998; Law Society of NSW *Consultation* Sydney 22 September 1998; Family law practitioner *Consultation* Sydney 7 September 1998, R Borthwick *Consultation* 29 January 1997; Family Proceedings Working Group *Meeting* Sydney 10 April 1997; FLRAA *Submission* 157.

<sup>1979</sup>Family law practitioner *Consultation* Sydney 7 September 1998.

<sup>1980</sup>.Law Society Family Law Committee *Consultation* Sydney 22 September 1998.

11.186 The Commission has been told that Courtinitiated adjournments have reduced following the recent appointment of a new category of judicial registrars.

11.187 Parties reported finding the listing practices inexplicable, frustrating, and onerous in terms of cost and inconvenience. Responses to the Commission's survey of litigants in person disclosed that unrepresented applicants had spent a median of seven days attending court, and unrepresented respondents a median of four days.<sup>1981</sup> The experience was described by a Family Court litigant in a radio broadcast.

Something surprised me. Each day I attended, it was very rare for hearings to be heard at the scheduled time. As I said, on one occasion I waited all day and the matter was not heard. And I was very surprised that the court didn't have a mechanism to advise litigants of delays. To me that implied they didn't have any client service standards. The impression I had is that the courts basically are there to satisfy their own needs and if they were inconsistent with the needs of litigants, that is just too bad.<sup>1982</sup>

11.188 Listing delays, even for a few hours, can be distressing and frustrating for parties. A recent survey of client satisfaction by the Family Court received a number of comments on this issue, including the following.

I was kept waiting for full days without case being heard! No reasonable explanation was offered in regard to this... Everybody has been ordered here at 10 and you may have to wait all day. Maybe all week. Surely appointments should be made – 39 cases before judge today.<sup>1983</sup>

11.189 The Commission considers that adjournments caused by parties being unprepared for a hearing should be minimised by overview of the interlocutory process as described in proposal 11.8. The notional allocation of cases to a particular judge, even if that judge has no contact with the case prior to hearing, should promote certainty of hearing date and efficiency in relisting hearings and provide early notice of adjournment to the parties where this is unavoidable. The Commission considers there is room for improvement in the Court's listing practices, especially in relation to listing of commencement times.

**Proposal 11.10.** The Family Court of Australia should identify the registries in which hearings are adjourned most and least frequently, and develop, in consultation with practitioners, the most appropriate practices for registries identified as having frequent adjournments.

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<sup>1981</sup> T Matruglio, Family Court Empirical Report Part Two, Part D table 15. This includes attending court for procedures such as information sessions and counselling, as well as directions and other hearings.

<sup>1982</sup> S Lobe, interview with 'David', ABC Radio National Law Report transcript 27 October 1998 <<http://www.abc.net/au/rn/talks/8.30/lawrpt/lstories/lr981027.htm>> (2 November 1998).

<sup>1983</sup> KPMG 'Survey of family client perceptions of service quality' *Unpublished* Family Court of Australia March 1999.



*Conduct of hearings*<sup>1984</sup>

11.190 Under s123(1)(ba) of the Family Law Act judges have power to make rules of court, including rules in relation to trial management. Order 30 r 1A of the Family Law Rules gives the Court power to give directions as to the order of evidence and addresses; and generally as to the conduct of a trial. Section 101 of the Family Law Act gives the Court power to restrain abusive use of cross-examination.

11.191 Under the Family Law Rules, the Court may give directions as to the order of evidence and addresses and generally as to the conduct of the trial.<sup>1985</sup> Evidence in chief is given by affidavit unless otherwise ordered by the Court;<sup>1986</sup> and under case management guidelines, parties are required to file an 'Outline of Case' document summarising the relevant facts, orders sought, and propositions of law and authorities.<sup>1987</sup> Cross-examination and submissions continue to be oral.<sup>1988</sup>

11.192 Most hearings in the Family Court do not appear to be lengthy. In the sample covered by the Commission study, few hearings took longer than two days – 73% of the sample hearings took one day and 14% took two days. The maximum number of hearing days for a case in the sample was eight.<sup>1989</sup>

11.193 The Commission was told that the length of hearings has increased because of the lack of attention paid to defining issues in the interlocutory stages.

The present exchange of affidavits are like ships passing in the night. No formal definition of the issues occurs. This causes lengthy evidence to be given on the morning of the trial.<sup>1990</sup>

11.194 There was some criticism of hearing management by some judges but no indication of the extent of the problem.

It is surprising to find how little judicial intervention there is. Lawyers are known to examine witnesses for hours on matters which are hardly germane to the issues before the court, with little or no interruption from the judge.<sup>1991</sup>

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<sup>1984</sup>.See ch 9.

<sup>1985</sup>.Family Law Rules O 30 r 1A.

<sup>1986</sup>.Family Law Rules O 30 r 2.

<sup>1987</sup>.Family Court case management guidelines, annexures C and F.

<sup>1988</sup>.See discussion of oral and written evidence and advocacy in ALRC Background Paper 5 *Civil litigation practice and procedure* Sydney December 1996, 29–35.

<sup>1989</sup>.There was a slightly lower proportion of complex track cases for the sample than for the year as a whole, which may have affected the maximum figure: T Matruggio & G McAllister, Family Court Empirical Report Part One, 40. The Commission has been told that the average hearing length in 1997 was 2.2 days for children-only matters, 1.7 days for property-only matters, and three days for children and property matters: LCA *Submission* 224. The Commission regards average figures as less helpful than median figures for indicating the experience of the majority of cases.

<sup>1990</sup>.Family Court judge *Consultation* Sydney 4 September 1997.

11.195 Similar comments were made by a person subpoenaed in Family Court litigation, in the following extract from a radio broadcast.

. . . the lawyer, and then the barrister, admitted they had seen no documents, they had followed no line of research, so the judge said, 'Well you don't expect me to do your homework for you?' . . . That day cost me \$5 000 for ten minutes in court.

We went back and we arrived at 10 o'clock and the judge said 'Come back at half past twelve'. We went back at half past twelve and one of the plaintiffs [sic] lobbed some more ad hoc affidavits onto his Bench. He said 'I'll have to read these. Come back at 2 o'clock'. We got back at 2 o'clock, and we were on edge on our side. We were taken at half past three, and he said, 'Oh, I'll have to read these. I haven't had time, I have had other matters to attend to. Come back in a fortnight'. That's cost me another \$5 000.<sup>1992</sup>

11.196 The Commission was told that in some cases the Court should make greater use of its powers to sanction breaches of procedure, control litigation excesses or strike out vexatious claims.<sup>1993</sup> It was suggested to the Commission that the Family Law Rules should explicitly set out the powers of judges in relation to trial management, including that they may limit the time for examination and cross-examination of witnesses.<sup>1994</sup>

11.197 Many practitioners commented on inconsistencies in approach to procedural rules and requirements by judges, noting that some insist upon strict compliance with the Rules and may refuse to hear cases if there are deficiencies in documents such as the Outline of Case, while others are content with substantial compliance provided the issues are clear and relevant evidence is available.<sup>1995</sup> Under the current system, practitioners must attempt to satisfy all possible judges.

11.198 The Commission received various comments about the emphasis on written evidence. Some argued that written evidence saves no time, as judges often adjourn hearings in order to read the papers.<sup>1996</sup> Others said that parties find it stressful to begin their oral evidence with cross-examination rather than evidence-in-chief. Some suggested that litigants in person might benefit from the opportunity to give evidence in chief orally and file fewer documents.<sup>1997</sup>

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<sup>1991</sup>.FLR (NSW) *Submission 134*.

<sup>1992</sup>.S Lobe interview with 'John' *Transcript Law Report Radio National 27 October 1998* <<http://www.abc.net/au/rn/talks/8.30/lawrpt/lstories/lr981027.htm>> (2 November 1998).

<sup>1993</sup>.LANSW *Submission 242*; FLR (NSW) *Submission 134*; Law Society of NSW *Submission 240*.

<sup>1994</sup>.Law Society of NSW *Submission 240*.

<sup>1995</sup>.See para 11.66, 11.133.

<sup>1996</sup>.Legal Aid *Consultation Sydney 14 September 1998*; Family law practitioner *Consultation Sydney 7 September 1998*.

<sup>1997</sup>.Family Court of Australia *Consultation Sydney 14 September 1998*.

11.199 In a Family Court survey of judges and judicial registrars, nearly all stated they usually read the affidavit material before entering Court, and seldom retire from Court during the running of a case to read affidavit material. Nearly all said they mostly permitted an opening address, and most would also permit an address by the respondent in most cases.<sup>1998</sup> In practice, many judges exercise some flexibility regarding procedures in cases involving litigants in person.<sup>1999</sup>

**Question 11.1.** The Commission invites comment on whether the Family Law Rules, or a practice note, should provide more specific powers in relation to trial management, for example to limit the time for examination, cross-examination or re-examination of a witness, or for oral submissions.

### *'Relentless' litigants*

11.200 In some cases, parties use family law litigation as a weapon to intimidate and harass a former partner: such behaviour may be associated with domestic violence.<sup>2000</sup> The Family Court has the power to dismiss applications by such parties and prevent them from making further applications without leave.<sup>2001</sup> In *Vlug and Poulos*,<sup>2002</sup> the Full Court, setting aside an earlier such order, said

[t]he fact that a party seeks to assert his or her rights of appeal should not, in our view, be a matter to be taken into account against him or her in proceedings under s 118 of the Family Law Act or under O 40 r 6 of the Family Law Rules, or under the provisions governing the grant of stays, unless a clear pattern emerges of a series of hopeless appeals being filed which consistently challenge almost any ruling about which the appellant feels aggrieved.<sup>2003</sup> (emphasis added.)

11.201 It is apparent that before orders can be made under s 118 or O 40 r 6, the party seeking such orders must have responded to repeated Court applications that had no merit. For cases in which the pattern of applications falls short of vexatious, the options open to the Court are effective management of interlocutory and hearing procedures, and use of s 118(1)(a) to strike out specific proceedings where appropriate.

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<sup>1998</sup>. The survey defined an opening address as more than a mere identification of the matters that remain in issue or nomination of the witnesses to be called. A Barblett *Correspondence* 3 July 1997. The survey covered judges in the Family Court of Western Australia as well as the Family Court of Australia.

<sup>1999</sup>. Family Court judge *Consultation* Sydney 23 September 1998.

<sup>2000</sup>. WLS Brisbane *Submission 218*. See also ALRC 73; Family Law Council *Child contact orders: Enforcement and penalties* Family Law Council Canberra June 1998.

<sup>2001</sup>. Where satisfied that proceedings are frivolous or vexatious, the Court has power to dismiss proceedings; make orders as to costs; and, on the application of a party, order that the person who instituted the proceedings may not institute any further proceedings without leave of the Court: Family Law Act s 118. Such orders can be made on the application of a party or on the Court's own motion: Family Law Rules O 40 r 6. This issue was addressed in ALRC 73.

<sup>2002</sup>. *In the marriage of Vlug and Poulos* (1997) 22 Fam LR 324.

<sup>2003</sup>. 22 Fam LR 324, 350.

11.202 It has been noted that parties have more difficulty obtaining orders restraining litigants from repeatedly filing unmeritorious or vexatious applications if the successive applications are dealt with by different judges. The Legal Services Commission of South Australia provided the following example

Example: matter of R. in Adelaide registry. Between January and December 1995 seven interim custody applications were instituted by the husband – all unsuccessful, all of dubious merit BUT each of the first six applications were dealt with by different judges/JRs [judicial registrars]. Not until the seventh application did the husband strike a repeat judge (who then dismissed the husband's application and made orders in favour of the wife pending trial).<sup>2004</sup>

11.203 The Commission has previously recommended that the Court make more rigorous use of its powers under s 118.<sup>2005</sup> It has been suggested that in considering making such orders the Court should explicitly take into account evidence of a history of domestic violence or harassment.<sup>2006</sup> Again, the Commission's proposal 11.8 should help to address this issue.

### *Judgments*

11.204 In its report on Family Court appeal and review, the Family Law Council (FLC) reported mixed views from court users on whether delay in appeal processes was a problem.<sup>2007</sup> One issue that was highlighted was the delay sometimes experienced in obtaining the judgment at first instance. The Council observed that this delay 'places litigants in a difficult position as they are unable to determine whether or not there is any substantive basis on which to appeal'. It recommended that the Family Court's case management guidelines should be amended to provide for speedier first instance judgments and that the time limits for appeals should not run until written reasons have been provided.<sup>2008</sup> This recommendation has not been implemented.

11.205 The Commission received some comments concerning delay in handing down judgments in the Family Court. One litigant reported to the Commission that he had waited eight months since the hearing of his appeal in a parenting case, and still had not received a decision nor an indication of when the decision would be handed down.<sup>2009</sup>

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<sup>2004</sup>.LANSW *Submission 242*.

<sup>2005</sup>.ALRC 73. Note that in the Federal Court also it has been suggested that the strict rules governing summary judgment should be relaxed where this would promote just disposal of a case: See para 10.120-10.124.

<sup>2006</sup>.WLS Brisbane *Submission 218*.

<sup>2007</sup>.Family Law Council *Family Law Appeals and Review: An evaluation of the appeal and review of family law decisions* June 1996, 22-23.

<sup>2008</sup>.id 47-48.

<sup>2009</sup>.Confidential *Submission 233*.

11.206 In a survey of Family Court judges and judicial registrars,<sup>2010</sup> most said they reserved decisions more often than not. Questioned on the level of detail they thought necessary, most said that where neither counsel sought a weighting in favour of his or her client on the point, they would set out in the judgment the detail of initial contributions, and the history of dealings in real estate. They were equally divided on whether they would recount the details of non-financial contributions as homemaker and as parent. They were also equally divided on the question whether they mention in reasons for judgment every issue of fact about which there was contest in the hearing.<sup>2011</sup>

11.207 The Commission notes that the majority of judgments are delivered ex tempore or handed down within one month. Consideration by the Court of the need for sufficient support staff should take into account whether additional support staff such as associates would assist judges and judicial registrars to produce timely judgments (see proposal 11.9).

**Question 11.2.** The Commission invites comment on whether there is a widespread problem with delay in handing down judgments in the Family Court of Australia.

**Question 11.3.** The Commission invites comment on whether the expanded use of ex tempore judgments or the introduction of short form judgments would enable parties to receive a considered decision more speedily; and whether any rules should apply to prevent such judgments being used in specific circumstances.

## Appeal case management

11.208 Appeals to the Full Court are heard by three or more judges of the Family Court sitting together, where a majority of those judges are members of the Appeal Division.<sup>2012</sup> The Appeal Division is constituted by the Chief Justice, the Deputy Chief Justice and other judges (not exceeding six) as are assigned to the Appeal Division.<sup>2013</sup>

11.209 Appeals in the Family Court are managed to hearing by regional appeal registrars.<sup>2014</sup> The case management guidelines state that the general standard for the disposal of appeals is six months from filing of notice of appeal to the hearing and provide a general timetable for the steps in an appeal.<sup>2015</sup> The Family Court

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<sup>2010</sup>.A Barblett *Correspondence* 3 July 1997. The survey included judges of the Family Court of Western Australia.

<sup>2011</sup>.ibid.

<sup>2012</sup>.Family Law Act s 4(1).

<sup>2013</sup>.Family Law Act s 22(2AA); (2AC).

<sup>2014</sup>.Family Court Case management guidelines ch 14.

<sup>2015</sup>.Family Court Case management guidelines 14.8, 14.10.

recently reported that increases in the numbers of appeals and financial constraints have made it more difficult to adhere to the six month standard.<sup>2016</sup>

### *Appellants in person*

11.210 The table shows that the number of unrepresented parties in appeals has increased over recent years. Many of the issues relating to unrepresented parties in first instance matters also apply to appeals.

**Table 11.14. Family Court appellants in person 1995-97<sup>2017</sup>**

<b>Appellants in person</b>	<b>1995-96</b>	<b>1996-97</b>	<b>1997-98</b>
In appeals	46 (19%)	73 (26%)	108 (36%)
In applications for leave to appeal	6 (17%)	12 (40%)	20 (37%)

11.211 The FLC's report on family law appeals and review noted that

[p]roblems resulting from unrepresented appellants include delay, failure to address the merits of the appeal, the length of time taken to present oral submissions, unmeritorious appeals and problems associated with the complexity of court procedures.<sup>2018</sup>

11.212 Particular problems relate to the preparation of the appeal book and to the presentation of the grounds of appeal at the hearing. For example in one case, a Family Court judge observed that

the Appeal Book contains a mishmash of complaints which the appellant makes in relation to the trial itself, the evidence given by witnesses in the course of it, and alleged prejudice and/or bias on the part of the trial Judge. Most of these matters are not in fact grounds of appeal at all, and given that the appellant is appearing in person, as I have already indicated, I think it preferable if we review the evidence that was before the trial Judge in order that we might ascertain whether any appellable error has occurred.<sup>2019</sup>

11.213 In another case the Full Court noted that

[a]t times during the hearing of this appeal it was far from clear from the husband's presentation precisely what all of his grounds of appeal were . . . the husband devoted a significant portion of his time in addressing this Court on matters of fact which are not in the appeal book. It is impossible for us to know whether he was referring to evidence at the trial and which would be in the transcript or whether this is material which is additional to that or a mixture of both. However, for

<sup>2016</sup>Family Court *Annual report 1997-98*, 39.

<sup>2017</sup>Family Court of Australia *Annual report 1995-1996*, 55; Family Court of Australia *Annual report 1996-1997*, 43, 47.

<sup>2018</sup>Family Law Council *Family law appeals and review: An evaluation of the appeal and review of family law decisions* AGPS Canberra 1996, 38.

<sup>2019</sup>*Jimmy Huu Loc Nguyen and Cathy Bach Yen Vuong* (unreported) Appeal No. SA 12 of 1996 (Baker J).

reasons which we have already explained, it is impossible for us to consider those matters; we are confined to the material contained in the appeal book.<sup>2020</sup>

11.214 There is no provision in the Family Law Act allowing a single judge of the Family Court to stay or strike out appeal proceedings for frivolity, vexatiousness or abuse of process. The Family Law Rules provide that only a Full Court may dismiss an appeal for failure to comply with requirements of the Rules.<sup>2021</sup> A Federal Court judge has recently commented that the existence of such a power 'would greatly assist the expeditious handling of the Court's business'.<sup>2022</sup> The Commission considers that such a power would also be beneficial in the Family Court.

**Proposal 11.11.** The Commission recommends that the Family Law Act be amended to permit a single judge in an appeal to exercise the powers of the Family Court of Australia to stay or dismiss any proceeding where

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

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<sup>2020</sup>. *Ian Kay and Heather Kay* (unreported) Family Court Appeal Nos. SA 62 and SA 761 of 1995 (Nicholson CJ, Fogarty & Kay JJ).

<sup>2021</sup>. Family Law Rules O 32 r 18.

<sup>2022</sup>. *D'Ortenzio v Telstra* (1998) 154 ALR 577, 583.

## 12. Case and hearing management in federal merits review tribunals

### Introduction

12.1 This chapter examines the case and hearing management of federal merits review tribunal proceedings (review tribunals). The Administrative Appeals Tribunal (AAT), the Commonwealth's generalist merits review tribunal is the focus of discussion and along with the Federal Court and the Family Court, was the subject of significant empirical research conducted by and on behalf of the Commission. Issues raised by the conduct of proceedings in other review tribunals are also examined.<sup>2023</sup>

12.2 In February 1998, the Government announced its intention to amalgamate the AAT, the Social Security Appeals Tribunal (SSAT), the Immigration Appeals Tribunal (IRT),<sup>2024</sup> and the Refugee Review Tribunal (RRT) into a single tribunal, to be called the Administrative Review Tribunal (ART).<sup>2025</sup> A notable omission is the Veterans' Review Board (VRB).

12.3 While issues relating solely to the structure and management of merits review tribunals are beyond the Commission's terms of reference, the discussion of proposals concerning review processes, prehearing case events, alternative dispute resolution (ADR),<sup>2026</sup> tribunal investigative functions and party participation are intended to assist the formulation of working models for divisions of the ART.

12.4 The analysis of these issues is informed by the Commission's overall findings concerning federal merits review tribunal proceedings. These are as follows.

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<sup>2023</sup> Principally the Migration Review Tribunal (MRT), Refugee Review Tribunal (RRT) and Social Security Appeals Tribunal (SSAT). The Veterans' Review Board (VRB) is not discussed, among other reasons, because the Commission considered it did not represent a sufficiently distinct model and because it will not be amalgamated within the ART.

<sup>2024</sup> From 1 June 1999, decisions previously reviewed by the IRT became reviewable by the Migration Review Tribunal (MRT), a new tribunal created through merging the IRT and the Migration Internal Review Office (MIRO): *Migration Legislation Amendment Act (No.1) 1998* (Commonwealth).

<sup>2025</sup> D Williams 'Reform of merits review tribunals' *News release* 3 February 1998 <<http://law.gov.au/aghome/agnews/1998newsag>> (1 August 1999)

<sup>2026</sup> ADR and the use of ADR processes within and outside Australian federal courts are discussed in more detail throughout this discussion paper. Any tribunal dispute resolution process is, in some sense, 'alternative' to traditional court proceedings, even if tribunal adjudication may sometimes closely resemble court proceedings. In this chapter the term ADR is used simply to refer to processes used to resolve tribunal proceedings, other than through a formal hearing or by decisions on the papers.



- The legislation and practice of review tribunals should be further directed to emphasise the administrative character of tribunal processes. Tribunal processes can and should be arranged to permit
  - enhanced investigation by tribunals
  - discontinuous hearing processes
  - resolution of certain issues on the papers
  - cooperative training and working arrangements between tribunals and the government departments and agencies whose decisions are under review.

The Commission's proposals should not be taken to threaten 'independent' merits review but to enhance the flexible decision making processes available outside the judicial process.

- The Commission's data shows legal and non-legal representatives play important roles in the resolution of review proceedings. A combination of practice rules, directions, costs incentives and case management should enhance a constructive role for party representatives in preparing and presenting cases and brokering negotiated outcomes. In those cases amenable to compromise, representative negotiation 'in the shadow of the tribunal' appears to be as effective as similar court based negotiation.
- Case management practices within review tribunals can and should be made to work more efficiently and effectively. The median duration of cases finalised in the AAT was longer than for cases in the Federal Court.<sup>2027</sup>

## The caseload of review tribunals

12.5 Federal merits review tribunals provide administrative review of primary decisions taken by an executive department or agency. Generally, review tribunals have all the powers and discretions of the original decision maker and may affirm the original decision, vary it, send it back to the original agency or substitute a new decision.<sup>2028</sup> The numbers of decisions lodged annually with the federal merits review tribunals which are the focus of this chapter are set out below.

**Table 12.1 Number of review applications lodged**<sup>2029</sup>

Year	AAT	SSAT	IRT	RRT
1995-96	6 512	12 242	3 467	4 018
1996-97	6 849	13 817	2 010	7 554
1997-98	7 330	11 628	4 172	7 398

<sup>2027</sup> See para 9.7.

<sup>2028</sup> *Administrative Appeals Tribunal Act 1975* (Commonwealth) (AAT Act) s 43(1); *Migration Act 1958* (Commonwealth) (Migration Act) s 349 (MRT); s 415 (RRT); *Social Security Act 1991* (Commonwealth) (Social Security Act) s1253(1).

<sup>2029</sup> AAT Annual reports 1995-98, IRT Annual reports 1995-98, RRT Annual reports 1995-98, SSAT Annual reports 1995-98.

12.6 The IRT (now the MRT) and the RRT are final merits review bodies concerned with certain visa refusal and cancellation decisions under the Migration Act. The SSAT reviews certain decisions made by officers of Centrelink under delegation from the Secretaries of the Department of Family and Community Services and the Department of Education, Training and Youth Affairs and certain decisions made by the Department of Veterans' Affairs in relation to age pension entitlements.

12.7 The AAT has statutory authority under about 303 separate enactments to review specific administrative decisions.<sup>2030</sup> The AAT's jurisdiction is diverse. Its high volume work derives from social security, veterans' affairs, Commonwealth employees' compensation and taxation decisions. In 1997-98, 7 330 applications were lodged with the AAT categorised by the AAT as follows.

**Table 12.2 Applications filed in the AAT 1997-98 by review jurisdiction**<sup>2031</sup>

AAT jurisdiction	Number lodged	%
Customs & excise/bounties	281	4%
Employment /retirement benefits	1 534	21%
Immigration & citizenship	269	3.5%
Freedom of information	122	1.5%
Professional qualifications	33	0.5%
Regulation of business	43	0.5%
Social welfare	1 808	25%
Student assistance	199	3%
Veterans' entitlements	1 607	22%
Taxation administration	1 282	17%
Other	152	2%
Total	7 330	100%

## The nature of review tribunal proceedings

12.8 The nature of the review application, the relative complexity of the facts or law, applicable time limits and directions relating to the order in which different categories of case should be dealt with, influence the approach the tribunal takes in the conduct of proceedings. Other relevant factors which influence the conduct of review tribunal proceedings include

- representation
- the nature of representation, whether legal or lay advocate, friend or family
- the importance of expert evidence
- the geographic location of the applicant

<sup>2030</sup> See AAT *Annual report 1997-98* Appendix 8 for a full list of reviewable decisions.

<sup>2031</sup> See id 106-109.

- the cultural and linguistic background of the applicant
- any disability of the applicant, including intellectual or psychiatric disability and
- other literacy and educational factors affecting the applicant.<sup>2032</sup>

### *Parties and representation in the AAT*

12.9 One party in all federal review tribunal proceedings is a government agency.<sup>2033</sup> The other, generally the applicant, is an individual or corporate entity. Applicants may have limited legal skills and resources. While legal representatives play a prominent role in most court proceedings, parties in tribunal proceedings are more likely to be unrepresented or to have representatives who are not lawyers.

12.10 Rights of representation at hearings before federal merits tribunals vary significantly.<sup>2034</sup> All parties to AAT proceedings have a right to be represented including at the hearing and most are represented, although the level of representation varies considerably between the AAT's review jurisdictions (see paragraph 12.12 below). Respondent government agencies are represented by agency officers, who may be legally qualified, or by outside lawyers<sup>2035</sup> including, on occasions, by senior counsel.<sup>2036</sup>

### *Levels of applicant representation*

12.11 Most applicants before the AAT are represented by lawyers. The Commission's survey of AAT case files found that 67% of applicants were recorded as represented,<sup>2037</sup> and mostly by lawyers. Others were assisted by customs agents, migration agents and accountants.

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<sup>2032</sup>eg see D O'Connor 'Appearing before the AAT: A non-adversarial approach' *Paper* NSW Bar Association Seminar Sydney 10 May 1999.

<sup>2033</sup>However, there are differences between federal merits review tribunals concerning who are the parties to review proceedings. In the MRT and RRT, the department is not a party to the proceedings, so the question of departmental representation does not arise. In the SSAT, while the agency is a party and may make written submissions, the agency, unlike the applicant, cannot make oral submissions or be represented.

<sup>2034</sup>See ALRC Issues Paper 24 *Review of the adversarial system of litigation: Federal tribunal proceedings* ALRC Sydney 1998 (ALRC IP 24), para 5.4-5.8. In the migration and refugee tribunals, the applicant is entitled, where there is to be a hearing, to appear to give evidence and to have another person present to 'assist' them. The participation of advisers or assistants at hearings is limited. In SSAT proceedings, applicants may be represented at hearings, but are usually unrepresented.

<sup>2035</sup>That is, lawyers from private firms or the Australian Government Solicitor (AGS).

<sup>2036</sup>Where the proceedings are before the AAT following a decision of the SSAT or VRB, the agency will have been unrepresented before the relevant first tier tribunal.

<sup>2037</sup>See ALRC *Part one: Empirical information about the Administrative Appeals Tribunal* ALRC Sydney June 1999 (ALRC, AAT Empirical Report Part One), table 7.1. A small number of applicants recorded as being represented did in fact receive some assistance from a representative (legal or non-legal) at some stage of the AAT proceedings.

12.12 The level of representation varied between AAT review jurisdictions. For example, while 90% and 86% of the sample applicants were represented in the veterans' affairs<sup>2038</sup> and compensation jurisdictions respectively, only 29% of applicants in the sampled social welfare cases were represented.<sup>2039</sup> Submissions noted the following factors as influencing levels of representation in particular areas of the AAT's jurisdiction

- the availability of legal aid for certain types of application, such as veterans' affairs applications
- the availability of costs orders in the compensation and certain other jurisdictions<sup>2040</sup>
- the availability of contingency fee arrangements for compensation, taxation, customs and some other cases.
- the availability of tax deductions for legal expenses
- the financial resources of applicants in certain jurisdictions<sup>2041</sup>
- the relative complexity of the matter
- the approach to matters in dispute taken by the respondent agency and
- pressures exerted by the tribunal.<sup>2042</sup>

12.13 In particular, some submissions emphasised the role of costs rules in encouraging legal representation in employees' compensation jurisdictions of the AAT.<sup>2043</sup> The fact that the costs of a successful application can be awarded by the AAT means that lawyers will take cases on a 'no win, no fee' basis. In this jurisdiction, Comcare observed that there is now an expectation, by some AAT members, that applicants should be represented and hearings are adjourned in order that they should go and seek such legal representation.<sup>2044</sup>

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<sup>2038</sup>.In New South Wales most applicant representation in veterans' affairs cases was provided by solicitors funded through the Legal Aid Commission, while in the other States most applicant representation was provided by non-legal specialist advocates.

<sup>2039</sup>.See ALRC, AAT Empirical Report Part One, table 7.1.

<sup>2040</sup>.The AAT has powers under the *Safety Rehabilitation and Compensation Act 1988* (Commonwealth) (SRC Act), the *Seafarers Rehabilitation and Compensation Act 1992* (Commonwealth), the *Freedom of Information Act 1982* (Commonwealth), the *Mutual Recognition Act 1992* (Commonwealth) and *Lands Acquisition Act 1989* (Commonwealth) to order or recommend that the respondent pay the costs, or part of the costs, of a successful applicant, or where the application has been instituted by the Commonwealth.

<sup>2041</sup>.Many applicants in customs or taxation disputes are incorporated bodies. These applications often concern commercial issues and substantial amounts of money: AAT *Submission 210*. The Australian Securities and Investments Commission (ASIC) observed that in matters involving review of decisions under the *Corporations Laws* approximately 95% of applicants are legally represented, reflecting the client base of ASIC and the complex issues in dispute: ASIC *Submission 184*.

<sup>2042</sup>.AAT *Submission 210*.

<sup>2043</sup>.Comcare *Submission 209*; M de Rohan *Submission 175*.

<sup>2044</sup>.Comcare *Submission 209*. The possible effects of cost rules on the role played by legal representatives and on when cases settle are examined in more detail at para 12.72-12.73.

12.14 Data collected by the SSAT in 1996 indicated that representatives, which include family members and other non specialist representatives, attended the hearing in about 15% of SSAT cases. A further 4% of cases had a representative who did not attend the hearing. The major sources of specialist representation were welfare rights and community legal centres.<sup>2045</sup>

12.15 In the former IRT, applicants had advisers appointed in 63% of cases.<sup>2046</sup> The RRT advised that about 52% of RRT applicants have some form of representation, mostly from migration agents. Based on a 1995 client satisfaction report, of those attending a RRT hearing, 38% brought a friend, spouse or relative with them, and 20% a lawyer. Almost 38% attended the hearing on their own.<sup>2047</sup> In the immigration and refugee tribunals the representative's involvement is limited. They may assist with the compilation of the application form or prepare written submissions but their participation at the hearing is limited by law.<sup>2048</sup>

#### *What can representatives contribute?*

12.16 Representatives provide a range of different services in relation to review tribunal proceedings. One submission described these services as including

- provision of oral advice about appeal rights and processes
- preparation of an application or response to an application
- negotiation and settlement advice and discussion
- participation in prehearing procedures, such as conferences
- preparation of written submissions before and/or after the hearing
- attending, addressing and/or providing advice during a hearing
- addressing the tribunal, but not participating in the questioning of witnesses and
- appearing on behalf of the applicant at the hearing.<sup>2049</sup>

12.17 The AAT noted that an applicant's need for legal representation often arises from characteristics of the applicant rather than characteristics of the review jurisdiction.

For example, applicants may require representation because they do not understand the requirements of the legislation governing their application and therefore the nature of the evidence required to support their case or because they lack the confidence to make written or oral submissions that are relevant to the tribunal's consideration. Such factors are independent of the jurisdiction or type of decision for which review is sought.<sup>2050</sup>

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<sup>2045</sup>.SSAT Submission 200.

<sup>2046</sup>.IRT Annual report 1997-98, 11.

<sup>2047</sup>.RRT Submission 211 referring to RRT Report on client satisfaction research – May 1995 RRT 11.

<sup>2048</sup>.See Migration Act s 366A (MRT); s 427(6) (RRT) and discussion in ALRC IP 24 , para 5.30-5.38.

<sup>2049</sup>.AAT Submission 210.

<sup>2050</sup>.ibid.

12.18 While tribunals like the AAT have extensive programs designed to assist unrepresented applicants, particularly through conferences, other tribunals are more circumspect in providing such assistance.

The AAT considers that conferences provide an effective way of assisting unrepresented parties to evaluate their case, and where necessary, prepare for a hearing. Where appropriate, conference convenors can give a frank evaluation of an unrepresented party's case and may also encourage settlement.<sup>2051</sup>

12.19 Unrepresented parties are assisted by AAT registrars or members by

- requiring the government representative to define the issues in dispute and outline evidence
- undertaking direct questioning of the unrepresented party
- identifying additional evidence that the unrepresented party may require and providing the party with an opportunity to gather such material.<sup>2052</sup>

12.20 Unrepresented applicants often require considerable assistance to understand the tribunal's case management process<sup>2053</sup> and with the content, preparation and presentation of their case.

12.21 Party representatives can bring additional expertise and information to the tribunal. Where representation is not permitted, this may affect the quality of decision making especially if members are not themselves legally qualified. Tribunals may incur additional costs assisting applicants to file and present evidence, explaining the law and tribunal processes and investigating the matter. In addition, the presence or absence of representation also appears to affect the ability of parties to settle disputes without the need for an oral hearing (see paragraphs 12.220–12.221).

12.22 Lack of representation is sometimes said to ensure informality in proceedings, but while the ability to participate as an unrepresented party may lead to higher levels of satisfaction with the process it may be at the expense of a favourable outcome.

The appearance of informality in tribunals may encourage applicants to assume they can simply tell the tribunal their stories in their own way, but such accounts are all too often of little legal relevance to a tribunal whose focus of interest is dictated by legislative

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<sup>2051</sup>.AAT *Submission 210*.

<sup>2052</sup> *ibid*; L Rodopoulos *Submission 178*.

<sup>2053</sup> eg the AAT proposes that a proper program of procedural assistance for unrepresented parties should include: clear written information about the role of the review tribunal, and each stage of the review process; personal contact between review tribunal staff and the applicant. The staff member should have good communication skills; thorough understanding of the tribunal's processes and the issues faced by unrepresented parties; as well as knowledge about the jurisdiction in which the applicant seeks review; and staff who can be contacted at any stage of the review process to provide additional assistance: AAT *Submission 210*.

criteria. . . Applicants who have told their stories, whether irrelevant or insufficient, may feel satisfied with the process, but lose their case.<sup>2054</sup>

12.23 Empirical research shows that unrepresented applicants in the AAT are less likely to be 'successful' in having the decision subject to review set aside, varied or remitted. This research, and the complex issues associated with representation are examined in more detail below (see paragraphs 12.212–12.323).

## The role of review tribunals

### *Correct or preferable decision making*

12.24 Review tribunals are directed to make the correct or preferable decision after looking at the whole of the evidence<sup>2055</sup> and to ensure that their decisions are in accordance with relevant legislation.

12.25 The legislation establishing some review tribunals also states that tribunals are to provide a mechanism for review that is 'fair, just, economical, informal and quick'<sup>2056</sup> or must conduct proceedings 'with as little formality and technicality, and with as much expedition' as possible.<sup>2057</sup> The immigration and refugee tribunals are also required to 'act according to the substantial justice and merits of the case'.<sup>2058</sup>

12.26 The tribunal's role to come to the correct or preferable decision after looking at the whole of the evidence may necessitate an investigation by the tribunal. Neither the applicant nor the respondent agency carries a burden of proof. That is, there is no obligation to prove or disprove a fact.<sup>2059</sup>

12.27 Furthermore, in review tribunal proceedings there is no necessary conflict between the interests of the applicant and of the government agency. Tribunals and other administrative decision making processes are not intended to identify the winner from two competing parties. It is not a zero-sum game. The public interest 'wins' just as much as the successful applicant because correct or preferable decision

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<sup>2054</sup> K Cronin 'Dispute resolution in administrative law' (1998) 87 *Canberra Bulletin of Public Administration* 60, 63 citing HGenn and Y Genn *The effectiveness of representation at tribunals* Lord Chancellor's Department London 1989 and H Genn 'Tribunals and informal justice' (1993) 56-*Modern Law Review* 393.

<sup>2055</sup> See *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577.

<sup>2056</sup> eg Migration Act s 353(1) (MRT); s 420(1) (RRT); Social Security Act s 1246.

<sup>2057</sup> AAT Act s 33(1)(b).

<sup>2058</sup> Migration Act s 353(2)(b)(MRT); s 420(2)(b)(RRT).

<sup>2059</sup> However, while there is no formal burden of proof, in some circumstances there may be a 'practical' burden on one of the parties. For example, where either party raises a specific fact for consideration, the responsibility for proving the existence of that fact may be accepted as falling on that party, particularly where the fact in question is solely within that party's knowledge.

making contributes, through its normative effect, to correct and fair administration and to jurisprudence and policy in the particular area.<sup>2060</sup>

12.28 An investigative model of proceedings is easier to apply in administrative review than in private civil litigation because at least one side of the 'case' is already available to the tribunal, through the government's reasons for decision and other material documenting the decision. Tribunals also make use of the respondent agency's resources to investigate facts in issue.

12.29 While the focus of review proceedings is on correct or preferable decision making, review tribunals can also be seen as engaging in dispute resolution. This is certainly the perspective of the applicant who is 'in dispute' with the government over a primary decision.<sup>2061</sup> Opportunities for negotiation are therefore part of the process provided by some review tribunals, including the AAT.

#### *A duty to assist applicants?*

12.30 The New South Wales Administrative Decisions Tribunal (ADT) has an explicit duty to assist the parties before it; to take such measures as are reasonably practicable

- to ensure that the parties to the proceedings before it understand the nature and legal implications of the assertions being made
- if requested to do so – to explain to the parties any aspect of the procedure of the tribunal, or any decision or ruling made by the tribunal, that relates to the proceedings and
- to ensure that the parties have the fullest opportunity practicable to be heard or otherwise have their submissions considered in the proceedings.<sup>2062</sup>

12.31 Submissions to the Commission did not support the imposition of such a duty on federal merits review tribunals.<sup>2063</sup> The SSAT said that such a duty was not necessary or desirable.<sup>2064</sup> The AAT observed that its current policy is to assist

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<sup>2060</sup> Many commentators question the extent to which federal review tribunals, in fact, contribute to normative effects on primary decision making: eg G Fleming 'Administrative review and the normative goal – Is anybody out there?' *Paper* 1999 *Administrative Law Forum* 29-30 April 1999, Canberra.

<sup>2061</sup> This basic point must be qualified for some review jurisdictions, such as in Commonwealth employees' compensation jurisdictions of the AAT, where the dispute is not so much between the Government and claimant, but between an injured worker and his or her employer [which happens to be a government agency] and the 'insurer' Comcare: *Comcare Submission 209*.

<sup>2062</sup> *Administrative Decisions Tribunal Act 1997* (NSW) (ADT Act) s 73(4).

<sup>2063</sup> Migration Act s 359A (MRT); s 424A (RRT) already place duties on the MRT and RRT to give the applicant particulars of any information which the tribunal considers would be part of the reason for affirming the decision under review and to ensure that the applicant understands why it is relevant to the review.

<sup>2064</sup> *SSAT Submission 200*; *AAT Submission 210*.



applicants wherever possible and that s 33 of the AAT Act gives the tribunal considerable scope to ensure that it provides such assistance.<sup>2065</sup>

12.32 Comcare observed that a minimum level of assistance for applicants may, in certain situations, be required by the rules of procedural fairness but that such a legislative requirement is likely to be counterproductive.

It would risk an overly prescriptive approach, as appeal courts will be asked to determine the extent to which the legislative requirement has been fulfilled. The current procedural fairness requirements are sufficient, and retain flexibility. A legislative requirement to assist applicants also risks modifying the position that the tribunal should not only be independent and impartial, but also be perceived to be so. This may increase, rather than reduce, the adversarial nature of the tribunal.<sup>2066</sup>

12.33 The RRT stated that assistance from the RRT should be limited to providing information about the review process and the functions of the RRT and to directing applicants to organisations and bodies from which they can seek independent advice.

It cannot be the RRT's role to advise applicants on the substance or merits of the application or claims. Any other duty would significantly increase costs to the RRT and the community. Any statutory duty to assist applicants should clearly state the nature of the duty. Assistance beyond simple explanations of processes and procedures would place additional pressure on RRT resources.<sup>2067</sup>

12.34 The Commission does not propose legislating an explicit duty to assist the parties to review tribunal proceedings.

## Case management in the Administrative Appeals Tribunal

12.35 The basic features of the AAT's case management can be summarised as follows.<sup>2068</sup>

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<sup>2065</sup>.AAT *Submission 210*.

<sup>2066</sup>.Comcare *Submission 209*. ASIC likewise saw little value in a legislative requirement to assist applicants and questioned the effect of such a provision and the consequences should the Tribunal fail to satisfy the specified standard of assistance. In ASIC's opinion, as each division of the ART has a different client base, it is best placed to determine the level and nature of assistance to be afforded, at its discretion: ASIC *Submission 184*. Mr de Rohan observed that, if tribunals are to have legislative responsibilities to assist unrepresented parties, this would add significantly to the duties of tribunals and add to the tension between a presiding member's duty to maintain an impartial detachment to the issues, on the one hand, and the duty to ensure that all relevant material is before the Tribunal, on the other: M de Rohan *Submission 175*. Also see J Mathews 'Assisting unrepresented parties in the AAT' (1998) 72 *Reform* 38, 41.

<sup>2067</sup>.RRT *Submission 211*.

<sup>2068</sup>.See T Thawley 'Adversarial and inquisitorial procedures in the Administrative Appeals Tribunal' (1996) 4 *Australian Journal of Administrative Law* 61, 72-73; K Ransome 'Applications to the Administrative Appeals Tribunal' in *The Australian Administrative Law Service* Butterworths Sydney

- The respondent's case is initially disclosed in a statement required by s 37 of the AAT Act, which sets out the reasons for the decision and refers to the facts, evidence and other material on which it was based. Copies of all relevant documents in the decision maker's possession or control are also lodged in accordance with s 37 (the 'T' documents).
- Where the applicant is legally represented, after the exchange of brief statements of issues by the applicant and the respondent,<sup>2069</sup> the issues are refined at a first conference. The issues in dispute and the need for any further evidence will be discussed and the prospect of settlement explored. The first conference will usually be held 6-10 weeks after an application for review has been lodged.<sup>2070</sup>
- The parties are required to exchange statements of facts and contentions<sup>2071</sup> and experts' reports before a second conference is held to narrow the issues, identify relevant witnesses to be called and, if possible, agree on facts. The evidence and the merits of the respective cases will be discussed with a view to settlement. The second conference will usually be held 12-16 weeks after the first conference.<sup>2072</sup>
- At any stage, if the AAT is satisfied that the issues can be adequately determined without an oral hearing and the parties consent, the AAT may review the decision by considering the documents before it and without conducting a hearing.<sup>2073</sup>
- If the parties and the AAT consent, a mediation may be held in a matter.
- At the end of the conference process in the compensation jurisdiction, if a matter has not settled and where the parties are represented, a compulsory conciliation conference is held
- The matter is listed for hearing. In the interim a directions hearing may be called, if necessary.

### *Case duration*

12.36 Most cases in the AAT are finalised within 12 months of the application being received by the Tribunal. The Commission's national AAT case file survey

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1979, 4089, 4095; AAT *General Practice Direction* 1 July 1998; AAT *Conciliation Conference Direction* 18-May 1998.

<sup>2069</sup> Unrepresented applicants are not required to provide statements of issues.

<sup>2070</sup> AAT *General Practice Direction* 1 July 1998, 2.1.

<sup>2071</sup> Unrepresented applicants are not required to provide statements of facts and contentions.

<sup>2072</sup> AAT *General Practice Direction* 1 July 1998, 2.2.

<sup>2073</sup> AAT Act s 34B.

found that the median time to disposition of the sample cases, measured from the time application was made to the AAT, to the final outcome of the case was 8.13-months.<sup>2074</sup>

12.37 Seventy-two percent (72%) of AAT cases were finalised within 12 months of the application being received, a figure consistent with the AAT's reported statistics for all cases finalised in 1997-98.<sup>2075</sup> Ninety-five percent (95%) of the sample cases were finalised within 24 months. Veterans' affairs (10.47 months) and compensation cases (10.27 months) had the longest median times to disposition and social welfare cases the shortest (5.33 months).<sup>2076</sup>

12.38 The 90<sup>th</sup> percentile time to disposition was 17.97 months. That is 10% of the sample cases took 18 months or more to finalise.<sup>2077</sup> In the view of the Commission, while these results do not constitute evidence of systemic problems with delay in AAT proceedings, they clearly indicate room to expedite case resolution.

12.39 In this context, new legislative obligations to review cancellation of visa decisions within the period of 84 days (after the day on which the person was notified of the primary decision)<sup>2078</sup> will clearly require changes in the processing of this category of AAT case. The AAT case file survey found that the median time to disposition for review of decisions refusing or cancelling visas was 245 days (n=13).

#### *How cases are resolved*

12.40 Most AAT cases are resolved without the need for a contested hearing before the Tribunal. In 1997-98, the AAT reported that 84% of veterans' cases, 71% of social security cases, 84% of compensation cases and 86% of taxation division cases were finalised other than by hearing.<sup>2079</sup>

12.41 The Commission's national AAT case file survey showed that the case categories with the highest proportions of cases resolved by consent were veterans'

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<sup>2074</sup> ALRC, AAT Empirical Report Part One, table 4.7.

<sup>2075</sup> Also 72%. Administrative Appeals Tribunal *Annual report 1997-98*, 116. The AAT's time standards provide for a target of 80% of applications being finalised within 12 months of lodgement.

<sup>2076</sup> ALRC, AAT Empirical Report Part One, table 4.7.

<sup>2077</sup> See ALRC, AAT Empirical Report Part One, table 4.8. The 90<sup>th</sup> percentile time to disposition was 21.60 months for compensation cases, 23.91 months for taxation administration cases, 19.40 months for veterans' affairs cases and 12.37 months for social welfare cases.

<sup>2078</sup> Migration Act s 500(6L), inserted by *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998* (Commonwealth). If the AAT has not made a decision within the 84 day period it is taken, at the end of that period, to have made a decision to affirm the decision under review.

<sup>2079</sup> AAT *Annual report 1997-98*, 111 table 5.5. While this table is entitled 'Percentage of applications finalised without a hearing' the Commission understands the figures include cases which went to a hearing but had an outcome determined by consent rather than by a decision of the Tribunal.

affairs (81%) and compensation (79%).<sup>2080</sup> The case categories with the highest proportion of cases resolved by decision of the Tribunal were social welfare (36%) and a mixed 'other' major case category (31%) which included customs and excise, immigration and citizenship and freedom of information review applications.<sup>2081</sup>

### *Conferences*

12.42 Conferences in the AAT are conducted by a tribunal member or conference registrar and are used to

- explore settlement options and the possibility of mediation<sup>2082</sup> and
- ensure that matters are better prepared for hearing should settlement not occur.

12.43 The AAT conducted 9 581 conferences in 1997–98. During the same period the Tribunal finalised 7 122 cases.<sup>2083</sup> The AAT's General Practice Direction provides that 'generally there will be only two conferences held'. Conferences can be in person or by telephone.<sup>2084</sup>

12.44 In most cases, conferences are now conducted by conference registrars.<sup>2085</sup> Cases are allocated by an AAT member who acts as a prehearing coordinator. Cases may be, but are not generally, managed by the same conference registrar throughout the process. An AAT member acts as a listing coordinator. After cases are listed for hearing they are allocated to a member or members who are then responsible for the case until it is finalised.

12.45 Conferences use ADR techniques, including explanations of the primary decision to applicants and more formal conciliation or mediation processes. There is debate concerning the role for ADR in administrative review proceedings and this was reflected in submissions.

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<sup>2080</sup> See ALRC, AAT Empirical Report Part One, para 5.1, table 5.1.

<sup>2081</sup> *ibid.*

<sup>2082</sup> In 1996–97, 77% of matters in the General and Veterans' Divisions and 90% of matters in the Taxation Division were finalised without a hearing: AAT *Annual report 1996–97*, 103.

<sup>2083</sup> Conferences and finalised cases in the General and Veterans' Divisions and in the Taxation Division: AAT *Annual report 1997–98*, 105.

<sup>2084</sup> AAT *General Practice Direction 1* July 1998, 2.2.

<sup>2085</sup> However, members conduct all conferences in the Brisbane registry and the majority of conferences in the Canberra registry. In Hobart conferences are conducted by members and the District registrar: AAT *Annual report 1997–98*, 25. The AAT claims that the use of conference registrars has led to an increase in the number of matters finalised by the tribunal, as members are now available for hearings on days which were previously devoted to the prehearing process. — AAT *Submission 210*. However, one submission suggested that using conference registrars rather than members to conduct preliminary conferences, is a waste of members' expertise. That is, members should conduct conferences where appropriate: L Rodopoulos *Submission 178*.

There is a contradiction between the underlying philosophies of ADR and Administrative review. ADR looks to 'privatise' individual complaints. Administrative review assumes complaints, in as much as they are subject to processes of accountability, to be public. The 'privatisation' of complaints ensures that 'government decision makers' do not have to take account of flawed administrative processes and improve these processes beyond the individual situation. Outcomes are not subject to precedent setting and further judicial scrutiny. As such, I do not think that ADR practices are consistent with the objectives of federal administrative review. Careful consideration needs to be given to the limitations of ADR in privatising public issues.<sup>2086</sup>

12.46 Against this, one commentator observed that such arguments ignore several key points.

First, the interpretation of legislation is not an exact science and there is often no one incontrovertible interpretation. Second, government policy may be capable of varying applications depending upon the circumstances of the case. Third, conflict over a government decision may reflect differences over the interpretation of the facts rather than law or policy or alternatively may simply reflect an individual's affront at the manner in which they were treated by government officers. Finally, even where the government's original decision is the correct and preferable one, there may still be something that the government can do, at small cost, to alleviate a person's distress or difficulties. It would be a rare case in which there is absolutely no room for negotiation.<sup>2087</sup>

12.47 ADR encompasses a range of techniques, including the provision of information explaining the decision to applicants to more formal conciliation or mediation processes. To adapt ADR techniques, one does not have to characterise the decision as a 'dispute'. A core group of applicants in most jurisdictions would accept and cease to challenge a decision if the decision was fully and effectively explained to them. Such explanations are now part of enhanced communication practices in some agencies<sup>2088</sup> and have been recommended for migration decision making.<sup>2089</sup>

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<sup>2086</sup> L Rodopoulos *Submission 178*.

<sup>2087</sup> S Beresford-Wylie 'The place of ADR in administrative review' *Paper ALRC, Australian Competition and Consumer Commission and the Commonwealth Ombudsman Conference The management of disputes involving the Commonwealth. Is litigation always the answer?* Canberra 22 April 1999.

<sup>2088</sup> For example, the use of Centrelink customer service officers: J Brown *Commentary 'Centrelink — a case study on managing/avoiding disputes'* ALRC, Australian Competition and Consumer Commission and the Commonwealth Ombudsman Conference *The management of disputes involving the Commonwealth. Is litigation always the answer?* Canberra 22 April 1999.

<sup>2089</sup> eg see comments of Wilcox J who said  
in my view, the better course is to establish a system whereby people whose applications are refused have assured access to proper interpretation services and independent legal advice. If that were done, the number of applications for judicial review would substantially decrease: *Mbuaby v Minister for Immigration and Multicultural Affairs* [1998] FCA 1093.

12.48 In that context, conferences utilising varied communication and mediation comprise the AAT's formal ADR program.<sup>2090</sup> The AAT stated that it

considers ADR processes and techniques to be part of a continuum of decision making. In addition, the skills and techniques that are considered to be part of ADR can be used throughout the course of proceedings from lodgement to resolution, including during any hearing that may take place.<sup>2091</sup>

12.49 The AAT's voluntary mediation program, conducted by members or officers of the AAT, was introduced in 1991.<sup>2092</sup> The AAT has emphasised that mediation is not used simply in order to reduce the tribunal's caseload. Parties cannot proceed directly to mediation. They must participate in at least one preliminary conference prior to mediation to ensure that they understand the process and are ready to mediate on the allocated date.<sup>2093</sup>

12.50 The AAT conducted 169 mediations in 1995–96, 114 in 1996–97 and 122 in 1997–98.<sup>2094</sup> The Commission's national AAT case file survey found that mediation was used in 33 cases (2% of the sample). 29 of these cases (88% of the cases attending mediation) ultimately resulted in consent outcomes, consistent with successful mediation.<sup>2095</sup>

12.51 The AAT notes that a likely explanation for the relatively small numbers of mediations conducted each year is the success of the conference system in providing a forum for resolution.

Mediation is offered after the conference process and as an alternative to proceeding to hearing. It is conceivable that many cases that would otherwise have proceeded to mediation have already settled during the conference process. Similarly, the introduction of conciliation conferences to the AAT's compensation jurisdiction may reduce the scope for formal mediation by resolving matters during the conciliation phase that otherwise would have resolved at a mediation.<sup>2096</sup>

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<sup>2090</sup> Tribunals such as the MRT, RRT and SSAT have not formalised ADR processes. However, ADR techniques may be adopted by individual tribunal members or staff as part of a broader focus on reducing legalism and promoting a less adversarial process in the hearing of disputes.

<sup>2091</sup> AAT *Submission 210*.

<sup>2092</sup> AAT Act s 34A. Members of the AAT who mediate are not permitted to determine or conduct conferences in the particular proceedings, other than for the purpose of making consent decisions, but can dismiss an application by consent or for failure by a party to appear: AAT Act s 34A(8). The AAT Act also provides that, if the Small Taxation Claims Tribunal considers at any time it may assist in the resolution of a dispute if the proceeding, or part of it, was dealt with by mediation, the Tribunal must recommend mediation and, if the parties consent, direct that the matter be referred to a mediator: AAT Act s 34A(1A)(b).

<sup>2093</sup> J Handley 'Mediation in the Commonwealth Administrative Appeals Tribunal' (1995) 6 *Australian Dispute Resolution Journal* 5, 6.

<sup>2094</sup> AAT *Annual report 1997–98*, 105.

<sup>2095</sup> See ALRC, AAT Empirical Report Part One, para 5.9.

<sup>2096</sup> Comcare *Submission 209*.

12.52 The AAT's 'conciliation' conferences for compensation cases<sup>2097</sup> are discussed in detail below (see paragraphs 12.80-12.84).

*Submissions and research findings on conferences*

12.53 The Commission's survey of AAT case files found that

- most AAT cases (75%) had at least one preliminary conference and
- nineteen percent (19%) of all AAT cases in the sample had more than two preliminary conferences.<sup>2098</sup>

12.54 The Commission collected information on the total duration of preliminary conferences and other prehearing cases events as recorded by the AAT. When the time spent on all prehearing case events for all sampled cases was added, the Commission found the median total time taken was 25 minutes, 30 minutes for cases proceeding to a final hearing and 20 minutes for those resolved prior to a final hearing.<sup>2099</sup>

12.55 As most AAT cases are resolved without a contested decision of the Tribunal, it is difficult to quantify the extent to which AAT conferences directly contribute to these consent outcomes. The Commission found that only 12% of the sample cases<sup>2100</sup> which experienced consent outcomes were resolved without any conference or other prehearing case event. Most settled cases therefore had a least one conference or other prehearing case event in the AAT.

12.56 The AAT conferencing system received considerable support in submissions to the inquiry, for example

The [AAT] case conferencing system provides a useful framework around which negotiation and attempted settlement can be made and should be installed with the new ART.<sup>2101</sup>

12.57 Legal Aid New South Wales observed that, while ADR processes such as mediation and conciliation are not particularly useful for administrative law disputes

[t]he standard pre-hearing processes used in the AAT, however, are extremely useful in identifying the issues in dispute, focussing the parties' attention on evidence required

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<sup>2097</sup>.AAT *Conciliation Conference Direction* 18 May 1998.

<sup>2098</sup>.See ALRC, *AAT Empirical Report Part One*, para 4.1, table 4.3.

<sup>2099</sup>.id table 4.5. The median total time in all prehearing case events (including preliminary conferences, directions hearings, collovers and other events) was 30 minutes for all cases, 40 minutes for cases proceeding to a final hearing and 25 minutes for those that did not proceed to a final hearing.

<sup>2100</sup>.After excluding cases withdrawn at the request of the applicant, a large proportion of which (30%) are withdrawn before any prehearing case event takes place.

<sup>2101</sup>.M de Rohan *Submission 175*.

and resolving disputes without the need to litigate. We believe that the AAT's standard practice of scheduling preliminary conferences in all matters is appropriate and effective and we recommend that the AAT model be adopted in all Federal merits review tribunals.<sup>2102</sup>

12.58 The Australian Securities and Investments Commission (ASIC) also noted that, in its experience

the AAT's preliminary conference procedure, where the parties are required to define the issues in dispute, is useful in determining whether the matter is suitable for ADR negotiations, which are then generally carried on unassisted between the parties.<sup>2103</sup>

12.59 Some submissions expressed concerns that the AAT case management system is not used effectively and equitably as between applicants and respondents. Comcare stated

the current AAT system is effective in identifying and reducing issues in dispute. However, Comcare is of the view that the AAT places most pressure on Comcare to settle issues and would prefer to see a more balanced approach taken by the AAT when seeking settlement by the parties.<sup>2104</sup>

12.60 The Commission's survey of representatives in AAT proceedings included questions related to management of cases.<sup>2105</sup> Representatives responding to the survey mostly agreed that AAT case management helped the parties negotiate or promoted settlement (for applicants 58% compared with 12% who disagreed; for respondents 45% compared with 11% who disagreed)<sup>2106</sup> and helped identify and focus the issues (for applicants 61% compared with 12% who disagreed; for respondents 50% compared with 13% who disagreed).<sup>2107</sup> These results provide further endorsement of the conferencing system in such cases. Some of the positive comments relating to AAT case management included the following.

I would like to see the jurisdiction of the AAT expanded to include decisions made under Part XVI of the Customs Act. I know of no other jurisdiction that provides a comparably quick and relatively cost effective public service as that provided by the AAT.<sup>2108</sup> (solicitor for the applicant in a customs and excise case)

The preliminary conferences in the AAT are very important: (i) to focus on and identify the issues (ii) lead parties to look at possible outcomes and are therefore conducive to

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<sup>2102</sup>.Legal Aid NSW *Submission* 228.

<sup>2103</sup>.ASIC *Submission* 223.

<sup>2104</sup>.Comcare *Submission* 209.

<sup>2105</sup>.ALRC *Part two: Empirical information about the Administrative Appeals Tribunal* ALRC Sydney June 1999 (ALRC, AAT Empirical Report Part Two) Appendix A, table 4.4–4.5.

<sup>2106</sup>.153 applicants and 228 respondents provided a response to this question.

<sup>2107</sup>.159 applicants and 228 respondents provided a response to this question.

<sup>2108</sup>.AAT case file survey response 155 (solicitor for the applicant).



settlement (iii) are valuable in cost cutting.<sup>2109</sup> (solicitor for the applicant in a taxation administration case)

The AAT's interventionist approach really helped settle this case.<sup>2110</sup> (solicitor for the applicant in a compensation case)

The AAT system is organised and efficient and far excels other litigious forums.<sup>2111</sup> (solicitor for the applicant in a veterans' affairs case)

AAT is a better forum for most litigants, due to (i) forced conferences help settle issues (ii) statement of facts and contentions likewise (compared to traditional pleadings).<sup>2112</sup> (solicitor for the applicant in a compensation case).

12.61 Respondents to the survey also made a number of negative comments. These were directed in particular to the management of cases in the compensation jurisdiction, discussed in more detail at paragraphs 12.74-12.84. Other negative comments included

Further intervention by AAT to isolate issues may have been useful.<sup>2113</sup> (solicitor for the applicant in a business regulation case)

The written submissions required were extremely detailed as to fact and legal argument. The process was every bit as rigorous as it would have been in the Federal Court. As such the perceived benefits of proceeding in the AAT (inquisitorial, less formal, low costs) were not realised.<sup>2114</sup> (solicitor for the applicant in a regulation of business case)

Processes could be streamlined and costs reduced by more effective interlocutory procedures. This is particularly so in cases involving unrepresented applicants and lawyers inexperienced in the AAT jurisdiction. AAT members should take a far more pro-active approach in dissuading applicants with hopeless cases from proceeding, compelling parties to focus on and articulate the issues and compelling applicants to articulate what they are after. Far too many members adapt a passive role and this results in all too frequent settlements on the door step of the tribunal, late withdrawals and the consequent escalation in costs.<sup>2115</sup> (solicitor for the applicant in a social welfare case).

### *Case management teams*

12.62 As certain of these comments and the Commission's data on case duration and outcome indicate, AAT case conferencing could and should be improved. The

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<sup>2109</sup>.AAT case file survey response 997 (solicitor for the applicant).

<sup>2110</sup>.AAT case file survey response 1015 (solicitor for the applicant).

<sup>2111</sup>.AAT case file survey response 1050 (solicitor for the applicant).

<sup>2112</sup>.AAT case file survey response 1449 (solicitor for the applicant).

<sup>2113</sup>.AAT case file survey response 719 (solicitor for the applicant).

<sup>2114</sup>.AAT case file survey response 980 (solicitor for the applicant).

<sup>2115</sup>.AAT case file survey response 1143 (solicitor for the applicant).

Commission considers such improvement could be secured if AAT cases were managed by the same conference registrar throughout the prehearing process.

12.63 Under this proposal, conference registrars would be assigned to specific AAT case types or divisions of the ART.<sup>2116</sup> This would allow conference registrars and members to develop or utilise their particular expertise and provide active and individual management for cases, flexibility to deal with problems and with non-compliance with directions.

12.64 The Commission's conclusions in this regard derive in part from analysing case management practices in the Federal Court and the Family Court where the Commission found clear benefits from using teams of members and registry staff who consistently manage and determine a particular docket of cases. The Commission considers that this option deserves detailed consideration in the AAT and for the ART.

12.65 Such a case management system would not place members in charge of all conferences but would allow registrars or other tribunal staff to retain responsibility for prehearing case events in most cases. However, allocation of a 'docket' of cases to teams of members and registrars allows for increased accountability from members for the effective, timely resolution of cases; for consistent dealing with cases; flexibility to involve members in making early determinations in appropriate cases; and affirms that case management is part of the overall review process and subject to direction or intervention by members, where appropriate.

**Proposal 12.1.** The Administrative Appeals Tribunal, and equivalent divisions of the new Administrative Review Tribunal, should introduce a case management system in which each case is allocated to particular members and registrars who jointly take responsibility for the allocated cases from commencement to finalisation.

### *The conference system and settlement*

12.66 The AAT conference program is considered highly successful in effecting settlement of disputes,<sup>2117</sup> but the AAT stated that 'the settlement rate in conferences could be improved if the conference convenor were uniformly activist and interventionist and encouraged settlement of matters wherever practicable'.<sup>2118</sup>

12.67 Case settlement can best be effected through the involvement and participation of the parties. The general practice in the AAT is that, in most cases, only the parties' legal representatives attend preliminary conferences and where applicants are represented, most preliminary conferences are conducted by

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<sup>2116</sup>.As suggested by the AAT: AAT *Submission 210*.

<sup>2117</sup>.Including by the AAT itself: AAT *Submission 210*.

<sup>2118</sup>.*ibid.*

telephone. If parties do not attend personally, the opportunities for conferences to explore settlement options are reduced. However, conferences with parties present may be more time-consuming and expensive for the AAT and the parties.

12.68 Settlement rates are not necessarily a measure of the effectiveness of conference proceedings. Some review applications are not amenable to consensual resolution. Compensation cases may be associated with a related dispute between the applicant and the employer (who is not a party to the AAT proceedings) which may complicate the prospects of settlement.

The biggest difficulty for Comcare (and it will be a continuing one) is that unlike most other jurisdictions, in the SRC Act jurisdiction there are three interests concerned: Comcare, the applicant, and the employing agency. In many instances the injured employee has an ongoing issue with the employer and or is seeking some benefit from the employer outside the SRC Act (most often a redundancy). These employer related benefits are not matters which Comcare can make a decision on and so, unless the employer is present and willing to negotiate on these matters, the mediation process tends to break down because problems arise from matters unrelated to the SRC Act decision.<sup>2119</sup>

12.69 As a further example, agency and party positions in social welfare applications, which have had internal review by the agency and a determination by the SSAT may be difficult to modify in the AAT proceedings. In any case, legislation may limit the scope of the agency's power to agree to a compromise. Comcare has observed that

the structure of the SRC Act does not lend itself to negotiated outcomes, but often lawyers representing applicants have a background in third party and damages actions and are seeking a lump sum payment for their client. Because the Act does not generally lend itself to this type of outcome the applicant's lawyers may take a more adversarial approach.<sup>2120</sup>

12.70 Improved settlements require not simply changes to AAT, but also to agency arrangements. It is in this context that the Commission recommends that agencies formulate and implement effective dispute avoidance and management strategies (see chapter 8). Such strategies may involve providing incentives or information to encourage applicants to settle the matter early. Veterans' affairs, social welfare and Commonwealth employees' compensation decision making could benefit from such approaches.

12.71 In veterans' and some social welfare cases, the Commonwealth provides funding to legal aid commissions to assist applicants who are seeking review of decisions before the AAT. The Commission proposes, particularly in cases where the only issue is a medical one, that agencies, tribunals and legal aid commissions cooperate to identify such cases and secure timely medical evidence. Reserving legal

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<sup>2119</sup> Comcare *Submission 209*.

<sup>2120</sup> *ibid.*

assistance in such cases to AAT proceedings can simply diminish the value of VRB or SSAT proceedings.

12.72 In compensation matters, it was suggested to the Commission that current costs arrangements act as a disincentive to settlement at the internal review (reconsideration) stage. Lawyers in the compensation jurisdiction largely operate on contingency fee arrangements and depend on a costs order in the AAT for their fees.<sup>2121</sup> There is no incentive for lawyers to put their clients' case at the reconsideration stage because they would not be paid for such services.<sup>2122</sup> Comcare noted that under the *Compensation (Commonwealth Government Employees) Act 1971* (Commonwealth) claimants' legal costs at the reconsideration stage were payable by Comcare's predecessor. The SRC Act deliberately removed this payment. The view was that claims management under the SRC Act was best managed 'in an administrative environment', that is, without legal costs payments.

12.73 Comcare acknowledges that while this arrangement initially worked well 'claimants increasingly are seeking legal representation at the reconsideration stage'.<sup>2123</sup> It makes little sense for lawyers in such cases to simply march their clients through a reconsideration process if the presentation of the case could resolve it at this early stage. The Commission considers that while there are good reasons to preserve the informality of a reconsideration process, due regard should be taken of its essential goal, namely early effective resolution of decisions which can and should be varied. To that end it may be sensible to encourage the full disclosure of a case and early medical reports by reviving the practice of paying costs for legal work undertaken at the reconsideration stage. These costs should not be added to those expended at the AAT stage if the matter does not resolve at reconsideration, but should be set at a fixed amount which is only paid if the case is finally resolved at this time.

### *Management and settlement of compensation cases*

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<sup>2121</sup>. AAT *General Practice Direction* 18 May 1998, 6. In proceedings under the SRC Act, the costs payable generally include witness expenses at the prescribed rate; all reasonable and proper disbursements; 75% of all professional costs, including counsel's fees, which would be allowable under the Federal Court scale.

<sup>2122</sup>. Comcare *Consultation* Canberra 26 May 1999. If an injured employee or an employer is dissatisfied with a Comcare decision on any part of their claim, the SRC Act affords the parties an opportunity to request that the decision be reconsidered by an officer not previously involved in its making. Comcare reports that the number of requests for reconsideration decreased from 2 460 in 1996-97 to 1 972 in 1997-98. In the same period AAT applications also decreased from 845 to 693: Comcare *Annual report 1997-98*, 28.

<sup>2123</sup>. Comcare *Submission* 272. In February 1998, the Government announced that Comcare's claims management business would be opened to private sector competition once the necessary legislative changes were made and a comprehensive regulatory model developed to ensure the provision of effective and efficient claims management services to premium paying agencies. The resolution of legislative and costs issues relating to the settlement of Commonwealth workers' compensation claims needs to be considered in this wider reform context.

12.74 In the Commission's survey, compensation cases were the most intensively managed major case type. A higher proportion of compensation cases had more than five prehearing case events than any other case type (29% compared with 15% of all cases). Compensation cases spent the longest median time in preliminary conferences and prehearing case events generally.<sup>2124</sup> Compensation cases are more process intensive, for example, requests for summonses were most often made in the compensation jurisdiction (in 46% of cases).<sup>2125</sup>

12.75 Attendances on return of summonses contribute to the number of prehearing case events. In the AAT (to obtain access to the summonsed documents) a party must attend before a presidential member or a senior member on the return date.<sup>2126</sup> It was suggested that return of summonses should be by telephone or an 'automatic system like the [NSW] District Court or Compensation Court in Sydney and Newcastle'<sup>2127</sup> or at least able to be ordered by all, not just presidential or senior, members. Legislative amendments would be necessary for this change.<sup>2128</sup>

12.76 Many of the negative comments the Commission received about AAT case management concerned compensation cases. One respondent to the survey listed the following problems with the case management of compensation cases.

- (i) Procedure too highly geared requiring too many attendances and documents; ii) Hearing of matters relatively lengthy compared to other jurisdictions with rules and evidence followed even though AAT not bound; (iii) Lack of commercial reality usually displayed by federal parties and their lawyers particularly the AGS; (iv) Waste of resources – [the AAT is] an 'empty palace' compared to state tribunals (v) Difficulty entering AAT decisions (vi) Difficulty of winning in AAT means there is no applicant's bar or a proper [looseleaf] service for procedure (vii) Inability to get costs for work done before proceedings commenced is incentive to only prepare case once proceedings instituted. [This] does not encourage resolution of dispute at determination and reconsideration stage.<sup>2129</sup> (solicitor for the applicant in a compensation case).

<sup>2124</sup> See ALRC, AAT Empirical Report Part One, para 4.1, table 4.4–4.6.

<sup>2125</sup> *id.* para 6.1.

<sup>2126</sup> AAT Act s 40(1D) provides that a presidential member or a senior member may give a party to a proceeding leave to inspect a document produced under a summons.

<sup>2127</sup> AAT case file survey response 910 (solicitor for the applicant). In the NSW Compensation Court, an automatic order giving access is sent to both parties, who then have 14 days to object before first access is automatically granted.

<sup>2128</sup> It would be desirable to remove the requirement in the AAT Act that a summons to produce documents must be returned at a directions hearing or a hearing: AAT Act s 40(1A), 40(1B). The Tribunal should be able to require a person merely to provide the documents to a registry of the Tribunal or another place by a particular time. Directions hearings would need to be held only if specific issues arose in relation to a summons or if one of the parties wished to object to access to any of the documents that had been produced. Also AAT Act s 40(1D) provides that a presidential member or a senior member may give a party to a proceeding leave to inspect a document produced under a summons. The AAT would enjoy greater flexibility in dealing with summonses for productions of documents if the AAT Act were amended to allow all members of the Tribunal to grant a party leave to inspect a document produced under summons, not just presidential members of senior members.

<sup>2129</sup> AAT case file survey response 70 (solicitor for the applicant).

12.77 This respondent was not alone in considering that compensation cases are over-managed by the AAT, without a corresponding benefit in settlements or hearing preparation.

The Commonwealth AAT is very particular on form/paperwork. While issues are clearly defined in my experience respondents produce new evidence at the hearings which is allowed into evidence in any event. Thus, there is a lot of time and resources spent on preparing materials which do not seem to carry much weight. I think a lot of this could be avoided and therefore costs decreased. The matters could be brought to a hearing more quickly. Some of the directions and pre-hearing conferences could be avoided.<sup>2130</sup> (solicitor for the applicant in a compensation case)

Applications of this nature often deal with complex questions of law and fact, a situation which is not always acknowledged in the costing of these applications. Moreover the constant drive by the tribunal to introduce more and more documentation such as statements of issues, statements of facts and contentions, witness statements and applicant's statements which do not substantially reduce the length of a hearing, ignores the issue of increased costs to the parties, particularly applicants who are generally concerned about the costs they may incur in the event that their application is unsuccessful. This then has the added effect of preventing deserving people from pursuing their lawful rights.<sup>2131</sup> (solicitor for the applicant in a compensation case).

12.78 The value of conferences in compensation cases was the subject of differing comment by representatives responding to the survey.

Telephone conferences in compensation matters do not assist resolution (except perhaps, for unrepresented applicants). They serve an administrative purpose only.<sup>2132</sup> (solicitor for the applicant in a compensation case)

Many of the people who conduct AAT conferences are not sufficiently skilled to be doing so (telephone conferences) etc. They tend to side with Comcare and give them every assistance in not paying compensation to people. The whole system is weighted heavily against the claimants who get a better run in state compensation courts.<sup>2133</sup> (solicitor for the applicant in a compensation case).

The telephone conference system is in the main a good idea and should be retained. Face to face conferences are largely a waste of time and money.<sup>2134</sup> (solicitor for the applicant in a compensation case).

12.79 One particular case management problem, identified by the AAT and in the Commission's data, relates to late settlement in compensation cases. The Commission's case file survey found that 28% of all cases (and 51% of compensation

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<sup>2130</sup>.AAT case file survey response 685 (solicitor for the applicant).

<sup>2131</sup>.AAT case file survey response 814 (solicitor for the applicant).

<sup>2132</sup>.AAT case file survey response 1084 (solicitor for the applicant).

<sup>2133</sup>.AAT case file survey response 275 (solicitor for the applicant).

<sup>2134</sup>.AAT case file survey response 182 (solicitor for the applicant).

cases) which attended a final hearing were nevertheless resolved by consent, with some variation to the original decision.<sup>2135</sup>

12.80 In response to this problem of late settlement the AAT introduced mandatory 'conciliation' conferences for compensation cases where both parties are represented.<sup>2136</sup>

These conferences are intended to overcome the phenomenon of late settlement that is prevalent in the compensation jurisdiction. The intention is that the conference convenor will adopt an active, interventionist stance in the conference. Whilst the AAT believes that this is the approach taken at other conferences as well, the purpose of the conciliation conference is to make it clear to both parties that there will be a meaningful attempt at settlement and that the Tribunal will assist this to happen.<sup>2137</sup>

12.81 All parties are required to be present.

For applicants this has the benefit of direct engagement with the process, overcomes the problem of authority to settle and has the added advantage of enhanced satisfaction with the process. In many cases this satisfaction will still be present even if the outcome does not provide everything that the party wanted.<sup>2138</sup>

Comcare supported this requirement, noting its earlier experience of legal representatives arriving at 'mediation' conferences without the client, not being in a position to settle matters and 'seeing the mediation conference as just another preliminary conference'. Comcare's experience with mediation has been 'mixed at best'.

12.82 At the commencement of the conciliation conference each party must certify that they have authority to settle the application.<sup>2139</sup> In its submission to the

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<sup>2135</sup> ALRC, AAT Empirical Report Part One, para 5.6, table 5.6. However, it is problematic to consider consent variation of the original decision as an applicant 'success' because the outcome may in fact constitute a concession by the applicant from an interim bargaining position. Therefore, while the results are consistent with a failure on the part of agencies or their representatives to properly assess the merits at an early time (delays in briefing counsel are one possible reason for this: Law Council Administrative Law Committee *Consultation* Sydney 6 May 1999) they are equally consistent with applicants 'holding out' for their ambit claim until the latest possible time before accepting the agency's offer.

<sup>2136</sup> AAT *Conciliation Conference Direction* 18 May 1998.

<sup>2137</sup> AAT *Submission 210*. In this context the Commission notes that while there are many different definitions and practices encompassed by the term 'conciliation', generally conciliation is regarded as a more advisory process than mediation. During conciliation conferences, the convenor is likely to take a more active role in setting out options and discussing with the parties the merits of their respective cases than is usually the case in AAT conferences. However, under existing conference processes AAT conference convenors often express views on the adequacy of the evidence and, sometimes, on the likely outcome of the case, particularly where one party is unrepresented: J-Mathews 'Assisting unrepresented parties in the AAT' (1998) 72 *Reform* 38, 40.

<sup>2138</sup> AAT *Submission 210*.

<sup>2139</sup> AAT *Conciliation Conference Direction* 18 May 1998.

inquiry, Comcare confirmed its support for the conciliation conference approach but observed that not all cases are suitable for conciliation.

The parties need to believe that conciliation has something to offer them over and above a normal hearing, otherwise the parties may as well proceed straight to hearing. It would be useful to revisit this question after the AAT's Practice Direction on Conciliation Conferences has been in effect for twelve months . . .<sup>2140</sup>

12.83 Comcare participated in an estimated 346 conciliation conferences in the 1998–99 financial year. The average time taken to resolve compensation cases before the AAT decreased, since the implementation of the conciliation process, from 400 days (for cases decided in July 1998) to 250 days (for cases decided in April 1999).<sup>2141</sup>

12.84 In cases where redundancy or dismissal from service issues arise and there is some prospect of these issues being settled between the employer and employee, Comcare requests the employer's representatives to attend the conciliation conference. These service issues are unrelated to the SRC Act decision and if all issues are resolved the employment outcome will not appear as part of the compensation consent decision issued by the tribunal.

**Proposal 12.2.** A system for the automatic return of summonses should be adopted in the Administrative Appeals Tribunal and the Administrative Appeals Tribunal Act should be amended to allow such a system to be adopted.

**Proposal 12.3.** In compensation cases in which a conciliation conference is to be held, the respondent agency should be directed to investigate whether the employer's representatives should be requested to attend.

**Proposal 12.4.** Arrangements for costs in the compensation jurisdiction should be reviewed to allow payment by respondent agencies of legal costs on a successful application for reconsideration of a compensation decision. Such costs could be a capped amount to be paid where the lawyer advises and prepares the application for reconsideration. The costs should only be paid if the matter is resolved at this stage. Such sums for legal costs should not be added to the legal costs claimed at the conclusion of any subsequent review tribunal proceeding.

## Case management in other review tribunals

12.85 In the SSAT, MRT and RRT, the other federal review tribunals considered by the Commission, there is limited case management. Most applications in these

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<sup>2140</sup> Comcare *Submission 209*.

<sup>2141</sup> *ibid.*



jurisdictions go to a hearing, although there is scope for deciding 'on the papers'.<sup>2142</sup> Therefore there are no arrangements secure 'settlement'.

12.86 In each of these tribunals, the agency or departmental secretary is required to provide statements of the reasons for the decision, the facts on which it was based and relevant documents.<sup>2143</sup> In practice, the applicant's file is copied and sent to the tribunals. There are few prehearing case events or preliminary meetings and submissions indicated that there is no, or very limited, need for such events.<sup>2144</sup>

12.87 However, recent Migration Act amendments are likely to increase prehearing contact between applicants and the MRT and RRT. These amendments included those providing the principal members of the MRT and the RRT with clear authority to give directions on the operation of the tribunals and the conduct of reviews; preventing MRT and RRT hearings from being unnecessarily delayed where prescribed notice of a personal hearing has been provided; giving the MRT and RRT clear authority to use telephone or other media to conduct personal hearings or for people to appear before them; and applying a code of procedure to the MRT and the RRT in relation to decisions on the entry and stay of non-citizens.<sup>2145</sup>

12.88 In the MRT, a case management model has been introduced under which applications are allocated to a case team led by a senior case officer who examines the files, assembles relevant documents and prepares applications for review by tribunal members. A case will be the responsibility of the team unit until it is, in the opinion of a case team leader or another senior tribunal officer, ready for consideration by a member.<sup>2146</sup> The efficacy of the new scheme relies on the skills of the case officers identifying and investigating matters in issue. If the case officers do

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<sup>2142</sup>Neither the former IRT nor the RRT report in their annual reports the number of cases that are decided by review 'on the papers' as opposed to a hearing. The RRT advised that, as at 30 April 1999, since the inception of the Tribunal 228 out of a total 24 884 applications have been decided on the papers without a hearing in the way most favourable to the applicant and a further 8 851 (35%) decisions were decided without a final hearing because the applicant failed to attend. RRT *Submission 274*. In the SSAT, while applications may be decided on the papers or by telephone hearings, most applications are decided through a hearing attended by the applicant. If the review raises purely legal questions a hearing may take place in the absence of the applicant.

<sup>2143</sup>Social Security Act s 1261; Migration Act s 352 (MRT); s 418 (RRT).

<sup>2144</sup>S Tongue *Submission 231*; MRT *Submission 273*; RRT *Submission 211*. In its 1992 report, the Committee for Review of the System for Review of Migration Decisions (CROSROMD) stated that it should be standard practice for immigration and refugee tribunals to conduct preliminary meetings to assist in the identification of all relevant evidence: Committee for Review of the System for Review of Migration Decisions *Non-adversarial review of migration decisions: the way forward* AGPS Canberra 1992, 57. Submissions made in 1997 to the Senate Legal and Constitutional Legislation Committee also suggested a need for preliminary conferences in RRT proceedings: See Senate Legal and Constitutional Legislation Committee: Consideration of Migration Legislation Amendment Bill (No.s 4 & 5) 1997; Victorian Immigration Advice and Rights Centre *Submission 1*, 9 September 1997, 7; Victorian Immigration Advice and Rights Centre *Submission 1A*, 15 September 1997, 10; Refugee Advice and Casework Service (Aust) Inc *Submission 5*, 15 September 1997, 7.

<sup>2145</sup>*Migration Legislation Amendment Act (No.1) 1998* (Commonwealth).

<sup>2146</sup>S Tongue 'The New Migration Review Tribunal: What does it mean for migration agents?' <<http://www.mrt.gov.au/speech.htm>> (21 May 1999).

not have such skills, work will be duplicated and the time taken to determine the matter extended.

12.89 In the context of the new ART, the Attorney-General's Department has stated that the use of preliminary meetings will vary between jurisdictions and that flexible arrangements for such meetings should be provided in divisional practice directions.<sup>2147</sup> The ART legislation is expected to 'provide the new tribunal with the flexibility and powers necessary to enable it to make best use of ADR'.<sup>2148</sup>

12.90 Submissions confirmed the need to consider ADR processes by reference to the review jurisdiction, so that these too are arranged flexibly. The SSAT stated that ADR would not be appropriate in the income support division of the ART.

[ADR] would increase time and costs and is therefore inconsistent with the particular statutory objectives or providing a mechanism that is 'economical' and 'quick'. In addition, it is impossible to mediate a 'right'. A customer will either be entitled or not entitled to a pension or benefit - it is not possible to mediate such issues.<sup>2149</sup>

12.91 The Department of Immigration and Multicultural Affairs (DIMA) stated that review should not consider the application as a dispute between the review applicant and the Department but as a process in which disappointed applicants are given a second chance to put a more convincing case to an independent decision maker. Therefore

. . . ultimately the concept of alternative dispute resolution may have limited applicability in the tribunal review process. The tribunal is not a referee, umpire or judge, but a *de novo* administrative decision maker whose primary duty is to make the correct and preferable decision. Once a primary decision has been made and there is no consensus between the Department and the applicant that an error of law has been made, it is no longer open to the Department to make concessions to the applicant because the Minister's power to make the primary decision has been spent (ie that decision-maker is *functus officio*) and the review process must necessarily take its own course as required by statute.<sup>2150</sup>

DIMA noted that in a review of Migration Act decisions, where regulations tightly control the grant and cancellation of visas, ADR techniques have a very limited role.<sup>2151</sup>

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<sup>2147</sup>.A-G's Dept (Commonwealth) *Reform of the Merits Review Tribunals: Government Proposal* Consultation document March 1998.

<sup>2148</sup>S Pidgeon 'Reforming the system: Proposed reform in the federal arena' *Paper* Australian Competition and Consumer Commission and the Commonwealth Ombudsman Conference *The management of disputes involving the Commonwealth. Is litigation always the answer?* Canberra 22 April 1999.

<sup>2149</sup>SSAT *Submission 200*.

<sup>2150</sup>DIMA *Submission 216*.

<sup>2151</sup>For example, in clarifying the understanding of facts which the applicant claims have been misunderstood, in suggesting novel forms of legislative interpretation, and in suggesting further reasons why a discretion embodied in legislation should be exercised in the applicant's favour: *ibid*.

## 12.92 The AAT concurred that

... ADR can only be available as a resolution method in those Divisions [of the ART] where both parties participate in the resolution of the dispute. The extent to which this will occur in Divisions such as Immigration and Refugee and Income Support is unclear. If these Divisions mirror the operations of existing review tribunals such as the SSAT, IRT and RRT then the capacity to undertake ADR will be absent as the respondent does not currently participate in proceedings.<sup>2152</sup>

The AAT stated that in those divisions of the ART where it is expected that both parties will be participating,<sup>2153</sup> ADR should be available as a resolution method.

If working effectively, an ADR programme should result in timely, cost effective resolution. However, there will need to be a commitment of resources to any ADR programme to ensure that it is effective. ... the use of ADR processes may well be expanded in proceedings where all parties participate and in matters which do not involve significant questions of law or policy.<sup>2154</sup>

12.93 Certainly, in the review jurisdictions presently covered by the AAT, any diminution in the level of withdrawals or consent determinations would create extensive backlogs in hearing caseloads. Further, in cases where there is discretion to vary the primary decision, failure to incorporate ADR may result in cases settling at or just before hearings when they could have settled earlier and at less cost to the parties<sup>2155</sup> and to the tribunal. In particular, a limit on representation or controls on party participation in tribunal proceedings may significantly reduce the opportunities for and the efficacy of ADR processes for settlement (see paragraphs-12.220-12.227). ADR processes as much as adjudicative processes also need skilled intermediaries to be successful.

12.94 The Commission therefore supports the ART adopting a prehearing conference system based on that currently used in the AAT, which provides a useful framework for negotiation and hearing preparation. This should be subject to

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<sup>2152</sup>.AAT Submission 210.

<sup>2153</sup>.The AAT said that these are likely to be the compensation, veterans' appeals, taxation and commercial and general divisions.

<sup>2154</sup>.AAT Submission 210. In this context the AAT also observed that 'ADR leads to individualised justice as it is contingent on the relationship between two parties. It provides an outcome that benefits the immediate parties to the dispute. Whilst there is a definite role for ADR in the merits review process it should be noted that ADR is but one of the appropriate methods for resolving administrative disputes. ADR is not appropriate in all circumstances for many reasons, and the broader interest of improving public administration is not generally addressed by the use of ADR in review tribunal proceedings'.

<sup>2155</sup>.Clearly, cases resolved by consent can be expected to cost less to run. The Commission's AAT case file survey confirms this. The survey found a significant difference in the cost of compensation cases, depending on whether cases were resolved by a decision of the tribunal, by consent or by dismissal. The median total legal costs for cases that resolved by consent was \$4000, compared with \$5512 for cases that were dismissed and \$9860 for cases resolved by a contested decision: ALRC, AAT Empirical Report Part Two, table 5.6.

appropriate variation in particular divisions. It would be inappropriate to require that cases in the income support division or immigration and refugee divisions of the ART attend settlement conferences as a matter of course.

**Proposal 12.5.** Practice directions for the new Administrative Review Tribunal should endorse, subject to appropriate variation in particular review jurisdictions, a prehearing conference system based on that currently used in the Administrative Appeals Tribunal, which provides a useful framework for negotiation and hearing preparation.

## Decisions on the papers

12.95 Many federal merits review tribunals have the power to make final determinations ‘on the papers’ and without an oral hearing. The AAT may review the decision by considering the documents before it and without conducting a hearing if the AAT is satisfied that the issues can be adequately determined without an oral hearing and the parties consent.<sup>2156</sup> The SSAT may proceed to make a decision on the papers where applicants advise that they do not intend making oral submissions<sup>2157</sup> or where applicants fail to attend a hearing at the time fixed for the hearing.<sup>2158</sup>

12.96 The ARC recommended that review tribunals should not convene an oral hearing of a matter if they consider that the issue may be determined adequately without an oral hearing, and provided that the applicant gives informed consent to the tribunal adopting that course.<sup>2159</sup>

12.97 Both the RRT and the MRT have power to make a decision on the basis of the documents provided by the applicant and DIMA, in certain circumstances, that is

- if the tribunal considers that it should decide in the applicant’s favour on the basis of the material before it or
- if the applicant consents to the tribunal deciding the review without the applicant appearing before it.<sup>2160</sup>

12.98 The Migration Act now also provides that when

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<sup>2156</sup>.AAT Act s 34B.

<sup>2157</sup>.Social Security Act s 1266(1).

<sup>2158</sup>.Including where oral submissions are to be made by telephone and the presiding member of the SSAT has made all reasonable attempts to contact the applicant or the applicant’s representative on the day fixed: Social Security Act s 1266(2), s 1266(3).

<sup>2159</sup>.ARC 39, rec 19. The common law rules of procedural fairness do not require that in all cases an oral hearing be offered to the applicant. However, requirements of procedural fairness may require an oral hearing where, for example, real issues of credibility are involved or it is otherwise apparent that an applicant is disadvantaged by being limited to written submissions or responses to the decision maker: *Chen v Minister for Immigration and Ethnic Affairs* (1994) 48 FCR 591, 602.

<sup>2160</sup>.Migration Act s 360(2)(a)(b)(MRT); s 425(2)(a)(b)(RRT).

- a person is invited by the tribunal to provide additional information and does not give the information before the time for giving it has passed or
- an applicant is invited by the tribunal to comment on information and does give comments before the time for giving them has passed, then
- the tribunal may make a decision without taking any further action to obtain the additional information or the applicant's views on the information.<sup>2161</sup>

If a decision on the papers is not possible, the applicant generally has a right to attend an oral hearing before the tribunal to give evidence.<sup>2162</sup> The MRT or RRT may also proceed without a hearing if the applicant fails to appear before the tribunal at a scheduled hearing.<sup>2163</sup>

12.99 The AAT observed that decisions on the papers can offer significant savings. However, oral hearings may be necessary in the following circumstances

- where the application raises an issue of general importance to Commonwealth administration
- where the application involves complex questions of law or fact
- where the outcome of the application is likely to have significant financial or other repercussions for the applicant
- where there are questions as to the credit of the applicant or a witness
- where there is significant conflict as to the facts or the correct interpretation of the law, for example, where conflicting reports have been prepared by expert witnesses or
- where an unrepresented applicant, by reason of cultural or linguistic background or for other reasons, cannot present a cogent argument in writing or does not understand the tribunal's role.<sup>2164</sup>

12.100 In some circumstances a hearing will provide a more efficient method of presenting and testing relevant material.

Oral hearings allow review tribunals to pursue matters as they arise during the hearing. Relevant evidence which has been omitted from written submissions may be revealed during a hearing. Also during a hearing, the parties can respond to submissions or evidence which does not support their case. Unrepresented applicants, who may not

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<sup>2161</sup>.id s 360(2)(c), s 359C(1)(2)(MRT); s 425(2)(c), s 424C(1)(2)(RRT).

<sup>2162</sup>.id s 360(1)(MRT); s 425(1)(RRT). However, RRT practice directions provide that where the tribunal is unable to make a favourable decision 'on the papers' a letter will be sent to the applicant advising that they are entitled to an oral hearing and requesting that they complete a 'Response to offer of hearing' form. Where no response is received to the offer, the practice direction states that the tribunal may proceed to a decision on the case without further notice: RRT *Practice Directions* 23-September 1998.

<sup>2163</sup>.id s 362B(MRT); s 426A(RRT).

<sup>2164</sup>.AAT *Submission 210*.

appreciate the types of evidence it is necessary to produce to support their application, may also benefit from assistance from the review tribunal during a hearing.<sup>2165</sup>

12.101 The AAT further submitted that the informed consent of the parties must be obtained before a review tribunal makes a final determination without an oral hearing.<sup>2166</sup> The AAT suggested that the ART's power to make a decision on the papers should be expressed legislatively in terms similar to s 34B of the AAT Act.<sup>2167</sup>

12.102 Several submissions considered that there should be greater scope for the practice of decisions on the papers.<sup>2168</sup> Comcare stated where there is no new evidence, or limited new evidence, it could be appropriate to make a decision on the papers. The MRT considered that, for efficiency reasons, there should be enhanced powers to decide cases on the papers where there are 'no key facts in dispute'.<sup>2169</sup> The RRT noted that, on average, about one third of people do not appear for their scheduled hearing and that 'it would be preferable, as a matter of efficiency, for more refugee determinations in the ART to be made on the papers than is currently the case'. However, the RRT observed that it would be problematic to determine cases involving humanitarian claims and issues of credibility without having heard and observed the applicant.<sup>2170</sup> DIMA emphasised that an oral hearing, whether to ascertain the relevant facts of the case or to hear argument about the relevance or role of those facts, is merely a part of the review process and not the review process itself. An oral hearing may not be a necessary part of the review process in every case.<sup>2171</sup>

12.103 The Commission agrees that decisions on the papers should be more widely available in review tribunals, but only following appropriate consideration, and after procedurally fair opportunities have been afforded to the parties to respond. Such procedures do not require a hearing but generally will require communication or attempted communication with the applicant.

12.104 Even where a decision on the papers is not appropriate, members should be encouraged to consider alternatives to full hearing, such as limiting the amount of oral evidence required to be given at the hearing and relying on written reports from medical experts or other witnesses.

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<sup>2165</sup>.ibid.

<sup>2166</sup>.ibid.

<sup>2167</sup>.ibid.

<sup>2168</sup>.ASIC *Submission 184*; SSAT *Submission 200*; Comcare *Submission 209*.

<sup>2169</sup>.For example, in Schedule 3 cases where there is no dispute as to key dates and there is no discretion available to the members: MRT *Submission 273*.

<sup>2170</sup>.RRT *Submission 211*.

<sup>2171</sup>.DIMA *Submission 216*.

In the SRC Act jurisdiction, where medical evidence is in issue, invariably both sides seek to lodge fresh medical reports, but having done so there might be scope for a greater reliance on the papers rather than calling medical experts to hearings.<sup>2172</sup>

In some circumstances, even where credibility is an issue, it may also be possible to substitute written questions and answers for cross-examination at a hearing. Administrative processes allow discontinuous and varied hearing and adjudication processes. Tribunal members should be encouraged and trained to utilise the full range of appropriate and effective decision making processes.

**Proposal 12.6.** Decisions on the papers should be more widely available in review tribunal proceedings, but only following appropriate consideration, investigation and after procedurally fair opportunities have been afforded to the parties to respond. Members should be encouraged to use decisions on the papers more often to resolve review applications.

## Investigation

12.105 Federal merits review legislation enables tribunals to undertake their own investigations or inquire into matters relevant to decisions under review. Review tribunals are provided with a range of permissive, information gathering powers to enable them to perform investigative functions.

12.106 In the AAT, the current practice is for there to be investigation by the parties under the direction of the tribunal. The prehearing conference process investigates by isolating issues in dispute and identifying evidence relevant to the decision. Parties are encouraged to gather relevant material. The AAT undertakes limited investigation in most cases.

12.107 In contrast, the SSAT, the MRT and the RRT were explicitly set up to as investigative review tribunals. Their legislation does not impose a general duty to investigate matters relevant to their review decisions but the Federal Court has stated that failure to make particular investigations may, in some circumstances render a decision unfair or unreasonable or imply bias.<sup>2173</sup> Similarly, over-zealous investigation of only some of the relevant facts may lead to imputations of bias.<sup>2174</sup> A closer look at their experience may help identify what is needed to operate an effective investigative model of tribunal proceedings.

12.108 ALRC IP 24 asked what types of legislative provisions might be effective in ensuring that tribunals are able to operate as an investigative model and whether

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<sup>2172</sup>.Comcare Submission 209.

<sup>2173</sup>.*Minister for Immigration and Ethnic Affairs and Another v Singh* (1997) 144 ALR 284, 291; *Garcha v Minister for Immigration and Multicultural Affairs* (1997) 145 ALR 55, 63.

<sup>2174</sup>.*Sun Zhan Qui v Minister for Immigration and Ethnic Affairs* (1998) 151 ALR 505; *Eshetu v Minister for Immigration and Ethnic Affairs* (1997) 145 ALR 621.

existing powers are sufficient.<sup>2175</sup> The answers to these questions are most relevant in the context of the proposed ART. Legislation establishing a new ART will not itself produce an effective investigative model of tribunal proceedings. Other factors are just as important, including

- the resources available to tribunals and their members (for example, whether a tribunal has the resources to conduct its own investigations, the number of tribunal members, the tribunal's caseload and management performance targets)
- factors relevant to the parties (for example, their knowledge, experience and the nature and role of representation in the proceedings) and
- personal preferences of tribunal members, the membership and 'culture' of the tribunal.

12.109 Submissions to the inquiry emphasised that the legal 'culture' of members and representatives may encourage over-reliance on traditional 'adversarial' procedure.<sup>2176</sup> Legal professionals appearing before the tribunals may not expect members to investigate matters and some members may not be willing or practised in so doing.<sup>2177</sup>

#### *The responsibility to investigate*

12.110 The AAT has noted that broadly expressed powers, such as those in s 33 of the AAT Act, which provide that in a proceeding the procedure of the Tribunal is within the Tribunal's discretion and that the Tribunal may inform itself on any matter in such manner as it thinks appropriate, may not be sufficiently directive to encourage investigative procedures. The New South Wales ADT Act gives increased emphasis to investigative procedures.<sup>2178</sup> The ADT Act

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<sup>2175</sup> See ALRC IP 24 ch 6.

<sup>2176</sup> eg AAT *Submission 210*; L Rodopoulos *Submission 178*.

<sup>2177</sup> Views have been expressed that the membership and organisational structure of the AAT which is dominated by judges and other experienced lawyers, contributes to a 'default' assumption that procedures adopted by tribunals should follow those of traditional civil litigation: eg L Rodopoulos *Submission 178*. The AAT noted that the prevailing legal culture early in the history of the AAT favoured an adversarial approach to review tribunal proceedings. The present culture of the AAT is not biased towards adversarial procedures: AAT *Submission 210*. In the past, many commentators have indicated that there is a preference or bias towards adversarial proceedings in tribunals except where tribunals are specifically required by legislation to proceed in another manner. This preference is generally felt to be most evident in the AAT: See T Thawley 'Adversarial and inquisitorial procedures in the Administrative Appeals Tribunal' (1997) 4 *Australian Journal of Administrative Law* 61; J Fitzgerald 'The Commonwealth Administrative Appeals Tribunal – aspects of the system of fact-finding and rules of evidence' (1996) 58 *Canberra Bulletin of Public Administration* 127; S Henchcliffe 'Theory, practice and procedural fairness at Administrative Appeal Tribunal hearings' (1995) 13 *Australian Bar Review* 243; F Esparraga 'Procedure in the Administrative Appeals Tribunal' in J McMillan (ed) *Administrative law: does the public benefit?*; J-Dwyer, 'Overcoming the adversarial bias in tribunal procedures' (1991) 20 *Federal Law Review* 252.

<sup>2178</sup> F Cameron 'NSW ADT – Scope for inquisitorial procedures in new Administrative Decisions Tribunal' (1997) 35(7) *Law Society Journal* 41, 42.



- provides that the ADT may call witnesses of its own motion and examine and cross-examine witnesses to such extent it thinks proper<sup>2179</sup>
- provides the ADT with a range of express powers to control proceedings before it, including powers to require material to be placed before it in writing, to decide which matters will be dealt with by oral evidence or argument, to require the presentation of parties' cases to be time limited<sup>2180</sup>
- places the ADT under an obligation to ensure that all relevant material is disclosed to enable it to determine all the relevant facts in issue in any proceedings<sup>2181</sup> and
- provides that the ADT may inquire into any matter in such manner as it thinks fit.<sup>2182</sup>

12.111 Some submissions suggested that the proposed ART legislation should contain an explicit and comprehensive statement of tribunal powers and responsibilities, including legislative provisions placing the Tribunal under an obligation to ensure that all relevant material is disclosed to enable it to determine all the relevant facts in issue.<sup>2183</sup>

12.112 Investigations vary in scope and nature. Investigations might simply involve a telephone call, for example by an SSAT member to Centrelink case managers, employers, parents, landlords and other people from whom verification of relevant information may be obtained. In migration and refugee cases investigation can be more time consuming and involved. For example, the RRT, in assessing an applicant's claims to fear persecution in their home country, may obtain information from many sources, including Australian embassies in relevant countries, academic researchers, overseas aid organisations, schools and universities.

12.113 The AAT identified four investigative models which may be used in various divisions of the ART.

- Model 1. Only the applicant appears at the hearing, with no prehearing process (this model is currently used in the RRT and SSAT).<sup>2184</sup>
- Model 2. Only the applicant appears at the hearing, with prehearing process (this model has been used in the IRT).
- Model 3. Both parties appear at the hearing, with no prehearing process.

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<sup>2179</sup>.ADT Act s 83; cf AAT Act s 40(1A).

<sup>2180</sup>.ADT Act s 73(5)(c), (d).

<sup>2181</sup>.ADT Act s 73(5)(b).

<sup>2182</sup>.ADT Act s 73(2); cf AAT Act s 33(1)(c).

<sup>2183</sup>.M de Rohan *Submission 175*.

<sup>2184</sup>.The MRT is also expected to have very few preliminary meetings and therefore best fit within this model: MRT *Submission 273*.

- Model 4. Both parties appear at the hearing, with prehearing process (this model is currently used in the AAT).<sup>2185</sup>

12.114 The AAT observed that there will be a substantial need and therefore a duty to investigate on the part of the Tribunal where only the applicant has a right to appear before the Tribunal (under models 1 and 2). However, under model 2 the investigative burden on the Tribunal is somewhat reduced as applicants, through the prehearing process, should be assisted to prepare their case for hearing.<sup>2186</sup> Where both parties have a right to appear before the Tribunal, as in models 3 and 4, the need to investigate should be reduced, particularly where the Tribunal is assisted by investigation by the respondent agency.

12.115 Review applications generally require some level of case preparation and investigation. The following questions arise with respect to such investigation.

- Who is to conduct investigation? Options include Tribunal members, Tribunal case officers or research staff, or the representatives or officers of the respondent government agency.
- When and how is investigation to be conducted? Questions arise about the powers and responsibilities of Tribunal members to investigate matters and the limits of such investigation.
- What Tribunal or other resources are available for investigative activities? Management performance standards for timeliness directly affect the scope and nature of investigation.

12.116 Existing investigative arrangements in review tribunals vary according to the type of information being sought. For example

- where departmental decision making processes or medical matters are in issue questions may be within the expertise of particular members such as the executive members of the SSAT or specialist non-legal members of the AAT
- the RRT, which requires data on the political or social environment and events in other countries has a research unit which investigates and compiles 'country information' and maintains its library of refugee-related information
- the MRT uses case officers to investigate cases, including assembling evidence, arranging for submissions to be made and commissioning relevant reports

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<sup>2185</sup>.AAT *Submission 210*.

<sup>2186</sup>.*ibid.* The MRT noted that Migration Act s 359A will assist applicants to focus on the issues to be addressed and will require the MRT to have undertaken a certain amount of investigation prior to the s 359A advice being sent to the applicant: MRT *Submission 273*.

- in migration cases investigation is often undertaken by specialist bodies such as the National Office of Overseas Skills Recognition (NOOSR) or Medical Officers of the Commonwealth whose findings bind the tribunal.

12.117 A key element in considering the duty to investigate is the quality of an applicant's representation.

... the extent of the tribunal member's duty to investigate during the course of a hearing will always depend on the quality of the parties' presentation of their case to the review tribunal. Where parties make thorough submissions which address all the facts and law relevant to the application, the tribunal member would only have a limited need or duty to investigate; where a party makes limited submissions, or fails to present relevant evidence, then the ART members should have a greater duty to engage in investigation and fact finding during the hearing.<sup>2187</sup>

12.118 In the absence of skilled representatives, expert binding determinations of fact or the assistance of skilled case or research officers, tribunal decision making requires a wider range of member skill. Specialist legal knowledge and experience in the areas of decision making may be more important. Decision making in the absence of representatives may be more easily undertaken by joint discussion and consideration by several tribunal members representing varied perspectives and experience.

12.119 An example is the composition of panels in the SSAT. SSAT panels comprise a legal member, to ensure that decisions are made in accordance with the law, an executive member, bringing specialist knowledge of social security administration, and a welfare member, bringing expertise in recognising the needs, interests, and views of applicants<sup>2188</sup>

[t]he multi-disciplinary panel ensures that the tribunal panel as a whole is able to investigate the relevant facts, while ensuring that the unrepresented applicant is given a fair hearing. Members are able to take joint responsibility to ensure that all relevant evidence is presented, and that the applicant has a reasonable understanding of the proceedings. Multi member panels look at the facts presented in slightly different ways. Each member of the panel is able to analyze the evidence and as a result the findings of fact usually better represent the evidence presented.<sup>2189</sup>

12.120 Multi-member tribunals may have some advantages over single member panels in achieving high quality and speedy decision making, in particular, where the review panel includes a member appointed by, or with a close relationship to, the respondent agency. In addition

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<sup>2187</sup>.AAT Submission 210.

<sup>2188</sup>However, the extent to which tribunal members rely on their own expertise may raise concerns about whether procedural fairness has been given: see H Katzen 'Procedural fairness and specialist members of the AAT' (1995) 2 *Australian Journal of Administrative Law* 169.

<sup>2189</sup>.SSAT Submission 200.

- multi-member tribunals may be more suitable where the tribunal takes an active role in the process of gathering and assessing evidence (in that they are less likely to cause antagonism than if one member alone has to question an applicant and test his or her evidence)
- multi-member tribunals may be particularly useful when it comes to assessing the credibility and character of review applicants and
- several members working together may be more likely to ensure that all relevant information is brought out and tested at or before the hearing.<sup>2190</sup>

These advantages must be weighed up against any additional costs of providing multi-member tribunals.<sup>2191</sup>

12.121 Leaving aside the resource implications of direct tribunal investigation the AAT noted that some types of matter may be more amenable to direct tribunal investigation than others, for example

immigration and refugee matters may be more suited to fact finding by the tribunal because the review process will often require 'objective' research and fact finding about an applicant's country of origin. By contrast [AAT] compensation matters, for example, necessarily require applicants to establish their case, and to identify and provide the evidence necessary to do so.<sup>2192</sup>

12.122 The AAT observed that the high rate of settlement indicates that investigation by the parties with the AAT as supervisor is effective. The approach is cost-effective and appropriate to the present jurisdictions of the AAT.<sup>2193</sup> In the AAT's current jurisdictions, which will be transferred into the ART, the AAT would prefer refinement of current practices, rather than the introduction of an investigative process which places such duty upon the tribunal.<sup>2194</sup>

12.123 In the RRT and MRT case investigation may be facilitated by multi-member panels. A responsible member would examine the application, decide on measures of investigation, order the disclosure of documents and draft a report in which the facts are set out, the arguments of the parties are summarised and a draft decision prepared. Panels so constituted, as with the SSAT, could hear and determine two or three cases in one day. Where issues of credit are involved, the responsible member could undertake the questioning of witnesses and the applicant, which helps ensure the applicant experiences the hearing as a fair process.

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<sup>2190</sup>.ARC 39, 32. Also see Committee for the Review of the System for Review of Migration Decisions *Non-adversarial review of migration decisions: The way forward* AGPS Canberra 1992, 63-64.

<sup>2191</sup>.These advantages may be contested. For example, the RRT doubts that multi-member tribunals assist in determining credibility issues, given the existing protection provided to applicants by the strict requirements of the Federal Court in relation to credibility findings: RRT *Submission 274* referring to *Meadows v MIMA* (unreported) Full Federal Court 23 December 1998.

<sup>2192</sup>.AAT *Submission 210*.

<sup>2193</sup>.*ibid.*

<sup>2194</sup>.*ibid.*

**Proposal 12.7.** Federal review tribunals should be permitted to have multi-member tribunals, to be constituted as appropriate in all review jurisdictions.

### *The role of agencies*

12.124 One obvious source for investigative assistance is the department or agency. Even that classic investigative institution, the Ombudsman, relies primarily on the agency under complaint to provide the necessary information.

12.125 On occasion, all review tribunals need to obtain further information from departmental officers. For example, the MRT may find it necessary to get information from migration compliance officers to confirm what was actually observed by the officer, where the information on file indicates that an applicant tried to 'abscond'.

12.126 While the migration and refugee tribunals have the power to require the Secretary to report, the Commission was informed there is no institutionalised way of facilitating or responding to such requests. It can be time-consuming to secure 'formal' responses in writing and an unnecessary complication to summons officers as witnesses. Certainly it is difficult to obtain information in a time frame consistent with the tribunals' obligations to provide speedy decision making. The Commission was informed by then IRT members and practitioners that the relationship between the IRT and DIMA in relation to investigation was not well structured for cooperative investigation.

12.127 The MRT stated that there is now greater scope for DIMA to make submissions to the MRT and for the MRT to invite submissions but that there needs to be an agreed process in place to ensure that this can be done efficiently and that the views expressed in any submission 'accurately reflect the views of the Department, rather than one work area or individual within the Department'. The absence of an effective 'bridge' to DIMA may leave such review tribunals with 'the worst of both worlds', that is, they are deemed to be 'inquisitorial', but are left with no effective means to inquire.

I have no doubt that the work of the IRT suffers from not having ready access to departmental input into investigations. . . . I see real advantage in having a unit staffed by departmental officers and located either in the Department or in the Tribunal to assist the Tribunal with its investigations. While there are disadvantages with this approach (cost, likely criticism of loss of independence and adversarialism) there would be an improvement in the Tribunal's access to materials on which departmental decision makers rely and understanding of the Department's position.<sup>2195</sup>

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<sup>2195</sup>S Tongue *Submission 231*.

12.128 The 'bridge' between the SSAT and Centrelink is provided, in part, by the executive members of the panel (members selected for expertise and knowledge of social security administration and who are usually detached officers of Centrelink). Where further information is required from Centrelink, these executive members are usually responsible for obtaining this information.

12.129 The Commission was told that such links work well, allow easy access to 'line' or supervising officers to check factual information and create a supportive relationship between the department, agency and tribunal. The Commission was also told such links are essential if the tribunal is to play an effective role in improving decision making. While the SSAT and RRT were confident of their 'good working relationship' with their departments, there needs to be effective arrangements for communication and assistance between review tribunals and agencies.

**Proposal 12.8.** Close policy consideration should be given to the means to provide the most appropriate 'bridge' between review tribunals and the agencies whose decisions are subject to review, to enable investigative assistance to be given by the agency to the tribunal and to provide a conduit for the normative effects of decision making. The options include (i) executive members appointed to tribunals (ii) departmental presenting officers attached to the tribunal (iii) tribunal/agency liaison committees or officers.

### *Case officers*

12.130 One way to provide a link with a department, without compromising the independence of the tribunal, is the use of departmental 'presenting officers'.<sup>2196</sup> Presenting officers are relatively senior public servants attached to the tribunal who present the Minister's case before it. The presenting officer provides a conduit to assist the tribunal in its investigation and decision making and reports back to the department on decisions made.<sup>2197</sup>

12.131 A modification of this arrangement is being implemented in the MRT in which the preliminary and research work is undertaken by tribunal administrative staff. Case officers are to be

empowered to conduct routine case correspondence, investigate cases and assemble evidence, invite people to make submissions, commission relevant reports on behalf of the tribunal and in general assemble a properly documented file so that the Member is relieved of the administrative burden of directing that these things be done.<sup>2198</sup>

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<sup>2196</sup>.As used in the UK Immigration Appeals Tribunal.

<sup>2197</sup>.An more modest change in this direction might involve steps to reinforcing the duties of agency representatives to assist the decision making of the tribunal, issues discussed in more detail below. See para 12.233-12.241; proposals 12.20-12.21.

<sup>2198</sup>.DIMA *Submission 216*. DIMA notes that members are free to direct staff to make specific inquiries, to make any further inquiries themselves or commission any further reports that they think fit.

12.132 The Principal Member of the MRT has stated that members and case teams (tribunal staff led by senior case officers) will be supported by an information section including specialist migration lawyers. Members and case teams will specialise in the review of decisions about a limited number of visa classes before rotating, after a suitable period, into another category of review.

12.133 The case teams follow administrative procedures as directed by the Principal Member including advising applicants of the current status of their application, clarifying which criteria DIMA considers the applicant has failed to satisfy and preparing, prior to the hearing, for the benefit of the applicant and the member conducting the review, an outline of issues in dispute and on which further evidence may be needed.<sup>2199</sup>

12.134 The government has proposed that the ART also use case officers to manage part of the work of review applications. Member and case officer involvement in the review process would vary depending on the sort of decision being reviewed.

12.135 Concerns have been expressed that tribunal members adopting case officer research without further contribution or evaluation might be taken to be acting under dictation.

Decisions about the investigations which may be needed in a particular case, or the collection of evidence and the identification of potential witnesses, influence the ultimate outcome of a case. It must be remembered that these decisions take place in an informal, inquisitorial context, without the protection of the rules of evidence and without the presence of the Department or opposed parties concerned with their own rights and interests.<sup>2200</sup>

12.136 The problem of dictation may be a particular concern in the context of MRT case management where, as discussed above, the responsible member is not constituted to the case until the 'review on the papers' stage. The extent to which MRT case officers will be involved in preparing what are, in effect, draft decisions is unclear.

12.137 Another concern is that MRT (or ART immigration and refugee division) case officers may be relatively junior officers with limited experience in case preparation, evaluation, investigation or in questioning witnesses. Further, the case officer model does not necessarily facilitate communication with, or provide assistance from, the agency or department. If case officers are junior administrative staff it may even retard such communication. If the officers are more senior and recruited from the department, the tribunal may be seen to be coopted, not just assisted by, the agency. Presenting officers present the department's case. Case officers prepare the

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<sup>2199</sup>S Tongue 'The New Migration Review Tribunal: What does it mean for migration agents?' <<http://www.mrt.gov.au/speech.htm>> (21 May 1999).

<sup>2200</sup>G Fleming *Submission 234*.

tribunal's brief. This position is therefore not easily transformed into a bridge to the department. Nevertheless the case officer model is a recent and interesting initiative. It deserves close evaluation as a model which may be adapted to other administrative review proceedings.

12.138 The AAT's submission notes that in divisions of the ART where there is no prehearing process particularly where the applicant attends at a hearing but the department is not a party, tribunal members should carry out, or supervise, the fact finding process provided 'clear policy guidelines are developed and appropriate training is made available to members to ensure that they carry out adequate fact finding and avoid any inference of bias in their decision making.'<sup>2201</sup> The AAT adds that the best use of resources would be for investigations and research to be conducted by staff or teams of staff under the direction of the member responsible for hearing the matter.<sup>2202</sup>

12.139 An additional investigative arrangement is set down in the NSW ADT Act which provides that the tribunal may appoint 'assessors' to enable it to undertake its own inquiries. As well as being able to conduct preliminary conferences and inquire into and report to the tribunal on any issue, ADT assessors may have matters delegated to them for determination or sit with, assist and advise the tribunal without participating in the adjudication of the matter.<sup>2203</sup>

12.140 Submissions to the inquiry did not favour the appointment of assessors for federal review tribunals. Given the role of specialist tribunal members and other forms of staff investigative and research assistance,<sup>2204</sup> submissions doubted that these additional non-member tribunal functions would be necessary or desirable.<sup>2205</sup> Concerns were also expressed about maintaining procedural fairness.<sup>2206</sup> The Commission does not see benefit in the appointment of tribunal assessors.

### *The scope of investigation*

12.141 In ALRC IP 24, the Commission asked whether legislation and case law adequately define the powers and responsibilities of tribunal members in investigating matters relevant to decisions and the limits of such investigation and if not, how this should be remedied.

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<sup>2201</sup>.AAT *Submission 210*.

<sup>2202</sup>.*ibid.*

<sup>2203</sup>.ADT Act (NSW) s 74, s 33, s 34, s 35.

<sup>2204</sup>.For example that provided by the Country and Legal Research Sections of the RRT.

<sup>2205</sup>.RRT *Submission 211*; ASIC *Submission 184*.

<sup>2206</sup>.In particular ensuring that parties have access to all relevant adverse materials obtained by the assessors on which the tribunal relies in making a decision: ASIC *Submission 184*.



12.142 In response, DIMA submitted that the common law provides the immigration and refugee tribunals, along with other administrative decision makers, with an uncertain guide to their duty to make further inquiries, while discharging the obligation of procedural fairness. DIMA considered that this is one reason why recent amendments to the Migration Act<sup>2207</sup> included provisions to

- allow the tribunal to obtain any information it considers relevant, and having obtained that information, the tribunal must have regard to it in making its decision<sup>2208</sup>
- ensure that an applicant is given particulars of any information that would be the reasons or part of the reasons for affirming the decision under review and is asked to comment on that information<sup>2209</sup> and
- prescribe a code of procedure for seeking additional information or comment from the applicant and to allow the tribunal to make a decision without any delay if the applicant fails to respond to a request for further information or comment within the prescribed period.<sup>2210</sup>

12.143 In its submission the RRT stated that, as a general rule, the legislation and case law adequately define the extent of its responsibilities to investigate case facts. The RRT observed that s 425 of the Migration Act provides that the Tribunal may obtain such evidence as it considers necessary and referred to the case of *Minister for Immigration and Ethnic Affairs and Another v Singh*<sup>2211</sup> as providing the Tribunal with ‘workable guidelines’ when deciding whether to seek further inquiries.<sup>2212</sup> The Commission considers that this view may overstate the helpfulness of the decision in *Singh* and subsequent Federal Court cases which do not set out general guidance on the obligation to investigate but review the processes undertaken in particular cases.

12.144 The RRT submitted that, given the nature of refugee review proceedings and the need to act in accordance with substantive justice and the merits of the case, it is

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<sup>2207</sup>.Inserted by the *Migration Legislation Amendment Act (No.1) 1998* (Commonwealth).

<sup>2208</sup>.Migration Act s 359(1) (MRT); s 424 (1)(RRT).

<sup>2209</sup>.Migration Act s 359A(1) (MRT); s 424A(1) (RRT). The fact that the information must be specifically about the applicant or another person and not just about a class of person has been criticised. See Senate Legal and Constitutional Legislation Committee *Report on the Migration Legislation Amendment Bill (No 4) 1997 and the Migration Legislation Amendment Bill (No 5) 1997* Commonwealth of Australia 1997, 19–20.

<sup>2210</sup>.Migration Act s 359B, s 359C (MRT); s 424B, s 424C (RRT).

<sup>2211</sup>.(1997) 144 ALR 284. This case was discussed in ALRC IP 24, para 6.63.

<sup>2212</sup>.RRT *Submission 211*. In *Singh*, while the Full Federal Court rejected the idea that there is any general duty placed on the immigration or refugee tribunals to make inquiries it concluded that there may be circumstances in which the tribunals’ obligations to act according to substantial justice require them to make inquiries. In particular, the Court held that there is no general duty to verify the authenticity of official documents produced by the applicant. (1997) 144 ALR 284, 291. The Federal Court has considered the RRT’s duty to investigate in specific circumstances in many other cases eg *Sun Zhan Qui v Minister for Immigration and Ethnic Affairs* (1998) 151 ALR 505, 548; *Navaratne v Minister for Immigration and Multicultural Affairs* [1997] 713 FCA (1 August 1997).

'not desirable to legislate the various circumstances in which investigation would be warranted',<sup>2213</sup> and the 'current flexibility' should be retained. The RRT stated that there should be no general duty to inquire, but that the requirement to investigate facts or issues should be determined by the circumstances of each case. The imposition of a duty to inquire may result in the Tribunal committing unnecessary resources to investigations. Where possible, applicants should provide information in support of their claims, although this presents difficulties for some applicants.<sup>2214</sup>

12.145 DIMA stated that while the Tribunal should have unfettered discretion to investigate the relevant facts in each case, in most cases it will be more expeditious for the Tribunal to accept some or all of the primary decision maker's findings of fact, particularly those beneficial to the applicant, and the legislation and practice directions should not prevent the Tribunal adopting this course.<sup>2215</sup>

12.146 The SSAT noted that if all the facts have not been presented to the Tribunal, or those facts are unclear then it has a duty to attempt to clarify those facts, if this is practical.<sup>2216</sup> The SSAT stated that a Tribunal member should investigate the facts of the matter where those facts are unclear, and there is a possibility that the facts situation can be clarified either by talking to a third party or by obtaining documentation.

12.147 Such investigations will always be a matter of degree. In many cases it will not be possible to obtain a definitive answer concerning facts in issue. In those cases the tribunal must decide the facts on the available information.<sup>2217</sup> There was no support from tribunals for the imposition of a general duty to investigate case facts and issues.

### *Investigative resources*

12.148 Resources are an important constraint on tribunal investigations. Investigation takes time and requires expenditure on staff resources or on expert advice or opinion.

Although an inquisitorial approach is not going to save courts and tribunals money, it should reduce the amount of expenditure on litigation by the community as a whole, but that is hard to establish. The fact that it may add to the budget expenditure of a court or tribunal means that, in the current culture of budget cuts and competition, those who

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<sup>2213</sup>.ibid.

<sup>2214</sup>.ibid.

<sup>2215</sup>.DIMA *Submission 216*.

<sup>2216</sup>.SSAT *Submission 200*.

<sup>2217</sup>.Examples given include: where the Centrelink file does not contain all relevant documents (eg documents be essential to establish whether a debt is owed by the applicant, whether the applicant has any duty or obligation to Centrelink, and whether Centrelink has a responsibility to the applicant) and those documents are contained in archives; where information must be obtained from other parties, such as an employers, to confirm the content of information provided to Centrelink.

have adopted the criticism of the AAT as too adversarial, may find that they like an effective inquisitorial approach by tribunals even less.<sup>2218</sup>

12.149 A more active investigation review model has implications for the allocation of resources overall, between primary decision making and review tribunals<sup>2219</sup> and between first and second tier review (where that is available).<sup>2220</sup>

12.150 An example involves access to specialist medical reports in social welfare cases. The SSAT does not generally have the power or resources to commission such reports.<sup>2221</sup> Submissions confirmed that many matters appealed from the SSAT to the AAT are subsequently conceded by the agency or withdrawn by the applicant, following grant of legal aid and the acquisition of appropriate independent medical evidence.<sup>2222</sup> The policy question is whether, and if so at what stage of the decision making continuum, the resources necessary to provide this information should be provided.

12.151 Active investigation by tribunals would increase the direct cost to government of the review tribunals system.<sup>2223</sup> The RRT observed that tribunal investigation inevitably requires expenditure, but may also result in a reduction in costs for both the applicant and the agency.

The adoption of an investigatory approach to merits review effectively results in a shift in responsibility for costs away from the applicant to the tribunal. This is important in the refugee jurisdiction where applicants often arrive in Australia with little or no funds and where the funding of their representation will often come from the community. Placing the responsibility of investigation on the RRT reduces the cost to the community of ensuring representation. A shift in focus of expenditure towards the RRT is an efficient use of funds and limited resources.<sup>2224</sup>

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<sup>2218</sup>J Dwyer 'Fair play the inquisitorial way' (1997) 5 *Australian Journal of Administrative Law* 5, 32.

<sup>2219</sup>See G Osborne 'Inquisitorial procedures in the Administrative Appeals Tribunal – A comparative perspective' (1982) 13 *Federal Law Review* 150, 181. Particularly where tribunals are funded through the running costs of departments whose decisions they review.

<sup>2220</sup>Some figures on public expenditure on internal review mechanisms and on first and second tier review tribunals are contained in ch 4.

<sup>2221</sup>On rare occasions, the SSAT does obtain and pay for its own medical reports. The SSAT has stated that the power and the resources to commission specialist medical reports, when required, are essential to its operations: *SSAT Submission 200*.

<sup>2222</sup>M de Rohan stated that many Disability Support pension cases need to be resolved at the AAT, once legal aid is granted, simply by expenditure on more thorough specialist reports, not made available at SSAT level: *M de Rohan Submission 175*.

<sup>2223</sup>*Comcare Submission 209*; *RRT Submission 211*. *Comcare* stated that, in the Commonwealth employees' compensation jurisdiction, most AAT cases relate to disagreements on medical evidence. *Comcare* observed that, unless the Tribunal was willing to decide the matter on papers presented to it, an investigative Tribunal would have to seek independent medical advice on its own behalf and would have to take a more active role in testing the evidence than is currently the case, where it can usually rely on matters being drawn out in cross-examination.

<sup>2224</sup>*RRT Submission 211*.

12.152 Some submissions referred to the possibility that expenditure in prehearing stages may be offset by savings through earlier settlement of cases, without the need for a hearing.<sup>2225</sup>

In broad terms, a more investigative approach, requiring pro-active investigation by staff or members of the tribunal, may be more expensive to government during the pre-hearing phase. However, providing that settlement is an option available to parties and the tribunal, a properly managed investigative approach in some jurisdictions might result in less hearings, which may produce savings that offset some of these additional costs. It is also likely that shifting the burden of fact finding from parties to the tribunal would reduce the cost to parties of tribunal proceedings. However, it is not possible to quantify these assumptions without reference to a detailed proposal for reform.<sup>2226</sup>

12.153 These competing interests are important to resolve within each review jurisdiction. The Commission's recommendations concerning the planning and implementation of dispute management and resolution schemes would allow consideration to be given to such issues within each portfolio. Certainly there seems no good reason why, due to lack of resources or inappropriate investigation powers, a case which could be resolved by medical evidence, should advance to another level of review before such evidence is obtained. In chapter 7, the Commission proposes that planning for integrated review processes should include legal aid commissions (LACs).<sup>2227</sup> LACs provide additional investigative resources funded by government. In certain jurisdictions it may be more cost and time effective to have the SSAT refer cases to an LAC to obtain medical reports. Any such arrangements should be carefully evaluated to measure cost and time savings to the review system as a whole.

#### *Management performance standards*

12.154 Management pressures for efficient decision making also place limitations on the investigation able to be undertaken by members or tribunal staff. Such performance standards generally are expressed as tribunal-wide or member targets. For example, the AAT has set time standards for the processing of review applications to each step of the case management process and from receipt of application to final disposal.<sup>2228</sup>

12.155 The IRT had a productivity target for full-time members to average not more than two working days per case finalisation and for part-time members to average not more than two daily fees per finalisation.<sup>2229</sup> The Code of Conduct for MRT members requires members to 'produce a target number of written decisions in each financial year as set by the Principal Member'. The Code adds that 'such decisions

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<sup>2225</sup>.AAT Submission 210; Comcare Submission 209.

<sup>2226</sup>.AAT Submission 210.

<sup>2227</sup>.See para 7.87-7.90; proposals 7.11-7.13.

<sup>2228</sup>.See AAT Annual report 1997-98, 116.

<sup>2229</sup>.IRT Annual report 1997-98, 8.

must be consistent with other Tribunal decisions of a like nature and of a quality acceptable to the Principal Member'.<sup>2230</sup>

The danger is that such provisions may undermine both the perception and reality of independent merits review of migration decisions. At their worst, performance measures could be an administrative means of achieving objectives which the Government has unsuccessfully attempted to include in legislation.<sup>2231</sup>

12.156 Management performance standards may have a direct and very real effect on decisions about how cases are to be conducted. In complying with such standards, members are preserving their own continuing employment. The standards should not be so prescriptive that they deter members taking the time to undertake investigation in appropriate cases. The impact of productivity targets should be monitored within each tribunal and members' views sought on the quality of their decisions and any increase in judicial review applications noted and considered.

12.157 The Commission supports efforts to improve members' productivity and accountability but such initiatives should have due regard to the diversity in cases. Some cases are routine but others have complex facts, legal issues or difficult or distressed parties. As stated, research in Australia and overseas confirms that parties in litigation and review want fair and careful processes and the sense that their claim has been seriously considered.<sup>2232</sup> There are no savings if parties, aggrieved at attenuated, 'unfair' merits review processes, then lodge judicial review applications. In this context, it is important to attend to the 'sub-text' of parties' grievances in judicial review. Behind the legal argument to support such claims, applicants frequently articulate concerns about process, especially findings on credit or examination of witnesses. The Commission was repeatedly told by practitioners that the sensibilities of applicants concerning these matters generates judicial review claims.<sup>2233</sup>

**Proposal 12.9.** Review tribunals should monitor the effect of management performance standards on case processing including by canvassing members' views on the quality of their decisions and by recording and examining judicial review applications.

### *The Commission's views*

<sup>2230</sup>.M Neave 'In the eye of the beholder – Measuring administrative justice' *Paper* 1999 Administrative Law Forum Canberra 29–30 April 1999, citing <<http://www.immi.gov.au/mrt/code.htm>>.

<sup>2231</sup>.*ibid.*

<sup>2232</sup>.See para 2.3.

<sup>2233</sup>.The Federal Court has also expressed dissatisfaction with credit findings of the RRT: eg *Meadows v MIMA* (unreported) Full Federal Court 23 December 1998 and other cases cited and discussed in R-Bacon et al 'Justice and Fairness in an inquisitorial tribunal' *Paper* Refugee Review Tribunal Members' Conference 24–25 March 1999 RRT Sydney; *Selliah v Minster for Immigration and Multicultural Affairs* [1999] FCA 615.

12.158 At present, tribunal members continually balance investigation and the time and resources needed to conduct inquiries, in a context where legislation and case law do not adequately define the powers and responsibilities of tribunal members within an investigative model. The Commission has concluded that the scope and parameters of the responsibility or duty to investigate need to be better defined.

12.159 Concerns that making such duties more explicit may lead to an increase in judicial review applications can be addressed by codifying elements of fair procedure. Tribunals should be enabled to direct that applicants provide additional information where it is not practicable for the tribunal to inquire, and to determine the matter in the absence of such information where it is not provided.

12.160 The Migration Act provides one model for such provisions.<sup>2234</sup> The Act defines procedurally fair arrangements for soliciting and utilising additional information from the applicant. These provisions do not indicate the circumstances in which the tribunals should make inquiries and obtain information from sources other than the applicant.

**Proposal 12.10.** Federal merits review tribunals should be required

- to ensure that all relevant material is disclosed in a timely way by the applicant and respondent to enable the tribunal to determine all the relevant facts in issue
- to inquire into any relevant fact in issue where (i) the fact is relied on by an applicant (ii) a finding in relation to that fact is necessary in order for the tribunal to reach its decision and (iii) it is practicable for the tribunal to inquire into that fact.

**Proposal 12.11.** Review tribunals should have express powers, similar to those in the Migration Act, to decide the case when an applicant has been directed to provide information but has not provided the information in the reasonable time set.

## Evidence

12.161 In AAT proceedings, the basis for the agency's decision is initially disclosed in a statement required by s 37 of the AAT Act, which sets out the reasons for the decision and refers to the facts, evidence and other material on which it was based. Copies of all relevant documents in the decision maker's possession or control are also lodged. These 'T' documents must be lodged by the agency within 28 days of the agency receiving notice of the review application.<sup>2235</sup>

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<sup>2234</sup>Migration Act s 359B, s 359C (MRT); s 424B, s 424C (RRT).

<sup>2235</sup>The Commission's national AAT case file survey collected information about the number of individual documents in the 'T' document, as one measure of the documentary burden of review applications. The median number of individual 'T' documents filed was 20 and the maximum

12.162 In the AAT, statements of issues and of facts and contentions are also required to be filed before and after the first preliminary conference. These documents take the place of pleadings and particulars in AAT proceedings.<sup>2236</sup> Other documentation is commonly obtained through summonses.<sup>2237</sup>

12.163 Comcare's submission to the inquiry highlighted problems with the way in which case documentation, and particularly medical reports, are managed in the compensation jurisdiction of the AAT.

Currently in this jurisdiction, under the AAT arrangements, there is much time spent in directions hearings arguing over what documents should be provided to the tribunal following commencement of proceedings. For example, should documents which might be considered to be subject to legal professional privilege be released? In Comcare's view, all documents relevant to the decision (the decision and supporting documentation) should be forwarded to the [ART]. There should be clear agreement by way of procedures developed by Comcare and the [ART] about what and when documents will be provided to other parties; for example, following commencement of proceedings, the release of all medical reports, including those that may not be supportive of one side. There need to be clear procedures on the release and provision of documents that come into existence following the commencement of proceedings in the [ART] and, where appropriate, the release of those documents to other parties.<sup>2238</sup>

12.164 Concerns have been expressed that respondents in compensation cases do not automatically make available to applicants copies of the reports of all the respondent's medical experts. It has been suggested that there should be a legislative amendment to make immediate disclosure of medical reports of this nature a statutory requirement.<sup>2239</sup> The Commission agrees with this suggestion.

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number of documents was 417. 'T' documents were lodged in 1386 cases (87% of sampled cases). The documentary burden was heaviest in compensation cases which had a median of 36 individual 'T' documents: ALRC, AAT Empirical Report Part One, para 6.2, table 6.2.

<sup>2236</sup> The procedures set out in the AAT's *General Practice Direction 1* July 1998 apply only where the applicant is represented. The Commission's national AAT case file survey found that statements of issues were filed in 59% of the sampled cases and statements of facts and contentions in 37% of the cases: ALRC, AAT Empirical Report Part One, table 6.1.

<sup>2237</sup> 15% of sampled cases were recorded as involving at least one request for a summons. Requests for summonses were most often made in the compensation jurisdiction (in 48% of cases): ALRC, AAT Empirical Report Part One, table 6.2 and text.

<sup>2238</sup> Comcare submission to the Government's March consultation paper – A-G's Dept (Commonwealth) *Reform of the merits review tribunals: Government proposal* Consultation document March 1998 as quoted in Comcare *Submission 209*.

<sup>2239</sup> J Dwyer *Submission 269*. The AAT's *General Practice Direction* provides that the applicant must provide the respondent and the Tribunal with all expert reports and the statements of all witnesses at least fourteen days before the second conference, at which the statement of facts and contentions must be lodged. The respondent must do likewise at least seven days before the second conference: AAT *General Practice Direction 18* May 1998, 2.2.

12.165 The Commission considers that there should be more general reform relating to the disclosure of expert reports in review tribunal proceedings, applying equally to respondent agencies and to applicants.

12.166 Client legal privilege may be claimed for communications between a client (or his or her lawyer) and an expert if such communications are made in connection with anticipated or pending legal proceedings.<sup>2240</sup> Written communications with an expert (such as instructions, draft reports or reports) will also generally be privileged where they are intended to assist a lawyer to provide legal advice, whether or not legal proceedings are contemplated.

12.167 While the AAT has power to order disclosure of expert reports in the possession of the respondent agency, notwithstanding 'any rule of law relating to privilege'<sup>2241</sup> the AAT cannot order production of a privileged document that is in the possession of an agency other than the respondent agency,<sup>2242</sup> or in the possession of an applicant.<sup>2243</sup>

12.168 In its 1985 interim report on the law of evidence the Commission considered the various justifications for the application of legal professional privilege to third party communications in connection with litigation. The Commission noted the view that each of the justifications pointed to privilege being 'integral to the adversary mode of trial'.<sup>2244</sup>

The privilege was but a logical consequence of the principal characteristics of the [litigation] system – party responsibility for the collection of evidence and party autonomy in presenting the evidence that would best advance the party's case or destroy that of the adversary.<sup>2245</sup>

12.169 The Commission considers that within administrative review proceedings such claims for legal privilege, at least as these relate to expert reports, have less justification. Both applicants and respondents should be under a duty to disclose such reports. Under this proposal client legal privilege would still apply to communications between client and lawyer.

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<sup>2240</sup> Client legal privilege may apply to communications in relation to administrative review proceedings: *Waterford v Department of Treasury* (1987) 71 ALR 673. The AAT has often upheld objections to the production of documents on this basis.

<sup>2241</sup> AAT Act s 37(2)–(3); *Re McMaugh and Australian Telecommunications Commission* (1991) 22 ALD 393 discussed in J Dwyer 'Fair play the inquisitorial way' (1997) 5 *Australian Journal of Administrative Law* 5, 29.

<sup>2242</sup> *Re Lindsey and Australian Postal Commission* (1989) 18 ALD 340.

<sup>2243</sup> *Re Loknar and Secretary, DSS* (1992) 20 ALD 591.

<sup>2244</sup> ALRC Report 26 *Evidence* Sydney 1985 (ALRC 26) Vol 1, para 877 referring to N Williams 'Discovery of civil litigation trial preparation in Canada' (198) 58 *Canadian Bar Review* 1, 47.

<sup>2245</sup> *ibid.*



12.170 The proposal would affect all cases before review tribunals. The scope may need to be limited. It is directed at cases in the compensation, veterans' and social welfare jurisdictions which frequently turn on medical expert evidence and where the present system produces repeat partisan experts who are seen to be 'applicant' or 'respondent' medical experts.

12.171 It was suggested to the Commission that one unintended result of such a reform may be to entrench the use of clearly partisan experts. Parties will not wish to risk receiving an adverse report which will have to be disclosed. The Commission recognises this possible effect. The proposal with respect to privilege is one of series of proposals designed to diminish adversarial tactics in administrative review proceedings. The Commission supports additional changes to direct parties to agree on a choice of expert. A list of experts could be jointly compiled by representatives of Commonwealth employers and employees, LACs and expert associations, from which parties to AAT proceedings could choose. Such agreed lists of suitable, independent, experts could further help moderate partisanship.

#### *Disclosure of evidence and cross-examination*

12.172 A further issue relating to the disclosure of evidence in AAT proceedings arises from the decision in *Hayes*<sup>2246</sup> in which Justice Wilcox set aside a direction of the AAT that the applicant should be shown a video film at the commencement of her evidence before the Tribunal, agreeing with the respondent's arguments that the video should not be shown to her until she was under cross-examination on the grounds that it would effectively deny the right to test the credit of the claimant. The judge also observed that

If it appears that the production of a particular document at a particular stage to a particular person (even a party) would result in a denial of procedural fairness, the tribunal may make a direction restricting access at that stage, even to a document which was considered by the original decision-maker.<sup>2247</sup>

12.173 However, Justice Wilcox agreed that this would be an exceptional case and both the present and former Presidents of the AAT have indicated that *Hayes* should be seen as the 'high point' for a party who is seeking to have otherwise relevant documents withheld from disclosure to another party.<sup>2248</sup> Justice O'Connor recently stated

In my view it is absolutely crucial to the function of the Tribunal, a tribunal of fact which is charged with making the correct or preferable decision, that all the material relevant to the resolution of the application is placed before the Tribunal. . . It is the duty of counsel to assist the Tribunal to fulfil this function. Material that is relevant to the determination

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<sup>2246</sup> *Australian Postal Corporation v Hayes* (1989) 23 FCR 320.

<sup>2247</sup> .id 328.

<sup>2248</sup> D O'Connor 'Appearing before the AAT: A non-adversarial approach' *Paper* NSW Bar Association Seminar Sydney 10 May 1999 referring to the decision of Mathews J in *Re Taxation Appeals* 21 AAR 275.

of those issues should be disclosed unless there is a very sound basis for its exclusion.<sup>2249</sup>

The Commission endorses such sentiments and considers legislation should provide review tribunals with clear power to order prehearing disclosure of video evidence to the tribunal and the other party. Proposals to promote disclosure and joint instructions to agreed medical experts have a better chance of working if both applicants and respondents are required to 'show their hand'.

**Proposal 12.12.** Federal merits review legislation should require timely disclosure of relevant medical reports of the applicant's and the respondent's medical experts.

**Proposal 12.13.** Federal merits review legislation should provide that neither applicants nor respondent agencies should be able to claim client legal privilege for expert reports which were created for the dominant purpose of anticipated or pending review tribunal proceedings. As an alternative, this reform could apply only to medical expert reports created for compensation, veterans' affairs or social welfare cases.

**Proposal 12.14.** Federal merits review legislation should provide review tribunals with clear power to order prehearing disclosure of video evidence.

**Proposal 12.15.** The Administrative Appeals Tribunal should convene a meeting of representatives of Commonwealth employers and employees, legal aid commissions, the medical profession and the Law Council of Australia to consider options for compiling lists of suitable medical experts for compensation, veterans' and social welfare cases.

**Proposal 12.16.** Administrative Appeals Tribunal practice directions should require parties to agree to the instruction of a single expert for the case. Additional expert evidence on the same matter should only be permitted in exceptional circumstances.

### *Compliance issues*

12.174 A range of concerns have been expressed about compliance with directions in AAT proceedings. The AAT commented, with respect to statements of issues and of facts and contentions, that

[t]he only negative impact on effectiveness [of statements of issues/facts and contentions] is where parties fail to comply with the General Practice Direction's requirements. The Tribunal is hindered in its ability to ensure compliance as there are very few sanctions for the parties if they fail to comply. This is particularly the case in relation to respondent agencies.<sup>2250</sup>

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<sup>2249</sup> *ibid.*

<sup>2250</sup> *AAT Submission 210.*

12.175 Comcare noted that AAT members have on occasion failed to enforce requirements that statements of facts and contentions be specific, both as to facts and as to law and that witness statements and expert evidence be served prior to the hearing.<sup>2251</sup> Comcare considered that such statements should be filed earlier and that the AAT should ensure that applicants are obliged to file as much of their relevant material as respondents currently are required to do.<sup>2252</sup>

12.176 It was suggested that AAT members should be provided with power to make disciplinary and case management cost orders to encourage compliance with practice directions.<sup>2253</sup>

12.177 In 1995, legislation was introduced which would have conferred on the AAT a discretionary power to award costs against a party, or the party's representative, as a disciplinary measure in certain defined circumstances.<sup>2254</sup> The power would have been exercisable where the AAT considered that a party, or that party's representative, had engaged in conduct in which he or she ought not to have engaged and another party had incurred costs that he or she would not have incurred if the conduct had not been engaged in. The Bill lapsed with the prorogation of Parliament for the March 1996 federal election, and the enactment of such a costs power has not been pursued by subsequent governments.

12.178 The AAT has also submitted that, to ensure the efficacy of prehearing investigation, conference registrars should have the power to issue orders that are binding on both the applicant and the respondent.<sup>2255</sup>

The AAT considers that the effectiveness of conference registrars would be enhanced by a statutory power to issue directions relating to procedural matters. In this regard the AAT submits that Conference Registrars in the ART should have statutory powers, similar to those of Judicial Registrars in the Federal and Family courts, to issue such directions.<sup>2256</sup>

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<sup>2251</sup> See T Thawley 'Adversarial and inquisitorial procedures in the Administrative Appeals Tribunal' (1997) 4 *Australian Journal of Administrative Law* 61, 76.

<sup>2252</sup> AGS *Consultation* Sydney 6 September 1996. Also see Comcare's comments in the context of duties of representatives in administrative review proceedings at para 12.238.

<sup>2253</sup> See ALRC Report 75 *Costs shifting – who pays for litigation* AGPS Canberra 1995 (ALRC 75) in which the Commission recommended: that at any stage of proceedings a court or tribunal should be able to make a disciplinary costs order against a party, his or her legal representative or any other person involved in the litigation who, in the opinion of the court or tribunal does not comply with a procedural rule or an order of the court or tribunal; that a court or tribunal should be able to order a party or his or her legal representative to pay the costs incurred by the other parties to the proceedings as a result of an unreasonable claim or defence: ALRC 75, rec 34 and 37.

<sup>2254</sup> Law and Justice Legislation Amendment Bill (No. 2) 1995.

<sup>2255</sup> AAT *Submission* 210.

<sup>2256</sup> *ibid.*

12.179 Submissions to the inquiry favoured the ART being empowered to make disciplinary and case management cost orders.<sup>2257</sup> A contrary view was expressed by Michael de Rohan who considered that costs sanctions would inevitably lead to a formalisation of prehearing procedures so that these processes would lose much of their useful flexibility and informality.<sup>2258</sup> Agencies were concerned that the costs power should not be confined to orders against a respondent agency.<sup>2259</sup> Federal tribunals may make binding orders against the Commonwealth, but the Constitution constrains tribunals from making costs orders against other parties.<sup>2260</sup>

12.180 There are options other than costs orders which might be used to address some problems of non-compliance in AAT proceedings. One option would be to provide statutory power for decision makers to infer, in cases of non-compliance with directions to disclose evidence, that the evidence would not have assisted the non-complying party.<sup>2261</sup> The Migration Act provisions referred to above (see proposal 12.11) are an example.<sup>2262</sup>

12.181 Problems of non-disclosure could also be addressed, in those jurisdictions which have provision for costs orders, by not allowing applicants to recover certain costs, such as the cost of expert reports or other evidence disclosed late. The Commission's proposals for consistent management of the case by the same registrars or members is likewise directed to ensure improved compliance with directions.

12.182 Further information is needed on the level of non-compliance in AAT proceedings and the problems caused by such non-compliance, before firm recommendations can be made about reforms in this area.

**Proposal 12.17.** Review tribunal members should be provided with power to make disciplinary and case management cost orders in order to encourage compliance with practice directions.

**Proposal 12.18.** Tribunal conference registrars should have statutory powers, similar to those of Judicial Registrars in the Federal Court and the Family Court, to issue directions relating to procedural matters.

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<sup>2257</sup>.ASIC *Submission 184*; Comcare *Submission 209*; AAT *Submission 210*.

<sup>2258</sup>.M de Rohan *Submission 175*.

<sup>2259</sup>.ASIC *Submission 184*; Comcare *Submission 209*.

<sup>2260</sup>.*Brandy v HREOC* (1995) 127 ALR 1, as discussed in ALRC 75, 106. The AAT advise that, at the time of drafting the Law and Justice Legislation Amendment Bill (No. 2) 1995, advice was received by the Attorney-General's Department to the effect that the power to make costs orders 'could probably not be conferred on a non-judicial body'.

<sup>2261</sup>.Similar to applying the rule in *Jones v Dunkel* (1959) 101 CLR 298 which operates to allow a decision maker to infer that the evidence of an absent witness would not have assisted the party where a witness whom a party normally would be expected to call is not called, and there is no reasonable explanation for the failure to call the witness.

<sup>2262</sup>.Migration Act s 359B, s 359C (MRT); s 424B, s 424C (RRT).

## Representation

12.183 Representatives, whether legally qualified or not, can assist in identifying and obtaining relevant evidence, explore the potential for the resolution of matters prior to hearing, elicit relevant evidence at hearings and make submissions on the evidence, relevant legislation and case law.<sup>2263</sup> This is particularly relevant to the AAT.

The diversity of the AAT's jurisdiction, which encompasses more than 300 enactments, means that it is not possible for members to have detailed knowledge and expertise about every aspect of the jurisdiction. There is therefore an important role for agency and applicant representatives in the AAT. This is particularly the case where complex factual and legal issues are involved. Well reasoned submissions provided by both parties to the review contribute significantly to the efficiency of AAT proceedings. It assists the AAT identify and interpret the relevant law, elicit facts, formulate reasons and thereby reach the correct or preferable decision. Without such assistance, the AAT would have to expend significant additional resources to achieve the same quality of decision making.<sup>2264</sup>

12.184 There has been much criticism of the role of lawyer representatives in review tribunal proceedings. In particular, lawyers are said to have produced unnecessarily complex, formal, and costly tribunal processes, notably in the AAT.<sup>2265</sup>

12.185 Questions about restricting legal representation in tribunals have been widely canvassed. The ARC recommended in 1995 there should be no prohibition against lawyers, or any particular group advising or representing parties in review tribunal proceedings and that the participation of representatives or assistants at hearings should not be restricted. In this context, the ARC recommended

[t]he extent to which an applicant's representative or assistant can participate in review proceedings should be left to the discretion of the tribunal. There should be no statutory limitations on the role that such representatives or assistants are allowed to play.<sup>2266</sup>

12.186 More recently the Guilfoyle review concluded that agency representation is necessary in a significant proportion of cases and recommended that Centrelink should participate in ART proceedings to the extent it considers appropriate and should assist the ART by participating in those proceedings where that is requested.<sup>2267</sup>

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<sup>2263</sup>.AAT Submission 210.

<sup>2264</sup>.ibid.

<sup>2265</sup>.ARC 39, 61.

<sup>2266</sup>.ARC 39, rec 25.

<sup>2267</sup>.M Guilfoyle *Review of the social security review and appeals system: A report to the Minister for Social Security* August 1997, 53 (the Guilfoyle review).

12.187 The federal government has proposed that the role and level of participation by representatives in the ART should continue to vary as between existing review jurisdictions and has made a number of specific proposals. Notably it proposed that, except where portfolio legislation specifies otherwise, the expectation be that representation at proceedings should only be allowed in exceptional or prescribed circumstances and where agreed by the Minister responsible for the particular review jurisdiction.<sup>2268</sup> However, the government has also proposed that where a case raises precedent issues or is to be determined by a multi-member panel (including a review panel), an agency may request the ART to allow it to make submissions or appear with or without representation. The paper also proposes that divisional practice directions should provide that, where representation is permitted, it is permitted to all parties on equal terms.<sup>2269</sup>

### *Submissions on the role of representation*

12.188 Submissions received by the Commission were strongly of the view that representation and the participation of representatives should not be further restricted.<sup>2270</sup>

12.189 The AAT opposes any presumption that applicant representation should be permitted only in exceptional or prescribed circumstances and submits that the ART's enabling legislation should provide that parties may be represented, subject to divisional practice directions which define the role of representatives in proceedings in particular divisions.<sup>2271</sup>

12.190 One submission observed that legislative changes relevant to review jurisdictions<sup>2272</sup> have increased the need for statutory interpretation skills not normally possessed by non-lawyers.<sup>2273</sup> Other submissions expressed concerns that

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<sup>2268</sup>.A-G's Dept (Commonwealth) *Reform of the merits review tribunals: Government proposal* Consultation document March 1998.

<sup>2269</sup>.*ibid.*

<sup>2270</sup>.AAT *Submission 210*; M de Rohan *Submission 175*; ASIC *Submission 184*; Law Society of NSW *Submission 190*; SSAT *Submission 200*. The AAT stated that, as a general principle, there should be no restriction on representation in review tribunal proceedings and, in particular, no presumption that representation should be permitted only in exceptional or prescribed circumstances with the presiding member's agreement. However, the AAT accepted that given representatives' participation is currently restricted in the IRT and RRT similar restrictions may be appropriate in corresponding divisions of the ART, provided procedures are in place to ensure that non-agency parties are not substantially disadvantaged. The SSAT's submission supported the view that tribunals should have discretion to permit the participation of representatives and that there should be no statutory limitations.

<sup>2271</sup>.AAT *Submission 210*.

<sup>2272</sup>.In particular welfare legislation, at one time considered 'soft' law with sufficient discretion allowed to suit critical individual differences, has now become hard edged with a dramatic reduction in such discretion being replaced by rationalised formulae: M de Rohan *Submission 175*.

<sup>2273</sup>.*ibid.*

excluding legal representation might result in injustice or unfairness or that significant test cases may not be identified or fully argued.<sup>2274</sup>

12.191 Submissions noted that limiting representatives involvement to written submissions may increase applicants' costs.<sup>2275</sup> The SSAT stated that if the participation of legal representatives in the SSAT were to be limited to written submissions this would increase the applicant's costs and cause delay in proceedings. The SSAT is most assisted by representatives preparing evidence and submissions prior to the hearing rather than involvement in the hearing itself, but applicants may be most assisted by having a representative at the hearing.<sup>2276</sup>

12.192 Submissions noted that the benefits of representation to the applicant and to the tribunal depend on the quality of that representation and that this quality varies markedly.<sup>2277</sup> For example, in the context of IRT proceedings, it was observed that

[o]ccasionally an agent presents detailed written argument with the application to the tribunal and generally in response to a MIRO decision, which allows a decision to be made on the papers. Often agents either do not understand, or choose to ignore, the main obstacle to the grant of the visa to their client and thus add little value to the Tribunal's deliberations.<sup>2278</sup>

12.193 The most effective representatives are, by common consensus, not necessarily lawyers but those who understand the jurisdiction, the processes and can present relevant information. The AAT stated that effective representatives before review tribunals should possess the following attributes

- a full understanding of the review tribunal's processes from lodgement of the application to finalisation
- the ability to identify and apply relevant legislation and case law
- the ability to test evidence according to relevance
- the capacity to present coherent and concise submissions during the hearing and
- an understanding of and readiness to use ADR processes.<sup>2279</sup>

12.194 Submissions also emphasised that representation in itself did not necessarily lead to formality or inappropriately 'adversarial' procedure.<sup>2280</sup> The AAT observed

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<sup>2274</sup>SSAT Submission 200; Law Society of NSW Submission 190.

<sup>2275</sup>The RRT stated that an active oral role for representatives at refugee hearings would not remove the need for relevant written submissions, so that increased participation at hearings by legal advisers would not reduce private legal costs: RRT Submission 211.

<sup>2276</sup>SSAT Submission 200.

<sup>2277</sup>S Tongue Submission 231; AAT Submission 210. The AAT observed that it is to a review tribunal's benefit to improve the performance of representatives by conducting training and awareness programs which outline their role when appearing before review tribunals.

<sup>2278</sup>S Tongue Submission 231.

<sup>2279</sup>AAT Submission 210.

that while the presence of lawyers can lead to proceedings at hearing being conducted in a court-like manner

[t]his is not necessarily undesirable. The AAT has always taken the view that different jurisdictions require different processes. In applications which are commercial in nature and have a substantial amount of money in issue the parties will tend to favour a court like model. However at issue here is not really the presence or absence of lawyers rather it is the ability of the presiding member to control the proceedings and to ensure that they are conducted in the most appropriate manner.<sup>2281</sup>

12.195 The RRT and the DIMA supported the continuation of existing restrictions on the participation of representatives in IRT and RRT proceedings.<sup>2282</sup> DIMA's view is that any legislative rules governing representation in the ART should be included in portfolio legislation, supplemented by separate binding practice directions issued for each ART Division.<sup>2283</sup> The RRT expressed concerns that formal legal representation in proceedings would lead to much more structured court-like proceedings and greater emphasis on rules of evidence, which would not necessarily assist in resolving the issues. Furthermore, it is said that

in cases where credibility is being tested, the direct intervention of a legal adviser in the actual questioning process might be unhelpful.<sup>2284</sup>

12.196 The absence of a 'proactive role for representatives at hearing is said to ensure that the focus of proceedings is on the interaction between the Tribunal and the applicant'. It is said that the direct interaction between the decision maker and the applicant is vital and contributes to reducing the confrontation and trauma of more structured adversarial proceedings. The RRT refers to the findings of a 1995 report on client satisfaction as highlighting that the elements of the process of most concern to applicants, were 'essentially unrelated to the presence of a representative'.<sup>2285</sup>

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<sup>2280</sup>.AAT *Submission 210*; South Australian Legal Services Commission *Submission 175*.

<sup>2281</sup>.AAT *Submission 210*.

<sup>2282</sup>.As summarised in ALRC IP 24 ch 5. DIMA stated that requiring tribunal members to take a strongly investigative approach and maintaining research support for members ensures fair exposition of the case, where there is no representation or restrictions on representation. DIMA pointed to the specialised caseload of the immigration and refugee division as meaning that members will not need to hear detailed legal arguments from applicants and can manage without professional representation provided they have appropriate preliminary training and sufficient access to experienced legally-qualified support staff within the tribunal: DIMA *Submission 216*.

<sup>2283</sup>.*ibid.*

<sup>2284</sup>.RRT *Submission 211*.

<sup>2285</sup>.*ibid* referring to RRT *Report on client satisfaction research – May 1995* RRT, 11. The report found that an overwhelming majority of applicants (83%) felt that the hearing was not only fair, but was the fairest aspect of the review process. Of those who felt that the hearing was the fairest part of the process 33% did so because it gave them an opportunity to have their say and 22% felt that having an opportunity to appeal and to express themselves was the fairest part of the process. Applicants felt that the least fair part of the review process was the length of time.



12.197 The only witnesses before the RRT are those nominated and produced by the applicant.<sup>2286</sup> In the view of the RRT there is, therefore, little to be gained by a representative or adviser 'cross-examining' the applicant or other witnesses.

At hearing, there will rarely be any useful role to be played by an adviser conducting any kind of oral examination. However, members of the RRT have found it useful to have a third party briefly summarise the applicant's claims and address any particular difficulties which may appear to have arisen during the hearing, at its conclusion.<sup>2287</sup>

The RRT stated that written submissions are the most useful form of contribution to decision making by applicant's representatives.

In the refugee jurisdiction, the role of an adviser or representative is not fundamentally related to the proceedings at hearing, but to ensuring that the applicant's relevant personal circumstances are put forward and that any directly relevant supporting material and country information is brought to the attention of the Tribunal.<sup>2288</sup>

12.198 Some submissions nevertheless favoured some role for representation at hearings in the proposed immigration and refugee division of the ART. For example, while the RRT favours retention of current restrictions on the roles of advisers or representatives in refugee cases it opposes moves towards the more restrictive IRT model.<sup>2289</sup> The RRT observed that representatives can have an important role to play where issues of law arise.<sup>2290</sup>

Although proceedings before the RRT are non-adversarial, where matters are legally complex a representative may greatly assist the RRT and the applicant by focussing on relevant issues and summing up the applicant's case.<sup>2291</sup>

The IRT Principal Member submitted that there have been cases before the IRT where legal representatives would have been of assistance and suggested that the use of representatives could be limited to specific test cases and provide for the specific approval of the Minister of the Principal Member to ensure the numbers of occasions on which they are used remains limited.<sup>2292</sup>

### *Participation of agency representatives*

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<sup>2286</sup>.RRT Submission 211.

<sup>2287</sup>.ibid.

<sup>2288</sup>.ibid.

<sup>2289</sup>.That is, the situation in the IRT where assistants are not entitled to present arguments to the IRT, or address the Tribunal, except in 'exceptional circumstances': Migration Act s 366A(2); RRT Submission 211.

<sup>2290</sup>.In contrast, the RRT observed that issues of fact are essentially a matter for the RRT to determine by listening to and questioning the applicant: RRT Submission 211.

<sup>2291</sup>.RRT Submission 211.

<sup>2292</sup>.S Tongue Submission 231.

12.199 The government agency or its representative currently appear and are represented in all matters in the AAT. The AAT stated that such agency participation can be of considerable assistance to a review tribunal, particularly in relation to fact finding, identification of the relevant law and to cross-examine witnesses when credibility is in issue.<sup>2293</sup> The AAT supports agency participation to make submissions in review proceedings where appropriate. In addition, the AAT suggested that the ART should have a discretion to require agencies to participate in review proceedings.

12.200 Similar views about the importance of agency representation were echoed by submissions from agencies. ASIC emphasised the importance of agency representation in review of decisions made under the Corporations Law. These often involve complex and sensitive commercial issues and significant issues of policy on which ASIC is well placed to assist the AAT.<sup>2294</sup>

12.201 Similarly, Comcare observed that the AAT's jurisdiction under the SRC Act could be compared to ordinary personal injury cases. The decision making agency must be a party to put its case, especially in 'test' cases.<sup>2295</sup> Nevertheless, Comcare supported the 'presumption of a reduced need for representation' in the ART proposal.

Comcare sees a reduction in representation being brought about by the ART taking on a more proactive role through methods such as increased use of conciliation so that applicants are more comfortable in appearing at the ART without representation.

As part of the move to support a reduction in representation, Comcare would expect that where the applicant is unrepresented, Comcare's representation would be limited to its own officers, be they legally qualified or not. There may be exceptions to this where a question of law needed to be argued and having counsel, even where the applicant was unrepresented, might assist the tribunal.<sup>2296</sup>

12.202 The SSAT submission noted reasons for<sup>2297</sup> and against<sup>2298</sup> agency representation at SSAT hearings. The SSAT favoured the continued possibility of

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<sup>2293</sup>.AAT *Submission 210*. The AAT stated that where a case turns on credibility 'it is desirable for the member to be more removed from the questioning process than is the present case in some tribunals' [ie the IRT and RRT.] The SSAT also noted that skilled representation can assist complicated cases, but warns that it should not be assumed that cross -examination and adversarial methods are the best methods for testing evidence effectively: SSAT *Submission 200*.

<sup>2294</sup>.ASIC *Submission 184*.

<sup>2295</sup>.Comcare *Submission 209*.

<sup>2296</sup>.*ibid*.

<sup>2297</sup>.Reasons cited by the SSAT in its submission to the Guilfoyle Review in support of agency attendance at hearing were that, in some cases attendance by the agency: would increase the agency's accountability; assist the SSAT with information about decision making; allow the Tribunal to pose additional questions for the agency; increase chances of settlement; reinforce members' awareness of the need for procedural fairness; help underline the Tribunal's independence: SSAT *Submission 200*.

agency representation in social welfare review cases in the proposed income security division of the ART under the following guidelines.

- The agency (Centrelink) should indicate in advance those cases that they wish to be represented at.
- Agency representatives should be sufficiently well-informed about the decision under review and relevant legislative policy considerations so that they can assist the Tribunal.
- There should be no diminution in the quality of agency's written submission.
- Agency representatives should have necessary delegations to make concessions.
- The Tribunal should maintain firm control over hearing process while retaining flexibility over the order of a hearing, and may at any time in a hearing seek information or assistance from the agency representative.
- The Tribunal should conduct all questioning. After the Tribunal has asked the applicant questions, it should ask the agency representative if there are any further questions; the Tribunal then has discretion whether and how to put those questions to the applicant.<sup>2299</sup>

The SSAT observed that

attendance at Tribunal hearings by Centrelink representatives would involve a significant change to procedures and it is for these reasons that these guidelines should be adhered to. They are seen to be fundamentally important in avoiding an adversarial environment and thereby losing the well recognised advantages of current SSAT procedures and processes.<sup>2300</sup>

However, the SSAT stated that the agency should be represented at the final tier of merits review, such as before review panels of the new ART.<sup>2301</sup>

12.203 In refugee and migration review cases, the agency (DIMA) does not generally seek to put its view separately from the documentary material it provides to the

<sup>2298</sup>Reasons cited by the SSAT against agency attendance at hearing were that it might: deter applicants from attending; increase the time and cost of hearings; set up an adversarial environment. The SSAT also noted that there may be better ways of informing the Tribunal of departmental perspectives than attendance by representatives and that attendance may often not be necessary to obtain relevant records or explanations of complex calculations: SSAT *Submission 200*.

<sup>2299</sup>Recommended by the SSAT in its submission to the Guilfoyle Review. M Guilfoyle *Review of the social security review and appeals system: A report to the Minister of Social Security August 1997*: SSAT *Submission 200*.

<sup>2300</sup>SSAT *Submission 200*.

<sup>2301</sup>*ibid.*

RRT. The RRT noted that while the Migration Act provides that the Secretary of DIMA may give the registrar of the RRT written argument,<sup>2302</sup> it is very rare for DIMA to play an active role in RRT proceedings.<sup>2303</sup> The RRT does not envisage a general role for DIMA representatives in refugee review proceedings.<sup>2304</sup>

12.204 Certain IRT members expressed contrary views to the Commission, advocating a DIMA representative to question witnesses in credibility cases, such as spouse and visa cancellation cases. Such a role is supported not so much to assist the tribunal, but to give the Department a stake in the process in cases where the Department has made clear findings on credit and would feel aggrieved at any contrary credit finding by the tribunal.

### *Assisting unrepresented applicants*

12.205 The AAT submitted that, if it is intended that the majority of applicants to the ART will not be represented, then the review process will only operate fairly and effectively if resources are made available to

- explain the process to unrepresented parties (taking into account the breadth of the ART's proposed jurisdiction and the diverse cultural and linguistic backgrounds of potential applicants to the ART)
- assist unrepresented parties to identify and understand the issues and evidence which will be relevant to their application
- ensure that unrepresented parties are able to present the evidence and address the issues during hearings
- ensure that interpreters and translators are available to all parties who require such assistance, free of charge
- ensure that unrepresented parties understand the reasons for the ART's final decision and
- ensure that unrepresented parties understand their review rights subsequent to receiving the decision and reasons of the ART.<sup>2305</sup>

12.206 The ability of review tribunals to assist unrepresented parties is limited, not only by the requirements of procedural fairness, but also by the resources and time available to the tribunal to provide assistance and the skill and personal attributes of individual tribunal members.<sup>2306</sup>

Faced with unrepresented parties, the tribunal has a duty to inform itself about the relevant facts, issues and law. It will generally have to adopt a more interventionist

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<sup>2302</sup>.Migration Act s 423(1).

<sup>2303</sup>.RRT *Submission 211*. The RRT advises that it is aware of only two occasions on which DIMA made generic submissions covering a number of cases with similar circumstances and only one case in which DIMA has made specific post-hearing submissions.

<sup>2304</sup>.*ibid.*

<sup>2305</sup>.AAT *Submission 210*.

<sup>2306</sup>.*ibid.*

approach and must undertake substantial preparation to appraise itself about the facts and the law. Effectively, “research costs” will be shifted away from applicants and agencies to the Tribunal.<sup>2307</sup>

12.207 The RRT noted that while tribunal staff are able to assist applicants in filling in their applications for review, they cannot assist in preparation of submissions to support an applicant's case.<sup>2308</sup> The RRT stated that assistance from the RRT is, and should be, limited to providing information about the review process and the functions of the RRT and to directing applicants to organisations and bodies from which they can seek independent advice.

It can not be the RRT's role to advise applicants on the substance or merits of the application or claims. Any other duty would significantly increase costs to the RRT and the community. Any statutory duty to assist applicants should clearly state the nature of the duty. Assistance beyond simple explanations of processes and procedures would place additional pressure on RRT resources.<sup>2309</sup>

12.208 In the context of hearings, the RRT observed that because hearings focus on the factual claims of the applicant rather than legal argument, assistance at hearing is generally limited to explanation of the nature and purpose of the hearing. However, while unrepresented applicants are responsible for presenting their case, RRT members have a responsibility to ‘do their best to ensure that they are satisfied that applicants are given an opportunity to present their case to the best of their ability’.

This may involve asking for further detail where an applicant only mentions a matter of apparent significance in a cursory way. It does not involve the RRT making out an applicant's case.<sup>2310</sup>

12.209 As part of the Commission's AAT case file survey, unrepresented applicants were questioned about the assistance received through AAT case conferences. The responses were ambivalent about the value of this assistance.

- Seventy-three people (47% of those responding to this question) agreed or strongly agreed that the AAT registrar or member helped negotiations or promoted settlement of the case. The remaining 80 people disagreed or strongly disagreed.
- Ninety-one people (60% of those responding to this question) agreed or strongly agreed that the involvement of the Tribunal registrar or member helped to identify and focus the issues in the case. The remaining 60 people disagreed or strongly disagreed.

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<sup>2307</sup> .ibid.

<sup>2308</sup> RRT *Submission 211*.

<sup>2309</sup> .ibid.

<sup>2310</sup> .ibid.

- Fifty-seven people (40% of those responding to this question) agreed or strongly agreed that the involvement of the Tribunal registrars or member made the dispute 'drag on' for too long. The remaining 89 people disagreed or strongly disagreed.

12.210 Many parties commented that they received information on the process, including the video of AAT proceedings.<sup>2311</sup> Some unrepresented parties expressed satisfaction with the assistance they received from the AAT.

I was given all help required and was made to feel confident in presenting my own case. This was my first experience at anything of this type. I was not confident until I became involved with dealing with the AAT staff and received their help, advice and informative material. Even a video of a typical AAT hearing was made available to me.<sup>2312</sup> (unrepresented party in Austudy case)

I was assisted in every way with positive advice, co-operation, vital facts regarding my case and this made me aware of the situation at hand. Through the AAT assistance I was able to confidently appear at two hearings for the first time.<sup>2313</sup> (unrepresented party in Employment and Retirement case)

I found the AAT most helpful, encouraging, patient and very professional. I was made to feel an individual and I am grateful for the service provided. I hope it remains available to the public who cannot afford expensive legal costs.<sup>2314</sup> (unrepresented party in Social Welfare case)

Principally, the guidance literature was very useful and the loan video informative. Fortunately I was able to read the legislation, the AAT guidelines and the medical evidence. The process could be difficult and extremely expensive for someone who could not.<sup>2315</sup> (unrepresented applicant in a compensation case).

Others were far from satisfied with the level of assistance they were provided.

I received no assistance from AAT to present my case. Although I believed I had a good case I had no legal grounding and therefore no basis to proceed. Whilst the AAT is supposed to be informal, I believed that it was also less than strictly legal which I found not to be the case. I would have appreciated the AAT determining if I was representing myself and providing an hour or so with an independent person (AAT or otherwise) to advise me about the things I should be doing. Instead, I came to the first conference without any clue. The legality aspect did not really appear until the second conference when I discovered I was fighting a legal precedent. Had I been given an understanding

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<sup>2311</sup>.It is a standard procedure in the AAT for the AAT's Outreach Information Officers to provide a video about AAT procedure to unrepresented parties.

<sup>2312</sup>.AAT case file survey response 567 (unrepresented party).

<sup>2313</sup>.AAT case file survey response 630 (unrepresented party).

<sup>2314</sup>.AAT case file survey response 831 (unrepresented party).

<sup>2315</sup>.AAT case file survey response 1504 (unrepresented applicant).

of this prior to the first conference, I may not have proceeded or proceeded differently.<sup>2316</sup>(unrepresented applicant in a compensation case)

Expecting only a conference due to cancellation of first conference I was nervous when had to face reps of Comcare, employer, legal rep Comcare, AAT member, without warning and etc. I have no complaints about the way I was treated except to state there is a difference between a conference and a full blown hearing.<sup>2317</sup> (unrepresented applicant in a compensation case)

Duration of case very long. Role of AAT not clear. Far conferences/hearing when you live in the countryside. Big legal terminologies for simple officers. Cost involvement is of concern. Other departmental pressures are of concern. Finally to get the rights through the AAT is very hard for simple officers.<sup>2318</sup> (unrepresented applicant in a compensation case).

12.211 There were some unrepresented applicants who said that they had received no assistance at all from the AAT. From their comments it is clear that the assistance they were seeking was legal representation rather than just assistance in presenting the case themselves.

I required a person who can present my case and assist me. No there was no assistance provided.<sup>2319</sup> (unrepresented party in Social Welfare case)

I was left to flounder without any assistance from the AAT and was therefore not able to put my case without legal representation.<sup>2320</sup> (unrepresented party in Social Welfare case)

Dealing with Commonwealth officers which always have access to legal assistance more than the applicant is always at a disadvantage. Access to legal assistance could be more equitable and would almost certainly speed the process up.<sup>2321</sup> (unrepresented applicant in a compensation case).

### *Disadvantages faced by unrepresented applicants*

12.212 The Commission's survey provided some interesting comments about disadvantages perceived by unrepresented applicants in the sample cases. One point made by many parties was that they had not been aware of how like a court the AAT was, and that they would have been a better position had they had legal representation.

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<sup>2316</sup>.AAT case file survey response 1056 (unrepresented applicant).

<sup>2317</sup>.AAT case file survey response 679 (unrepresented applicant).

<sup>2318</sup>.AAT case file survey response 60 (unrepresented applicant).

<sup>2319</sup>.AAT case file survey response 873 (unrepresented party).

<sup>2320</sup>.AAT case file survey response 944 (unrepresented party).

<sup>2321</sup>.AAT case file survey response 1094 (unrepresented applicant).

Very hard for a person with no legal background to help themselves, feels like us against them.<sup>2322</sup> (unrepresented party in Social Welfare case)

I did my own representation. I had no choice. The DSS had a lawyer. I felt intimidated by the DSS lawyer.<sup>2323</sup> (unrepresented party in Social Welfare case)

If I was represented, I may have succeeded.<sup>2324</sup> (unrepresented party in Social Welfare case)

I was ill prepared as I did not understand what was required. Some representation or assistance on case preparation would have helped.<sup>2325</sup> (unrepresented party in Social Welfare case)

The AAT or some other body should provide legal advice (or an adviser) if requested . . . I could not afford personal legal advice and feel I lost the case because I did not have the necessary legal experience to present my argument properly.<sup>2326</sup> (unrepresented party in Social Welfare case)

At all times I felt pressured by both the tribunal and the other party's legal representative to get my own legal representation . . . There appeared to be no avenue for true unbiased resolution for a non-represented person.<sup>2327</sup> (unrepresented party in Social Welfare case).

12.213 The AAT accepted that unrepresented applicants may face disadvantage in proceedings before it, but noted that, without more research, it is not possible to quantify the extent of the disadvantage. The AAT stated that 'any move to further restrict representation would have negative consequences for applicants'.<sup>2328</sup>

12.214 Comcare agreed that applicants who are not legally represented are at a disadvantage under current arrangements and that 'the high level of applicant representation is an indication that applicants believe such representation is to their advantage'.<sup>2329</sup> These observations are supported by the Commission's research (see paragraphs 12.218–12.221).

12.215 In contrast, submissions from decision makers in the immigration and refugee jurisdictions emphasised that participatory representation is less useful in

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<sup>2322</sup>.AAT case file survey response 591 (unrepresented party).

<sup>2323</sup>.AAT case file survey response 317 (unrepresented party).

<sup>2324</sup>.AAT case file survey response 729 (unrepresented party).

<sup>2325</sup>.AAT case file survey response 553 (unrepresented party).

<sup>2326</sup>.AAT case file survey response 661 (unrepresented party).

<sup>2327</sup>.AAT case file survey response 987 (unrepresented party).

<sup>2328</sup>.AAT *Submission 210*.

<sup>2329</sup>.Comcare *Submission 209*.



investigative proceedings where the tribunal questions the applicant and witnesses and makes its own inquiries.<sup>2330</sup>

12.216 The RRT stated that there does not appear to be any significant disadvantage between unrepresented and represented applicants in proceedings before it, because of the limited role of representatives in the RRT process, including at the hearing, and the investigative role of the RRT. In the 1997–98 financial year the RRT set aside about 9.5% of decisions subject to review. The applicant was assisted by an advisor in 65% of these set aside cases.<sup>2331</sup> The higher success rate for represented parties may be explained by the proportion of applicants with meritorious cases funded (then) by legal aid or taken up by private lawyers.<sup>2332</sup>

12.217 In relation to the IRT, the Principal Member Sue Tongue said that

[i]n my experience applicants rarely suffer disadvantage by not having representation. Tribunal members are aware of the criteria which must be satisfied in order to qualify for a visa and have had considerable experience with applications in most visa classes. They actively seek information from applicants.<sup>2333</sup>

The IRT's 1997–98 annual report stated that applicants received a favourable decision in 49% of cases. Applicants who had appointed an adviser received a favourable decision in 53% of cases (4% more than the average) and applicants without an adviser received a favourable decision in only 41% of cases (8% less than the average).<sup>2334</sup>

12.218 Analysis of the Commission's AAT case file survey results found that representation had a significant impact on whether applicants were 'successful'.<sup>2335</sup> Unrepresented applicants in the AAT sample were more likely to be unsuccessful in having the decision under review set aside, varied or remitted. After excluding agency appeals, applicants were successful in 42% of all the sampled AAT cases. An unrepresented applicant 'won' (albeit sometimes only in the sense of getting the case remitted) 23% of the time compared to 51% of the time, if represented. If the

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<sup>2330</sup>.DIMA Submission 216; RRT Submission 211.

<sup>2331</sup>.RRT Submission 211.

<sup>2332</sup>.ibid. The RRT adds that a proportion of applicants are motivated to appeal simply by a desire to prolong their stay in Australia and may be 'just as unlikely to seek representation as they are to succeed in their application'.

<sup>2333</sup>.S Tongue Submission 231.

<sup>2334</sup>.RRT Annual report 1997–98, 11. Favourable decisions are those that set aside and substituted a decision, varied a decision or remitted a case to the primary decision maker for reconsideration.

<sup>2335</sup>.ALRC, AAT Empirical Report Part One, 7.4–7.5, table 7.4. The success or otherwise of the applicant was assessed by reference to AAT decision codes on the AAT's computerised case management system (AATCAMS) information sheet. Briefly, applicants were deemed to have been successful for these purposes if the decision subject to review was set aside, varied or remitted, either by AAT decision or by consent. Of course, many of the consent outcomes could be considered to be 'win/win' situations, where the government party also received some benefit through early settlement.

applicant had a final hearing the figures were 17% for unrepresented applicants and 54% if represented.

12.219 The impact of representation on applicant success was statistically significant across all AAT review jurisdictions, including those jurisdictions where representation is the norm and those where most applicants are unrepresented. For example, in social welfare cases (where less than one third of applicants are represented) those who were unrepresented received a positive outcome in only 21% of cases, compared to 41% if represented. In tax cases (where three quarters of applicants in the sample were represented) those who were unrepresented received a positive outcome in 26% of cases, compared to 47% of applicants if represented. Research conducted by the University of Wollongong delivered similar results.<sup>2336</sup>

12.220 The Commission's AAT case file survey also found that representation was related to whether cases were resolved by consent or by a contested decision of the Tribunal.<sup>2337</sup> In particular, cases were more likely to be resolved by consent and less likely to be resolved by hearing and determination of the AAT where there was applicant representation.<sup>2338</sup> This effect was not due solely to a greater proportion of cases settling in review jurisdictions in which representation is more common.<sup>2339</sup> Representation had a relationship with the number of conferences, directions hearing and other prehearing case events. Where the applicant was represented, there were significantly more case events before finalisation.<sup>2340</sup> In particular, a high proportion of compensation cases with represented applicants had five or more prehearing case events.<sup>2341</sup>

12.221 The survey confirmed that representation had a significant relationship with when cases were resolved. More cases with unrepresented applicants were disposed of before any prehearing case event or after one prehearing case event and more stayed on to a final hearing. That is, they 'drop out early' or 'go the full distance' through the process. This finding is consistent with commentary on the results of

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<sup>2336</sup> See H Gamble & R Mohr 'Litigants in person in the Federal Court of Australia and the Administrative Appeals Tribunal: A research note' *Paper* presented to the Sixteenth AIJA Annual Conference Melbourne 4-6 September 1998.

<sup>2337</sup> ALRC, AAT Empirical Report Part One, para 7.6.

<sup>2338</sup> 79% of cases with applicant representation resolved by consent, compared to 54% of cases where there was no applicant representation. 17% of cases with applicant representation were resolved by hearing and determination, compared to 35% of cases where there was no applicant representation: *ibid.*

<sup>2339</sup> The relationship between representation and consent outcomes was also found to be statistically significant when considering only social welfare cases, only veterans' affairs cases and only taxation administration cases.

<sup>2340</sup> ALRC, AAT Empirical Report Part One, para 7.7.

<sup>2341</sup> 32% of cases with applicant representation, compared to 15% of cases where there was no applicant representation: *ibid.*

University of Wollongong and Justice Research Centre research<sup>2342</sup> and are consistent with comments about the role of representation made by the AAT in its submission.

With respect to applicants, experienced representatives are able to use review tribunal processes strategically; persisting with an application only when they consider that there is a prospect of success, and withdrawing or settling an application when it is realistic to do so. Unrepresented applicants may not have sufficient experience to properly evaluate their prospects of success during the course of an application. . . . A conclusion is that unrepresented applicants lack the knowledge or experience to use pre-hearing proceedings to best advantage.<sup>2343</sup>

12.222 The reasons why unrepresented parties are less successful and experience different case processing are complex and will vary from case to case. The fundamental unknown factors are the merits of particular review applications and the knowledge and skills of different individual applicants, some of whom may be quite capable of presenting their own cases. Without an assessment of the relative strengths and weaknesses of unrepresented applicants' cases and abilities it is not possible to say whether the outcomes received indicate disadvantage caused by lack of representation.

12.223 Lawyers generally may be unwilling to represent applicants with unmeritorious cases. In those case types where legal aid is available, applicants with meritorious cases can obtain grants of legal aid or other legal assistance.<sup>2344</sup> A proportion of unrepresented parties may simply want an opportunity to be heard on their concerns, notwithstanding that these concerns do not constitute grounds for setting aside the primary decision.

12.224 All these factors mean that it is not possible to say that, simply because unrepresented applicants are less successful, they are necessarily 'disadvantaged' in AAT proceedings but the findings should make policy makers cautious about excluding representatives from the review process.

### *The Commission's findings*

Case preparation and the provision of evidence is fundamental to the outcome of tribunal hearings. Tribunals and representatives are well aware of this fact. Appellants, on the other hand, are not.<sup>2345</sup>

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<sup>2342</sup>H Gamble & R Mohr 'Litigants in person in the Federal Court of Australia and the Administrative Appeals Tribunal: A research note' *Paper* presented to the Sixteenth AIJA Annual Conference Melbourne 4-6 September 1998.

<sup>2343</sup>AAT *Submission 210*.

<sup>2344</sup>eg most applicants with representation in the AAT's social welfare jurisdiction are represented by lawyers funded by legal aid: P Alexander *Correspondence* 7 June 1999.

<sup>2345</sup>H Genn 'Tribunals and informal justice' (1993) 56 *Modern Law Review* 393, 404.

12.225 Representation can help the tribunal to identify and interpret the relevant law, elicit facts and formulate reasons. Although the government and some parties may wish for a simpler review system, the complex factual and legislative framework within which some decisions are made makes this objective unrealistic in many administrative review contexts.

12.226 The Commission's work highlights the role that representatives play in securing settlement of review applications. Unrepresented applicants are less likely than those with representation to be successful in having decisions under review set aside, varied or remitted and in securing a consensual outcome to their claims.

12.227 Active engagement of applicant representatives, in negotiation with agencies and in case preparation, is important to the early resolution of review applications. This fact alone has implications for priorities in and the arrangements for providing government funding for administrative dispute resolution. In particular it may be more cost-effective to provide legal or specialist non-legal representation (whether through legal aid, community legal centres, specialist advocacy services or other means) at the case preparation or prehearing stages, rather than at hearing.

12.228 There are compelling reasons why agencies should also be represented at the hearing to assist the tribunal in some review tribunal proceedings, particularly where the applicant is unrepresented; where the facts and law are complicated; and in cases turning on credit before a single member who must otherwise examine witnesses and the applicant. The Commission was consistently told by immigration practitioners that applicants dissatisfied with the processes of credit hearings before the RRT are pre-disposed towards and difficult to dissuade from seeking a new 'fairer' hearing before the Federal Court.<sup>2346</sup>

12.229 At the same time the Commission's research indicates that cases with applicant representatives had many more prehearing events than those without representation. It is difficult from this to make assumptions about the effectiveness or otherwise of such prehearing events. Nevertheless it points to the essential conundrum of involving representatives – they may be advantageous, even necessary, for the fair and effective resolution of cases, but they need to be controlled.

12.230 The Commission's recommendations concerning consistent compliance provisions, expert evidence and costs incentives are all directed to manage representative and party involvement to secure effective, efficient case resolution. For example, the costs provisions in compensation cases could be carefully structured to permit costs recovery only for those expert reports disclosed or used in

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<sup>2346</sup> The Federal Court has also expressed dissatisfaction with credit findings of the RRT; eg *Meadows v MIMA* (unreported) Full Federal Court 23 December 1998 and other cases cited and discussed in R-Bacon et al 'Justice and fairness in an inquisitorial tribunal' *Paper Refugee Review Tribunal Members' Conference* 24–25 March 1999 RRT Sydney; *Selliah v Minister for Immigration and Multicultural Affairs* [1999] FCA 615.

the hearing and for only two prehearing case events and, as stated previously, provide incentives for settlement. Such provisions can be judiciously targeted to manage or modify, but not restrict, representation. The restrictions on representation which presently operate to control lawyers in the MRT and RRT also constrain those Tribunals and may in certain cases, limit their capacities to hear and evaluate all relevant evidence.

12.231 The Commission considers that legislation, policy and practice concerning federal review tribunal proceedings, rather than seeking ways to restrict representation in review tribunal proceedings, should focus on better defining and managing representatives. Where there is scope for resolution of the case without a hearing, full participation by representatives should be encouraged, as should assistance by representatives in written case preparation.

12.232 Even where, as in the MRT and RRT, the legislation seeks to constrain the mode of the hearing, so that the hearing is based on direct interaction between the decision maker and the applicant, the legislation should nevertheless provide tribunals with discretion to permit representative participation at hearing as considered appropriate and useful in hearing applications. Case types where some discretion to permit representative participation at hearing would be beneficial include cancellation of visa cases and refugee cases turning on credibility. This can contribute to applicants' perceptions that processes are 'fair'. Given the need for discretion, it may be more appropriate for management provisions relating to representation to be contained in divisional practice directions, rather than in portfolio legislation.

**Proposal 12.19.** There should be no legislative presumption that representation in review tribunal proceedings should only be allowed in exceptional or prescribed circumstances or where agreed by the minister responsible for the particular review jurisdiction. Legislation should provide that parties may be represented at hearings, at the discretion of the tribunal.

#### *Duties of agency representatives*

12.233 Agency representatives are held by the Federal Court to have a duty to assist the AAT in reaching the correct decision.<sup>2347</sup> The agency should ensure that all relevant facts and documents are before the AAT, whether favourable to the applicant or not, and not place undue emphasis on defeat of the application.<sup>2348</sup>

12.234 The AAT has taken such obligations to be analogous to 'counsel assisting the crown', particularly with regard to the disclosure of evidence. The AAT noted

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<sup>2347</sup> *McDonald v Director-General of Social Security* (1984) 6 ALD 6.

<sup>2348</sup> *Re Cimino and Director-General of Social Services* (1982) 4 ALN N106; *Re Stewart and Department of Employment, Education and Training* (1990) 20 ALD 471; J Dwyer 'Overcoming the adversarial bias in tribunal procedures' (1991) 20 *Federal Law Review* 252, 255.

instances where respondent agencies or their representatives have adopted an excessively combative stance before the AAT demonstrated by

- failure to comply with deadlines for lodgement of documents
- engaging in unnecessarily adversarial tactics such as late disclosure of material
- failure to disclose material evidence which may assist an applicant's case and
- focussing solely on defeat of the application during the hearing.<sup>2349</sup>

12.235 Solicitors representing applicants who responded to the Commission's national AAT case file survey questionnaires raised a range of concerns about the conduct of agencies and their representatives in the cases in which they were involved.

For some as yet unknown reason the respondent would not objectively reconsider an obviously incorrect technical decision . . . and seemed intent on placing as much expense and inconvenience in the way of the applicant (with the temerity to challenge the incorrect decision).<sup>2350</sup> (solicitor for the applicant in a taxation case)

DEETYA's attitude in all cases it ran into the AAT was woeful. It had no understanding of the Commonwealth as model litigant and no sense of proportion in the costs of the actions it took in comparison to the result.<sup>2351</sup> (solicitor for the applicant in a social welfare case)

The respondent had adopted an extremely hostile and adversarial attitude to the applicant across a range of proceedings until their position collapsed at the hearing.<sup>2352</sup>(solicitor for the applicant in a veterans' entitlements case)

The department did the wrong thing and did not want to admit it.<sup>2353</sup> (solicitor for the applicant in a compensation case)

The legitimate medical dispute/issue was clouded by an inappropriate and intrusive cross-examination of our client's past medical history. This added to the cost as well as the unpleasantness of the hearing. Greater control by the AAT might have stopped this problem.<sup>2354</sup> (solicitor for the applicant in a compensation case)

12.236 The AAT submitted that legislation governing procedure before review tribunals should explicitly mandate a form of 'counsel assisting' role for representatives in review tribunal proceedings. In this regard, no distinction should

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<sup>2349</sup>.AAT *Submission* 210.

<sup>2350</sup>.AAT case file survey response 35 (solicitor for the applicant).

<sup>2351</sup>.AAT case file survey response 596 (solicitor for the applicant).

<sup>2352</sup>.AAT case file survey response 1335 (solicitor for the applicant).

<sup>2353</sup>.AAT case file survey response 1097(solicitor for the applicant).

<sup>2354</sup>.AAT case file survey response 1112 (solicitor for the applicant).

be drawn between representation which is provided by government agencies or that which is provided by private contractors on behalf of government.<sup>2355</sup>

12.237 Agencies were less supportive of a prescription of their representatives' role. For example, ASIC stated that such an initiative would be inappropriate in light of the significant differences in issues which must be addressed in each jurisdiction.

The role of the agency, including its chosen representative, is best addressed by the procedures of the respective divisions of the ART. The members of the divisions should have a significant role to play in controlling the proceedings before them.<sup>2356</sup>

12.238 Comcare in general supported some statement of the duties of respondent representatives to, for example, give full disclosure of all relevant facts and documents and not place undue emphasis on defeat of the application but stated that the same onus should be placed on the applicant. For example, in tribunal proceedings, both sides should be under the same obligation to produce all their medical reports.<sup>2357</sup>

12.239 One option for reinforcing the duties of agency representatives would be for legislation constituting the ART to mandate a 'counsel assisting' role for agencies and agency representatives in review tribunal proceedings, based on existing judicial statements. Another option would be for the Attorney-General to issue a legal services direction. Under recent changes to the Judiciary Act related to the 'untying' from the Australian Government Solicitor of Commonwealth government litigation work, the Attorney-General can issue legal services directions. A direction is capable of applying to agencies and to the Australian Government Solicitor or private lawyers, in respect of Commonwealth legal work, including representing agencies in review tribunal proceedings. The Attorney-General has sole power to enforce compliance with the legal services directions.<sup>2358</sup> Legal services directions are discussed in more detail in chapter 8.

12.240 Whatever mechanism is used it is important that the role be clearly defined. The rules should place limits on the assistance which a review tribunal may require the agency to provide to an applicant and also make it clear that it is not intended to prevent the government or its representatives from acting firmly and properly to protect and argue for the Commonwealth's interests.

12.241 The conduct of agency representatives should not be the only focus, although their association with the agency does assume the coincidence of their commitment to secure the correct decision. The Commission's recommendations concerning the

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<sup>2355</sup>.AAT *Submission 210*. Another submission said that it is important to clarify the role of agency representatives in merits review tribunal proceedings, especially where government legal work is outsourced and where non-legal advocates appear for agencies: M de Rohan *Submission 175*.

<sup>2356</sup>.ASIC *Submission 184*.

<sup>2357</sup>.Comcare *Submission 209*.

<sup>2358</sup>.*Judiciary Act 1903* (Commonwealth) s 55ZG(2), inserted by the *Judiciary Amendment Act 1999* (Cth).

disclosure of expert reports and the management of tribunal cases aim to set down practices for all representatives engaged in these jurisdictions. More generally, the Commission considers that the legal profession, review tribunals and representatives from the Office of Legal Services Coordination should work together to assist the profession to devise relevant practice standards for all practitioners representing clients before review tribunals. Such standards could specifically recognise the goals of review tribunal proceedings, including those related to providing economical, informal and more expeditious forms of dispute resolution.

**Proposal 12.20.** Legislation constituting federal review tribunals should mandate a 'counsel assisting' role for agencies and agency representatives in review tribunal proceedings based on existing judicial statements, and that the Attorney-General issue a legal services direction under the Judiciary Act mandating such a role.

**Proposal 12.21.** Professional bodies should work with tribunals and representatives from the Office of Legal Services Coordination to assist the profession to develop appropriate practice standards for practitioners representing clients before review tribunals.



## 13. Expert evidence

### Introduction

13.1 The Commission's terms of reference require it to consider, among other things, mechanisms for identifying the issues in dispute and means of gathering, testing and examining evidence. In relation to federal civil litigation, the Commission has been asked particularly to focus its attention on expert evidence and expert witnesses.

### Expert witnesses in the Federal Court, Family Court and the AAT

13.2 Some of the criticism of the present use of expert evidence is based on claims that the use of expert evidence and expert witnesses are a source of unwarranted cost, delay and inconvenience in court and tribunal proceedings. It seems clear that the provision of expert evidence is a significant off-shoot of the litigation 'industry'. However, little research has been conducted in Australia on the use and cost of expert witnesses as a component of litigation costs.<sup>2359</sup>

#### *Expert witnesses in the Federal Court of Australia*

13.3 Expert witnesses play a role in many cases in the Federal Court, including cases involving breaches of the consumer protection or restrictive trade practices provisions of the *Trade Practices Act 1974* (Cth) (*Trade Practices Act*); copyright, designs and other intellectual property cases; and income tax, sales tax and custom duties cases.

13.4 The Commission's Federal Court case file survey of 682 cases provides some information on the use of experts in Federal Court proceedings and the cost of expert evidence.<sup>2360</sup> There was evidence of the use of experts in around 5% of cases (32) in the sample. Experts were most often used in trade practices cases (20). The

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<sup>2359</sup> The Australian Institute of Judicial Administration (AIJA) conducted a study on the cost of civil litigation in the District Court of Queensland and the County Court of Victoria which found that medical reports and medical experts at trial accounted for a significant proportion of the total costs of litigation. In Victoria expert witnesses accounted for 27% of the cost of cases settled at the pre-trial conference and 16% of the cost of cases that went to verdict. The comparable figures for Queensland were 10% and 15%; P Williams et al *The Cost of Civil Litigation before Intermediate Courts in Australia* AIJA Inc Melbourne 1992, 72.

<sup>2360</sup> T Matruglio & G McAllister *Part one: Empirical information about the Federal Court of Australia* ALRC Sydney March 1999 (T Matruglio & G McAllister, *Federal Court Empirical Report Part One*) para-7.2.

most common categories of expert were accountants (19) and actuaries/valuers (8).<sup>2361</sup>

13.5 The second stage of this survey, which collected costs information from the solicitors on the record in respect of the same sample of Federal Court case files, revealed that the median cost of expert fees was \$2000 and \$5995 for applicants and respondents respectively, but with a range from \$350 to \$515000.<sup>2362</sup>

13.6 In some types of proceedings, the cost of expert evidence as a component of overall costs is significant. Consultations have suggested that the cost of experts is a major cost component of Part IV Trade Practices Act,<sup>2363</sup> patent<sup>2364</sup> and Corporations Law takeover cases.<sup>2365</sup>

### *Expert witnesses in the Family Court of Australia*

13.7 Expert evidence is also commonly used in the Family Court. In particular

- family, child counsellors and psychiatric experts are often asked to prepare reports in proceedings involving the care, welfare and development of children
- property valuation and other financial expert evidence is frequently adduced in proceedings involving matrimonial property.

With the exception of information about family reports, there is little precise information on the types or numbers of experts involved, the types of case in which they are involved or the cost. The Family Court reports that, in 1997–98, family reports were prepared in 7% of the 25 297 cases dealt with by the Counselling Service.<sup>2366</sup> The role of family reports is discussed in more detail at chapter 11.<sup>2367</sup>

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<sup>2361</sup>Other types of experts involved in the sample cases included medical/scientific experts, trade experts, economists, architects, loss assessors, forensic document examiners and migration agents. See T Matruglio & G McAllister, Federal Court Empirical Report Part One, tables 27–28.

<sup>2362</sup>T Matruglio *Part two: The costs of litigation in the Federal Court of Australia* ALRC Sydney 1999 (T-Matruglio, Federal Court Empirical Report Part Two) 44, table 8.

<sup>2363</sup>In these cases, in order to determine whether particular conduct has an effect on competition it can be necessary to define the market and to determine the nature and extent of the impact of the conduct on the market. There is wide scope for the use of expert evidence from economists and others in resolving these issues. For example in *QIW Retailers Ltd V Davids Holdings Pty Ltd: Attorney-General of the Commonwealth v Davids Holdings Pty Ltd* (1993) ATPR 41–226 a merger case involving grocery wholesaling, the evidence of seven economists, offering three alternative market definitions was adduced.

<sup>2364</sup>In these cases, expert reports may be prepared early in a dispute in order to challenge the validity of registration and provide a defence to allegations of patent infringement.

<sup>2365</sup>These cases often involve complex accountancy evidence relating to whether the bidder and the target company have provided full and accurate information to shareholders.

<sup>2366</sup>Family Court of Australia *Annual report 1997–98*, 28 (5.6% of 25 869 cases seen in person by the Counselling Service).

<sup>2367</sup>para 11.80–11.108.

13.8 The Commission's national survey of Family Court files provides some limited information on the use of experts in Family Court proceedings. Information on the number of expert witnesses the parties anticipated calling at the hearing was taken from prehearing conference or compliance conference records. While relatively few cases were recorded as having expert witnesses (7%, n=130), around 28% (n=51) of applicants and 27% (n=49) of respondents whose cases were listed for hearing filed information on their expert witnesses.<sup>2368</sup>

13.9 Property matters listed for hearing had a much higher proportion of experts on record than children's matters (for applicants 58% of property matters, compared with 14% for children's matters and for respondents 52% for property matters and 17% for children's matters).<sup>2369</sup> The most common categories of expert identified from the court files were actuaries/valuers (69) and accountants (33).<sup>2370</sup>

13.10 The second stage of the survey, which collected information from the solicitors on the record in respect of the same sample of Family Court case files revealed most applicant (74%, n=285) and respondent (75%, n=205) solicitors did not engage any experts. The use of multiple experts appeared to be rare in the sampled Family Court cases.<sup>2371</sup> The most common categories of expert used in the cases were Family Court counsellors (69), actuaries/valuers (52), doctors (38) and accountants (23).<sup>2372</sup>

13.11 The survey also collected information about expert fees. Information about the cost of specific expert types was possible to determine in only 17 applicant cases and in 8 respondent cases, therefore the findings must be qualified by the low sample numbers. In most cases, the type of expert consulted was a valuer/actuary or an accountant. The median cost per expert of expert valuation or actuarial evidence was \$300 for applicants and \$375 for respondents. The median cost of expert accounting evidence per expert was \$4 830 for applicants and \$5 290 for respondents. The range was \$50 to \$7526.<sup>2373</sup>

#### *Expert witnesses in the Administrative Appeals Tribunal (AAT)*

13.12 Many proceedings in the AAT turn on expert evidence. In particular, review of decisions concerning Commonwealth employees' compensation, veterans' entitlements and some social welfare cases often involve extensive medical evidence

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<sup>2368</sup>T Matruglio & G McAllister *Part one: Empirical information about the Family Court of Australia* ALRC Sydney February 1999 (T Matruglio & G McAllister, Family Court Empirical Report Part One) ch 7.

<sup>2369</sup>.id para 7.1.

<sup>2370</sup>.Other types of experts involved in the sample cases included doctors and other medical experts, psychologist, psychiatrists and social/refuge workers. T Matruglio & G McAllister, Family Court Empirical Report Part One, table 33.

<sup>2371</sup>T Matruglio *Part two: The costs of litigation in the Family Court of Australia* ALRC Sydney June 1999 (T-Matruglio, Family Court Empirical Report Part Two) ch 4, table 12.

<sup>2372</sup>.id ch 4, table 13.

<sup>2373</sup>.id ch 4, table 16.

and numbers of medical experts provide reports or give oral evidence before the tribunal. Other types of expert evidence may be significant in matters involving customs, tax and securities and therapeutic drugs registration cases.

13.13 The Commission's AAT case file survey provided more detailed information on the use of experts in AAT proceedings and the cost of expert evidence.<sup>2374</sup> Information was collected about the number of experts who provided an expert report or who were to be called to give oral evidence at a hearing, as indicated by the information on hearing certificates.<sup>2375</sup> There was evidence of the use of experts in 50% of the sample. Compensation cases had a median of 2 experts used by each side and 84% (n=361) of compensation cases had some expert evidence.<sup>2376</sup>

13.14 The costs survey showed that the median cost of expert fees in the sampled AAT cases was \$703 for applicants and \$570 for respondents, with a range from \$25 to \$ 9000. In the AAT's compensation jurisdiction the median cost of expert fees was \$750 for applicants and \$540 for respondents, with a range from \$80 to \$3638.<sup>2377</sup>

13.15 The Commission's survey sample sizes were generally insufficient to draw firm conclusions about the costs of experts relative to legal costs. However, some useful data indicated that for compensation cases in respect of which the representative provided a figure for experts' fees (n=34), the median expert fee paid by applicants was 13% of median legal costs and by respondents was 8% of median legal costs. For veterans' affairs cases in respect of which the representative provided a figure for experts' fees (n=48), the median expert fee paid by applicants was 18% of median legal costs.<sup>2378</sup> Medical evidence in such cases often is the decisive issue. This proportion of legal costs for experts cannot be considered excessive.

## Approach to reform

13.16 Any attempt to assess the advantages and disadvantages of the present use of expert evidence and expert witnesses is made difficult by a lack of empirical information, including how much time and money is spent on adducing expert evidence. While court and tribunal records indicate the number of expert witnesses whom the parties propose to call, it is more difficult to discover how many experts the parties actually consulted about their dispute.

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<sup>2374</sup>.ALRC *Part one: Empirical information about the Administrative Appeals Tribunal* ALRC Sydney June 1999 (ALRC, AAT Empirical Report Part One), para 6.3, table 6.3-6.4.

<sup>2375</sup>.The case files do not disclose whether other experts were consulted but not used in proceedings. In cases involving expert medical evidence, the reports of the treating doctors were counted, but only where these appeared to have been prepared for the purposes of the claim which later became the subject of the review application.

<sup>2376</sup>.ALRC, AAT Empirical Report Part One, para 6.3, table 6.4.

<sup>2377</sup>.ALRC *Part two: Empirical information about the Administrative Appeals Tribunal* ALRC Sydney June 1999 (ALRC, AAT Empirical Report Part Two), table 5.1 and 5.3.

<sup>2378</sup>.id para 5.2.

13.17 Concerns have been expressed that some reforms, including moves to impose new obligations on expert witnesses, to reduce the number of expert witnesses or for court appointed experts, may lead to parties retaining 'silent' experts to provide initial advice and a different expert or experts for the purposes of litigation thus adding further costs and reducing transparency.<sup>2379</sup>

13.18 The problems most frequently associated with expert evidence are summarised as follows

- the court hears not the most expert opinions, but those favourable to the respective parties
- the corrupt expert may be a rare phenomenon, but will not necessarily be exposed by an inexpert cross-examination
- the expert is paid for the expert's services, and is instructed by one party only; some bias is inevitable
- questioning, whether educive or hostile, by lawyers may lead to the presentation of an inaccurate picture, which will mislead the court and frustrate the expert
- where a substantial disagreement arises, it is irrational to ask a lay judge to solve it; the judge has no criteria by which to evaluate the opinions
- success may depend on the plausibility or self-confidence of the expert, rather than the expert's professional competence.<sup>2380</sup>

13.19 Early in the course of this inquiry, the Law Council of Australia submitted that in the absence of significant civil justice research that might suggest otherwise, any problems caused by the present use of expert evidence in the Federal Court are isolated. Therefore, in the Law Council's view, to propose arbitrary and wholesale restrictions on party use of expert evidence might be an excessive reaction to a minimal problem.<sup>2381</sup> The Law Council submitted that any restrictions on existing party freedom to present its case, including by way of expert evidence, should be imposed only on those cases where the cost of expert evidence is 'relatively significant'. The Law Council anticipated that, in these cases, the problems may best be addressed by 'specific management processes' rather than any broader reform.

13.20 Similarly, the Law Council's assessment of family law proceedings was that, in most cases, expert witnesses are used quite 'effectively and appropriately' in the Family Court under the present system and that wholesale change was not warranted.<sup>2382</sup> However, the Law Council proposed a number of procedural

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<sup>2379</sup>Forensic Accounting Special Interest Group *Consultation* Sydney 20 April 1999; Federal Court practitioners *Consultation* Sydney June 4 1999.

<sup>2380</sup>J Basten 'The Court Expert in Civil Trials – A Comparative Appraisal' (1977) 40 *Modern Law Review* 174, 174.

<sup>2381</sup>Law Council of Australia (LCA) *Submission 126*.

<sup>2382</sup>LCA *Submission 197*.

changes which it considered would improve the use of expert evidence in family proceedings.<sup>2383</sup>

13.21 The Commission's task in assessing expert evidence has been greatly assisted by recent research conducted for the AIJA by Freckelton, Reddy and Selby who conducted a survey of 480 Australian judges, to provide data on the difficulties attendant on the reception of expert evidence by Australian courts.<sup>2384</sup> The survey sought judges' views, among other things, on

- the problems posed by expert evidence
- the role of advocates in adducing expert evidence
- training of experts and advocates
- admissibility issues and
- court experts, assessors and referees.

13.22 The results of this survey (the AIJA empirical study) and the conclusions drawn by the researchers are discussed at various points in this chapter. Federal judges comprised only about 20% of the respondents surveyed.<sup>2385</sup> The researchers have expressed the view that

[the judges' answers] articulate a preparedness on the part of a substantial part of Australia's judiciary to confront in a flexible way the difficulties posed by complex and conflicting evidence by experts. Many do not feel themselves constrained to an uninvolved, non-interventionist role but are ready, in principle, to become involved in the litigation to the extent necessary to render the evidence before them susceptible of effective evaluation. They are concerned to reduce what they identify as a culture of inadequate objectivity by many doctors, accountants, scientists and psychologists, to improve the performance of experts and advocates alike and to explore means of bringing information before the courts in a form which is both clear and amenable to sophisticated and cost-efficient assessment.<sup>2386</sup>

### *Federal Court reforms*

13.23 In recent years, the Federal Court, in consultation with the Law Council and other professional bodies, has actively considered proposed reforms on the use of

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<sup>2383</sup>. That is, wider use of the power to require experts to confer and provide a joint statement under the Family Law Rules and further consideration of the timing of expert reports and expert conferences. See para 13.48; 13.50; 13.54.

<sup>2384</sup>. I Freckelton et al *Australian Judicial Perspectives on Expert Evidence: An Empirical Study* AIJA Melbourne 1999.

<sup>2385</sup>.id 21-22. The response rate to the survey was 51%. Federal judges comprised about 20% of the respondents. The respondent judges indicated that their main areas of practice as judges were criminal trials (27%); appellate cases (7%); family law hearings (14%); personal injury/workers' compensation hearings (8%); commercial/equity hearings (12%), other, including intellectual property, bankruptcy, taxation, judicial review and administrative appeals (13%). The remaining respondents reported more than one main area of practice.

<sup>2386</sup>.id 12-13.

experts.<sup>2387</sup> The Federal Court proposals aimed to refine court controls over the calling of expert evidence and to reinforce the duties of experts to the Court.<sup>2388</sup>

13.24 The Federal Court issued a practice direction providing guidelines for expert witnesses in September 1998.<sup>2389</sup> In December 1998, the Federal Court also issued new rules of court dealing with the evidence of expert witness.<sup>2390</sup> The Federal Court's original proposals<sup>2391</sup> were similar to those of Lord Woolf, who recommended that in the United Kingdom the calling of expert evidence should be subject to the complete control of the court.<sup>2392</sup>

13.25 Lord Woolf's recommendations influenced new provisions relating to experts and assessors contained in new English Civil Procedure Rules.<sup>2393</sup> The Federal Court's rules and practice direction, the Woolf report and the new English Civil Procedure Rules are referred to in more detail throughout this chapter.

### *The role of expert evidence*

The ultimate criterion for admission of opinion evidence should be whether it will assist the trier of fact in understanding the testimony, or determining a fact in issue.<sup>2394</sup>

13.26 Expert opinion evidence is needed to enable decision makers to understand evidence before them and to make better decisions about disputed facts. Judges and tribunal members need to be able to understand the expert evidence and be confident about relying upon it.

Decision-makers need to look for touchstones of reliability, indicia including the expert being impartial, a disinclination by the expert to step beyond their limits of expertise, and a familiarity on the part of the expert with the relevant facts. In short, the

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<sup>2387</sup> In October 1996, Chief Justice Black wrote to the Law Council to seek comments on proposed reforms. Following consultation and further consideration by the Federal Court's Practice and Procedures Committee, these proposals were amended and comment again sought from interested groups in August 1997.

<sup>2388</sup> Federal Court *Correspondence* 20 August 1997; Federal Court *Correspondence* 24 October 1996.

<sup>2389</sup> Federal Court *Practice Direction: Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia* (15 September 1998).

<sup>2390</sup> Fed Ct Rules O 34A.

<sup>2391</sup> That is, of 20 August 1997 and 24 October 1996.

<sup>2392</sup> Lord Woolf *Access to justice: Final report to the Lord Chancellor on the civil justice system in England and Wales* HMSO London 1996 (Woolf final report) rec 156.

<sup>2393</sup> Civil Procedure Rules 1999 (UK) (CPR(UK)). The new Rules which came into force on 26 April 1999 followed review of Lord Woolf's draft civil proceedings rules by a Civil Procedure Rules Committee established by the *Civil Procedure Act 1997* (UK).

<sup>2394</sup> Australian Law Reform Commission Report 26 *Evidence* AGPS Canberra 1985 (ALRC 26) vol 1 para-739-740.

decision-maker needs to feel secure that their application of an expert opinion to facts in dispute is truly fair and reasonable.<sup>2395</sup>

13.27 While the function of the expert witness, as seen from the perspective of decision makers, is to educate and inform the judge or tribunal member, parties to a case instruct an expert in order to support their case – they want to win. Lawyers, in a manner consistent with their duty to advance their client’s interests, naturally look for an expert who will support the client’s case. More broadly, the particular use of experts and expert evidence may become part of the ‘tactical play’ of adversarial litigation, with parties and their lawyers ‘shopping’ for experts who support their case, seeking to overwhelm the court or the other party with the volume or complexity of expert evidence or withholding expert opinion evidence or related material that may be damaging to a parties’ own case or advantageous to their opponents.

13.28 Expert evidence can be one of the principal weapons used by litigators to take advantage of the other side’s lack of resources or ignorance of relevant facts or opinions.<sup>2396</sup> The extent to which this occurs in proceedings before courts and tribunals exercising federal jurisdiction is not easy to establish. However, it is clear that the problems are not new. Federal courts and tribunals have well developed rules and procedures enabling them to control the use of expert evidence by the parties, to maximise the usefulness and timeliness of such evidence and to avoid undesirable ‘tactical play’. These rules and procedures are discussed in detail below (see para 13.29-13.38). Reforms associated with expert evidence can usefully distinguish particular case types for focussed management or direction.

## **Court and tribunal control of expert witnesses**

13.29 Federal courts and tribunals have developed rules, procedures and case management processes to control the use of expert evidence by the parties. Sometimes these rules and procedures are part of broader case management processes used to manage the time and events involved in proceedings. In relation to expert evidence, such rules, procedures and processes allow courts and tribunals to control, among other things

- the timing of disclosure of expert reports, so that the parties know what expert evidence is being advanced by the other side at an earlier stage and may more readily identify areas of agreement
- the deliberations of expert witnesses; for example, by requiring that parties’ experts meet to identify and attempt to narrow the issues in dispute
- the way in which expert evidence is presented; for example, by providing that expert evidence is to be given in written form or in a joint report by experts appointed from both sides and

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<sup>2395</sup>I Freckelton et al *Australian Judicial Perspectives on Expert Evidence: An Empirical Study* AIJA Melbourne 1999, 4.

<sup>2396</sup>Woolf final report, 138.



- the manner in which expert evidence is presented at hearings; for example, by limiting the numbers of expert witnesses and the extent of examination and cross examination of experts.

### *Federal Court Rules*

13.30 The Federal Court has certain ‘inherent’ or ‘implied’ powers to control the parties’ use of expert evidence. In the prehearing context, Federal Court Rules expressly provide that on a directions hearing the Court may

- make orders with respect to the disclosure of reports of experts<sup>2397</sup>
- order that the reports of experts be exchanged<sup>2398</sup>
- direct, in proceedings in which a party seeks to rely on the opinion of person involving a subject in which a person has specialist qualifications, that all or part of such opinion be received by way of submission in such manner and form as the Court may think fit, whether or not the opinion would be admissible as evidence<sup>2399</sup> or
- order that no more than a specified number of expert witnesses may be called.<sup>2400</sup>

13.31 In addition, a Federal Court practice note sets out procedures ordinarily to be followed by parties wishing to have a survey conducted, with a view to the results being used in evidence. The practice note directs parties to attempt to agree on questions of survey methodology.<sup>2401</sup>

13.32 At any time before or during a hearing, the Court may make directions to limit the time taken for trial, including limiting

- the time for examining, cross-examining or re-examining a witness or
- the number of witnesses (including expert witnesses) that a party may call.<sup>2402</sup>

13.33 In December 1998, the Federal Court issued new rules dealing with the evidence of expert witness.<sup>2403</sup> These rules provide that, where two or more parties call or intend to call expert witnesses to give opinion evidence about the same or a similar question, the Court may order that

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<sup>2397</sup>.Fed Ct Rules O 10 r 1(2)(a)(xv).

<sup>2398</sup>.id O 10 r 1(2)(da).

<sup>2399</sup>.id O 10 r 1(2)(j).

<sup>2400</sup>.id O 10 r 1(2)(a)(d).

<sup>2401</sup>.Federal Court *Practice Note No. 11*, 8 April 1994.

<sup>2402</sup>.Fed Ct Rules O 32 r 4A.

<sup>2403</sup>.id O 34A.

- the expert witnesses confer<sup>2404</sup>
- the expert witnesses produce a document identifying issues about which their opinions agree or differ<sup>2405</sup>
- expert witnesses give evidence after all or certain factual evidence has been led<sup>2406</sup>
- after factual evidence has been led, expert witnesses file and serve an affidavit or statement indicating whether they adhere to their earlier opinions or wish to modify those opinions<sup>2407</sup>
- expert witnesses be empanelled together and occupy a point in the courtroom appropriate for giving expert evidence (not necessarily in the witness box)<sup>2408</sup>
- an expert witness give an oral exposition of his or her opinion, including views about the opinions offered by another expert witness<sup>2409</sup>
- expert witnesses be cross-examined in a certain manner or sequence<sup>2410</sup> or
- the cross-examination or re-examination of expert witnesses be conducted by completing the cross-examination or re-examination of one witnesses before the other, or by putting to each expert witness in turn each question until cross-examination or re-examination is completed.<sup>2411</sup>

### ***Family Law Rules***

13.34 The Rules provide, among other things, that

- where the evidence of two or more experts is to be adduced in proceedings, the Court may order a conference of the experts for the purpose of identifying those parts of their evidence that are in issue in the proceedings<sup>2412</sup>
- a party intending to adduce the evidence of two or more experts in relation to the same issue at a hearing must apply for directions, on the application of which the Court may give a direction specifying number of experts who may be called on the same issue by a party<sup>2413</sup> and
- the directions of the Court must not allow two or more experts to be called by the same party on the same issue unless the Court is satisfied that there are special circumstances.<sup>2414</sup>

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<sup>2404</sup>.id O 34A(2)(a).

<sup>2405</sup>.id O 34A(2)(b).

<sup>2406</sup>.id O 34A(2)(c).

<sup>2407</sup>.id O 34A(2)(d).

<sup>2408</sup>.id O 34A(2)(e).

<sup>2409</sup>.id O 34A(2)(f).

<sup>2410</sup>.id O 34A(2)(h).

<sup>2411</sup>.id O 34A(2)(i).

<sup>2412</sup>.Fam Law Rules O 30A r 9(1).

<sup>2413</sup>.id O 30A r 8(1)(2).

<sup>2414</sup>.id O 30A r 8(1)(2).

13.35 Case management guidelines provide that, at a prehearing conference, the registrar will usually direct that reports of expert witnesses be exchanged not less than 28 days before the hearing.<sup>2415</sup>

13.36 The *Family Law Act 1975* (Cth) (Family Law Act) specifically restricts parties using independent expert evidence resulting from examinations of children relating to abuse, for the purposes of proceedings under the Act. Where a child is examined without the leave of the court, the evidence is not admissible, except where the examination was for the purpose of deciding whether to bring proceedings based on allegations of abuse.<sup>2416</sup>

### *AAT practice directions*

13.37 The AAT's General Practice Direction requires the exchange of expert reports at an early stage in proceedings. The applicant must provide the respondent and the tribunal with all expert reports and the statements of all witnesses at least 14 days before the second conference, at which the statement of facts and contentions must be lodged. The respondent must do likewise at least seven days before the second conference.<sup>2417</sup>

13.38 The AAT also has broad general discretion in relation to its procedures.<sup>2418</sup> Members sometimes

- require that parties' experts meet to identify and attempt to narrow issues in dispute
- direct the way in which expert evidence is to be presented, for example by requiring the expert evidence is to be given in written form or in a joint report by experts appointed by both sides or

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<sup>2415</sup>Family Court of Australia Case Management Guidelines: Practice Direction 97/1 (Family Court Case management guidelines) para 8.7(j).

<sup>2416</sup>Family Law Act s 102A. Where an application has been made to have a child further examined or interviewed by more than one expert, the Family Law Act sets out factors that the Court must consider in deciding whether to grant leave to have the child further examined. Family Law Act s-102A(3). The Commission has recommended that, in deciding whether to grant an application that a child be interviewed or examined by an expert, the court should consider any wishes expressed by the child as well as the other specified considerations, and that s 102A(3) of the Family Law Act should be amended to this effect. The Commission also recommended that the Family Court should collect and maintain statistics concerning the number of times experts, including Family Court counsellors, interview each child in each litigated matter in the Family Court. These statistics should be used to conduct a regular assessment of whether children are over-interviewed during family law proceedings. — ALRC 84 rec 146; ALRC 84, rec 147.

<sup>2417</sup>AAT *General Practice Direction* 18 May 1998, 2.2.

<sup>2418</sup>Proceedings must be conducted with as little formality, and technicality and with as much expedition as the relevant legislation and proper consideration of the matters before the tribunal permits: AAT Act s 33(1).

- direct the way in which expert evidence is presented at hearings, for example by limiting the number of expert witnesses and the extent of cross-examination.<sup>2419</sup>

### *Disclosure of expert reports*

13.39 One important way in which courts or tribunals control the use of expert evidence is by ordering early disclosure of expert evidence to the opposing party and to the court or tribunal. Without adequate prehearing processes, it may become apparent, even as late as at the hearing that

- the facts on which expert evidence has been based have not yet been sufficiently established or
- opposing experts may not be answering the same question in their evidence or addressing the same issues.<sup>2420</sup>

13.40 Early disclosure of expert reports can enable the parties and decision makers to identify the issues, the relative merits of claims and areas in which agreement may be reached between the parties at a timely stage in proceedings. For those matters which proceed to a hearing, such disclosure helps ensure that the parties are less likely to be taken by surprise at the hearing. Disclosure of reports may facilitate settlement of part or all of the issues, or where settlement is not possible, allow the preparation of focussed, relevant expert evidence for trial. Such outcomes are capable of reducing costs and delay and improving decision making.

13.41 Some concerns have been expressed about the exchange of expert reports in family law proceedings. The Family Law Rules no longer contain specific provisions relating to the exchange of expert reports.<sup>2421</sup> The Family Court sees merit in early exchange of expert reports because

- interim arrangements for parenting may be in place for some time while waiting for a hearing and it is important for the court to have access to expert reports before making interim orders and

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<sup>2419</sup>.D O'Connor 'Appearing before the AAT: A non-adversarial approach' *Paper* NSW Bar Association Seminar 10 May 1999.

<sup>2420</sup>.Some judges have said that judicial difficulty in following expert opinion most often rests not with the expert's opinions themselves, but the factual assumptions being used by the opposing experts: Supreme Court of SA *Consultation* Adelaide 1 September 1997.

<sup>2421</sup>.eg Fam Law Rules O 30A r 2, repealed by SR 1993 No 160 r 18. However, the Family Law Rules specifically require valuations of property and medical or psychiatric reports to be produced at or before conciliation conferences in relation to proceedings with respect to financial matters: O 24 r 2. Also Family Court Case management guidelines, para 7.9. Otherwise, the rules require that, as with other evidence in chief, unless the Court orders otherwise, expert evidence must be given by affidavit at the hearing: O 30 r 2. Affidavit evidence must generally be filed as directed at a prehearing conference or no later than 28 days before the day fixed for the hearing: O 30 r 2AA.

- reduced legal aid means more self-representation and in such cases expert reports provide a valuable assessment of family and parenting orders.<sup>2422</sup>

13.42 The Law Council stated that it would be beneficial in many family law cases to have expert reports filed earlier in the process.<sup>2423</sup>

The level of compliance, or more accurately, non-compliance, in matters proceeding to trial in the Family Court as little as two weeks before the appointed trial date, supports the suggestion that parties prepare for trial at the last moment, and only when it becomes apparent to both parties that a trial is inevitable.<sup>2424</sup>

13.43 Concerns have also been expressed about the timing of family reports prepared by court counsellors. This issue is discussed in chapter 11.<sup>2425</sup>

### *Conferences of experts*

13.44 Conferences or other communications between experts also help to identify and narrow the issues in dispute at an earlier stage in proceedings. Experienced expert witnesses have suggested that meetings between experts often establish that the instructions given to experts, and therefore the assumptions underpinning their reports, differ significantly. Sometimes, when the assumed facts are agreed, there is little difference in the views of the experts.<sup>2426</sup>

13.45 Courts and tribunals actively manage the deliberations of experts by

- encouraging or requiring party experts to communicate, or to communicate at an earlier stage in proceedings or
- encouraging or requiring experts to produce joint reports, statements of facts, agreed chronologies or other evidentiary materials.

13.46 Submissions suggested judges and tribunal members should more frequently order that conferences or other communications take place between experts.<sup>2427</sup>

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<sup>2422</sup>Family Court of Australia *Submission 264*.

<sup>2423</sup>LCA *Submission 197*.

<sup>2424</sup>I Coleman *Submission 257*.

<sup>2425</sup>para 11.80–11.108.

<sup>2426</sup>Comments, Law Week seminar on expert witnesses, New South Wales Parliament Theatre, 29–May 1997; Forensic Accounting Special Interest Group *Consultation* Sydney 20 April 1999.

<sup>2427</sup>Standard directions on expert evidence, requiring parties to meet together to attempt to reach agreement on matters of expert opinion and to produce a joint report (for an arbitrator or referee) were developed by Sir Laurence Street and first published in 1992. L Street 'Expert evidence in arbitrations and references' (1992) 66 *Australian Law Journal* 861. Lord Woolf considered that orders for experts to meet was the most promising of practices aimed at narrowing the issues between experts. In his final report he noted 'widespread support' for his suggestion that experts' meetings should be encouraged and recommended that meetings should normally be held in private, that is, without the attendance of the parties or their legal advisers: Woolf final report, 147, rec 172. However, when the court directs a meeting, the parties would be able to apply for any special

Contact between experts may be convened by, or presided over, by the court or tribunal, either directly or via written questions and responses.

### *Conferences of experts in federal proceedings*

13.47 Federal Court and Family Court judges increasingly direct the parties' experts to confer with one another prior to trial.<sup>2428</sup> In December 1998, the Federal Court Rules were amended expressly to allow for the Court to order conferences of experts.<sup>2429</sup>

13.48 In the Family Court, expert conferences are usually ordered as a matter of course in property proceedings, as required by case management guidelines. The Court may order that the experts prepare a joint statement setting out those parts of their evidence on which they agree and those parts on which they disagree.<sup>2430</sup> It is not uncommon for legal representatives themselves to organise informal conferences between experts in family law proceedings.<sup>2431</sup>

13.49 Justice Dessau of the Family Court has observed that the powers to order conferences of experts are seldom applied in children's cases, notwithstanding that these cases are known to comprise the majority of the complex, lengthy matters which last through to trial and many involve the extensive use of expert witnesses.<sup>2432</sup>

13.50 The Law Council has supported the wider use of the Family Court's power to order experts to confer and supports further consideration of the timing of such conferences. The Law Council suggests that conferences should be held earlier in the process, rather than a few days prior to the day of the hearing, as is often the case at present.<sup>2433</sup>

13.51 In the AAT, preliminary conferences are used to limit expert evidence by obtaining agreement on issues. In some jurisdictions of the AAT, notably veterans'

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arrangements such as attendance by the parties' legal advisers. Experienced expert witnesses in Australia have also suggested that meetings of experts work best if the lawyers are not present. Comments, Law Week seminar on expert witnesses, New South Wales Parliament Theatre, 29-May 1997; Forensic Accounting Special Interest Group *Consultation* Sydney 20 April 1999. In *Trident Properties Ltd v Capita Financial Group Ltd* (1993) 30 NSWLR 403, the NSW Court of Appeal upheld orders made in a construction dispute that the parties' experts meet, under the chairmanship of a referee, in the absence of legal representation.

<sup>2428</sup> P Heerey *Submission* 49.

<sup>2429</sup> Fed Ct Rules O 34A.

<sup>2430</sup> Fam Law Rules O 30A r 9(2); Family Court Case management guidelines, Usual Order No 8. Some Family Court judges advise that they invariably order experts to confer and to prepare a joint statement under Family Law Rules O 30A.

<sup>2431</sup> LCA *Submission* 197.

<sup>2432</sup> L Dessau, 'Trial management: balancing the competing interests of justice' *Paper* 7th National Family Law Conference Canberra 13-18 October 1996, 95.

<sup>2433</sup> LCA *Submission* 197.

entitlements and social security, the parties' representatives occasionally agree to provide joint questions to experts.<sup>2434</sup>

### *Limiting expert evidence at hearing*

13.52 Additional reforms seek to control expert evidence at hearings with courts and tribunals limiting the numbers of expert witnesses and the extent of examination and cross examination of experts.<sup>2435</sup>

13.53 The Federal Court Rules permit the Court to limit the number of expert witnesses to be called.<sup>2436</sup> Recent rules give the Court power to control the conduct of trials by, for example, limiting the time for cross examination.<sup>2437</sup> One Federal Court judge noted that he commonly directs that the parties prepare an agreed outline of the course of the hearing, including estimates of the time to be taken in adducing expert evidence.<sup>2438</sup>

13.54 In this context, the issue is whether the calling of expert evidence 'should be subject to the complete control of the court'<sup>2439</sup> or 'subject to the control of the parties, with the Court taking some control in exceptional cases'.<sup>2440</sup> This last was the compromise position of the Federal Court in developing its recent guidelines. The formulation received general support. In particular, the Law Council agreed that limiting the number of experts called in any one speciality could be appropriate.<sup>2441</sup> The Law Council also considered that the timing of calling expert evidence was one area the Court, rather than the parties, should control.<sup>2442</sup>

13.55 The Commission considers that the existing powers of the Federal Court, Family Court and AAT are sufficient to control the presentation of expert evidence at hearing. Proposals 13.13-13.14 below are intended to encourage improved practices utilising these powers.

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<sup>2434</sup>J Dwyer *Submission 269*. Senior Member Dwyer advises that during her 15 years on the AAT, this has occurred in only three cases.

<sup>2435</sup>G Davies 'A blueprint for reform: some proposals of the Litigation Reform Commission and their rationale' (1996) 5 *Journal of Judicial Administration* 201, 214.

<sup>2436</sup>Fed Ct Rules O 10 r 1(2)(a)(d).

<sup>2437</sup>id O 32 r 4A.

<sup>2438</sup>K Lindgren, Comments at 'A day in the Federal Court' College of Law CLE Seminar 12 June 1998.

<sup>2439</sup>A phrase used by Lord Woolf. Woolf final report, rec 156.

<sup>2440</sup>Federal Court *Correspondence* 20 August 1997.

<sup>2441</sup>Other submissions have supported moves to limit the number of expert witnesses able to be called by the parties, 'particularly where the purpose of calling such witnesses appears to be simply to demonstrate that more experts support one side's point of view than the other': ACCC *Submission-67*.

<sup>2442</sup>LCA *Correspondence* 30 September 1997. Ordinarily, an expert is called for the purpose of giving an opinion on factual assumptions. The factual matters upon which the expert's opinion is based need to be proved by witnesses who can give evidence directly to those facts or by other admissible evidence. For this reason expert evidence is often given after all other evidence has been given.

### *Written evidence*

13.56 Written expert reports or witness statements can substitute for the evidence in chief of a witness and thereby reduce the length of the hearing. The South Australian Supreme Court has proposed that, unless there are special circumstances, the Court should require that the evidence in chief of all expert witnesses be given exclusively in writing.

Of course, it is a matter for the trial Judge to determine the appropriate manner in which any evidence is to be led, but experience rather suggests especially in large commercial cases, that expert evidence takes far too long to deliver and at the end is often confused and confusing.

It seems to me that an expert ought to be able, if he or she is truly an expert, to put that expert's evidence in a form which is readily understandable and intelligible and in a form which can be put before the court as the evidence in chief of that expert.<sup>2443</sup>

13.57 There may be other advantages in written expert evidence. Sir Peter Middleton, in evaluating Lord Woolf's proposals, concluded

The need for experts to give oral evidence is a major cause of delay. Its removal in all but exceptional fast track cases is a key change. This should also mean that more experts are prepared to act as witnesses, which may in turn help to reduce the cost of experts' reports.<sup>2444</sup>

13.58 The new English Civil Procedure Rules provide that expert evidence is to be given in a written report and, if a claim is on the 'fast track', the court will not direct an expert to attend a hearing 'unless is necessary to do so in the interests of justice'.<sup>2445</sup> Certainly the cost of arranging attendance for medical expert witnesses in the AAT can be significant.<sup>2446</sup>

13.59 In the Federal Court, Family Court and AAT expert evidence is generally provided in writing. Expert examination in chief is not required, but experts are subject to cross-examination. The Law Society of South Australia has submitted that consideration should be given to requiring leave to cross-examine experts.<sup>2447</sup>

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<sup>2443</sup>Supreme Court of South Australia *Report on the Supreme Court Rules* Supreme Court of South Australia Adelaide 1997, 128. In this context, the Rules of the Supreme Court of South Australia place an obligation on experts to provide reports which contain full details of the qualifications of the expert and are in a form which clearly indicates all of the factual assumptions upon which the opinion is based and clearly distinguishes what is opinion from the factual assumptions: SA-Supreme Court Rules r 38.01(7)b)(c).

<sup>2444</sup>P Middleton *Report to the Lord Chancellor by Sir Peter Middleton GCB* Lord Chancellor's Dept London 1997 (Middleton report) 28.

<sup>2445</sup>CPR (UK) R 35.5(2).

<sup>2446</sup>AAT case file survey response 182 (solicitor for the applicant in a compensation case); AAT case file survey response 223 (solicitor for the applicant in a compensation case).

<sup>2447</sup>The Law Society of South Australia *Submission* 94.



### *Experts and case management*

13.60 Practitioners and expert witnesses consulted by the Commission generally agreed that federal courts and tribunals had sufficient powers to manage, control and obtain expert evidence. It was also agreed that they did not always use such powers effectively. Effective management of expert evidence was related to the court or tribunal case management system.

13.61 The Federal Court individual docket system (IDS) was seen as affording the best opportunity for judicial control without detracting from party presentation of the case. Active judicial management gives the judge a clearer sense of the nature of the dispute involving expert evidence and its importance as an issue in the case. Directions on expert evidence can be adapted for the particular case.

13.62 Most criticism relating to the use of expert evidence concerned such evidence in the Family Court and the AAT, where particular case types routinely use the same expert witnesses and the experts can become associated as ‘applicant’ or ‘respondent’ experts and where case management systems are not so effective in adapting orders for particular cases or providing the consistent oversight necessary to control and manage such evidential issues. The Commission’s proposals relating to expert evidence in the compensation, veterans’ and social welfare jurisdictions in the AAT (proposals 12.12–12.16) and to improve case management in the Family Court and the AAT are designed to deal with these issues (see proposals 11.8 and 12.1).

13.63 One management concern raised in consultations was that current practice does not sufficiently promote communication between experts. In this respect, expert witnesses supported the drafting of standard procedures for expert conferences.<sup>2448</sup> In many cases there can be considerable tension between experts, who may be professional rivals, and differing expectations about whether the lawyers should attend expert conferences and, if so, what role they should play. Some experts indicated that they were unsure of their role in direct negotiation concerning settlements. It is not enough for courts and tribunals to direct experts to confer – they may need to set certain ground rules for these conferences.

**Proposal 13.1.** Federal courts and tribunals should routinely encourage communication between relevant experts as a standard procedure and should order or facilitate conferences and other prehearing contact between such experts wherever appropriate. Consideration should be given to developing guidelines on the conduct of court or tribunal ordered conferences of experts.

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<sup>2448</sup>Forensic Accounting Special Interest Group *Consultation* Sydney 20 April 1999.

**Proposal 13.2.** The Family Court of Australia should more frequently order experts to confer at an appropriate stage in proceedings, including in children's cases.

**Proposal 13.3.** The Family Law Rules should contain provisions requiring expert reports to be filed and exchanged at an earlier stage in proceedings. Expert reports should be available in time for any interim hearing and, in most cases, in time for post-directions conciliation counselling or conciliation conferences.

## The partisan expert

13.64 The adversarial model assumes that the role of experts is to 'educate' and inform decision makers with several 'voices' or that 'the truth is best discovered by powerful statements on both sides of the question'. On this view, the written reports, examination and cross-examination of opposing experts will get closer to the truth than would be possible through the evidence of a single 'neutral' expert appointed by the court.

13.65 However, critics assert that the present use of expert evidence does not conform with this assumption and does not assist judges and other decision makers to understand the issues and often clouds the issues.

13.66 In this regard, the tendency for parties to 'shop' for an expert who will best support their case, and the retainers between experts and parties produces expert evidence that is not impartial, independent and objective. Experts are partisan advocates rather than disinterested advisers. Examination and cross-examination processes may be inadequate to reveal and correct flaws in such partisan expert evidence.

13.67 The following parts of this chapter examine this concern and discuss options for reform aimed at providing decision makers with independent expert evidence, presented or interpreted in the way that better assists them to make high quality decisions.

### *Partisanship*

13.68 Where an expert witness is briefed and remunerated by one side, it is often assumed that the expert is likely to exhibit a tendency to give evidence which favours that side.<sup>2449</sup>

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<sup>2449</sup>G Davies & S Sheldon 'Some proposed changes in civil procedure: their practical benefits and ethical rationale' (1993-1994) 3 *Journal of Judicial Administration* 111. Langbein, an American academic, refers to the slang term 'saxophones' which is given to expert witnesses because the lawyer plays the tune, manipulating the expert as though the expert were a musical instrument on which the lawyer sounds the desired notes: J Langbein 'The German advantage in civil procedure' (1985) 52(4) *University of Chicago Law Review* 835.

[T]he realistic assumption is that the expert will give evidence at the end of the range which most accords with his or her client's contentions; otherwise the witness generally would not be called.<sup>2450</sup>

In practice experts often seem to differ from counsel only in that their submissions are specialised and presented from a different part of the courtroom. Professional opinions which ostensibly flow inexorably from years of learning and experience still manage to display an uncanny correlation to the interests of the party which engaged them.<sup>2451</sup>

13.69 An extensive American study undertaken in 1994 established that the qualities American lawyers looked for in potential expert witnesses were their credentials and the adamancy of their support for the lawyer's viewpoint (88% and 84% respectively).<sup>2452</sup> Experts may have a direct financial interest in providing expert evidence or in a continuing relationship with a particular party or lawyer. This interest risks colouring the evidence the expert may give.<sup>2453</sup>

Pressure to accept a contingency fee, an express or implied promise to place the expert on a list of preferred experts or the desire of a retired practitioner to receive a 'brief' in a one off case may all be relevant considerations in relation to independence of experts.<sup>2454</sup>

13.70 A tendency to partisanship may be exacerbated if the expert and the party, or the party's lawyers, have a relationship which pre-dates the commencement of litigation or will continue after the litigation has concluded. A long period of contact

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<sup>2450</sup>G Davies 'A blueprint for reform: some proposals of the Litigation Reform Commission and their rationale' (1996) 5 *Journal of Judicial Administration* 201, 207. Lord Woolf has recommended that in their reports, experts should not only give their opinion but also, indicate the extent of any 'range' of reasonable opinion. Woolf final report, 146.

<sup>2451</sup>R Fisher 'Reining in Expert Witnesses' *Address Intellectual Property Society of Australia and New Zealand* 14 April 1999.

<sup>2452</sup>'Fee charged' by the expert was the next most important feature at 75%. Shuman et al 'An empirical examination of the use of expert witnesses in the courts — Part II: a three city study' (1994) *Jurimetric Journal* 193, quoted by I Freckelton 'The challenge of junk psychiatry, psychology and science: the evolving role of the forensic expert' in H Selby *Tomorrow's Law* Federation Press Sydney 1995, 58–9.

<sup>2453</sup>In order to overcome the possibility of unconscious bias on occasion experts may be given a 'blind briefing', that is instructions which do not disclose which side of the case the instructing lawyers are working for.

<sup>2454</sup>Report of the Official Referee's Working Group *Lord Woolf's inquiry: Access to justice, work conducted for the Final Report for the Lord Chancellor* July 1996 21. In this context it should be noted that to provide expert evidence in return for a share in the fruits of the litigation, or for a contingency fee, is illegal because it amounts to champerty: *Magic Menu Systems v AFA Facilitation Pty Ltd* (1996) 137-ALR 260, 273. Some professionals involved in providing expert evidence consider that arrangements for contingency fees are unethical. The Code of Ethics of the Australian and New Zealand Forensic Science Society provides that no services shall be rendered where the fee is dependent on the outcome of the forensic examination: Australia and New Zealand Forensic Science Society *Code of Ethics of the Australia and New Zealand Forensic Science Society* 1990 para 5 ('General matters') reproduced in I Freckelton & H Selby *Expert Evidence* Law Book Company Looseleaf Service, ch 22.

with other members of the 'litigation team' may lead expert witnesses, consciously or unconsciously, to share attitudes, assumptions and goals with those retaining them.<sup>2455</sup> Judges in certain jurisdictions report that the same expert witnesses appear regularly in litigation before them for the same side.<sup>2456</sup> Experts, such as valuers, often assist in negotiations before disputes become the subject of legal proceedings.

The dilemma is, then, that our witness is employed and paid by one party to a dispute, he commences as consultant and probably becomes negotiator. If he is doing his client justice he will be partisan, the hired gun. He must, however, change his spots when he commences his report and while he is 'in court' remember that he is the [decision maker's] assistant even though it is his client who is paying for his appearance at the hearing.<sup>2457</sup>

13.71 A consultation paper issued by the Law Reform Commission of Western Australia identifies many of the problems concerning the use of expert evidence in the litigation process as following from a failure to distinguish between the role of experts 'who may assist lawyers to prepare a case for trial and advise clients as to the merits of the case' and the role of experts in 'giving independent expert evidence'.<sup>2458</sup> The paper recommends that the practice and procedure of the civil courts should maintain a clear distinction between expert advisers and expert witnesses.<sup>2459</sup>

When engaging experts in relation to a civil dispute a party (and the party's advisors) should be encouraged to communicate with experts in a manner that ensures independence. Court practices should encourage an expert who has been engaged by a party to give expert evidence to decline to provide advice concerning the preparation for, or prospects of success in, the litigation . . .<sup>2460</sup>

13.72 The AIJA empirical survey confirms that some judges have misgivings about the partisanship of expert evidence.

Judges were asked in the survey whether they had encountered a number of problems that could impact upon the utility of expert evidence. Two thirds of those who answered the question (68.10%, n=158) reported that they "occasionally" encountered bias on the

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<sup>2455</sup> *Vernon v Bosley* (No 2) [1997] 1 All ER 614, 647.

<sup>2456</sup> 72% of judges responding to the AIJA survey said that they encountered the same witnesses appearing regularly before them. I Freckelton et al *Australian Judicial Perspectives on Expert Evidence: An Empirical Study* AIJA Melbourne 1999, 81.

<sup>2457</sup> J Franks 'The expert witness: what an arbitrator should expect' (1994) May *The Arbitrator* 25, 28-29.

<sup>2458</sup> Law Reform Commission of Western Australia *Consultation Draft: Expert Evidence in Civil Proceedings* Project No 92, December 1998, 26.

<sup>2459</sup> *id* proposal 1.

<sup>2460</sup> *id* 26.

part of experts, while just over a quarter (27.59%, n=64) reported that they encountered this phenomenon “often”.<sup>2461</sup>

The AIJA researchers commented that

The responses in relation to ‘bias’ are significant, particularly the considerable proportion of the Australian judiciary reporting a consistent pattern of finding partisanship on the part of specialist witnesses called before them. The definition of bias, that is to say whether the connotation of the word necessarily involves deliberate or unwitting lack of objectivity, is less important. What appears to concern judges is the product of the bias, namely reports and oral evidence that ends up being partisan.<sup>2462</sup>

The answers specifically in relation to judges’ experiences of ‘partisan’ expert witnesses are equally of concern. Nearly nine in ten judges responding said that they had encountered bias in expert witnesses. Nearly a half of the respondents who had encountered partisanship said that it was a significant problem for fact finding in their court.<sup>2463</sup>

13.73 Similar concerns about expert bias have been expressed by members of the AAT concerning the use of medical expert witnesses in the veterans’ affairs and compensation jurisdictions of the AAT.<sup>2464</sup>

13.74 One view is that to some extent the problems of expert partisanship are self policing, in that expert witnesses who are overtly partisan will soon lose credibility within the professional community and not be called by other parties in future cases.<sup>2465</sup> In consultations the Commission was informed that many experts are

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<sup>2461</sup>I Freckelton et al *Australian Judicial Perspectives on Expert Evidence: An Empirical Study* AIJA Melbourne 1999, 25.

<sup>2462</sup>.id 26.

<sup>2463</sup>.id 81. There are reported examples of judges becoming frustrated with partisan expert evidence brought before them. In *Vakauta v Kelly* (1988) 13 NSWLR 502 a judge of the Supreme Court of New South Wales described the Government Insurance Office (GIO) as using ‘its usual panel of doctors who think you can do a full weeks work without any arms or legs’. The judge went on to say I am not usually very impressed with the views [of these] doctors...on the basis that those views are almost inevitably slanted in favour of the GIO by whom they have been retained, consciously or unconsciously. . . . It is, I believe, a well-known phenomenon that the GIO does retain doctors who are likely to express views which will not assist the plaintiff’s case. Such a selective attitude is, of course, not restricted to the GIO or even to defendants generally: *Vakauta v Kelly* (1988) 13 NSWLR 502, 507.

Also see the English Court of Appeal cases of *Vernon v Bosley (No 1)* [1997] 1 All ER 577; *Vernon v Bosley (No 2)* [1997] 1 All ER 614 in relation to which Thorpe LJ commented on the readiness of psychiatric experts

to do their best to present the plaintiff’s condition on different dates and in different proceedings in the light that seemed most helpful to the immediate cause, ignoring their equal and greater duty to the court and disregarding the very considerable inconsistencies that inevitably developed: *Vernon v Bosley (No 2)* [1997] 1 All ER 614, 647.

<sup>2464</sup>J Dwyer ‘Fair play the inquisitorial way’ (1997) 5 *Australian Journal of Administrative Law* 5, 25–29.

<sup>2465</sup>.Family Court judges *Consultation* Adelaide 2 September 1997.

uncertain about what is expected of them and concerned about the misleading interpretation give to their evidence due to the manner of its presentation or examination. In a recent report of the Australian Council of Professions, it was claimed that

[i]t is not at all clear to most experts to whom a duty is owed, and the claim on that duty by the party who pays the expert's fee carries considerable weight.<sup>2466</sup>

13.75 One appropriate area of reform pursued by the Federal Court, lies in creating new understandings of lawyers' and experts' ethical obligations and the imposition on experts of a primary obligation to the court.

#### *Experts' duties and responsibilities*

13.76 An influential statement of the duties and responsibilities of expert witnesses in civil cases was given in the English case *The Ikarian Reefer*.<sup>2467</sup> The Federal Court has incorporated many of the components of this statement into a practice direction, developed cooperatively with the Law Council, providing guidelines for expert witnesses.<sup>2468</sup> The Federal Court practice direction states that

- an expert witness has an overriding duty to assist the Court on matters relevant to the expert's area of expertise
- an expert witness is not an advocate for a party and

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<sup>2466</sup> Australian Council of Professions Ltd *Dealing with Risk: Managing Expectations* Deakin ACT 1996, 24. The Council has since issued adopted a policy statement on the role and duties of an expert witness (see para 13.83).

<sup>2467</sup> *National Justice Compania Naviera SA v Prudential Assurance Co Ltd, The Ikarian Reefer* [1993] 2-LloydsRep 68, 81-82; *National Justice Compania Naviera SA v Prudential Assurance Co Ltd, The Ikarian Reefer* [1995] 1 Lloyds Rep 455, 498. In that case, the Court of Appeal endorsed the statement of the English Commercial Court that these duties and responsibilities include the following: Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or context by the exigencies of litigation; an expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within the expert's expertise; an expert witness should never assume the role of advocate; an expert witness should state the facts or assumptions on which the expert's opinion is based and should not omit to consider facts that detract from the concluded opinion; an expert witness should make it clear when a particular question or issue falls outside the expert's expertise; if an expert's opinion is not properly researched because the expert considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one; if, after exchange of reports, an expert witness changes view on a material matter, such change of view should be communicated to the other side without delay and when appropriate to the court; where expert evidence refers to photographs, plans, calculations, surveys, reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports.

<sup>2468</sup> *Federal Court Practice Direction: Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia* (15 September 1998) (Federal Court *Guidelines for Expert Witnesses*). The practice direction was influenced by the recommendations of Lord Woolf and in particular, Lord Woolf's draft civil proceedings rules. Lord Woolf *Access to justice draft civil proceedings rules* HMSO London 1996 (Woolf rules) 32.1-32.9.

- the expert witness's paramount duty is to the Court and not to the person retaining the expert.<sup>2469</sup>

13.77 The practice direction provides guidelines for written expert evidence to make expert evidence more explicable and transparent and emphasise the ethical obligations of the expert to the Court. For example, the practice direction states that

- expert reports should end with a declaration that the expert has made all the inquiries which the expert believes are desirable and appropriate and that no matters of significance which the expert regards as relevant have, to the expert's knowledge, been withheld from the Court<sup>2470</sup> and
- if experts retained by the parties meet at the direction of the Court, it would be improper conduct for an expert to be given or to accept instructions not to reach agreement.<sup>2471</sup>

13.78 Some lawyers resist suggestions that their ability to instruct experts as they see fit should be constrained. They perceive a loss of control over what may be agreed between experts as affecting their opportunities to establish and exploit strategic advantages from their closer involvement with expert deliberations.

It should certainly not be unprofessional conduct for lawyers to specify the terms of an experts meeting: it is the client's case and the lawyers who run it, and except for specific areas within the expert's province, it should not be for the experts to decide important issues 'behind closed doors'.<sup>2472</sup>

13.79 In this context, the Law Council has emphasised that any agreement between experts should be confined to matters of expert opinion rather than matters of fact.<sup>2473</sup> Such concerns highlight the need for guidelines on expert conferences.

### *Codes of ethics*

13.80 A related initiative concerns the development of an experts' codes of ethics, whether a general code or one specific to particular professions, with a focus on the duties of experts when they are preparing and providing information to lawyers or evidence to the court.

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<sup>2469</sup>.ibid.

<sup>2470</sup>.ibid cf Woolf final report rec 161, Woolf Rules 32.9.

<sup>2471</sup>.Federal Court *Guidelines for Expert Witnesses* cf Woolf final report rec 162. In addition, an earlier proposal of the Federal Court suggested that any report or draft report prepared for the purpose of giving evidence to the court and delivered to a client should be addressed to the Court: Federal Court *Correspondence* 20 August 1997 cf Woolf final report rec 160.

<sup>2472</sup>.The Law Society *Access to Justice: Lord Woolf's Inquiry: Issues Papers. Responses by the Law Society Civil Litigation and Courts and Legal Services Committees: Volume 1: Fast Track, Housing, Multi-party Actions, Expert Evidence, Costs* The Law Society London March 1996 Response of the Law Society's Civil Litigation Committee to Issues Paper on Expert Evidence 15–16.

<sup>2473</sup>.LCA *Submission to Federal Court of Australia on the use of experts in technical cases* April 1997.

13.81 The Federal Court suggested that codes of practice should be drawn up jointly by the appropriate professional bodies representing the experts and the legal profession (the Law Council of Australia) and an expert should state to the Court whether his or her report has been prepared in accordance with the relevant code of practice.<sup>2474</sup> The Commission supports this suggestion.

13.82 Presently, there is only one such professional code of ethics in Australia, the Code of Ethics of the Australian and New Zealand Forensic Science Society,<sup>2475</sup> to which a high percentage of forensic scientists belong. The Code of Ethics gives primacy to the duty to the court by providing that

- the object of the practice of forensic science is to provide objective and impartial evidence to assist in the administration of the law<sup>2476</sup> and
- the expert witness should appeal to the presiding judicial officer if he or she believes that the manner in which evidence is being elicited is such as to prevent disclosure of a significant relevant matter or circumstance.<sup>2477</sup>

The Code comprises directions relating to the use of accepted scientific method; distinctions between results of tests and opinions based on them, pre-trial and trial conduct; and the obligation on the expert to be open and frank in the provision of relevant information.<sup>2478</sup>

13.83 Recently, the Australian Council of Professions adopted a policy statement on the role and duties of an expert witness.<sup>2479</sup> The Council, in developing the guidelines, intended them to be adopted by member organisations in appropriate ways, particularly by incorporation in codes of ethics or rules governing conduct of members of those organisations.<sup>2480</sup>

13.84 The statement provides that the experts' primary duty is to the court. An expert is also said to have a duty to the body of knowledge and understanding from which the experts' expertise is drawn<sup>2481</sup> and a 'tertiary' duty to the party who has

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<sup>2474</sup> Federal Court *Correspondence* 20 August 1997 cf Woolf final report rec 163.

<sup>2475</sup> Australia and New Zealand Forensic Science Society *Code of Ethics of the Australia and New Zealand Forensic Science Society* (1990) reproduced in I Freckelton & H Selby *Expert Evidence* Law Book Company Looseleaf Service, ch 22.

<sup>2476</sup> *id* para 1 ('Preamble').

<sup>2477</sup> *id* para 6 ('Conduct in Court').

<sup>2478</sup> See also the UK Academy of Experts Code of Practice for Experts which covers the same ground but in much less detail; may be accessed at <<http://www.academy-experts.org/codeprac.htm>>.

<sup>2479</sup> Australian Council of Professions Policy Statement *The role and duties of an expert witness in litigation* adopted at Annual General Meeting 25 May 1998.

<sup>2480</sup> A de Fina 'Australian Council of Professions: Guidelines for expert witnesses' (1998) 14 *Building and Construction Law* 460.

<sup>2481</sup> The statement notes that 'This implies recognition of its limitations and the humility that should flow from such recognition, since the outcome of litigation is likely to influence the practical application of such knowledge and understanding in the future.'



sought his or her advice. This last mentioned duty is to provide advice in the context of the other duties, implying that the expert should not be an advocate for a party. This code has been criticised because the 'hierarchical order of different duties applicable to the expert, arguably does not and cannot stand scrutiny'.<sup>2482</sup>

13.85 Nevertheless, the continuing development of codes of ethics by professional groups, in consultation with the legal profession should be encouraged. In particular, the Commission agrees that the Australian Council of Professions, in cooperation with the Law Council, should develop a code of practice for expert witnesses, drawing on the Federal Court guidelines. Other professional bodies should be encouraged to supplement this generic code with provisions specific to particular disciplines, such as accountancy, engineering or medical experts.

#### *Disclosure of expert communications*

13.86 It has been further suggested that to reinforce the duties of the experts to the court and introduce transparency into the process, new obligations also should be created to encourage the disclosure of communications between expert witnesses and their clients, including by modifying client legal privilege.

13.87 Briefly, legal professional privilege (or 'client legal privilege' as it is referred to in the *Evidence Act 1995* (Cth)(Evidence Act)) may be claimed in respect of: confidential documents prepared by the client or a lawyer for the dominant purpose of the lawyer providing legal advice; confidential communications between the client or a lawyer acting for the client and another person made for the dominant purpose of litigation; the contents of confidential documents prepared by the client or lawyer for the dominant purpose of litigation.<sup>2483</sup> Communications between a client (or his or her lawyer) and an expert will be privileged if they are in connection with anticipated or pending legal proceedings. Written communications with an expert (such as instructions, draft reports or reports) generally will also be privileged where they are intended to assist the lawyer to provide legal advice, whether or not litigation is contemplated.<sup>2484</sup>

13.88 In his interim report, Lord Woolf recommended that, once an expert has been instructed to prepare a report for the use of a court, any communication between the expert and the client or the client's advisers should no longer be the subject of legal

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<sup>2482</sup>.A de Fina 'Australian Council of Professions: Guidelines for expert witnesses' (1998) 14 *Building and Construction Law* 460, 461.

<sup>2483</sup>.*Evidence Act 1995* (Cth)(Evidence Act) s 117-119.

<sup>2484</sup>.However, at common law, client legal privilege does not extend to documents which were brought into existence or were obtained by an expert to assist in the preparation of an expert report. That is, 'witness document privilege' does not exist. Drafts of an expert's written opinion, working papers and other documents on the expert's file (unless in the form of a communication from the client or his or her lawyer or a confidential document prepared by the client or lawyer) are not subject to client legal privilege. This position also applies under the Evidence Act. *Grosvenor Hill (Qld) Pty Ltd v Interchase Corporation Limited* (1999) 1 QdR 141; (1999) 1 QdR 163.

privilege.<sup>2485</sup> The intention was to prevent the suppression of relevant opinions or factual material which did not support the case put forward by the party instructing the expert.<sup>2486</sup> Lord Woolf's proposal to modify the application of legal privilege in this way met with considerable opposition and in his final report, while he recommended that instructions to experts should be disclosed, the proposal to remove legal privilege was dropped.<sup>2487</sup>

13.89 The Federal Court proposed an identical reform,<sup>2488</sup> which was opposed by the Law Council.<sup>2489</sup> The Law Council stressed that modifying legal privilege would discourage full and frank discussions with experts and might lead lawyers to delay giving instructions for as long as possible, so as to ascertain first whether the expert's opinion would suit the client's case.<sup>2490</sup>

13.90 Some Australian jurisdictions have modified client legal privilege for expert evidence. The South Australian Supreme Court Rules require mandatory disclosure to an opponent of reports prepared for the purposes of litigation and which would, but for the rules, be protected from inspection by client legal privilege. All reports, whether favourable or unfavourable must be exchanged by the parties.<sup>2491</sup>

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<sup>2485</sup> Lord Woolf *Access to justice: Interim report to the Lord Chancellor on the civil justice system in England and Wales* LCD London 1995 (Woolf interim report) rec 108.

<sup>2486</sup> Woolf final report, 144.

<sup>2487</sup> Lord Woolf explained that

My intention was to prevent the suppression of relevant opinions or factual material which did not support the case put forward by the party instructing the expert. There is, I believe, no disagreement with that intention, but it has been put to me very strongly that waiver of legal privilege is not the way to achieve it. The point has been made that experts must be free to submit drafts to client and their legal advisers, so that factual misconceptions can be corrected. A further objection is that a great deal of time could be wasted if all these documents were disclosable, because the opposing party would have to comb through the various versions of the report to identify, any changes, the reasons for which would not always be clear in any event. Another possibility is that lawyers and experts might begin to subvert the system by avoiding written communication in favour of off the record conversations: Woolf final report 144.

<sup>2488</sup> Federal Court *Correspondence* October 1996; August 1997.

<sup>2489</sup> *ibid.*

<sup>2490</sup> LCA *Submission to Federal Court of Australia on the use of experts in technical cases* April 1997; *Correspondence* 30 September 1997.

<sup>2491</sup> SA Supreme Court Rules O 38.01; *Robinson v Adelaide Raceway* (1993) 61 SASR 279. See also Qld Supreme Court Rules O 35 r 5(2). Proposals have been made in South Australia to extend this obligation even further so as to oblige a party to: provide to the opposing party a list of all documents which that party has provided to that party's experts and, on demand, a copy; a list of the conferences held with any expert, other persons present at the conference and a copy of any notes made at the conference; to discover to the opposing party the financial arrangements between the party and the proposed expert; to provide to the opposing party all documents in the possession of an expert and all notes and drafts of reports prepared by the expert. Supreme Court of South Australia *Report on the Supreme Court Rules* Supreme Court of South Australia Adelaide 1997, 127–128. The Law Reform Commission of Western Australia's consultation paper proposes that where a party calls its own expert to give evidence there should be a waiver of legal professional privilege in respect of all communications with the expert: Law Reform Commission of Western

13.91 The view is widely held that narrowing the scope of client legal privilege adds to the documentary burden of litigation without any necessary improvement in the quality of the evidence adduced before the court. In most circumstances, it would be unfair to expose experts to cross-examination on the contents of draft reports (which may be no more than the 'preliminary musings' of the expert).<sup>2492</sup> Experts often modify their views as they carry out more work.<sup>2493</sup>

13.92 The Commission proposes modification of client legal privilege for expert reports in administrative review proceedings (see proposal 12.13 above), but no similar reform is suggested in relation to federal court proceedings. Administrative review proceedings are not party disputes but inquiries directed to arriving at the correct or preferable decision. The public interest in correct decision making justifies changes to the normal rules on legal privilege.

13.93 Other reforms require the disclosure of the party's instructions to experts. The Federal Court's practice direction provides that all instructions, whether in writing or oral, should be attached to the expert report, or summarised in it.<sup>2494</sup> The new English Civil Procedure Rules provide that the expert's report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written.<sup>2495</sup> The instructions are not privileged against disclosure but the court will not, in relation to those instructions, order disclosure of any specific document or permit any questioning in court other than by the party who instructed the expert, unless it is satisfied that there are reasonable grounds to consider the statement of instructions to be inaccurate or incomplete.<sup>2496</sup>

#### *The Commission's views*

13.94 The Federal Court practice direction clarifies the general duty of expert witnesses to the Court. It is hoped that such guidelines may contribute to a change in the dynamics of the relationship between experts and the lawyers who retain them. Experts, reminded of their duty to the Court, may be more confident to resist any suggestions from lawyers to tailor reports to secure a particular legal outcome. Lawyers, in turn, may become less likely to suggest such tactical play to their experts. This is at least the plan.

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Australia *Consultation Draft: Expert Evidence in Civil Proceedings* Project No 92, December 1998, 30, proposal 4.

<sup>2492</sup>.eg Forensic Accounting Special Interest Group *Consultation* Sydney 20 April 1999. One barrister notes that he routinely asks experts in cross-examination for drafts of reports that they have prepared and for commissioning letters and has never been refused: I Freckelton *Correspondence* 5-January 1999.

<sup>2493</sup>.P Meadows *Submission* 266.

<sup>2494</sup>.Federal Court *Guidelines for Expert Witnesses*.

<sup>2495</sup>.CPR (UK) 35.10(3).

<sup>2496</sup>.id R 35.10(4).

13.95 The guidelines also provide detailed requirements concerning the form and content of expert evidence which may improve the clarity and usefulness of expert reports and encourage openness about instructions given to and factual assumptions used by experts.<sup>2497</sup> The express requirement for experts to articulate reasons for their opinions is also important, given that, at least in the view of some legal practitioners, many kinds of expert reports, particularly those of forensic scientists 'tend toward the short-form and somewhat cryptic'.<sup>2498</sup>

13.96 Aspects of the Federal Court's practice direction have been the subject of considerable criticism in Commission consultations. Practitioners and experts are particularly concerned at the requirement to disclose instructions. The Commission was told that parties may choose to retain two experts, one to act as an adviser, or 'silent' expert and the other to give evidence in court.

13.97 The terms of the Federal Court declaration<sup>2499</sup> have also been criticised as not making clear the limit of the expert's declaration as to inquiries made and providing an unsatisfactory basis for cross-examination to discredit expert opinions.<sup>2500</sup> One way to address these concerns may be to incorporate a similar provision restricting cross-examination in the manner of the English Rules.<sup>2501</sup>

13.98 Practitioners were concerned about how the Federal Court will deal with breaches of the expert guidelines. It was suggested that in this, as with other areas of procedure, courts should use preclusionary sanctions<sup>2502</sup> so that, for example, where there has been a breach of the guidelines only limited supplementation of experts reports should be allowed at trial.<sup>2503</sup>

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<sup>2497</sup> Another example of rules focussing on improving the clarity of expert reports is the Land and Environment Court (NSW) *Practice Direction 3: Expert Evidence in Class 1 and 2 appeals*. This practice direction requires, among other things, that (a) expert reports shall be so presented as to clearly and concisely state the opinions proffered and the basis for those opinions. Expert reports should eliminate unnecessary background material (b) Where a party relies on a number of experts a brief summary report covering an expert opinion may also be served and filed with the Court prior to the hearing (c) unless the Court or the opposing party signifies no later than seven days before the listed hearing date its requirement that the expert witness attend the hearing for the purpose of oral examination there shall be no need for the expert's attendance and that person's written report may be treated as evidence.

<sup>2498</sup> I Freckelton *Correspondence* 5 January 1999.

<sup>2499</sup> That the expert has 'made all the inquiries which the expert believes are desirable and appropriate and that no matters of significance which the expert regards as relevant have, to the expert's knowledge, been withheld from the Court'. Federal Court *Guidelines for Expert Witnesses*.

<sup>2500</sup> Arthur Andersen *Dispute Analysis* October 1998; Forensic Accounting Special Interest Group *Consultation* Sydney 20 April 1999.

<sup>2501</sup> CPR (UK) 35.10(4).

<sup>2502</sup> However, preclusionary sanctions are difficult to justify in many cases, especially in children's matters, owing to the best interests principle.

<sup>2503</sup> P Meadows 'Civil litigation reform' *Paper* 1998 Corporate Law Conference Melbourne 24 September 1998. This suggestion is supported by the Family Court. Family Court *Submission* 264. Others have suggested that 'only in the most cases would costs or preclusionary sanctions be appropriate' in

13.99 It is difficult to evaluate the concerns discussed above. The Federal Court guidelines have been in operation only for a short time. Certainly the guidelines are consistent with the approach to expert evidence in many overseas jurisdictions and the Commission considers that they have broad application for other courts and tribunals.<sup>2504</sup>

**Proposal 13.4.** The Family Court of Australia and the Administrative Appeals Tribunal should develop practice directions providing guidelines for expert witnesses in terms similar to those issued by the Federal Court.

**Proposal 13.5.** Guidelines such as those developed in the Federal Court and recommended for the Family Court of Australia and the Administrative Appeals Tribunal should be consistently enforced by cost or preclusionary sanctions.

**Proposal 13.6.** The Australian Council of Professions should develop a template code of practice for expert witnesses, in cooperation with the Law Council, drawing on the Federal Court's guidelines for expert witnesses. The Australian Council of Professions should encourage other professional bodies to supplement this code with discipline specific provisions, where appropriate.

## Agreed or court appointed experts

13.100 Another reform to address the problems of partisanship in expert evidence has been to encourage the appointment of experts agreed by the parties, or the

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relation to the enforcing guidelines such as those issued by the Federal Court: The Australian Capital Territory Bar Association *Submission 249*.

<sup>2504</sup>The Law Council submitted that an equivalent practice direction to that issued by the Federal Court is not currently required in the Family Court: *LCA Submission 197*. In contrast, the then President of the Law Society of NSW wrote to the Chief Justice of the Family Court suggesting that he consider issuing a similar direction in the Family Court: (1998) November *Law Society Journal* 52. The Australian Capital Territory Bar Association also supports the use in other courts and tribunals of guidelines similar to those developed by the Federal Court. The Australian Capital Territory Bar Association *Submission 249*. The Family Court saw merit in development of similar practice directions in its own jurisdiction but recognising that the Federal Court guidelines may be useful for financial cases but inappropriate in children's cases. *Family Court Submission 264*. The AAT considered that the Federal Court's practice direction on experts, with appropriate modifications could be used by review tribunals. *AAT Submission 210*. The President of the AAT has indicated her support for requirements for the disclosure of instructions and other material similar to those in the Federal Court guidelines: D O'Connor 'Appearing before the AAT: A non-adversarial approach' *Paper NSW Bar Association Seminar 10 May 1999*.

appointment of court (or tribunal) experts.<sup>2505</sup> Agreed or court appointed experts should be less costly for the parties.<sup>2506</sup>

13.101 Lord Woolf recommended that as a general principle single experts should be used where the case or the issue is concerned with a substantially established area of knowledge and that, in any case, parties and procedural judges should always consider whether a single expert could be appointed in a particular case or to deal with a particular issue.<sup>2507</sup> The English Civil Procedure Rules provide that

(1) Where two or more parties wish to submit evidence on a particular issue, the court may direct that the evidence on that issue is to be given by one expert only.

...

(3) Where the instructing parties cannot agree who should be the expert, the court may

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- (a) Select the expert from a list prepared or identified by the instructing parties; or
- (b) direct that the expert be selected in such other manner as the court may direct.<sup>2508</sup>

13.102 The recent consultation paper released by the Law Reform Commission of Western Australia proposes that Western Australian courts should encourage agreed experts and makes a number of specific proposals to ensure that the court has sufficient powers to achieve this.<sup>2509</sup>

### ***Possible benefits***

13.103 The benefits of single agreed or court appointed, experts are said to include that

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<sup>2505</sup>.In Australia there has been much recent debate about the desirability of agreed or court appointed experts: See for eg G Davies & S Sheldon 'Some proposed changes in civil procedure' (1993-1994) 3-*Journal of Judicial Administration* 121; RScott 'Court-appointed experts' (1995) 25(1) *Queensland Law Society Journal* 87.

<sup>2506</sup>.In this context, it is important to distinguish between (i) courts and tribunals appointing their own experts to be used in substitution for, or in addition to, party experts (court appointed experts) and (ii) courts and tribunals requiring that expert evidence is to be given by one or more experts chosen and instructed by agreement between the parties (agreed experts who then may become court appointed experts, if the case goes to a hearing).

<sup>2507</sup>.Woolf final report rec 167-168. See also Middleton report 28. Lord Woolf's draft civil proceedings rules provided that wherever it will help to resolve the proceedings justly (a) parties must give instructions to a single expert and (b) experts instructed by the parties must seek to carry out any examination jointly: Woolf Rules 32.6.

<sup>2508</sup>.CPR (UK) R 35.7.

<sup>2509</sup>.Law Reform Commission of Western Australia *Consultation Draft: Expert Evidence in Civil Proceedings* Project No 92, December 1998, 28-29, proposal 3. The paper proposes that the use of single experts would be encouraged through the requirement for leave to adduce expert evidence (proposal 2) and, inter alia, through the use of costs supervision powers, directions relating to the instructions to be given to experts and the use of approved lists of experts. The paper also proposes that there should be power to require an expert to answer questions from other parties upon payment of reasonable costs of answering the question (proposal 9).

- if the expert reports to the court early in the proceedings, this may result in an early resolution of the dispute
- the expert is not being paid by any one party and therefore is more likely to be impartial
- the court will not be forced to choose between the opinions of two opposing experts
- time and money will be saved by the reduction in the number of experts, the diminution in time spent giving expert evidence and the fact that the court has some control over experts' fees.<sup>2510</sup>

13.104 A key factor in any assessment of the likely costs or benefits of court appointed experts is whether or in what circumstances parties would retain the right

- to appoint their own expert witnesses
- to cross-examine the court appointed experts.

13.105 While legal professional bodies have expressed concerns about court appointed experts (see below), they do not necessarily oppose wider use of such experts, as long as they are available for cross-examination and the parties retain the right to call their own expert witnesses.<sup>2511</sup>

13.106 The most significant disadvantage of court appointed experts is that if there is an appointed expert in addition to the parties' experts, proceedings may be lengthened and the cost to the parties and the court or tribunal increased. In particular, the parties may wish to cross-examine the court appointed expert to show bias, incorrect facts or erroneous opinion and present evidence from their own expert to do so.<sup>2512</sup>

13.107 Due to the special position of a court appointed expert, the cost of the expert's attendance may be greater than for a party expert witness. One view is that

[a] court appointed expert, or assessor, in order to be useful, might well have to be present for the whole court case, and would certainly have to be present while other expert witnesses were in the witness box.<sup>2513</sup>

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<sup>2510</sup>.G Davies & S Sheldon 'Some proposed changes in civil procedure' (1993-1994) 3 *Journal of Judicial Administration* 121 and RScott 'Court-appointed experts' (1995) 25(1) *Queensland Law Society Journal* 87.

<sup>2511</sup>.eg Law Society of WA *Submission* 78.

<sup>2512</sup>.The Law Society of SA *Submission* 94; NSW Bar Association *Submission* 88; The Victorian Bar *Submission* 57; Arthur Robison & Hedderwicks *Submission* 189; P Meadows *Submission* 266.

<sup>2513</sup>.G Nossal 'The Federal Court and the Expert: Medical and Scientific Expertise in the Service of Justice' *Paper Australian Legal Convention Melbourne* 1997.

Supporters of court appointed experts accept that costs will not necessarily be saved, if parties instruct their own experts.

That has to be a matter for the party concerned. It is sufficient to ensure that the party cannot deploy the report of such an expert in evidence nor in any circumstances recover the costs from his opponent.<sup>2514</sup>

13.108 If the question of appointing a court expert arises after some expert reports have been prepared it may be too late for the court to secure an agreed expert. The former Queensland Litigation Reform Commission (QLRC) proposed legislation to permit parties to apply to a court before proceedings were commenced for the appointment of an expert who, if the dispute ended in litigation, would be the court appointed expert.<sup>2515</sup> Such 'pre-action protocols' encourage parties to agree on an expert at an early time, with consequences in costs should they fail to do so.<sup>2516</sup> The areas of practice most suited to the development of such protocols are those in which the expert evidence adduced is relatively standard, such as in the employees' compensation jurisdictions of the AAT.

#### *Court appointed experts and decision making*

13.109 Some commentators have criticised suggestions that court appointed experts are likely to be more independent and accurate. If a single expert is appointed, the court 'effectively becomes reliant entirely on that one omniscient person's objectivity and acumen'.<sup>2517</sup> One view is that if courts are to give a single expert the role of choosing between differing opinions on any particular issue this abrogates the court's place and function in a hearing, particularly as it is difficult to draw the line between the technical or scientific information that is appropriate for an expert

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<sup>2514</sup>.Middleton report 29.

<sup>2515</sup>.G Davies 'Justice reform: A personal perspective' (1997) 15 *Australian Bar Review* 109, 112. The QLRC also proposed rules of court under which parties who claim that an expert's opinion is relevant to an issue would have to refer to the claim and identify the issue in their pleading. After the close of pleadings in cases identifying the need for an expert, the parties would come before the court which could then decide to appoint an expert: Litigation Reform Commission *Draft Supreme Court Rules Amendment Order (No...)* 1994.

<sup>2516</sup>.Lord Woolf's final report recorded that a group of lawyers and insurers had agreed a pre-action protocol for personal injury actions which included a protocol for instructing experts. The protocol provided that

the claimant's solicitors may in the first instance put forward more than one expert's name.

The defendant may indicate that one or more of these is unacceptable. The group considered that this would have advantages for both claimant and defendants.

Provided at least two names are acceptable to both parties, the claimant may reject a report by the expert of his first choice without letting the defendant know that he has done so. The advantage for defendants is that they can identify at an early stage if the claimant is intending to use an expert whom they regard as partisan and whose report they are unlikely to accept: Woolf final report 109.

<sup>2517</sup>.R Scott 'Court-appointed experts' (1995) 25 *Queensland Law Society Journal* 87, 92.



to submit on and those matters that the trier of fact can handle.<sup>2518</sup> However, in complex cases courts need not be limited to the appointment of a single expert.

13.110 Some submissions to the Commission's inquiry expressed strong reservations about the use of court appointed experts.<sup>2519</sup> The Law Council, among others, stressed that the parties in the case are in the best position to know which experts are the most appropriate to call and that the court or tribunal is unlikely to be in such a position.

One of the significant advantages of the current system, is that a court is in a position to hear views from experts selected by two sides and a judge is able to weigh up or assess that expert evidence.<sup>2520</sup>

13.111 The Law Council identified a major problem with court appointed experts as the bias or perceived bias that the court might have towards its own experts if the parties were to be allowed to also call experts (as the Law Council considered they should be allowed to).<sup>2521</sup> The NSW Bar Association had similar concerns. The AAT expressed concerns that it would be difficult for the tribunal to choose an expert who would not be perceived to favour one side or the other,<sup>2522</sup> affecting perceptions about the fairness of the tribunal's processes.

13.112 A particular problem highlighted in submissions, and in the literature, is said to arise where there are distinct 'schools' of experts within a discipline. In this situation, by appointing the expert, the court or tribunal is effectively choosing the opinion the expert is likely to give. Lord Woolf recognised this problem in his final report, conceding that for some cases, including those involving issues on which 'there are several tenable schools of thought, or where the boundaries of knowledge are being extended', the oral cross-examination of opposing experts selected by the parties may be the best way of producing a just result.<sup>2523</sup>

### **Federal Court**

13.113 The Federal Court Rules provide that where a question for an expert witness arises in any proceedings, the Court may at any stage of the proceedings on its own motion or on application by a party or the Registrar appoint an expert witness as a court expert.<sup>2524</sup> The court expert may be

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<sup>2518</sup>.id 93-94. As discussed earlier, at least at federal level, there are constitutional limitations on the exercise of judicial power constrain the role of experts in judicial determination.

<sup>2519</sup>.LCA *Submission 126*; NSW Bar Association *Submission 88*; Arthur Robinson & Hedderwicks *Submission 189*; P Meadows *Submission 266*.

<sup>2520</sup>.LCA *Submission 126*.

<sup>2521</sup>.ibid.

<sup>2522</sup>.AAT *Submission 210*.

<sup>2523</sup>.Woolf final report 141.

<sup>2524</sup>.Fed Ct Rules O 34 r 2(1).

- appointed to inquire into and report upon the question arising in the proceedings<sup>2525</sup>
- authorised to inquire into and report upon any facts relevant to his or her inquiry and report on the question<sup>2526</sup>
- directed to make a further and supplemental report or inquiry and report.<sup>2527</sup>

13.114 Generally, the Court may give such instructions as it thinks fit relating to any inquiry or report of the court expert. Any report of the court expert is to be sent to the Registrar, who sends a copy to the parties.<sup>2528</sup> Subject to the Court's cost powers, the parties are jointly and severally liable for the cost of the court expert.<sup>2529</sup>

13.115 Unless the Court orders otherwise, the report is admissible in evidence on the question on which it is made, but is not binding on any party.<sup>2530</sup> Upon application made by any party within 14 days after receiving a copy of a court expert's report, the Court shall make an order for the cross-examination of the court expert by all the parties, either before the Court, at the trial or at some other time; or before an examiner.<sup>2531</sup> Parties may adduce evidence from one other expert on the same question if they give reasonable notice before the commencement of the trial of an intention to do so. Otherwise, further expert evidence on the question may only be adduced with the leave of the Court.<sup>2532</sup> In practice, Federal Court appointment of a court expert is rare.<sup>2533</sup>

### *Family Court*

13.116 In many ways the Family Court is much more directly involved than the Federal Court in the way in which expert evidence is collected and presented to it. Family Court judges have expressed satisfaction with the current processes for the provision of opinion evidence in family reports and from valuers and accountants in property matters.<sup>2534</sup>

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<sup>2525</sup>.id O 34 r 2(1)(a).

<sup>2526</sup>.id O 34 r 2(1)(b).

<sup>2527</sup>.id O 34 r 2(1)(c).

<sup>2528</sup>.id O 34 r 3(1)(2).

<sup>2529</sup>.id O 34 r 5.

<sup>2530</sup>.id O 34 r 3(3).

<sup>2531</sup>.id O 34 r 4.

<sup>2532</sup>.id O 34 r 6.

<sup>2533</sup>.Reported cases include *Newark Pty Ltd v Civil & Civic Pty Ltd* (1987) 75 ALR 350 and *Trade Practices Commission v Arnotts* (1989) 89 ALR 131. The High Court (Murphy J) appointed a court expert under O 38 r 2 of the High Court Rules in *Minnesota Mining and Manufacturing Co. v Beiersdorf (Australia) Ltd* [1980] 144 CLR 253, a patent case involving 'breathable' adhesive surgical tape.

<sup>2534</sup>.I Freckleton et al *Australian Judicial Perspectives on Expert Evidence: An Empirical Study* AIJA Melbourne 1999, 110.

13.117 The Family Court has power to appoint court experts at any stage of proceedings, on application by a party or of its own motion.<sup>2535</sup> The Court may

- appoint an expert as a court expert to inquire into and report on any issue of fact or opinion, other than issues involving questions of law or construction, arising in the proceedings and
- give directions to extend or supplement, or otherwise in relation to, any such inquiry or report.<sup>2536</sup>

13.118 The court expert must be a person agreed upon between the parties or, if agreement is not possible, a person nominated by the court.<sup>2537</sup> The Court may receive the report and evidence and permit oral examination of the court expert.<sup>2538</sup> Unless the Court otherwise orders, a party wishing to cross-examine a court expert must pay the costs of the expert's attendance.<sup>2539</sup> Where a court expert has made a report on an issue, the parties may adduce the evidence of one other expert on that issue but require leave to adduce the evidence of two or more other experts.<sup>2540</sup>

13.119 Contrary to the position in the Federal Court, the Family Court frequently appoints court experts. Court experts are often appointed in contact cases where there are allegations of child abuse. The expert in these cases is often a specialist in child psychiatry.<sup>2541</sup>

13.120 In the Family Court it is not uncommon for parties (including the child's representative) to agree jointly to instruct an expert and on the expert's instructions and fees. The Law Council advises that in some registries where such an agreement is reached and orders made, this expert may be referred to as the 'Order 30A expert'.<sup>2542</sup> However, the expert is not strictly a 'court appointed expert' as the court has no role in approving the expert. The Commission's national case file survey of 1 288 Family Court cases disclosed only 12 cases (11 of which involved children's matters) in which an expert's report was ordered under O 30A. Order 30A reports were requested from 3 psychologists and 8 psychiatrists.<sup>2543</sup>

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<sup>2535</sup> Fam Law Rules O 30A r 3(1).

<sup>2536</sup> *id* O 30A r 3(1).

<sup>2537</sup> *id* O 30A r 3(2).

<sup>2538</sup> *id* O 30A r 4(2).

<sup>2539</sup> *id* O 30A r 5.

<sup>2540</sup> *id* O 30A r 7.

<sup>2541</sup> *eg In the Matter of P & P and Legal Aid Commission of NSW* (1995) 19 FamLR 1, a case involving an application for authorisation of a sterilisation procedure, the Family Court appointed a neurologist and a consulting psychiatrist as court experts. Also, see *Johnson v Johnson* (1997) 22 FamLR 141; *In the Marriage of I* (1995) 19 FamLR 147.

<sup>2542</sup> LCA Submission 197.

<sup>2543</sup> T Matruglio & G McAllister, Family Court Empirical Report Part One para 7.3.2.

13.121 The Family Court advised that in its experience the involvement of a single expert is common and advantageous in children's matters but is not likely to occur in financial matters. The Court agreed that where possible the expert should be chosen by agreement between the parties, and not imposed by the court, except in the case of children's matters where a counsellor is appointed.<sup>2544</sup>

13.122 Children who are the subject of disputes in the Family Court may be separately represented by a child's representative.<sup>2545</sup> Representatives are required to advocate in accordance with their assessment of the child's best interests. The functions of the child's representative may include arranging for the preparation of expert evidence and otherwise ensuring that all evidence relevant to the welfare of the child is before the Court.<sup>2546</sup> The Family Law Act also makes provision for family reports by court counsellors or by outside approved counselling organisations.<sup>2547</sup> The nature and role of family reports is discussed in detail in chapter 11.

### *Social science research*

13.123 The determination of issues in family law proceedings concerning the care, welfare or development of children often requires Family Court judges to make findings on social facts, for example, in relation to the reliability of the expressed wishes or preferences of children, the effects on children of separation from a parent, the capacity of parents to provide for the intellectual needs of the child or risk factors in child abuse.<sup>2548</sup>

13.124 Social science research is an obvious source of information on which to make such findings. The Court accesses social science research in a number of ways. Family reports may volunteer a summary of details of social science research or the persons assigned to prepare a family report may be directed to provide details of recent relevant research. Social science research also may be contained in information obtained through the appointment of court experts or as part of the evidence of expert witnesses. Section 66J of the Family Law Act specifically permits 'relevant findings of published research in relation to the maintenance of children' to be taken into account in considering financial support matters.

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<sup>2544</sup>Family Court of Australia *Submission 264*.

<sup>2545</sup>Amendments to the Family Law Act in 1995 refer to the representative for a child in this model of representation as a 'child's representative': s 68M(1). Prior to these amendments, the term used was 'separate representative'. The Family Court can appoint a child's representative wherever it appears to the Court that a child ought to be separately represented. Family Law Act s 68L(2).

<sup>2546</sup>See *P and P* (1995) FLC ¶92-616, 82,157.

<sup>2547</sup>For the purposes of the Family Law Rules, the term 'expert' does not include a family and child counsellor or a welfare officer: Fam Law Rules O 30A r 1.

<sup>2548</sup>ie factors to be considered by the Court in determining what is in the child's best interests: Family Law Act s 68F.

13.125 However, a survey of judgments in the Family Court <sup>2549</sup> and a survey of Family Court judges<sup>2550</sup> show that these methods are not often used. The judges appear often to rely on their own beliefs and private knowledge to arrive at findings of social facts.<sup>2551</sup>

13.126 Justice Mullane has suggested that some of the options for addressing the need for better access to social science research in Family Court decision making include: amending the Family Law Act to permit the Court to have regard to relevant research and studies of research published by the Institute of Family Studies and extending the role of the Institute so that it may publish research and studies of research on topics or issues suggested by the Family Court. The Court could also encourage greater use by the profession and Family Court judges of existing means to establish social facts.<sup>2552</sup> Justice Mullane concludes

It is important to the proper administration of justice that where evidentiary material is evaluated by a court and relied upon, the process is transparent. There is a demonstrated need for the present processes, by which the Family Court can access social science research evidence, to be further examined, improved and better utilised.<sup>2553</sup>

13.127 The Family Court has suggested the s 66J power to take social science research into account could be expanded to apply whenever the best interests of children are being determined. The Court also stressed the need for judicial education concerning the use of social science.<sup>2554</sup>

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<sup>2549</sup>. A Family Court study for the purposes of statistical analysis and submission to the 1992 Commonwealth Joint Select Committee on the Operation and Interpretation of the Family Law Act found that, where findings of social fact are made in Family Court judgments, the basis on which the social fact is established is often not stated. The results as to the stated or implied sources of findings of social facts were: previous findings of the Full Court as to a social fact (2%); expert evidence by court counsellor, court expert or other expert witnesses (32%); research nominated by the judge and specified in the judgment (1%); 'research' but judge did not identify the research (5%); no source stated (60%). See G Mullane 'Evidence of social science research: law, practice, and options in the Family Court of Australia' (1998) 72 *Australian Law Journal* 434, 452–453.

<sup>2550</sup>. G Mullane 'Evidence of social science research: law, practice, and options in the Family Court of Australia' (1998) 72 *Australian Law Journal* 434, 452–453.

<sup>2551</sup>. The results of the survey were said to be consistent with the following hypotheses: in custody judgments most judges do at times rely on their own beliefs as to social science research; of those that do so, only 36% always identify the research relied upon, 25% never do so and 39% sometimes do so; generally Family Court judges have not studied the relevant areas of social science as part of degree studies; Family Court judges do read articles about relevant research in newspapers, journal, books and so on; Family Court judges (69%) perceived a need for experts and the parties to assist the court by more often referring to relevant research: id 454.

<sup>2552</sup>. G Mullane 'Evidence of social science research: law, practice, and options in the Family Court of Australia' (1998) 72 *Australian Law Journal* 434, 456. Existing means include the taking of judicial notice of well-known social facts; findings of social fact by superior courts; reports by counsellors, welfare officers and court experts as to recognised social science research and social facts and oral evidence of recognised social science research by persons with specialist knowledge.

<sup>2553</sup>. *ibid.*

<sup>2554</sup>. Family Court of Australia *Submission* 264. Also see chapter 3 on education and training for judges.

*Administrative Appeals Tribunal*

13.128 The AAT may inform itself on any matter in such manner as it thinks appropriate.<sup>2555</sup> The AAT has a range of information gathering powers that empower it to obtain expert and other evidence, independently of the parties, if necessary. The AAT has power to

- require relevant documents to be lodged by any person where the tribunal is of the opinion that the documents may be relevant to a review of a decision<sup>2556</sup>
- summons a person to give evidence or produce documents, including of its own motion<sup>2557</sup>
- ask questions and seek clarification from witnesses at hearings.<sup>2558</sup>

13.129 In some cases the AAT arranges for expert reports to be obtained. For example, in criminal deportation cases where applicants are frequently unrepresented, the AAT sometimes arranges for the applicant to be examined for the purpose of determining his or her mental state and attitude towards rehabilitation.<sup>2559</sup> The AAT also may require the Department of Immigration and Multicultural Affairs to provide expert information or services which it is difficult for the applicant to obtain: for example, information through the Department of Foreign Affairs about the political or social situation in the country to which the applicant is likely to be deported.<sup>2560</sup>

*Lists of experts*

13.130 It has been suggested that federal courts and tribunals could maintain lists of experts in order to facilitate the appointment of agreed single and court appointed experts.

13.131 In some civil code countries,<sup>2561</sup> such as France, courts maintain lists or panels of experts covering the various fields of expertise from which they may

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<sup>2555</sup>. AAT Act s 33(1)(c).

<sup>2556</sup>. *id* s 37(2).

<sup>2557</sup>. *id* s 40(1A). The AAT may order that the fees and allowances of a person summoned to appear as a witness by the AAT are to be paid by the Commonwealth: AAT Act s 67(3).

<sup>2558</sup>. *id* s 33(1)(a)-(c).

<sup>2559</sup>. Administrative Appeals Tribunal *Submission* Joint Standing Committee on Migration: Inquiry into Criminal Deportation 16 April 1997.

<sup>2560</sup>. *ibid*.

<sup>2561</sup>. Proponents of the wider use of court appointed experts often refer to the civil code model. eg G-Davies & S Sheldon 'Some proposed changes in civil procedure: their practical benefits and ethical rationale' (1993) 3 *Journal of Judicial Administration* 111, 120-121; K Marks 'The interventionist court and procedure' (1992) 18(1) *Monash University Law Review* 1, 6-8. The role of an expert in civil code jurisdictions more analogous to that of a referee or other expert involved in determination, rather than to the role of a court appointed expert witness in the common law system. Comparisons may also be made between the role of the French expert and the use in common law jurisdictions of

choose experts to assist them.<sup>2562</sup> Judges have complete discretion in their choice of expert and may ignore the official lists. However, in practice, they usually choose from the lists as such lists are considered to include the most able and experienced experts.<sup>2563</sup> In Germany, the court also has the ultimate discretion in its choice of expert. However, there are experts who are publicly appointed for certain kinds of opinions and the German civil procedure code provides that other persons shall be chosen only in special circumstances.<sup>2564</sup>

13.132 It has been claimed that, in France at least, the system of official lists has largely eliminated the problem of incompetent experts and the 'professional expert', as the courts take care to ensure that those who act as experts do so in conjunction with normal professional practice.<sup>2565</sup>

13.133 As a general matter, experimentation with lists of experts in certain jurisdictions may be a good way to deal with problems of partisanship. The Commission proposes that such lists be prepared for medical experts in AAT compensation, veterans' affairs and social welfare cases.<sup>2566</sup>

#### *The Commission's views on court appointed experts*

13.134 With the exception of the use of family and child counsellors in the Family Court, court appointed experts are infrequently used in proceedings before the Federal Court, the Family Court<sup>2567</sup> or the AAT.

13.135 Many judges who contributed to this inquiry were positively disposed towards the increased use of court appointed experts as enhancing the quality of judicial decision making and decreasing the length and cost of litigation. This impression is consistent with the results of the AIJA empirical study (although only

arbitrators to resolve disputes relating to facts: See M Chapman 'Is the French civil expert a decider?' (1997) 63(2) *Arbitration* 138.

<sup>2562</sup> There is one national list (the list of the *Cour de cassation*) and one list for each of the 30 or so *cours d'appel*.

<sup>2563</sup> The process for application and inclusion on the list of experts differs from court to court. Inclusion on the list is considered a significant professional accolade, which may be recognised on the expert's professional letterhead: M Chapman 'The expert in France' (1995) 61(4) *Arbitration* 264, 264.

<sup>2564</sup> *Zivilprozessordnung* s 404(2). This gives a certain but only limited guarantee as to the class of expertise of those experts, because such experts are publicly appointed by the Chamber of Industry and Commerce: M Reynolds & S Rinderknecht 'The expert witness in England and Germany: a comparative study' 59(2) *Arbitration* 118, 119. Lists of experts who have already been used by the court or who are otherwise known as experts are maintained by courts. The courts may also ask industry or professional bodies for recommendations. Ruessmann in: *Alternativkommentar zur ZPO* (1987) vor s 402 Rdnr 8.

<sup>2565</sup> J Spencer 'Court experts and expert witnesses: have we a lesson to learn from the French?' (1992) 45 *Current Legal Problems* 213, 229.

<sup>2566</sup> See para 12.171; proposal 12.15.

<sup>2567</sup> However, it is not uncommon for the parties to family law proceedings to agree on a single expert, such as a valuer.

20% of the respondents were federal judges).<sup>2568</sup> About half of the respondent judges to the AIJA empirical study survey said that they thought that greater use of court appointed experts would be helpful to the fact-finding process, even though less than 5% of the judges said that they had appointed an expert in the last five years.<sup>2569</sup>

13.136 Such agreed or court appointed experts could be particularly effective in civil disputes over quantum rather than over liability and where valuation of assets is at issue.<sup>2570</sup> Family law practitioners and judges generally agreed that, except in complicated property cases, parties should be required jointly to instruct valuers. While some of the most protracted disputes in the Family Court are about the value of property, especially businesses, it is said that there should be no need in ordinary 'house and garden' cases, to secure any more than one reputable valuation and costs may be reduced by the appointment of joint expert.<sup>2571</sup>

13.137 Consultations revealed some support for the appointment of court experts in certain cases involving breaches of the restrictive trade practices (Part IV) and consumer protection (Part V) provisions of the Trade Practices Act.<sup>2572</sup> The ACCC submitted that

[c]ourt appointed experts could be of significant value in Part V cases involving untrue claims as to the operation or benefit of goods. In therapeutic goods cases, for example, an appropriately qualified medical or nutritional expert could deal with allegations concerning the qualities of products at far less cost and time than by each side preparing an analysis.<sup>2573</sup>

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<sup>2568</sup> While only a few respondents had themselves appointed expert witnesses, assessors or expert referees, there was strong in principle support for such measures — much more so, for instance, than the imposition of fetters upon the numbers of expert witnesses permitted to be called by parties: I Freckelton et al *Australian Judicial Perspectives on Expert Evidence: An Empirical Study* AIJA Melbourne 1999, 8.

<sup>2569</sup> id 101–102.

<sup>2570</sup> One English case in which a court appointed an expert to assist on questions of valuation in *Abbey National Mortgages Plc v Key Surveyors Ltd* [1996] 1 WLR 1534. In this case, the plaintiff was claiming damages against the defendant valuers for the alleged negligent valuation of 51 houses in different localities throughout England and Wales. The judge appointed an expert and ordered that party expert valuation evidence be limited to one witness per party. The Court of Appeal recognised the relative novelty of the judge's orders but upheld them, observing that

Exhortations on trial judges to be interventionist and managerial would be futile if every managerial initiative by a trial judge were to be condemned as an unwarranted departure from orthodoxy. . . . It would be most unfortunate if the Court of Appeal were to block reasonable attempts to mitigate the defects of established practice: *Abbey National Mortgages Plc v Key Surveyors Ltd* [1996] 1 WLR 1534, 1537.

<sup>2571</sup> Women's Legal Resources Centre *IP 22 Submission 153*; Forensic Accounting Special Interest Group *Consultation* Sydney 20 April 1999.

<sup>2572</sup> Federal Civil Litigation Working Group; *Consultation* Adelaide 10 September 1997.

<sup>2573</sup> ACCC *Submission 67*. However, the ACCC did not see court appointed experts as likely to be useful in Part V cases, which often involve complex economic evidence stating that

The principal difficulty with court appointed experts lies with those areas of expert opinion, such as economics, where it is possible for experts to reach in good faith, contrary views, upon a single set of facts. In such cases, the ACCC believes



13.138 The Commission considers that options for reform involving the increased use of agreed or court appointed experts should be more closely examined by federal courts and tribunals in cooperation with the legal professional and user groups.

**Proposal 13.7.** Parties, federal courts and tribunals should, as a matter of course, consider whether an expert (or experts) agreed between the parties should be appointed in a case or to deal with a particular issue. Some examples of categories of case where the use of agreed experts will often be appropriate include in (i) Family Court of Australia property disputes where valuation of assets is at issue (ii) Family Court of Australia childrens' cases and (iii) Federal Court trade practices cases.

**Proposal 13.8.** Federal court and tribunal rules should provide that parties who propose to rely on an expert's opinion are required to identify the issue in their originating application or in documentation filed prior to the first directions hearing. This will provide an early opportunity for the court or tribunal and parties to consider whether an agreed expert should be appointed and how such an expert is to be engaged or appointed or for the court or tribunal to make directions to facilitate communication between party experts.

**Proposal 13.9.** The Federal Court, the Family Court of Australia and the Administrative Appeals Tribunal should consider encouraging the development of 'pre-action protocols', in cooperation with legal professional and user groups, to encourage parties in particular areas of practice to agree on a single expert before commencing proceedings. The areas of practice most suited to the development of such protocols include the compensation, veterans' entitlements and social welfare jurisdictions of the Administrative Appeals Tribunal and uncomplicated Family Court of Australia property cases.

**Proposal 13.10.** The processes by which the Family Court of Australia accesses social science research evidence should be reviewed, with the aim of making the process whereby judges and registrars evaluate and rely on such evidence more transparent and amenable to challenge.

## Assessors

13.139 Certain difficulties faced by judges and other decision makers in understanding and evaluating conflicting expert evidence may derive from the highly specialised and technical nature of the evidence itself. Technical evidence needs to be presented and explained in a comprehensive, clear way, by the examination and cross-examination processes and the sequential presentation of

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that is preferable for each party to have the right to provide expert evidence to support its own economic analysis and not be constrained by the views of a court appointed expert.

evidence does not always assist this aim. One response to this difficulty is for the court to appoint an assessor or other expert assistant to advise the judge or other decision maker. There is a long tradition of appointing assessors in some areas of the law, particularly in admiralty cases.

13.140 Of the judges responding to the AIJA research survey, 70% conceded that on occasion they had felt that they had not understood expert evidence in the cases before them.<sup>2574</sup> Just under half the judges said that they had occasionally encountered evidence which they had not been able to evaluate adequately because of its complexity.<sup>2575</sup>

13.141 Even though judges may specialise in particular categories of case<sup>2576</sup> and develop considerable expertise in certain areas, it is unlikely that any single judge possesses sufficient scientific or other background information to be able to assess certain conflicting technical expert evidence without assistance.<sup>2577</sup>

In the Federal Court a judge might go, in the space of a few months, from a Trade Practices case involving economic evidence as to market definition, to a copyright case involving architectural plans, to an Admiralty case collision case involving seamanship and navigation, to a patent case involving DNA and molecular biology.<sup>2578</sup>

There has been criticism of legislation which secures resolution of merger, takeover and monopolies legislation in the Federal Court, in part because judges may lack the necessary economic expertise to determine complex economic issues such as market definition.<sup>2579</sup>

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<sup>2574</sup>.I Freckelton et al *Australian Judicial Perspectives on Expert Evidence: An Empirical Study* AIJA Melbourne 1999, 54.

<sup>2575</sup>.id 39.

<sup>2576</sup>.eg under the individual docket system, Federal Court cases in some areas of law (presently admiralty, intellectual property, taxation, takeovers, Part IV Trade Practices Act and native title) are allocated to a judge who is a member of a specialist panel.

<sup>2577</sup>.The educational needs of both decision makers and lawyers should also be considered in this context, as decision makers deal with legal and factual issues raised by accelerating scientific and technological change. Some commentators have suggested that legal education will need to ensure that future lawyers and judges are knowledgeable enough to make sound decisions when confronted with scientific questions if they become increasingly involved in distinguishing reliable from unreliable expert evidence: S Odgers & J Richardson 'Keeping bad science out of the courtroom — changes in American and Australian expert evidence law' (1995) 18 *University of New South Wales Law Journal* 108, 122. 'The challenge for tomorrow's litigation lawyer is to come to grips with information from other disciplines well enough to play an effective role in rendering forensic experts' expertise accountable'. I Freckelton 'Wizards in the Crucible: Making the Boffins Accountable' in J Nijboer & J Reintjies (eds) *Proceedings of the First World Conference on New Trends in Criminal Investigation and Evidence* 1997, 79.

<sup>2578</sup>.P Heerey 'Expert evidence intellectual property cases' (1998) 9 *Australian Intellectual Property Journal* 92, 94.

<sup>2579</sup>.See House of Representatives Standing Committee on Legal and Constitutional Affairs *Mergers, Takeovers and Monopolies: Profiting from Competition?* (Griffiths Committee report) Parliament of the Commonwealth of Australia, Canberra 1989, 139.

13.142 The ACCC considered that Part IV cases involving economic evidence are not as suitable for court appointed experts as cases in 'areas of expertise where agreed or established facts are likely to lead all qualified experts to the same view'.<sup>2580</sup> Nevertheless, views continue to be expressed that some form of independent assistance or advice may be desirable in these sorts of case.

For every expert economist prepared to swear the market should be defined narrowly, there will be just as many willing to testify that it should be defined widely . . . This raises again the suggestion that judges in such cases should be able to seek advice from a panel of independent economic experts. Since economists are notorious for their divergent views, these advisers may not necessarily agree with one another. Yet the provision of objective advice, however disparate, would surely be welcomed by judges whose legal training has not necessarily prepared them for economic analysis.<sup>2581</sup>

13.143 In response to such problems, which are not limited to trade practices cases, it is suggested that courts and tribunals should make wider use of powers to appoint assessors to advise and assist them in proceedings.

#### *What is an assessor?*

13.144 In common law systems, the term 'assessor' is associated with the English courts of admiralty. In admiralty matters before the English courts, the judge may be assisted by one or more nautical assessors.

The title of the office derives directly from the latin *assessor*, meaning one who sits with another, or an assistant, and in English law denotes a person who by virtue of some special skill, knowledge or experience he possesses, sits with a judge during judicial proceedings in order to answer any question which might be put to him by the judge on the subject in which he is an expert.<sup>2582</sup>

13.145 While the Admiralty Court is the only English court which is regularly assisted by assessors in its proceedings, the power to appoint assessors or advisers is not confined to courts with admiralty jurisdiction. For example, in *Genentech Inc v The Wellcome Foundation*,<sup>2583</sup> a case in the Court of Appeal involving the patenting of a process for the synthesis of a protein and its manufacture using re-combinant DNA technology, a molecular geneticist sat with the court providing 'scientific factual background'.

13.146 Clearly, the functions of an assessor in English law have some similarity with those of expert witnesses and court appointed expert witnesses. All are sources of

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<sup>2580</sup> ACCC Submission 67.

<sup>2581</sup> B Marshall (1996) 31 *Australian Lawyer* 7.

<sup>2582</sup> A Dickey 'The province and function of assessors in English Courts' (1970) *Modern Law Review* 494, 501.

<sup>2583</sup> (1989) 15 IPR 423.

information for the judge or other decision maker on matters within their sphere of expertise.<sup>2584</sup> However, there are important differences.

13.147 Unlike expert witnesses, assessors are not sworn and cannot be cross-examined. Their advice is sought and given to the judge in private and is only disclosed to the parties at the court's discretion and then usually at the end of the case in the judgment.<sup>2585</sup> The assessor is simply an expert available for the judge to consult if the judge requires assistance in understanding the effect or meaning of expert evidence.<sup>2586</sup>

An assessor of the traditional kind plays no other part in proceedings. In particular, an assessor cannot volunteer information that is not sought by the judge, cannot ask questions of the witnesses, and takes no part in the court's final decision.<sup>2587</sup>

13.148 The form of communication between the expert and the judge or other decision maker helps to distinguish an assessor from a court appointed expert. Justice Heerey has observed that

[A]t one extreme a court appointed expert could be limited to written communications [with the judge] which would be made available to the parties . . . At the other extreme, the judge might have unrestricted access to the expert.<sup>2588</sup>

13.149 Justice Heerey's favoured model is closer to the latter position, where communication between expert and judge is as unrestricted as that between the judge and his or her associate. He also suggests that, while it may be appropriate for the expert to present a written report to the judge towards the end of the trial which would be made available to the parties and subject to counsel's comments in final

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<sup>2584</sup> Freckelton and Selby state that '[t]here remains significant uncertainty as to the status of the advice given to judges by assessors. However, persuasive House of Lords authority suggests that their contribution is not properly to be classed as evidence: I Freckelton & H Selby *Expert Evidence* Law Book Company Looseleaf Service [19.170], citing *Richardson v Redpath, Brown & Co. Ltd* [1944] AC 62, 70-71.

<sup>2585</sup> See I Freckelton & H Selby *Expert Evidence* Law Book Company Looseleaf Service [19.200]; A Dickey 'The province and function of assessors in English Courts' (1970) *Modern Law Review* 494, 501.

<sup>2586</sup> *The Queen Mary* (1947) 80 Ll.L.Rep. 609, 612 cited in A Dickey 'The province and function of assessors in English Courts' (1970) *Modern Law Review* 494, 501 fn 52. It is common for assessors to sit with the judge for all or part of the proceedings.

<sup>2587</sup> A Dickey 'The function of assessors under the Family Law Act' (1991) 65 *Australian Law Journal* 724. However, it may not be strictly true to say that an assessor's function is solely to help the judge and is not, like an expert witness, to supply opinion evidence. Assessors at admiralty may properly be required to answer any question of fact within their special skill or knowledge that is relevant to the case, and expert evidence is inadmissible on matters within this special skill and knowledge: A Dickey 'The province and function of Assessors in English Courts' (1970) *Modern Law Review* 494, 502. In addition, on the application of any party, the court may make an order for inspection by the assessor of any ship or other property for the purpose of obtaining evidence in connection with any issue in the action: *Halsbury's Laws of England* 4th ed Butterworths London vol 1(1) para 452; RSC O-75 r 28.

<sup>2588</sup> P Heerey 'Expert evidence intellectual property cases' (1998) 9 *Australian Intellectual Property Journal* 92, 97.

submissions, he would not favour cross-examination of the expert.<sup>2589</sup> Expert assistance with these features is more akin to the role of an assessor than a court appointed expert witness.

13.150 While communication between an assessor and judge may be more or less private, an assessor or expert assistant may also contribute to deliberations at the hearing, in open court. For example, in *Beecham Group Ltd v Bristol-Myers Company (No 2)*<sup>2590</sup> Barker J of the High Court of New Zealand appointed a scientific adviser to assist him in a patent infringement case. In his judgment the judge reported that

[c]ounsel were happy that the adviser, in the course of the hearing, should comment on any matters raised by counsel's submissions; if he had any thoughts of his own, I encouraged him to articulate them in open Court and to seek counsel's reactions. Any major question which occurred to the adviser – not being simply a technical instruction to myself in the scientific area – was referred to counsel for their comment.<sup>2591</sup>

13.151 Assessors may be specifically charged with responsibility for making inquiries and reporting to the court or tribunal on particular issues.<sup>2592</sup> For example, it was intended that the Family Court would refer matters to an assessor for 'examination and report'.<sup>2593</sup> Such inquiry and reporting functions are more akin to those performed by a court appointed expert witness than an assessor.

13.152 Concerns have been expressed that an assessor may have too much influence over the judge. Counsel in the *Beecham Group* case,<sup>2594</sup> in opposing the appointment of the scientific adviser, expressed concerns that 'the adviser could readily transgress the limits of his proper role and express views to the Judge which parties may wish to challenge but would have no opportunity of doing'. The judge responded that, while this concern was valid, it could be addressed by carefully defining the role of the adviser.<sup>2595</sup>

13.153 In *Genetics Institute Inc v Kirin-Amgen Inc*,<sup>2596</sup> Heerey J rejected the respondent's arguments that High Court authorities concerning Ch III of the

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<sup>2589</sup>.id 98.

<sup>2590</sup>. [1980] 1 NZLR 185.

<sup>2591</sup>. *Beecham Group Ltd v Bristol-Myers Company (No 2)* [1980] 1 NZLR 185, 195.

<sup>2592</sup>. eg Assessors appointed under s 29 of the *Administrative Decisions Tribunal Act 1997* (NSW).

<sup>2593</sup>. *Hansard* (H of R) 30 May 1991, 4455.

<sup>2594</sup>. *Beecham Group Ltd v Bristol-Myers Company (No 2)* [1980] 1 NZLR 185.

<sup>2595</sup>.id 190. In the event, Barker J found it appropriate to confer with the adviser after judgement had been reserved, to ensure that the judgement was correct in its statements of scientific fact or principle: id 195.

<sup>2596</sup>. (1997) 149 ALR 247. This was a patent infringement case which involved complex and highly contested scientific issues concerning biochemical technology. Between them, the parties intended to call 14 scientific experts from various disciplines. The judge considered that in a case such as this he would be likely to be assisted by expert assistance such as that provided by an assessor. Given that the cost of such an appointment would not be disproportionate in the case and appropriate terms of appointment could be devised, Heerey J held that an assessor should be appointed.

Constitution stood in the way of appointing an assessor,<sup>2597</sup> stating that there was no question of an assessor giving a judgment or making an order or otherwise exercising any judicial functions.<sup>2598</sup> After the decision was handed down the losing party sought leave to appeal on the basis that, by having 'lengthy discussions' with the court assessor after the close of submissions, Heerey J had acted either improperly or in breach of principles of natural justice. This contention was rejected by the Full Federal Court.<sup>2599</sup>

### *Assessors in the Federal Court*

13.154 The term 'assessor' does not have any standard Australian legal usage. Relevant Commonwealth legislation describes the role of assessors as being to 'assist' or 'help' the court in the exercise of its jurisdiction.<sup>2600</sup> In some contexts, this assistance may go beyond helping the judge or other decision maker to understand expert evidence and may include taking evidence and preparing reports of evidence for the court.<sup>2601</sup>

13.155 The Governor-General may appoint assessors to assist the Federal Court in the exercise of its jurisdiction under the *Native Title Act 1993* (Cth).<sup>2602</sup> A native title assessor does not exercise any judicial power of the Court, and in relation to a case is subject to the direction and control of the Court. Assessors must have special knowledge in relation to Aboriginal or Torres Strait Islander societies, land management or dispute resolution, or other classes of matters with substantial relevance to their duties.<sup>2603</sup>

13.156 A part-time assessor to assist the Court in the exercise of its jurisdiction under the *Native Title Act 1993* (Cth) was appointed until November 1994.<sup>2604</sup> No

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<sup>2597</sup> *Harris v Caladine* (1991) 172 CLR 84; *Re JRL: Ex parte CJL* (1986) 161 CLR 342.

<sup>2598</sup> *Genetics Institute Inc v Kirin-Amgen Inc* (1997) 149 ALR 247, 250.

<sup>2599</sup> The Full Court noted that the trial judge had considered and addressed questions, before the commencement of the trial, about the role of the assessor and the potential impact of that role on the parties' rights of natural justice and the judge's obligations to perform his judicial functions fairly and independently. Against that background the Full Court was not persuaded that any aspect of the judge's conduct with respect to the assessor provided a basis for leave to appeal: *Genetics Institute Inc v Kirin-Amgen Inc* [1999] FCA 742 (7 June 1999).

<sup>2600</sup> eg Assessors appointed under s 37A of the *Federal Court of Australia Act 1976* (Cth) (Federal Court Act) to assist the Federal Court in the exercise of its jurisdiction under the *Native Title Act 1993* (Cth); assessors appointed under s 217 of the *Patents Act 1990*; assessors appointed under s 102B of the *Family Law Act*. The NSW Land and Environment Court uses 'assessors' to exercise some parts of the Court's jurisdiction. Land and Environment Court assessors determine disputes.

<sup>2601</sup> Fed Ct Rules O 78 r 16-17 (native title matters).

<sup>2602</sup> Federal Court Act s 37A.

<sup>2603</sup> id s 37B. The duties of assessors are set out in Order 78 of the Federal Court Rules. The Court may direct an assessor to: take evidence from parties; decide how the evidence is to be recorded; prepare a report of the evidence for the Court; decide how matters discussed at conferences are to be recorded; prepare a report of the matters discussed at a conference: Fed Ct Rules O 78 r 16-17.

<sup>2604</sup> Federal Court *Annual report 1994-95* 26.

native title assessors have since been appointed although changes in the resolution of native title matters following the enactment of the *Native Title Amendment Act 1998* (Cth) may mean that native title assessors come to play an increasingly important role in the Federal Court.

13.157 The Federal Court may appoint assessors to assist it in the hearing and trial or determination of any proceedings under s 217 of the *Patents Act 1990* (Cth). The appointment of such assessors is rare. Power to appoint assessors has been included in Commonwealth patents legislation since 1903 but had been used once<sup>2605</sup> until September 1997, when Heerey J made an order for the appointment of an assessor in the *Genetics Institute* case, discussed above.<sup>2606</sup>

#### *Assessors in the Family Court*

13.158 The Family Law Act provides that the Court may, in accordance with the rules, appoint an assessor to help it in the hearing and determination of proceedings.<sup>2607</sup> The Court is not bound by any opinion or finding of an assessor.<sup>2608</sup> There are no cases reporting the use of assessors in the Family Court.

#### *The Commission's views on assessors*

13.159 The AIJA empirical study asked judges about their views on the potentially more frequent appointment of assessors. Of those responding to the survey, 41% considered that greater use of assessors would enhance the fact finding process and 37% held the contrary view.<sup>2609</sup>

13.160 Some other Federal Court judges have commented favourably on the usefulness of assessors, particularly in restrictive trade practices and intellectual property cases.<sup>2610</sup> Some practitioners have also submitted that the power to

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<sup>2605</sup>.An assessor was appointed, by consent, in *Adhesives Pty Limited v Aktieselskabet Dansk Gaerings-Industri* (1936) 55 CLR 523; referred to in *Genetics Institute Inc v Kirin-Amgen Inc* (1997) 149 ALR 247, 249.

<sup>2606</sup>.*Genetics Institute Inc v Kirin-Amgen Inc* (1997) 149 ALR 247.

<sup>2607</sup>.Family Law Act s 102B.

<sup>2608</sup>.Fam Law Rules O 30B r 1(2).

<sup>2609</sup>.I Freckelton et al *Australian Judicial Perspectives on Expert Evidence: An Empirical Study 1999* Melbourne AIJA, 107.

<sup>2610</sup>.Comments, Law Week seminar on expert witnesses, New South Wales Parliament Theatre, 29-May 1997. If assessors were to be used in Part IV cases, members of the Australian Competition Tribunal would be well qualified to perform this role. Assessors could have a role in helping to define the appropriate extent of necessary evidence in cases involving market definition. This has proven to be a problem in restrictive trade practices cases. eg *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313, 316 in which investigation of the practical question of fact relating to Arnotts' position in the market for biscuits involved a trial occupying 110 hearing days generating 6500 pages of transcript and 292 exhibits (which stacked in ring bound folders extended for some five metres).

appoint assessors should be used more widely.<sup>2611</sup> The Federal Court is currently examining whether, apart from any inherent powers in this area,<sup>2612</sup> the Federal Court Rules should provide for the appointment with the consent of the parties of an 'expert assistant' to assist the Court in relation to the determination of any issue or issues.<sup>2613</sup>

13.161 The Commission endorses this initiative. An amendment to the Federal Court Act in order to encourage the broader use of expert assistants in Federal Court proceedings may also be desirable.

**Proposal 13.11.** The Federal Court and the Family Court of Australia, in cooperation with legal professional and user groups, should encourage the increased use of expert assistants in particular categories of case.

**Proposal 13.12.** Amendments should be made to the Federal Court Act and the Federal Court Rules to permit the wider use of expert assistants in Federal Court proceedings.

## Expert evidence at the hearing

13.162 It has been claimed that the manner in which expert evidence is usually presented at hearings, through examination and cross-examination, may not be the best way to assist decision makers to understand the issues, particularly when these are complex. The results of the AIJA empirical study indicate that many judges identify deficient advocacy as a significant contributor to the problems posed by expert evidence.

Over half the responding judges (57.81%, n=137) encountered "occasional" failure by cross-examiners to make expert witnesses accountable and over a third said that they "often" (35.44%, n=84) came across the problem. One judge commented that in his or her experience "many counsel have no idea how to cross-examine an expert".<sup>2614</sup>

### *Cross-examination and decision making*

13.163 There are indications that judges often find the presentation of expert evidence confusing and unhelpful. From the perspective of the decision maker, the formality of court room procedure and the judge's remoteness from the expert witnesses may handicap decision making.

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<sup>2611</sup>.Arthur Robinson & Hedderwicks *Submission 189*.

<sup>2612</sup>.In *Minnesota Mining and Manufacturing Co. v Beiersdorf (Australia) Ltd* [1980] 144 CLR 253, 269-270 Murphy J suggested courts have inherent power to obtain independent expert evidence.

<sup>2613</sup>.Federal Court proposed new O 34B. It is also anticipated that, leaving aside the option of appointing an expert assistant, judges will more often direct that the parties in scientific or technical cases provide a technical 'primer' for the use of the Court: B Beaumont *Submission 256*.

<sup>2614</sup>.I Freckleton et al *Australian Judicial Perspectives on Expert Evidence: An Empirical Study* AIJA Melbourne 1999, 37.



Sometimes, as a witness leaves the box, the judge feels that he is perhaps not really on top of the evidence, but does not know how to express what it is he does not know. But the witness is gone forever. While writing the judgment, the judge cannot ring up the expert and put some new idea to him or her or ask for the explanation of some conundrum.<sup>2615</sup>

13.164 A particular criticism of present hearing practices for adducing expert evidence is that they do not always allow experts to fully communicate their opinion to the decision maker.<sup>2616</sup> In many cases, experts complain that they are not given a chance to explain their written report, but are exposed immediately to cross-examination by the lawyers for the other party who have no interest in assisting the judge to understand the expert's views and actually may have an active interest in obscuring the expert's views.

The constraints inherent in the conventional procedure of examination in chief, cross examination and examination in reply do not always enable the expert to give of his/her best. This is frustrating for the expert as well as being less than satisfactory as an exercise in communicating the expert's opinion to the tribunal.<sup>2617</sup>

13.165 Experts may be frustrated that they cannot put relevant information before the court.<sup>2618</sup> Sir Gustav Nossal has observed that, while scientists may be accustomed to argument and conflict in other professional contexts, when giving expert evidence before a court

[t]he set piece, stately quality of examination and cross-examination can lead to a sense of incompleteness: If only I had said so-and-so; if only that they'd asked me such and such.<sup>2619</sup>

13.166 One view is that, if experts are there to 'teach' the court, reform should focus on introducing procedures that facilitate a teaching role, such as allowing the expert to have 10 minutes to summarise his or her opinion before cross-examination, or to use teaching aids such as overhead projectors or whiteboards. One experienced expert witness has observed that

[t]he teaching process is much more effective if the judge is an active pupil: asking questions, seeking clarification, even cutting short explanations of material he or she has already grasped. . . . Perhaps the judge already understands what is being questioned. Perhaps he or she has already concluded that this evidence will not fall to be ruled on.

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<sup>2615</sup> P Heerey 'Expert evidence intellectual property cases' (1998) 9 *Australian Intellectual Property Journal* 92, 94.

<sup>2616</sup> Comments, Law Week seminar on expert witnesses, New South Wales Parliament Theatre, 29-May 1997.

<sup>2617</sup> L Street 'Expert evidence in arbitrations and references' (1992) 66 *Australian Law Journal* 861, 861.

<sup>2618</sup> Australian Council of Professions Ltd *Dealing with Risk: Managing Expectations* Deakin ACT 1996, 24.

<sup>2619</sup> G Nossal 'The Federal Court and the expert: Medical and scientific expertise in the service of justice' *Paper Australian Legal Convention* 1997.

But when no communication is taking place between judge and expert, I certainly understand the frustrations many feel with the length and cost of commercial litigation.<sup>2620</sup>

13.167 One option for the presentation and examination of expert witnesses which may help to address some of these problems is the panel presentation of expert evidence.<sup>2621</sup> A panel approach has been used in some recent cases in both the Federal Court and the AAT and is discussed below.

#### *The Australian Competition Tribunal model*

13.168 A panel approach is used in the Australian Competition Tribunal and was adapted for use in the Federal Court by Justice Lockhart. Under the tribunal

- experts submit written statements to the tribunal, which they may freely modify or supplement orally at the hearing, after having heard all of the other evidence
- all of the experts are sworn in at the same time and each in turn provides an oral exposition of their expert opinion on the issues arising from the evidence
- each expert then expresses his or her view about the opinions expressed by the other experts
- counsel cross-examine the experts one after the other and are at liberty to put questions to all or any of the experts in respect of a particular issue.<sup>2622</sup> Re-examination is conducted on the same basis.<sup>2623</sup>

13.169 The overall effect is that the presentation of evidence is conducted in the manner more of a panel discussion between counsel, experts and tribunal members, than the normal, one-on-one adversarial practice of examination in chief and cross-examination. The main benefit derived from the process is said to be that

at the end of the exercise the Tribunal knows what the economists [as the experts invariably are] perceive as being the real issues, and areas of agreement and disagreement between them.<sup>2624</sup>

13.170 In a recent decision, the Tribunal recorded that the advantages of this process were that it

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<sup>2620</sup>.M Bryant 'Expert witnesses: thinking inside the box' (1998) 73 *Reform* 38.

<sup>2621</sup>.Standard directions on expert evidence in arbitrations and references developed by Sir Laurence Street provide for a form of panel discussion at the hearing. The directions provide that the discussion is to be chaired by the arbitrator or referee, who guides the discussion and intervenes to ensure that matters of disagreement are examined and analysed in such a way as to enable the decision maker to reach a determination on them. (1992) 66 *Australian Law Journal* 861.

<sup>2622</sup>.Lockhart J *Memorandum* to Registrar of the Federal Court 21 April 1998.

<sup>2623</sup>.An outline of the procedure is provided in *Re Queensland Independent Wholesalers Ltd (QIW)* (1995) ATPR 41-438, at 40,925 and in other decisions of the Australian Competition Tribunal.

<sup>2624</sup>.Lockhart J *Memorandum* to Registrar of the Federal Court of 21 April 1998.

- achieves clarity and coherence in that experts are required to prepare written submissions which are set down as a connected argument, and when giving oral evidence the same connected thread runs through it, rather than being a series of disconnected responses to questions by counsel
- achieves the result of the experts defining for their purposes points of agreements and disagreements and
- takes the expert as far away from the adversarial field as possible.<sup>2625</sup>

As well as being extremely useful to the tribunal in its deliberations, the experts involved in this procedure were unanimous in their support of it.<sup>2626</sup>

### *The Commission's views on experts at hearing*

13.171 There is considerable support for modification, in appropriate cases, of traditional examination and cross-examination of expert witnesses, and in particular for experimentation with panel approaches such as that used by the Australian Competition Tribunal.

13.172 Some experts have suggested that a simple reform which would improve the ability of experts to fully communicate their views to decision makers would be routinely to allow experts directly to explain their views to the judge, other than in examination-in-chief, cross-examination or re-examination.<sup>2627</sup>

13.173 Over the last few years, Federal Court judges have begun, on occasion, to adopt the Tribunal practice of having two or more experts sworn at the same time and permitting the witnesses to question each other and comment on each other's evidence. In 1998, the Federal Court amended its Rules to provide for the empanelling of experts in this manner.<sup>2628</sup>

13.174 The AIJA empirical study found support from Australian judges in favour of procedures for crystallising the issues in dispute between the parties' experts, including the Australian Competition Tribunal procedure.<sup>2629</sup> The Law Council has advised that it does not oppose such an approach to expert evidence, but only in cases similar to those dealt with in the Australian Competition Tribunal,<sup>2630</sup> cautioning that

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<sup>2625</sup>. *Re AGL Cooper Basin Natural Gas Supply Arrangements* (1997) ATPR 41-593.

<sup>2626</sup>. *ibid.*

<sup>2627</sup>. Forensic Accounting Special Interest Group *Consultation* Sydney 20 April 1999. In 1998, the Federal Court amended its Rules to provide that the Court may order an expert witness to give an oral exposition of his or her opinion, or of his or her opinion about the opinions given by another expert witness: Fed Ct Rules O 34A(f)(g).

<sup>2628</sup>. Fed Ct Rules O 34A(e)-(i).

<sup>2629</sup>. I Freckelton et al *Australian Judicial Perspectives on Expert Evidence: An Empirical Study* AIJA Melbourne 1999, 6.

<sup>2630</sup>. That is, in cases involving economic and commercial evidence in connection with allegations of breaches of the restrictive trade practices provisions of Part IV of the Trade Practices Act.

[i]n virtually all cases of the more ordinary kind where expert evidence is necessary, the panel approach would be an over-elaborate and thus too expensive approach. It will also detract from an orderly and thus efficient presentation of opposing opinions in the ordinary case.<sup>2631</sup>

13.175 The NSW Bar Association has also suggested that the way in which expert evidence is presented might be improved through panel approaches and providing experts with more opportunity to comment on the opinions of others.<sup>2632</sup> The AAT submitted that the Australian Competition Tribunal model could prove to be an effective mechanism in some AAT jurisdictions, but cautions that the adoption of this approach would require a 'significant cultural shift' by advocates who appear in review tribunals. The AAT is also concerned that the approach could sometimes extend proceedings where the experts fail to reach agreement and might unduly disadvantage unrepresented parties, who may not be able to guide or participate in a panel discussion.<sup>2633</sup>

13.176 Another avenue for improvement in adducing expert evidence at trial might be for courts and tribunals to encourage experts to be present when other experts give evidence. While the Commission understands this to be usual practice in the Family Court, in some jurisdictions expert witnesses are excluded from court until they give their evidence. The reasons for this are said to include a desire to reduce collusion among witnesses, to avoid the proliferation of disputes over technical points and to limit the costs of witness attendance at court.<sup>2634</sup> Prolonging the presence of expert witnesses at trial can add to costs. One problem, of particular concern to expert witnesses, is the time they may have to spend waiting at court for cases to commence and to be called to give evidence.

13.177 Judges responding to the AIJA survey about judicial attitudes towards expert evidence were overwhelmingly of the view that it is helpful to have expert witnesses in court to hear the evidence of other expert witnesses.<sup>2635</sup>

13.178 The existing rules of the Federal Court, Family Court and AAT do not appear to constrain experimentation with panel approaches.<sup>2636</sup> However, it may be desirable for courts and tribunals to have rules or practice directions expressly empowering, and therefore encouraging, judges and tribunal members to direct that expert evidence be adduced in a panel format. The Family Court has said that such

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<sup>2631</sup>.LCA *Correspondence* 30 September 1997.

<sup>2632</sup>.NSW Bar Association *Submission* 88.

<sup>2633</sup>.AAT *Submission* 210.

<sup>2634</sup>.I Freckelton 'Judicial attitudes towards scientific evidence: the Antipodean experience' (1997) 30(4) *University of California Davis Law Review* 1139, 1218.

<sup>2635</sup>.I Freckelton et al *Australian Judicial Perspectives on Expert Evidence: An Empirical Study* AIJA Melbourne 1999, 82.

<sup>2636</sup>.eg see Fed Ct Rules O 10 r 1(2)(j).

rules or practice directions would be inappropriate in child welfare matters, although it recognises the potential for panel approaches in complex matters.<sup>2637</sup>

**Proposal 13.13.** Procedures to adduce expert evidence in a panel format should be encouraged whenever appropriate. The Commission recommends that the Family Court of Australia and AAT establish rules or practice directions setting down such procedures, using the Federal Court Rules as a model.

**Proposal 13.14.** Expert witnesses routinely should be provided with an opportunity to be heard by the court or tribunal other than in examination or cross-examination and expert witnesses also should be encouraged to attend hearings to hear other expert witnesses present their evidence.

## Use of referees for inquiry and report

13.179 Referees, who may be appointed by courts by reason of their expertise to inquire and report on issues in dispute, have a more direct influence on decision making than court appointed expert witnesses or assessors. The fact that the referee makes a determination or recommendation most distinguishes the referee from a court appointed expert or an assessor.<sup>2638</sup> Determinations can be binding or non-binding on the parties, depending on the circumstances.

13.180 Australian courts generally have a discretion in civil matters to appoint referees and to refer the whole or part of proceedings for inquiry and report, with or without the consent of the parties. The report and opinions of court appointed referees are not binding on courts. The judge may accept, reject or vary all or part of the referee's report.

13.181 For example, in dealing with building and construction cases, the NSW Supreme Court commonly makes use of expert referees appointed under Part 72 of the Supreme Court Rules.<sup>2639</sup> Typically, the Court will appoint a referee, such as an architect or engineer, to inquire into and report on technical issues. A referee may be called upon to prepare a report on all the matters in issue, or to prepare a report on

<sup>2637</sup>Family Court of Australia *Submission 264*.

<sup>2638</sup>Although in the NSW Land and Environment Court expert officers of the Court who conduct and determine disputes are styled 'assessors'. These assessors hear merit appeals in certain merits appeals involving environmental planning, local government and land tenure issues: *Land and Environment Court Act 1979* (NSW) s 12, s 17-19, s 33(1).

<sup>2639</sup>Under Part 72 of the Supreme Court Rules, the NSW Supreme Court may make orders with respect to the conduct of proceedings under the reference, but otherwise the referee may determine the dispute in such manner as the referee thinks fit, having regard to the rules of natural justice. The report furnished by the referee may be accepted, varied or rejected by the Court: NSW Supreme Court Rules Part 72 O 1 r 8(1)(2); O 13; *Xuerub v Viola* (1989) 18 NSWLR 453. See also the discussion of referees in I Freckelton & H Selby *Expert Evidence* Law Book Company Looseleaf Service ch 18A.

all matters except legal questions.<sup>2640</sup> The Queensland Uniform Civil Procedure Rules provide that the court may refer any question of fact to a special referee to decide the question or to give a written opinion on the question to the court.<sup>2641</sup>

13.182 While the Federal Court may refer proceedings, or part of proceedings, to a mediator or arbitrator,<sup>2642</sup> the Court has no express power to refer issues to a referee for inquiry and report<sup>2643</sup> or to use lay decision makers to help it to decide cases.<sup>2644</sup>

13.183 Constitutional limitations concerning the exercise of judicial power constrain the role of experts in federal courts but, as confirmed by *Harris v Caladine*,<sup>2645</sup> the judicial power of the Commonwealth can be exercised by an officer of the court who is not a judge, such as a registrar, as long as judges continue to 'bear the major responsibility for the exercise of judicial power at least in relation to the more important aspects of contested matters'<sup>2646</sup> and monitor the officer's power or jurisdiction.<sup>2647</sup>

13.184 As noted above, judges are generally able to accept, vary or reject a report furnished by a referee. The principles regarding the use of a referee's report by the court have been stated as follows.

- If the report shows a thorough, analytical and scientific approach to the assessment of the subject matter of the inquiry, the court will have a disposition towards acceptance of the report, for to do otherwise would negate the purpose of and the facility of referring complex, technical issues to independent experts for inquiry and report.
- A court should not accept a report where it sees any reason to differ from the referee on any matter of law, or on any questions involving the application of a legal standard.

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<sup>2640</sup> P Dawson 'Construction Law Dispute Resolution: 1. The Court appointed referee's report' (1992) 3(3) *Australian Dispute Resolution Journal* 184.

<sup>2641</sup> *Uniform Civil Procedure Rules 1999* (Qld) R 501.

<sup>2642</sup> Federal Court Act s 53A, s 59; Fed Ct Rules O 72.

<sup>2643</sup> There appears nothing to prevent the Court, with the consent of the parties, from referring the proceedings or a matter arising out of them, to an arbitrator who is an expert. Federal Court Act s-53A(1), s 53A(1A); Fed Ct Rules O 72 r 9. However, while the Court may make an order in the terms of the arbitrator's award, it may not vary or reject the award as it may a referees's report.

<sup>2644</sup> As part of its reference on compliance with the Trade Practices Act, the Commission considered whether the Federal Court should be able to refer pricing matters or other economic issues to a specialist panel for a recommendation or determination. The Commission concluded that it was not satisfied that such an arrangement was either necessary or appropriate: Australian Law Reform Commission Report 68 *Compliance with the Trade Practice Act 1974* Sydney 1994 (ALRC 68) 148-149.

<sup>2645</sup> (1991) 172 CLR 84.

<sup>2646</sup> *Harris v Caladine* (1991) 172 CLR 84, 95.

<sup>2647</sup> eg through review *de novo*. id 95, 122, 126, 151-152. See P Lane *Lane's Commentary on the Australian Constitution* 2nd ed Law Book Company Sydney 1997, 460-462.

- Where a court is comfortably satisfied that the factual issues have been properly explored and considered by the referee, the court should adopt the referee's findings on fact.<sup>2648</sup>

13.185 The extent to which constitutional constraints might limit the powers of federal courts to adopt the reports of referees is not clear. In *Multicon Engineering Pty Ltd v Federal Airports Corporation*,<sup>2649</sup> the NSW Court of Appeal heard a constitutional challenge to the NSW Supreme Court adopting a referee's report in exercising federal jurisdiction. This aspect of the appeal was rejected on the basis that the appellant was not entitled to rely on the constitutional question for the first time on appeal, having consented to the reference. The Court noted, however, that there was 'powerful support' for the argument that reference out to referees, in the manner of Part 72 of the NSW Supreme Court Rules, was compatible with the non-delegation principle in *Harris v Caladine*.<sup>2650</sup>

13.186 The AIJA empirical study asked judges about their views on the more frequent appointment of referees. Respondents were divided on whether or not it would be helpful to fact finding to appoint referees.<sup>2651</sup> The Commission makes no recommendations concerning their use in federal courts.

#### *Determination by experts in tribunals*

13.187 Federal tribunals provide additional forms of determination by experts. The AAT and other federal merits review tribunals have non-legal members with specialist knowledge, skill and experience of administrative decision making.

13.188 Legislation may establish particular panels of experts to assist in dispute resolution and decision making in particular areas and reduce the need for expert evidence to be adduced by the parties. For example, many State courts and tribunals have expert panels, established under workers compensation legislation.<sup>2652</sup> These panels are intended to provide independent medical review and assessment of injury and impairment, including at the request of courts or tribunals. Reports or

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<sup>2648</sup>. *Cape v Maidment* (1991) 98 ACTR 1, 3–4, as cited and discussed in I Freckelton & H Selby *Expert Evidence* Law Book Company Looseleaf Service ch 18A.

<sup>2649</sup>. (unreported) Supreme Court of NSW, Court of Appeal 15 October 1997.

<sup>2650</sup>. Mason P as cited in I Freckelton & H Selby *Expert Evidence* Law Book Company Looseleaf Service [18A.51]. There has been at least one other case in which it has been claimed that, by referring issues to a referees the NSW Supreme Court was improperly exercising federal jurisdiction under Chapter III. Again the appellants were not permitted to raise the point for the first time on appeal: *Collings Constructions Co Pty Ltd v Australian Competition & Consumer Commission* (1998) 152 ALR 510.

<sup>2651</sup>. I Freckelton et al *Australian Judicial Perspectives on Expert Evidence: An Empirical Study* AIJA Melbourne 1999, 108.

<sup>2652</sup>. eg Medical referees and medical panels appointed and constituted under *Compensation Court Act 1984* (NSW) s 14A and s 14B for the purposes of the *Workers Compensation Act 1987* (NSW); Medical panels constituted under *Accident Compensation Act 1985* (Vic) s 63.

certificates from the panels are admissible as evidence in proceedings and, in some cases, constitute conclusive evidence.<sup>2653</sup>

13.189 In veterans' entitlement matters, the Repatriation Medical Authority issues statements of principles to provide the medical-scientific frame of reference for claims made for a pension or allowance for an injury, disease or death connected with service in the armed forces. Statements of principles are disallowable legislative instruments<sup>2654</sup> and binding on the Repatriation Commission, the VRB and the AAT.<sup>2655</sup> One effect of the statements of principle regime process may be to reduce the scope for expert evidence in veterans' entitlements matters. Similarly, in immigration matters

- the opinion of Medical Officers of the Commonwealth in determining whether an applicant satisfies health criteria for the grant of a visa must be taken as correct by the Minister and the IRT<sup>2656</sup> and
- statutory declarations made by 'competent persons' (including registered psychologists, nurses, social workers or Family Law Act court counsellors) may constitute conclusive evidence that a person has suffered domestic violence.<sup>2657</sup>

13.190 There may be some reason to examine whether the use of experts to determine certain issues would be appropriate, in the compensation jurisdictions of the AAT, as adopted in a number of State compensation jurisdictions.<sup>2658</sup> However, the procedural reforms proposed in chapter 12, including modification of the application of client legal privilege to expert reports, and the possible use of lists of experts in the compensation jurisdiction, should be the immediate focus for reform.

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<sup>2653</sup>.eg *Workers Compensation Act 1987* (NSW) s 131(5).

<sup>2654</sup>.*Veterans' Entitlements Act 1986* (Cth) s 196D. The Federal Court has recently confirmed that, because they are legislative in character, the Court lacks jurisdiction under the AD(JR) Act to review statements of principles: *Vietnam Veterans' Affairs Association of Australia New South Wales Branch Inc v Cohen and Others* (1996) 70 FCR 419.

<sup>2655</sup>.These statements state what factors related to service must exist to establish the necessary reasonable hypothesis connecting particular injuries, diseases or deaths and service. See *Veterans' Entitlements Act 1986* (Cth) s 196B. The legislation introducing statements of principles was aimed at ensuring that medical opinions supported by little or no medical-scientific evidence did not prevail over the carefully developed mass of medical-scientific opinion. *Veterans' Affairs* (1994-95 Budget Measures) Legislation Amendment Bill, Explanatory Memorandum.

<sup>2656</sup>.Migration Regulations (SR 268 of 1994) cl 2.25A(3). In *Minister for Immigration & Multicultural Affairs v Seligman* [1999] FCA 117 (1 March 1999) the Full Federal Court found that cl 2.25B of the Migration Regulations, which prescribes the approach to be taken by the Medical Officer, was invalid because, in directing the Medical Officer to consider some things but not others in the formation of his or her opinion, it imposed limitations which meant that the Medical Officer's opinion did not address the relevant criterion and was therefore beyond the power conferred by the Migration Act.

<sup>2657</sup>.Migration Regulations (SR 268 of 1994) cl 1.23.

<sup>2658</sup>.AAT *Submission 210*; J Dwyer *Submission 269*.



# Appendix A

## Participants

### The Commission

The Division of the Commission constituted under the *Law Reform Commission Act 1996* (Cth) for the purposes of this reference comprises the following:

#### *President*

Alan Rose AO (to May 1999)  
Professor David Weisbrot (from June 1999)

#### *Deputy President*

David Edwards PSM

#### *Members*

Dr Kathryn Cronin (full-time Commissioner)  
Michael Ryland (full-time Commissioner to December 1996)  
Justice John von Doussa (part-time Commissioner)  
Justice Ian Coleman (part-time Commissioner)  
Justice Mark Weinberg (part-time Commissioner from April 1998)

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Michael Barnett (from January 1997)  
Dr Tania Sourdin (from January 1997 to February 1999)

#### *Legal Specialists*

Dr David Kinley (from July 1996 to August 1998)  
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Lani Blackman (from June 1998)  
Alison Creighton (from December 1998)  
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## Appendix B

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Australian Dispute Resolution Association  
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Culkoff V, Cashman & Partners  
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Hunter D, Australian Council of Professions  
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## Appendix C

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## Appendix D

### Abbreviations

AAT	Administrative Appeals Tribunal
AAT Act	<i>Administrative Appeals Tribunal Act 1975 (Cth)</i>
ABA	American Bar Association
ABS	Australian Bureau of Statistics
ACCC	Australian Competition and Consumer Commission
ADJR	<i>Administrative Decisions (Judicial Review) Act 1977 (Cth)</i>
ADR	alternative, assisted, additional, affirmative or appropriate dispute resolution
ADT	Administrative Decisions Tribunal (NSW)
ADT Act	<i>Administrative Decisions Tribunal Act 1997 (NSW)</i>
AGS	Australian Government Solicitor
AIJA	Australian Institute of Judicial Administration
AIRC	Australian Industrial Relations Commission
AJAC	Access to Justice Advisory Committee
AJAC report	Access to Justice Advisory Committee <i>Access to justice – An action plan</i> AGPS Canberra 1994
ALRC	Australian Law Reform Commission
ALRC 38	<i>ALRC Evidence</i> AGPS Canberra 187
ALRC 46	<i>ALRC Grouped proceedings in the Federal Court</i> AGPS Canberra 1988
ALRC 69	<i>ALRC Equality before the law: Justice for women</i> ALRC Sydney 1994
	<i>ALRC Equality before the law: Women's equality</i> ALRC Sydney 1994
ALRC 73	<i>ALRC For the sake of the kids: Complex contact cases and the Family Court</i> ALRC Sydney 1995
ALRC 75	<i>ALRC Costs shifting – who pays for litigation</i> ALRC Sydney 1995
ALRC 78	<i>ALRC Beyond the door-keeper: Standing to sue for public remedies</i> ALRC Sydney 1996
ALRC 84	<i>ALRC &amp; HREOC Seen and heard: Priority for children in the legal process</i> ALRC Sydney 1997
ALRC, AAT Empirical Report Part One	<i>ALRC Part one: Empirical information about the Administrative Appeals Tribunal</i> ALRC Sydney June 1999
ALRC, AAT Empirical Report Part Two	<i>ALRC Part two: Empirical information about the Administrative Appeals Tribunal</i> ALRC Sydney June 1999
ALRC BP 1	<i>ALRC Background Paper 1 Federal jurisdiction</i> Sydney 1996

ALRC BP 2	ALRC Background Paper 2 <i>Alternative or assisted dispute resolution</i> Sydney 1996
ALRC BP 3	ALRC Background Paper 3 <i>Judicial and case management</i> Sydney 1996
ALRC BP 4	ALRC Background Paper 4 <i>The unrepresented party</i> Sydney 1996
ALRC BP 5	ALRC Background Paper 5 <i>Civil litigation practice and procedure</i> Sydney 1996
ALRC IP 20	ALRC Issues Paper 20 <i>Review of the adversarial system of litigation: Rethinking the federal civil litigation system</i> Sydney 1997
ALRC IP 21	ALRC Issues Paper 21 <i>Review of the adversarial system of litigation: Rethinking legal education and training</i> Sydney 1997
ALRC IP 22	ALRC Issues Paper 22 <i>Review of the adversarial system of litigation: Rethinking family law proceedings</i> Sydney 1997
ALRC IP 23	ALRC Issues Paper 23 <i>Technology – what it means for federal dispute resolution</i> Sydney 1998
ALRC IP 24	ALRC Issues Paper 24 <i>Review of the adversarial system of litigation: Federal tribunal proceedings</i> Sydney 1998
ARC	Administrative Review Council
ARC 39	ARC <i>Better decisions: Review of Commonwealth merits review tribunals</i> AGPS Canberra 1995
ART	Administrative Review Tribunal
ASIC	Australian Securities and Investment Commission
ATO	Australian Taxation Office
ATSIC	Aboriginal and Torres Strait Islander Commission
Bowman report	G Bowman <i>Review of the Court of Appeal (Civil Division) – Report to the Lord Chancellor</i> Lord Chancellor's Dept London 1997
CBA Task Force Papers	Canadian Bar Association <i>Systems of civil justice task force – Civil justice: Reform for the 21st century</i> Canadian Bar Association <i>Systems of Civil Justice Task Force Conference</i> Toronto February 1996
CBA Task Force Report	Canadian Bar Association <i>Systems of civil justice task force report</i> CBA Toronto August 1996
CLAFs	contingent legal aid (or assistance) funds
CLCs	community legal centres
CLE	continuing legal education
CPR (UK)	Civil Procedure Rules 1999 (UK)
DCM	Differential Case Management
Evidence Act	<i>Evidence Act 1995</i> (Cth)
Fed Crt Rules	Federal Court Rules
Federal Court Act	<i>Federal Court of Australia Act 1976</i> (Cth)
Family Law Act	<i>Family Law Act 1975</i> (Cth)
Fam Law Rules	Family Law Rules

Fam Law Regs	Family Law Regulations
FLC	Family Law Council
Griffith Legal Aid Report	J Dewar et al <i>The impact of changes in legal aid on criminal and family law practice in Queensland</i> Faculty of Law Griffith University 1998
Hilmer report	National Competition Policy Review <i>National competition policy</i> AGPS Canberra 1993
ICS	Integrated Client Services
IDS	Individual Docket System
IRT	Immigration Review Tribunal
JCNSW	Judicial Commission of New South Wales
JRC	Justice Research Centre
Justice Research Centre Family Court Research Part One	Justice Research Centre <i>Family Court research part one: Empirical information about the Family Court of Australia</i> ALRC Sydney June 1999
Justice Research Centre Family Court Research Part Two	Justice Research Centre <i>Family Court research part two: The costs of litigation in the Family Court of Australia</i> ALRC Sydney June 1999
Justice Research Centre Family Court Research Part Three	Justice Research Centre <i>Family Court research part three: Comparison with the report on "The review of scales of legal professional fees in federal jurisdictions"</i> by Professor Philip Williams et al ALRC Sydney June 1999
Justice Statement	Attorney-General's Dept <i>Justice statement</i> A-G's Dept (Cth) Canberra 1995
LACs	legal aid commissions
LAFS	Legal Aid and Family Services, A-G's Dept (Cth)
LCA	Law Council of Australia
LIPs	litigants in person
Logan report	B Logan et al <i>Report of the review of the Attorney-General's legal practice</i> AGPS Canberra 1997
MacCrate report	American Bar Association <i>Legal education and professional development – An educational continuum (Report of the task force on law schools and the profession: Narrowing the gap)</i> ABA Chicago 1992
Matruglio T, Family Court Empirical Report Part Two	T Matruglio <i>Part two: The costs of litigation in the Family Court of Australia</i> ALRC Sydney June 1999
Matruglio T, Federal Court Empirical Report Part Two	T Matruglio <i>Part two: The costs of litigation in the Federal Court of Australia</i> ALRC Sydney 1999
Matruglio T & McAllister G Family Court Empirical Report Part One	T Matruglio & G McAllister <i>Part one: Empirical information about the Family Court of Australia</i> ALRC Sydney February 1999
Matruglio T & McAllister G Federal Court Empirical Report Part One	T Matruglio & G McAllister <i>Part one: Empirical information about the Federal Court of Australia</i> ALRC Sydney March 1999
MCLE	mandatory continuing legal education
Middleton report	P Middleton <i>Report to the Lord Chancellor by Sir Peter Middleton</i> GCB Lord Chancellor's Dept London 1997

Migration Act	<i>Migration Act 1958</i> (Cth)
MRT	Migration Review Tribunal
NADRAC	National Alternative Dispute Resolution Advisory Council
NNTT	National Native Title Tribunal
OLSC (NSW)	Office of the Legal Services Commissioner (NSW)
Ontario Civil Justice Review	Ontario Civil Justice Review <i>Civil justice review: First report</i> Ontario Court of Justice & Ministry of the Attorney-General Toronto 1995
Ontario Legal Aid Review	Ontario Legal Aid Review <i>Report of the Ontario Legal Aid Review: A blueprint for publicly funded legal services</i> Queen's Printer for Ontario 1999 < <a href="http://www.attorneygeneral.jus.gov.on.ca/olar">http://www.attorneygeneral.jus.gov.on.ca/olar</a> >
PD	Practice Direction
PDR	Primary Dispute Resolution
Pearce report	D Pearce et al <i>Australian law schools: A discipline assessment for the Commonwealth Tertiary Education Commission</i> AGPS Canberra 1987
PLT	practical legal training
RRT	Refugee Review Tribunal
SCAG	Standing Committee of Attorneys-General
Senate Legal Aid Inquiry	Senate Legal & Constitutional References Committee <i>Inquiry into the Australian legal aid system – Third report</i> Senate Printing Unit Canberra June 1998
Social Security Act	<i>Social Security Act 1991</i> (Cth)
SRC Act	<i>Safety Rehabilitation and Compensation Act 1988</i> (Cth)
SSAT	Social Securities Appeals Tribunal
Steering Committee report on government services 1999	Steering Committee for the Review of Commonwealth/State Service Provision (SCRCSSP) <i>Report on government services 1999 Volume 1: Education, health, justice</i> AusInfo Canberra 1999
Trade Practices Act	<i>Trade Practices Act 1974</i> (Cth)
TPC final report	Trade Practices Commission Final report <i>Study of the professions – Legal</i> TPC Canberra 1994
VRB	Veterans' Review Board
Wallis Inquiry	S Wallis <i>Financial system inquiry: Final report</i> AGPS Canberra 1997
Williams report	P Williams et al <i>Report of the review of scales of legal professional fees in federal jurisdiction</i> A-G's Dept (Cth) Canberra 1998
Woolf final report	Lord Woolf <i>Access to justice: Final report to the Lord Chancellor on the civil justice system in England and Wales</i> HMSO London 1996
Woolf interim report	Lord Woolf <i>Access to justice: Interim report to the Lord Chancellor on the civil justice system in England and Wales</i> Lord Chancellor's Dept London 1995

Woolf Rules

Lord Woolf *Access to justice draft civil proceedings  
rules* HMSO London 1996

WR Act

*Workplace Relations Act 1996* (Cth)

## Appendix E

### Government expenditure on legal services

The table gives an indication of government expenditure on legal services. Only those departments and individual agencies which showed a separate component for 'Compensation and legal services' in the 1998-99 budget papers have been included. For individual agencies where comparable information could not be found in annual reports, the table has been left blank.<sup>2659</sup>

#### Expenditure and appropriation for compensation and legal services

Department or agency	1997-98 Actual expenditure <sup>a</sup>	1997-98 Estimated expenditure <sup>b</sup>	1998-99 Budget appropriation <sup>b</sup>
Attorney-General's	4 974 000	4 812 000	4 172 000
Australian Federal Police	3 643 994	481 000	466 000
Human Rights and Equal Opportunity Commission	79 765	80 000	80 000
National Crime Authority	583 993	341 000	207 000
Australian Bureau of Criminal Intelligence		3 000	3 000
National Native Title Tribunal	0	101 000	103 000
Communication and the Arts	31 860	100 000	100 000
Defence	121 836 000	127 040 000	127 030 000
Employment, Education, Training and Youth Affairs	882 926	1 007 000	1 020 000
Environment		186 000	186 000
Finance and Administration		4 541 000	2 395 000
Australian Electoral Commission	36 429	275 000	284 000
Office of Government Information Technology		90 000	50 000
Australian National Audit Office		3 000	3 000
Commonwealth Superannuation Administration		490 000	—
Foreign Affairs and Trade	111 330	224 000	229 000
Australian Secret Intelligence Service		50 000	—
Health and Family Services	3 953 000	3 953 000	4 047 000
Immigration and Multicultural Affairs	2 517 000	3 006 000	3 551 000
Industry, Science and Tourism	332 237	850 000	605 000
Australian Customs Service	2 070 000	3 908 000	3 966 000
Primary Industries and Energy	133 000	296 000	305 000
Australian Geological Survey Organisation		58 000	58 000
Prime Minister and Cabinet	575 087	464 000	450 000
Public Service Commissioner		10 000	10 000

<sup>2659</sup> Departments are named as at time of release of Budget Paper No 4 in 1998. A number of departments have since been restructured, renamed, or dissolved

Social Security	1 406 656	1 120 000	1 499 000
Transport and Regional Development	1 210 728	1 568 000	1 589 000
National Capital Authority	51 987	52 000	53 000
Treasury	112 748	700 000	943 000
Australian Bureau of Statistics	30 913	72 000	74 000
Australian Taxation Office	16 379 725	15 230 000	1 000 000
Australian Competition and Consumer Commission	2 570 856	3 203 000	3 386 000
Insurance and Superannuation Commission	163 454	120 000	319 000
Veterans' Affairs	1 580 143	1 330 000	2 379 000
Workplace Relations and Small Business	449 000	511 000	391 000
<b>Total</b>	<b>—</b>	<b>176 275 000</b>	<b>160 953 000</b>

a Source: Annual reports.

b Source: 1998-99 Budget paper No 4.

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