Government Response to Recommendations of Australian Law Reform Commission Report *Managing Justice: A review of the federal civil justice system* (ALRC 89)

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

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

Response: This recommendation is strongly supported. The Australian Research Council (ARC) supports and encourages collaborative approaches to research. The Linkage-Projects Program (formerly known as the SPIRT Scheme) has as its principal aim the support and development of long-term strategic alliances between higher education institutions and industry. The Commonwealth provides funds to universities for collaborative research projects with matching contributions provided by industry partners. Industry partners are broadly defined and may include private sector industry organisations, Government agencies or non-profit organisations.

In 2002 the ARC funded 44 research projects in the areas of law, justice and law enforcement under the Linkage-Projects Program worth $2,002,487. These projects had a total of 82 industry partners including:

- Association of Australian Magistrates;
- Environmental Defenders Office of North Queensland;
- Guardianship and Administration Tribunal;
- a range of courts, including Magistrates Courts in the Australian Capital Territory, Northern Territory, Queensland, South Australia, Tasmania and Victoria; and
- Catholic Social Services.

Other ARC programs also support collaborative research in law and justice. The ARC's Linkage-Infrastructure Program supports the development of an online national

legal research facility at the Australasian Legal Information Institute. Partners in the development of this facility include universities, government departments and private sector companies.

Chapter 2. Education, training and accountability

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

Response: This recommendation is a matter for university legal education authorities in the States and Territories. The Government supports the objectives of the recommendation and commends further consideration, in particular in light of the outcomes of current research on the combination of practical skills with academic training.

On 8 March 2002, the Standing Committee of Attorneys-General (SCAG) agreed to the development of nationally uniform laws for the regulation of the profession. SCAG will consider a range of proposals dealing with the admission of legal practitioners; practice (including the issuing of practising certificates, the separate regulation of solicitors and barristers and the making of practice rules); the reservation of legal work and the titles of legal practitioners; trust accounts; insurance and fidelity cover; complaints and discipline; and costs disclosure and the review of legal costs. Detailed proposals and model legislation are in the process of being developed, in consultation with the Law Council of Australia.

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

Response: This recommendation is primarily a matter for university law schools.

The Government understands that there is already a variety of quality assurance mechanisms in place in Australian law faculties and schools and most engage in regular review of their academic programs. In addition, all publicly funded higher educational institutions in Australia are subject to the audit processes of the Australian Universities Quality Agency on a 5 year rotation basis commencing in January 2000. These are whole-of-institution audits focussing on quality assurance across the institution's teaching and learning, research and management functions.

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

Response: The Government notes this recommendation and does not consider there is any demonstrated need for such a national discipline review at this time.

The Government is funding, through the Australian Universities Teaching Committee, a national project into learning outcomes and curriculum developments in law. The report is currently being finalised. While this is not a discipline review, the report assesses the impact on legal education in Australia of recent innovations in teaching, learning and curriculum development. It highlights examples of best practice and provides an indication of the quality of legal education.

Furthermore, as the Council of Australian Law Deans observed in comments on this recommendation made to the Government, it is not clear what purpose a discipline review would fulfil in the context of quality assurance mechanisms.

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

Response: This recommendation is primarily a matter for State and Territory admitting authorities. The Government understands that existing practical legal training requirements are sufficiently flexible to permit a diversity of approaches without reducing standards.

The Commonwealth Clinical Legal Education Program, which commenced on 1 July 1999, comprises 4 law clinics operated by a partnership arrangement between a university and a community legal service. The clinics enable supervised senior law students to gain valuable experience in the provision of legal assistance to disadvantaged clients. Through pursuit of educational objectives the program also promotes appreciation of public interest legal services.

As noted above, (see response to recommendation 2) SCAG is in the process of developing detailed proposals and model legislation for admission and legal education standards.

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

Response: The Government has consulted with relevant stakeholders. There is no consensus on whether the proposed Academy is appropriate. The Government does not consider there is any need for the further facilitation of the process recommended by the Commission. This is a matter for major stakeholders.

Recommendation 7. As a condition of maintaining a current practising certificate, all legal practitioners should be obliged to complete a program of professional development over a given three year period. Legal professional associations should ensure that practitioners are afforded full opportunities to undertake, as part of this regime, instruction in legal ethics, professional responsibility, practice management, and conflict and dispute resolution techniques.

Response: This recommendation is a matter for legal professional associations. The Government supports the principle of the profession engaging in continuing legal education.

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

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

Response: The Government accepts this recommendation.

At the initiation of the federal Attorney-General, the Standing Committee of Attorneys-General decided on 24 March 2000 to establish a working group to advise the Standing Committee and the Attorney-General on issues relating to a judicial college for the professional development of judges and judicial officers on a national basis. The Working Group, comprising judicial officers from Commonwealth and State courts and officers from the Commonwealth, New South Wales, Victorian and Western Australian Governments, reported in May 2001. That report was considered by the Standing Committee of Attorneys-General at its meeting on 25 July 2001. At that meeting the Attorneys-General agreed in principle to establish a national judicial college. The Commonwealth is to contribute 50% of the funding for the administration of the College. In addition to this funding, and that provided by participating States and Territories, fees will be charged for programs and courses.

The National Judicial College of Australia was incorporated on 16 May 2002. Governance of the College is vested in a 6 member council, comprising 4 judicial members from across the courts and 2 non-judicial members, one chosen by the federal

Attorney-General and the other by the State and Territory Attorneys-General. Chief Justice Doyle of the Supreme Court of South Australia is Chair of the College Council. The Secretary of the Commonwealth Attorney-General's Department, Robert Cornall, is the federal Attorney-General's appointee.

The courses to be offered by the College will be decided by the Council, on the advice of a Consultative Committee, which includes both judicial and non-judicial members drawn from all States and Territories. Consultations are under way on specific courses that are to be provided by the College. It is expected that the courses will commence in the second half of 2003.

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

Response: This recommendation is a matter for federal review tribunals.

Professional development activities take place in the Administrative Appeals Tribunal and other tribunals. The Government understands that, through heads of tribunals meetings, discussions are being held on arrangements for sharing professional development activities. In particular, the constitution of the new Council of Australasian Tribunals (see response to recommendation 10) includes the following objects:

(c) to provide training and support for members of tribunals, particularly smaller tribunals which may not have the resources to undertake such activities alone;

(f) to develop standards of behaviour and conduct for members of tribunals;

(g) to develop performance standards for tribunals.

Tribunals will also be assisted by the outcome of a 2000-2001 project undertaken by the Administrative Review Council. This project, which examined the ethical responsibilities, accountability, and personal and professional standards of members of merits review tribunals, resulted in *A Guide to Standards of Conduct for Tribunal Members* (September 2001).

Recommendation 10. A Council on Tribunals should be established as a national forum for tribunal leadership to develop policies, secure research and promote education on matters of common interest. The membership of the Council on Tribunals

should include the heads of federal and state tribunals engaged in administrative review and the President of the Administrative Review Council. The functions of the Council on Tribunals should include: developing performance indicators, charters, benchmarking, and best practice standards in tribunal management, practice and procedure, and professional development; improving and coordinating data collection arrangements; developing research and information services for decision making; and developing policies on tribunal member selection, induction and training.

Response: The Government accepts this recommendation.

At the Attorney-General's request, the Administrative Review Council facilitated a process to bring together tribunals interested in forming a Council of Australian Tribunals.

The inaugural meeting of the Council was held on 6 June 2002. The concept of a Council of Australian Tribunals was expanded at that meeting to the Council of Australasian Tribunals. The Council is made up of Commonwealth, State, Territory and New Zealand tribunals.

The Council will facilitate liaison and discussion between the heads of tribunals and establish a national network for members of tribunals to consult and discuss areas of concern or interest. The Council's objects include the development of model procedural rules, standards of behaviour and conduct for members and training and support for members of tribunals.

Further information is available in the Administrative Review Council's *Report on the Council of Australasian Tribunals* (October 2002) which is available from the Council in printed form, or electronically through the Council's website (www.law.gov.au/arc).

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

In its annual report to Parliament, each court and review tribunal should provide statistical details of its complaints handling experience under its protocol. This should include the number of complaints received, to the extent possible a breakdown by categories (for example, allegations of delay in delivering judgment, or discourtesy), and outcomes.

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

Response: This recommendation is a matter for federal courts and review tribunals. In view of the independence of courts and tribunals, it is a matter for each court and tribunal to determine how to deal with complaints.

Some courts and review tribunals already have protocols for handling complaints and some publish in their annual reports information about how they deal with complaints and statistics on numbers and types of complaints. These include the Family Court, which includes information in its Annual Report on the numbers, categories, and outcomes of response to complaints made, and the Administrative Appeals Tribunal, which provides information to applicants on how to make complaints and includes in its Annual Report information on numbers, categories, client satisfaction with outcomes and timeliness of response to complaints made. The Federal Magistrates Service also provides information about complaints in its annual report.

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

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

Response: While this recommendation is directed at Parliament, the Government supports the examination of the adoption of such a protocol and is currently in the process of developing such a protocol for Parliament's consideration. Whether or not a protocol should be adopted and the contents of any protocol are ultimately a matter for the Parliament.

Chapter 3. Legal practice and model litigant standards

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

Response: This recommendation is a matter for legal professional associations and State and Territory regulatory authorities. However, the Government supports the development and implementation of national model professional practice rules and has

been advised that the Law Council of Australia and the Australian Bar Association have developed and adopted model rules.

The Law Council advised the Government that its *Model Rules of Professional Conduct and Practice* were reviewed and comprehensive model rules were adopted at the Council meeting on 16 March 2002. Copies of the rules have been circulated to Commonwealth, State and Territory Attorneys-General. SCAG (see response to recommendation 2) is considering the adoption of consistent standards to govern the disciplining and striking-off of errant members of the profession.

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

Response: This is a matter for the Law Council of Australia. The Law Council has advised the Government that it does not support inclusion of commentary as part of national model professional practice rules, although it is not opposed to the development of separate commentary that is not part of the rules.

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

Response: The Government supports the thrust of this recommendation, and notes that implementation is a matter for the Law Council of Australia.

As noted in response to recommendation 13, the Council's *Model Rules of Professional Conduct and Practice,* were adopted at the meeting on 16 March 2002 and copies have been circulated to Commonwealth, State and Territory Attorneys-General.

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

- incorporate a rule consistent with Rule 11 of the United States Federal Rules of Civil Procedure, which requires practitioners and unrepresented parties to consider the purpose and content of pleadings and other papers before presentation to the court or tribunal. The standard applied should be 'to the best of the practitioner's knowledge and information'.

- are consistent with proposed New South Wales Bar Association rules, requiring practitioners to limit presentation of their case to genuine issues and to complete work in time constraints set by the court and occupy as short a time in court as is reasonably necessary to advance and protect the client's interests.

Response: The Government supports the thrust of this recommendation, and notes that implementation of this recommendation is a matter for the Law Council of Australia.

This recommendation was considered in the review of the Council's *Model Rules of Professional Conduct and Practice* (see above).

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

Response: This recommendation is a matter for federal courts and tribunals. The Government has been advised that the Federal Court has amended its Rules so as to require a legal representative who has prepared a pleading to sign a certificate to the effect that the factual and legal material available to the representative provides a proper basis for each allegation in the pleading, each denial in the pleading, and each non-admission in the pleading. The Family Court has advised that it does not support the recommendation. However, in the context of a broad review of its rules (see below at chapter 8) which the Family Court is undertaking, a certificate for all applications in similar terms to that contained in this recommendation has been included in draft new rules to be circulated for consultation. The Court's position will be considered further in light of responses.

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

Response: The Government supports the thrust of this recommendation, and notes that implementation is a matter for the Law Council of Australia. The Law Council of Australia has advised the Government that it supports this recommendation and that it supports the new NSW Barristers' Rules, Rule 17A (dealing with circumstances in which clients should be advised of alternatives to litigation) which it considers would, in part, meet this recommendation.

The Report of the Family Law Pathways Advisory Group has recommended the development of a national code of conduct for lawyers practising in family law. In response to that recommendation, the Family Law Section of the Law Council of Australia and the Family Law Council are working together to develop best practice guidelines for family law practitioners.

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

Response: The Government supports the thrust of this recommendation, and notes that implementation is a matter for the Law Council of Australia. See response to recommendation 14.

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

Response: This recommendation is a matter for the Law Council of Australia. The Law Council of Australia has advised the Government that it does not support this recommendation and it does not believe that there should be a distinction between professional conduct when lawyers are engaged in ADR and at other times. The Law Council also does not believe that separate national practice rules relating to lawyers acting for clients during ADR processes are either necessary or desirable.

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

Response: This recommendation is a matter for legal professional associations. However, the Law Council of Australia has advised the Government that it does not support a distinction being made between the professional conduct of legal practitioners engaged in family law matters and those engaged in other areas of law, but has nonetheless left open the possibility of development of national model guidelines for family law practitioners.

The Government sees merit and potential benefits for family practitioners, other practitioners representing children and their clients in the development of national model professional practice rules or guidelines. As indicated above in relation to recommendation 18, the Family Law Section of the Law Council of Australia and the Family Law Council are working together to develop best practice guidelines for family law practitioners. This is in response to a recommendation of the Family Law Pathways Advisory Group.

As part of the Government's Stronger Families and Communities Strategy, the Attorney-General and the Minister for Family and Community Services jointly set up the Family Law Pathways Advisory Group to advise government on making the family law system more accessible and responsive. The Advisory Group was comprised of family law experts, representatives from government, the community and academia and a social commentator to provide expert guidance and recommendation with the focus of better outcomes for families following marriage and relationship breakdown.

The Advisory Group's report to Government recommended (at recommendation 4) that:

> " all professionals and key staff working in the family law system adopt a multi-disciplinary approach to resolving issues for families, and that priority be given to the following strategies to support such a holistic approach:
>
> (g) development of a national code of conduct for lawyers practising in family law to reflect the principles outlined in the report and to include a commitment to actively promote non-adversarial dispute resolution and other good practices. Lawyers who subscribe to and observe the code should be readily identifiable to clients and service providers;
>
> (h) replacement of accreditation schemes for family lawyers which currently exist in some States by a national scheme, which links with the national code and the identification mechanism above;
>
> (i) requirement for regular continuing legal education for lawyers who wish to be known as supporters of the national code;
>
> ……
>
> (h) adoption of a multicultural perspective by all professionals and key staff working with members of culturally and linguistically diverse communities, and indigenous communities."

The Attorney-General's Department commissioned NFO Donovans Research to conduct research to find out about what information people need and how better to communicate information to them. Donovans found that 37% of people went to a lawyer first and only 6% went to the Court first. A further finding was that if people reached a settlement using a lawyer then they were more likely to report, after that

settlement, that they experienced increased conflict. The increased conflict was even more marked when people reached settlement by court order. However, those people who resolved their dispute by agreement were much more likely to experience less conflict after settlement. Donovans Research also found that, currently, lawyers only seem to refer to other lawyers.

The Department also commissioned research into how parents put their children's best interests first. This research examined people's perceptions about post-separation parenting. The findings of the research will inform future policy in relation to services aimed at improving post-separation parenting and, most importantly, at improving the outcomes for children.

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

Response: This recommendation is a matter for the Law Council of Australia. The Government understands that there are a variety of mentoring schemes for family law practitioners already in existence.

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

Response: The Government accepts this recommendation in principle.

The Attorney-General's Department will be conducting a review of the *Legal Services Directions on the Commonwealth's Obligations to Act as a Model Litigant* during 2003. This review will include the possibility of adding further commentary and examples to assist in understanding the requirements of the Legal Services Directions, as part of a general review of the Directions.

Attention will be focussed on ensuring that the statements of principle embodied in the Model Litigant Directions are of greater practical assistance, but not unnecessarily prescriptive.

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

Response: The functions of the Office of Legal Services Coordination (OLSC) in the Attorney-General's Department already include responsibility for investigating complaints relating to non-compliance with the *Legal Services Directions on the Commonwealth's Obligation to Act as a Model Litigant*. The *Compliance Strategy for the Enforcement of the Legal Services Directions*, developed by OLSC and published on its website, includes reference to the broad range of sanctions that may be imposed for a breach of the Legal Services Directions. The review referred to in the response to recommendation 23 will consider directly incorporating in the Legal Services Directions a reference to sanctions for a breach of the Directions.

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

Response: The Government accepts this recommendation in principle. The proposal for a coordinated approach to federal government dispute management, involving dispute avoidance and management plans, concerns government administration generally and goes beyond legal matters within the Attorney-General's portfolio responsibilities. For example, dispute avoidance and management plans can come within the *Client Service Charter Principles* (administered by the Department of Finance and Administration) and risk management programs undertaken by departments.

The Office of Legal Services Coordination (OLSC) in the Attorney-General's Department already undertakes an active role in relation to legal matters by promoting awareness of the *Legal Services Directions on the Commonwealth's Obligation to Act as a Model Litigant*. The enforcement strategy developed by OLSC, and available on its website, includes an emphasis on education about the content of the Legal Services Directions. As part of a review of the Directions, conducted by OLSC, consideration will be given to enhancing references in the Directions to alternate dispute resolution procedures. OLSC will liaise with the National Alternative Dispute Resolution Advisory Council in relation to appropriate amendments to the Directions. Further education and training will take account of any changes to the Directions as a result of the review. Any financial implications arising from this recommendation will require separate consideration at a later date.

Chapter 4. Legal costs

Recommendation 26. The federal Attorney-General, through the Standing Committee of State and Commonwealth Attorneys-General, should encourage all States and Territories to enact similar legislation to harmonise the requirements for solicitors and barristers to disclose actual, expected or charged fees, with the additional requirement

that solicitors and barristers advise their lay and professional clients from time to time, and not less than once every six months, of costs incurred to date and provide an estimate of the future cost of resolving the dispute. Nondisclosure of estimated costs should constitute grounds to cancel or rescind the agreement and a finding of professional misconduct. Where barristers are directly briefed by a lay client, the disclosure rules should be equivalent to those for solicitors.

Response: One of the areas to be addressed by SCAG as part of the process of developing uniform national regulation of the legal profession (see the response to recommendation 2) is costs disclosure. Detailed proposals in relation to costs disclosure, including model legislation, are being developed by SCAG.

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

Response: The Government supports the thrust of this recommendation, and notes that implementation is a matter for the Law Council of Australia. The Law Council has advised the Government that it considers that the American Bar Association rule provides a useful model for practice guidance, but such a rule should not be adopted as a conduct rule.

In relation to the Commission's recommendation that charging unreasonable or gross fees should constitute unsatisfactory professional conduct or professional misconduct, SCAG (see response to recommendation 2) will address consistent standards to govern the disciplining of the legal profession.

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

Response: This recommendation is a matter for the Commonwealth Parliament.

The Government notes, however, that this recommendation deals with matters which are considered by the Government when legislation is being developed, in the light of relevant policy considerations and expected budgetary and other financial impacts.

Recommendation 29. The federal Minister for Financial Services and Regulation should ask the Commonwealth Consumer Affairs Advisory Council to assume

responsibility for providing independent advice and information to consumers on consumer issues relating to the provision of legal services.

Response: The Government does not accept this recommendation. Consumer issues relating to the provision of legal services are matters for State and Territory Governments and for law societies. The Commonwealth Consumer Affairs Advisory Council is not an appropriate body to perform such a function.

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

Response: This recommendation is a matter for legal professional associations and State and Territory regulatory authorities.

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

Response: This recommendation is a matter for federal merits review tribunals.

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

Response: This recommendation is not accepted. The separate appropriation formerly known as 'compensation and legal' to which the recommendation refers was discontinued on 30 June 1999. The relevant distinction is now between 'administered' and 'departmental' items. Legal expenses fall within 'departmental' items. The general assumption is that all compensation and legal expenses are 'departmental' items, included in the price of output appropriations. Therefore, it is not proposed to amend the annual report requirements.

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

- The fee scale amounts set out in the Williams proposal should be recalculated to reflect market based fees paid to practitioners for work associated with case events and reasonably required.

- The judicial assessment of case complexity should be open to reassessment, by leave, at the conclusion of discovery.

- The fee scale matrix should be amended to allow for costs to be allocated to additional case events.

Response: The Government supports in principle the introduction of event based fee scales.

Implementation is ultimately a matter for the relevant courts. The Attorney-General's Department has established a working group examining the implementation of event based fee scales in family law. The working group includes the Family Court of Australia and the Law Council of Australia. The Federal Court and the High Court are also examining the implementation of event based fee scales in consultation with the Law Council.

The Federal Magistrates Court Rules 2001, which commenced on 30 July 2001, provide for event based fee scales for party-party costs (see Rule 21.10).

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

Response: The Government has deferred further consideration of this recommendation pending the outcome of current discussions on implementation of event based fee scales.

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

Response: The Government does not accept this recommendation. The Government considers that it is equitable for corporations to pay higher fees than individuals given that, in general, they have a greater capacity to pay, have higher rates of participation in litigation, and their fees are generally tax deductible.

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

Response: The Government accepts this recommendation in part.

Federal Court fee scales already increase as a case progresses to hearing and each notice of motion in the Federal Court already attracts a fee.

However, this recommendation assumes that the length of a hearing is always within the control of the initiating party and, accordingly, there is a risk that a party will unfairly incur extra fees when proceedings are protracted by the other party. This may be of particular relevance in family law cases and, accordingly, it is not considered appropriate to impose fees for interim applications in family law cases. Appropriate waiver and fee exemptions will continue to apply in order to safeguard access and equity interests.

Chapter 5 Legal assistance

Recommendation 37. Legal professional associations should urge members to undertake pro bono work each year in terms similar to that stated in American Bar Association Model rules of professional conduct rule 6.1.

Response: This recommendation is a matter for legal professional associations.

The Government has a strong interest in increasing pro bono activity and has pursued initiatives such as the first national pro bono conference in August 2000 to promote and develop pro bono work by the legal profession. This event was very well received and has provided an excellent platform for the Government and legal community to work together to further pro bono activity.

One of the many positive outcomes of the conference was the establishment of the National Pro Bono Taskforce, chaired by Professor David Weisbrot, President of the Australian Law Reform Commission. The Attorney-General established the Taskforce to build on the outcomes of the conference in relation to the promotion of pro bono schemes, best practice and quality assurance guidelines. The Taskforce presented its report in June 2001.

A key recommendation of the report was to establish a pro bono resource centre. The Government supported this recommendation and has committed $1 million over four years to support the establishment of the centre, and other recommendations from the Taskforce report. The centre was incorporated in October 2002 and will be responsible for organising the 2nd National Pro Bono Conference to be held in late 2003. Key objectives of the centre will be to:

- promote pro bono work throughout the legal profession;
- provide practical assistance and support to existing and potential pro bono service providers (including reviewing and reporting on the pro bono work being undertaken nationally);
- to make information and resources available to existing and potential pro bono service providers; and
- to promote pro bono law to community organisations and the general public.

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

Response: This recommendation is a matter for State and Territory legal education bodies and legal profession associations.

Since 1 July 1999 the Government has provided funding for the Clinical Legal Education Program which aims to develop clinical programs with a significant focus on community legal service for disadvantaged clients. As well as benefiting the most disadvantaged members of the community, the program provides educational benefits to law students and in the longer term will act to enhance the role of clinical legal education in shaping the legal profession in terms of practical legal skills and facilitating community involvement.

The National Pro Bono Task Force examined the activities that law schools are currently engaged in to promote pro bono and included in its report a discussion paper on means to promote further a pro bono ethos in law schools. The paper suggests nine strategies that law schools could implement to build on present gains. One strategy is that law schools should invest time and resources on activities that offer students the opportunity to participate in a variety of clinical programs.

The National Pro Bono Resource Centre has identified a number of possible projects aimed at promoting law students interests in pro bono, and including issues of relevance to pro bono within law school curriculum and/or practical legal training.

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

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

Response: The Government notes this recommendation, which is directed at legal aid commissions.

The Commonwealth and the legal aid commissions have been working together to standardise data collection. Legal aid agreements for the period 2000-2004 incorporate the Commonwealth's revised performance information collection and monitoring and reporting framework, including financial, quantity and quality information, and stress that the data must be collected on a common basis by all commissions. Data collected includes all items specified in this recommendation except data in relation to case and conference outcomes, which have proved difficult to categorise in a meaningful manner.

Recommendation 40. Federal courts and tribunals should publish data in their annual reports on the number of unrepresented parties. In gathering such data, courts and tribunals should consult to develop a standard definition of 'unrepresented party' and information on case outcomes and case duration in matters where there is an unrepresented party.

Response: This recommendation is a matter for federal courts and tribunals.

Some significant activities relating to unrepresented litigants include:

- the Family Court project, 'Self-represented Litigants – a Challenge', launched on 5 December 2000, which is aimed at developing a

coordinated national approach to service delivery for self-represented litigants;

- the Family Law Council's report, *Litigants in Person* (August 2000), which examined the effects of self-representation on the way in which a case was conducted;

- the Family Court Future Directions Committee's report (July 2000) on problems confronting self-represented litigants, which lists recommendations for improving the efficiency and effectiveness of court services;

- the Federal Court's review of issues associated with self-represented litigants. As part of this exercise, the Court's data collection and reporting will be refined, and recommendations made for improving the efficiency and effectiveness of court services for self-represented litigants. It is intended that, once the review is completed, the Court's data on self-represented parties will be published in its annual report;

- the establishment of the Federal Magistrates Service in July 2000, which provides a simple and accessible service for litigants with less formal procedures than the Federal and Family Courts. Information about self represented litigants is provided in the court's annual report;

- the Administrative Appeals Tribunal Outreach Program, which provides information about the Tribunal's practices and processes to people who are unrepresented.

Recommendation 41. The federal government's expensive cases fund should be open to applications on behalf of parties in all complex, expensive cases in the federal jurisdiction, include:

Response: The Government does not support this recommendation.

An expensive cases fund for Commonwealth criminal matters was established on 1 January 2000. This fund will ensure that the costs of any one complex criminal matter do not divert funds away from other matters of priority to the Government, particularly in the area of family law.

Family law matters are already accorded a high priority in the provision of Commonwealth legal assistance, accounting for 85% of such expenditure. The Government is of the view that its guidelines in relation to family law matters provide sufficient flexibility to deal with expensive cases. For example, if it is likely that costs in any grant of legal assistance for family law matters will exceed $10,000 for party professional costs and $15,000 for child representative's costs:

- arrangements may be made that give the commission greater control of the case, and therefore the costs, for example, ensuring that the case is handled in-house, using retained counsel, or negotiating a fee package with a service provider so that the matter may be handled by a private practitioner, or

- legal assistance is increased by an amount determined by the chief executive officer of the relevant commission after taking into account advice from the Family Court.

The Attorney-General has also agreed to waive these caps for separate representatives and legally aided parents of children whose cases will be managed under the Family Court of Australia's Magellan project. The waiver will be in place for a trial period until 30 June 2004.

Recommendation 42. The federal government should commission research to evaluate the intake procedures used by legal aid commissions to screen and assess applications for legal aid and to determine legal aid services for successful applicants.

Response: The Government considers that existing arrangements adequately implement this recommendation and no further research is necessary.

The Government sets priorities and guidelines for the provision of legal assistance under legal aid agreements but it leaves day to day operational decisions, such as the intake procedures used to screen and assess applications, to the commissions themselves. Legal aid commissions have a responsibility to ensure that the method of providing services is the most efficient and effective method available.

Under the current legal aid agreements, the performance of legal aid commissions in delivering services will be monitored on an ongoing basis. The Government has identified equity and access to services as one of the areas in which it will be seeking performance improvement. In addition, the Government provided funding in the 1999-2000 Budget for the development and implementation of a nationally consistent family violence awareness training package for intake/screening staff of primary dispute resolution programs in legal aid commissions. This training package has now been completed, with intake/screening staff of primary dispute resolution programs in legal aid commissions undertaking training in August 2002.

Recommendation 43. Legal aid commissions should develop effective mechanisms for identifying priority cases and clients in family law matters. Such priority clients should be assigned to inhouse legal aid lawyers wherever possible. Where an inhouse lawyer is unable to act for a priority client, referral should only be made to private practitioners who are experienced in family law work.

Response: This recommendation is a matter for legal aid commissions.

All legal aid commissions have mechanisms in place for identifying priority cases and clients in family law matters. Assignment practices take into account the Government's requirement that matters arising under Commonwealth law be undertaken in the most efficient and cost effective manner. The Government sets out its priorities for service delivery in the Commonwealth legal aid guidelines. However, the Government does not accept that it is always preferable to assign priority family law matters in-house.

Recommendation 44. Legal aid commissions, in conjunction with law societies and bar associations, should approve panels of lawyers to act in priority family law cases. Payments should be structured so as to retain the services of specialist family law practitioners. In that regard, legal aid commissions also should consider establishing a pro bono scheme in which participant panel lawyers who provide set, agreed, pro bono services are paid at a commensurably higher rate for performing other legal aid work.

Response: This recommendation is a matter for legal aid commissions. The Government notes that some commissions maintain panels of lawyers to act in priority family law cases, such as separate representation cases.

Recommendation 45. The Family Law and Legal Assistance division of the federal Attorney-General's Department, in consultation with legal aid commissions, should develop new procedures for assessing and imposing funding limits upon legally aided, family law cases. Such new procedures should ensure that

- 'stage of matter' grants focus on early opportunities for case resolution, including negotiations aimed at the resolution of a dispute, the preparation of preliminary stages of litigation or particular PDR processes, and obtaining evidence such as medical reports

- uniform caps are replaced by capping procedures directed at particular stages or events in the individual case

- exceptional additional payments are available in cases approved at director level as requiring funds beyond the cap for a certain stage and provision should be made for such payments to be drawn from the separate fund for expensive, complex cases, as stated in recommendation 41

- stage limits and caps, set for particular legally aided clients remain strictly confidential.

Response: The Government accepts this recommendation with the exception of the establishment of a separate fund for expensive, complex family law cases. Family law matters are already accorded a high priority in the provision of Commonwealth legal

assistance, accounting for 85% of such expenditure. The Government is of the view that its guidelines in relation to family law matters provide sufficient flexibility to deal with expensive cases.

The Government supports a stage of matter approach to legal aid grants in family law and endorses a focus on early opportunities for case resolution. The Commonwealth legal aid guidelines set out a stage of matter funding model for family law legal aid assignments with a view to ensuring national consistency in assignments of family law matters. The model follows the Family Court's case management system and will be updated as changes to the Court's procedures are implemented. The model also applies to matters in the Federal Magistrates Service. Commissions may implement the model on a lump sum or maximum fee basis. Overall costs limitations on family law cases have been retained pending an evaluation of the cost impact of the model. The model is designed to encourage where possible the use of means other than litigation to resolve disputes. For example, a grant of aid for primary dispute resolution is available for eligible applicants at any stage of a family law matter, whether prior to making an application to the court or at any time during the litigation process. The guidelines (which incorporate the stage of matter limits) are not confidential, but details of particular grants remain confidential.

Commissions may extend a grant of legal assistance in a family law matter by an amount determined by the commission's chief executive officer after having regard to advice from the Family Court about the length of time required for the hearing of the matter. There will be a waiver of caps for separate representatives and legally aided parents and children whose cases are managed under the Magellan project for a trial period until 30 June 2004.

Recommendation 46. Legal aid commissions should review their practices to allow for grants of aid to be made for family law property matters, subject to a charge levied on the property in dispute.

Response: The Government supports the provision of legal assistance in property matters but considers that other matters may be more urgent and should be given greater priority, eg matters in which a child's safety or welfare is at risk, the applicant's safety is at risk, there is an immediate risk of removal of a child from, or to a more remote part of, Australia, or there is a need to preserve assets.

The Commonwealth guidelines, which came into force on 1 July 2000, allow legal aid commissions to act in family law property matters where each party's equity does not exceed $100,000. This has substantially increased the number of family law property matters in which commissions can act. Many commissions already impose a contribution on the client which is secured by an equitable charge over property in dispute in family law matters.

Recommendation 47. Legal aid commissions should investigate establishing self-funding arbitration schemes for family law property disputes, with a fee calculated by reference to the value of the property in dispute.

Response: The *Family Law Amendment Act 2000* revised the provisions for arbitration in family law so that people can opt to have their property matter arbitrated. Funding has been provided to Legal Aid Queensland and the Legal Aid Office (ACT) to trial arbitration schemes for property disputes under the Family Law Act as part of those commissions' primary dispute resolution programs.

Recommendation 48. The Department of Immigration and Multicultural Affairs should reconsider IAAAS funding and priorities. Assistance should be available for the preparation of protection visa applications and/or applications to the Refugee Review Tribunal in cases where there is a strong likelihood of the applicant ultimately qualifying for the visa — for example, where the applicant is from a country with a high success rate for protection visas. Assistance should also be provided for cases before the AAT concerning visa cancellation and deportation. Selection criteria for firms and agencies receiving IAAAS funding should have regard to practitioners' experience in migration, refugee and administrative law matters.

Response: The Government does not accept this recommendation. The Government does not consider that IAAAS funding and priorities should be subject to any significant change and is satisfied that its existing procedures adequately ensure the quality of services available from providers receiving IAAAS funding. Existing arrangements provide some assistance with protection visa applications at primary and merits review levels and the Government does not consider it would be possible to identify the particular protection visa application which would have a "strong likelihood" of success. The Government does not propose to extend IAAAS assistance to cases before the Administrative Appeals Tribunal concerning visa cancellation and deportation matters.

Where appropriate, asylum seekers may also seek legal assistance under the general statutory scheme provided for by section 69 of the *Administrative Appeals Act 1975*. Under this scheme legal assistance may be available to a party to AAT proceedings, or on appeal from the AAT to the Federal Court in relation to decisions made under the *Migration Act 1958* that are reviewable by the AAT. This may include certain decisions of the Minister or his delegate to refuse or cancel visas, including protection visas, and certain deportation issues.

Recommendation 49. Commonwealth legal aid guidelines should be modified to allow limited grants of aid in veterans' matters to clients who satisfy a merit test, to be available for the purposes of

- paying for necessary early disbursements, such as medical reports

- conducting initial negotiations and drafting correspondence to the Department of Veterans' Affairs in respect of refused applications which have a strong likelihood of success on review.

Response: The current Commonwealth legal aid guidelines permit funding to be granted for non-complex and complex war veterans' matters. In relation to non-complex matters this funding provides for up to $2,500 for the following costs and disbursements:

- a maximum of 10 hours for work up to and including the second preliminary conference (including all attempts to settle the matter);
- up to 2 medical reports;
- a maximum of 12 hours work for the hearing (including all preparation and either the costs of a solicitor or the fees of a barrister for appearing at the hearing); and
- witness expenses.

Recommendation 50. The Department of Veterans' Affairs, the Repatriation Commission and legal aid commissions should cooperate to establish panels of agreed medical experts and processes for the early resolution of disputes.

Response: The Government supports the establishment of processes for the early resolution of disputes in veterans' matters but does not consider the establishment of panels of agreed medical experts is necessarily the most appropriate way to achieve this outcome.

In the course of revising the operation of the War Veterans' Legal Aid Scheme during 1999, the Attorney-General's Department considered whether panels of agreed medical experts should be established for war veterans' matters. However, responses from legal aid commissions and ex-service organisations revealed concerns about natural justice for veterans, in that the establishment of panels of agreed medical experts would restrict access to a medical practitioner of choice.

Recommendation 51. Commonwealth legal aid guidelines should be modified to allow limited grants of aid in social security matters, to clients who satisfy the means and merits test, to be available for the purposes of

- paying for early necessary disbursements, such as medical reports

- conducting initial negotiations and drafting correspondence to Centrelink in respect of refused applications.

Response: The Government has established priorities for the provision of legal assistance. High priorities include family law matters, especially matters relating to children, serious criminal law matters and war veterans' matters. While civil law matters are generally accorded a lesser priority, the following matters arising under a Commonwealth Act are considered a priority:

- A decision affecting the receipt or amount of Commonwealth employees' compensation or a Commonwealth pension, benefit or allowance (including a pension, benefit or allowance under Commonwealth legislation relating to war veterans);

- A decision or action by a Commonwealth authority in relation to a person that has a real prospect of affecting the person's capacity to continue in his or her usual occupation;

- Discrimination;

- Migration (subject to circumstances set out in guideline 3, Part 4);

- Consumer protection matters.

Recommendation 52. The Attorney-General's Department should establish a 'first port of call' online information service to act as a central point of reference and referral for anyone seeking general information on a civil legal matter.

Response: The Government accepts this recommendation. On 21 June 2001, the Attorney-General launched Australian Law Online, which comprises:

- A 'first port of call' website at www.law.gov.au for all information and services provided by the Commonwealth Attorney-General's Department. This website will be developed into a comprehensive law and justice portal.

- 'Family Law Online', a national family law and referral website accessible from www.law.gov.au. This website provides quick and easy access and up-to-date family law system information by postcode on topics such as how the Federal Magistrates Service operates, alternatives to court-based dispute resolution and child support, and details on support materials and service providers, such as counsellors and mediators, capable of providing further assistance.

- 'The Family Law Hotline', a free confidential telephone information service for people requiring assisted access to the full range of information available on the Family Law Online website. This service is accessible nationwide Monday to Friday from 8am to 8pm. The toll free number is 1800 050 321.

- 'The Regional Law Hotline', an enhanced telephone hotline service using the Family Law Hotline infrastructure. The Attorney-General launched this service on 6 September 2001. The Regional Law Hotline provides family law system information as well as basic legal advice for people living in designated rural and remote areas throughout Australia.

Recommendation 53. Legal aid commissions, legal services commissioners and legal ombudsmen, and law societies should consult to clarify and develop procedures for identifying, dealing with and preventing the occurrence of conflicts of interest in legally aided matters.

Response: This recommendation is a matter for State and Territory legal aid commissions and regulatory authorities and for law societies.

While the Government sets the priorities and guidelines for the provision of legal assistance under legal aid agreements, day to day operational matters are the responsibility of the legal aid commissions. Each commission has procedures for identifying, dealing with and preventing conflicts of interest.

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

Response: The Government does not support Commonwealth legislation with respect to conflict of interest in Commonwealth law matters funded through legal aid commissions.

It is a matter for State governments whether they choose to implement the recommendation in relation to State law matters.

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

- Provision of one-stop advice where the advice provider is accountable for providing an adequate response to a given inquiry. Such advice provider should be able to contact other organisations, panels of specialist legal aid and private practitioners and refer back to the client with the correct advice.

- Apportionment of work to legal aid commissions, community legal centres and other service providers according to resources and expertise.

- Continued development of registers of experts, including experts relevant to family and civil matters.

- Coordination of community legal education, information, administrative innovation and continuing legal education for staff.

- The exchange of information and education about processes, programs, kits and classes which various service providers use as self-help schemes for unrepresented litigants.

Response: This recommendation is a matter for legal aid commissions, community legal centres and law societies, but the Government notes that legal aid commissions already coordinate these activities among the commissions and other relevant bodies to a large extent.

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

- information as to avenues of legal advice, dispute resolution, and related referrals such as relationship and drug and alcohol counselling, community and emergency housing and refuge, ethnic support and interpretation services, domestic violence, trauma and torture services

- relevant government departments and officers

- specialist and approved lawyers who accept legal aid work, initial free consultations and contingency fee arrangements

- and be designed to complement the law handbooks produced by community legal centres.

Response: This recommendation is a matter for legal aid commissions. The Government understands that some legal aid commissions have developed comprehensive referral directories. See response to recommendation 52.

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

Response: This recommendation is a matter for legal aid commissions. Commissions have arrangements in place, including the employment of paralegals and law students in internship programs to assist with a range of commission activities, which may include, where necessary, assisting applicants to complete legal aid applications.

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

Response: The Government accepts this recommendation. The Attorney-General and the Chief Justice of the Family Court of Australia agreed in July 2000 on a joint evaluation of the Family Law Assistance Program, particularly the Family Court Support element, which is funded by the Commonwealth Government through its Clinical Legal Education Program. The evaluation report, completed in April 2001, examines the potential for the Family Court Support Program (FCSP) or similar programs to be implemented on a national basis. This program operates only at the Dandenong Registry of the Family Court, where the evaluation was undertaken. The program continues to receive Commonwealth funding in 2002-2003.

The evaluation was designed to examine and draw conclusions from both quantitative and qualitative sources to indicate the effectiveness and efficiency impact of the FCSP over the first eight months of operation (November 1999 - June 2000). The evaluation was also designed to provide information on stakeholder satisfaction, possible recommendations for program improvement and possible extensions of similar programs to other Family Court registries.

The results of the evaluation indicate that the FCSP is sufficiently successful, especially in qualitative terms, to support the continued funding of the program and for a possible expansion to some other Family Court registries should additional funding become available. The report identifies the Parramatta and Newcastle Registries in NSW and the Brisbane Registry in Queensland as possible locations. The Family Law Assistance Program at the Dandenong registry has benefited from the cooperation of other local resources and its direct relevance to users of the Court. These would be important factors for consideration before introducing the program in other registries.

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

Response: The question of developing Court Network schemes in all Family Court registries is one that will be examined by the Government as funding allows. In the meantime, the Government is providing funding in Victoria for the family law program of the Court Network in 2002-2003.

Chapter 6. General issues — practice, procedure and case management

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

Response: This recommendation is a matter for the Federal Court, the Family Court and federal review tribunals.

Work is already being done in the spirit of this recommendation. In April 2000 a meeting of IT directors from the Family and Federal Courts and representatives of court administrations from Victoria, Queensland, New South Wales and South Australia endorsed the need for a closer and more effective working relationship between the various jurisdictions. In October 2000 the Council of Chief Justices of Australia and New Zealand (CCJ), noting the potential for duplication, agreed that the Courts' committee which reported to the CCJ on IT matters be merged with the Australian Institute of Judicial Administration Technology Protocols Steering Committee. The major Commonwealth merits review tribunals consult on the use of technology in the merits reviews process and review progress through the informal meetings of the heads of these tribunals.

The Government supports consistency in the use of technology in courts and tribunals.

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

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

Response: This recommendation is a matter for the Federal Court, the Family Court and federal review tribunals. The Government notes the close liaison between the Federal Court, the Family Court and the Federal Magistrates Service in relation to information technology and, in particular, arrangements to enable electronic transfer of files and access to case management systems. These Courts are also discussing and sharing other information technology as appropriate. In addition, the merged Council of Chief Justices of Australia and New Zealand and the Australian Institute of Judicial

Administration group (see response to recommendation 60) is to develop standards and protocols which could appropriately be adopted in all jurisdictions.

Recently, the Federal Court and the Family Court of Australia have been in discussions aimed at the shared use of the Family Court's case management system known as 'Casetrack'. Both Courts are now pursuing a shared cost model to advance the case management system to the benefit of both Courts. The Courts are looking to reduce both their costs and increase their benefits in the shared enhancement of the system. This venture, when successful, will bring to four the number of Courts sharing in the Family Court's investment in the Casetrack system.

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

Response: This recommendation is a matter for federal courts and tribunals.

The Federal Court has introduced a range of rules and guidelines, including Orders 34A and 34B of the Federal Court Rules and Practice Direction: "Guidelines for Expert Witnesses in proceedings in the Federal Court of Australia", issued by the Chief Justice in September 1998. The Guidelines require experts to meet and discuss issues before hearings. Rule 15.07 of the Federal Magistrates Court Rules 2001 provides that an expert witness should be guided by the Federal Court practice direction guidelines for expert witnesses.

The Family Court is in broad agreement with the recommendation. The Court has consulted the Institute of Chartered Accountants, the Institute of Valuers and several state-based psychologists boards with a view to settling appropriate Codes of Conduct prescribing the standards to be adopted by their members. In June 2002 the Family Court published a discussion paper "The Changing Face of the Expert Witness". After considering the submissions received, the Court is in the process of drafting amendments to its rules and introducing, by way of Practice Direction, guidelines for experts which will include provisions addressing this recommendation.

The Administrative Appeals Tribunal supports the recommendation and is examining the issue of expert evidence with a view to developing a specific practice direction on the issue. However, in some tribunals, such as those in the migration jurisdiction, preliminary conferences and experts do not generally need to be utilised.

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

Response: This recommendation is a matter for courts and tribunals.

The Federal Court has considered this recommendation as part of its review of its expert witness guidelines. The Administrative Appeals Tribunal has advised that it supports the recommendation. In some tribunals, the need to use experts is limited.

The Family Court is in the process of drafting amendments to its rules which will set up a process similar to that in the UK Civil Procedure Code at Rule 35.6 enabling parties to serve questions on an expert in line with this recommendation.

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

Response: This recommendation is a matter for the Family Court and the Administrative Appeals Tribunal. The Family Court is in broad agreement with this recommendation. As noted in relation to recommendation 62, the Administrative Appeals Tribunal is currently examining the issue of expert evidence.

As part of the process referred to under recommendation 62, the Family Court will include in its Practice Direction guidelines provisions about the contents of expert reports and the duties and responsibilities of experts in Family Court cases.

As noted below in recommendation 119, the legislation to establish the Administrative Review Tribunal was not passed by the Parliament and, on 6 February 2003, the Government announced that it would not seek to introduce the legislation in the current Parliament.

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

Response: This recommendation is a matter for the Australian Council of Professions. The Government understands that the Federal Court has consulted the Council in the course of its review of its expert witness guidelines.

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

Response: This recommendation is a matter for federal courts and tribunals. The Family Court is in broad agreement with this recommendation. Included in the process outlined under recommendation 62 is the proposal for the Rules to enable the Court to control the appointment of experts and, where appropriate, require the parties to jointly instruct a single expert. In the revised rules the Court is also proposing to introduce a pre-action procedure which will encourage parties to jointly instruct an expert witness and to concentrate on resolving the dispute.

The Federal Court has considered this recommendation in its review of its expert witness guidelines. The recommendation is also being considered in the course of the Administrative Appeals Tribunal's examination of the issue of expert evidence.

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

Response: This recommendation is a matter for the Family Court and the Administrative Appeals Tribunal. The Family Court is in broad agreement with this recommendation. Included in the process outlined under recommendation 62 is the proposal for the Rules to enable the Court to control the appointment of experts and, where appropriate, require the parties to jointly instruct a single expert. In the revised rules the Court is also proposing to introduce a pre-action procedure which will encourage parties to jointly instruct an expert witness and to concentrate on resolving the dispute.

The recommendation is also being considered in the course of the Administrative Appeals Tribunal's examination of the issue of expert evidence and a study is being undertaken in the Tribunal's Sydney Registry.

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

Response: The Government accepts the thrust of this recommendation and notes the proposal for a best practice blueprint applicable to dispute avoidance, management and resolution raises issues of administration across government that go beyond legal matters within the Attorney-General's portfolio responsibilities.

The Government also notes that, consistent with the obligations on chief executives of Commonwealth agencies under the *Financial Management and Accountability Act 1997*, the extent to which an agency has formal processes for dealing with disputes is primarily a matter for each agency chief executive.

The question of which department or agency should coordinate the development of a best practice blueprint applicable to dispute avoidance, management and resolution for all federal departments and agencies will be a matter for further Government consideration.

The Office of Legal Services Coordination (OLSC) within the Attorney-General's Department plays an important role in advising on strategies to ensure that a coordinated, whole-of-government approach is adopted in litigation as appropriate. OLSC can also advise on ways to minimise disputes and the need for litigation. The Legal Services Directions issued by the Attorney-General under the *Judiciary Act 1903* incorporate rules relating to the handling and conduct of claims and litigation by or against Commonwealth agencies.

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

Response: See response to recommendation 68.

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

Response: The Government accepts the thrust of this recommendation, and notes that the issues of dispute resolution and management go beyond legal matters within the Attorney-General's portfolio responsibilities. The Office of Legal Services Coordination will convene a meeting of relevant departments and agencies to explore opportunities for sharing knowledge and experiences. Any financial implications arising from this recommendation will require separate consideration at a later date.

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

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

Response: This recommendation is a matter for the Federal Court. The Federal Court published a national guideline for the Court's individual docket system in May 2002. A copy of the guideline is available from the Federal Court's web site at (http://www.fedcourt.gov.au/pracproc/aboutct_IDS.html)

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

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

- listing management practices are adequately publicised.

Response: This recommendation is a matter for Federal Court. The Federal Court has advised that this recommendation is addressed in the national guideline on the individual document system, and that it will consider the issue of listing problems arising from busy dockets as part of its review of the individual docket system.

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

Response: The Government accepts this recommendation. Section 25 of the *Federal Court of Australia Act 1976* was amended by the *Jurisdiction of Courts Legislation Amendment Act 2002* to allow a single judge to dismiss an appeal for want of prosecution, or for failure to comply with a direction of the Court.

Recommendation 74. The Federal Court should continue to facilitate meetings between representatives from the Aboriginal representative bodies, Federal government, State and Territory governments, Federal Court and National Native Title Tribunal to discuss the expected time frame for resolution of native title claims and ways to manage the cases so as to meet the agreed timetable.

Response: The Federal Court has advised that it has initiated national facilitative meetings with the bodies mentioned in recommendation 74, and with national and state user groups. For example, there are Court liaison meetings with the National Native Title Tribunal (NNTT) at various levels; meetings between representatives of the Commonwealth, the NNTT and ATSIC; and Federal Court user group meetings. Issues arising at the national and state user group meetings are fed back into the Court's Native Title Coordinating Committee and, if necessary, issues arising are taken to the national Judges' Meetings. The Federal Court will continue to facilitate user group and other consultative meetings.

Recommendation 75. To promote the development of consistent and efficient practices and procedures for the management of native title cases, protocols and

practice notes should be developed by the Federal Court, in consultation with the National Native Title Tribunal, in relation to

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

Response: The Federal Court has advised that all aspects of this recommendation are carried out during the course of routine consultative meetings between the NNTT and the Court. The Court liaises with the NNTT at several levels: the President of the NNTT meets from time to time with the Convenor and members of the Native Title Coordination Committee (NTCC) and on occasion participates in meetings of the NTCC in relation to specific issues; the Federal Court/Tribunal Liaison Group meet on a regular basis and there is local liaison between the Court and the NNTT at each State and Territory level.

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

Response: The Federal Court has advised that the way in which evidence might be taken in native title cases is constantly under consideration by the Court's Native Title Coordinating Committee.

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

Response: The Government believes that the Federal Court would be the most appropriate agency to consider the establishment of a panel of assessors. The Federal Court is proposing to develop ways in which it may appoint its own panel of anthropological experts. One problem is that there are relatively few anthropological experts to draw upon. Experts have been appointed in some individual cases to assist the Court.

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

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

Response: This recommendation is a matter for the Federal Court.

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

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

Response: This recommendation is a matter for the Federal Court. The Federal Court's Practice and Procedure Committee has considered the recommendation and does not consider the additional rules are necessary.

Recommendation 80. The provisions of Part IVA of the Federal Court Act 1976 (Cth) should be amended to

- require class closure at a specified time before judgment and
- enable the Court to approve fee agreements between the representative party and/or group members with the representative party's lawyer.

Response: The Government is considering this recommendation.

Recommendation 81. The Attorney-General should commission a review of the operation of Part IVA of the Federal Court Act 1976 (Cth).

Response: The Government does not accept this recommendation at this stage.

The validity of Part IVA and procedural aspects of those provisions continue to be the subject of litigation in the Federal Court and the High Court. The Government is keeping the scope of Part IVA under review, will consult with the Federal Court on the extent to which changes might be needed and will then decide whether a separate review needs to be commissioned.

Recommendation 82. The profession should include rules governing lawyers' responsibilities to multiple claimants and in representative proceedings in professional practice rules.

Response: This recommendation is a matter for the legal profession.

Recommendation 83. The practice in the New South Wales and Victorian registries of the Federal Court, whereby the solicitor acting on behalf of the Minister for Immigration and Multicultural Affairs, prepares, files and serves a bundle of relevant documents in the matter before the first directions hearing in migration matters, should **be extended to all the other Federal Court registries.**

Response: This recommendation has been implemented by the Department of Immigration and Multicultural and Indigenous Affairs in consultation with the Federal Court.

Recommendation 84. In its review of the operation of the guidelines for expert witnesses, the Federal Court, in consultation with relevant professional bodies should give particular attention to

- whether parties increasingly are choosing to retain 'silent' expert advisors and the implications of any such trend
- the incidence and effectiveness of conferences and other prehearing contact between experts and whether guidelines on the conduct of court ordered conferences of experts should be developed (see recommendation 62)
- whether the guidelines should explicitly remind experts that they can take the initiative before or at the hearing to correct any misstatement or apparent misunderstanding of the evidence they have provided to the Court
- whether there should be provision for the Court to give leave for parties to submit questions to the expert prior to the hearing, upon payment of

the experts' reasonable costs of answering such questions (see recommendation 63)

- the incidence and effectiveness of the use of panel presentation of expert evidence.

Response: This recommendation is a matter for the Federal Court. The Federal Court has advised that all the issues raised in the recommendation have been considered during the course of the Court's review of its expert witness guidelines.

Recommendation 85. The Federal Court should continue to develop appropriate procedures and arrangements, in consultation with legal professional and user groups, to allow judges to benefit from expert assistance in understanding the effect or meaning of expert evidence.

Response: This recommendation is a matter for the Federal Court, which has advised that it has amended the Federal Court Rules to provide for the appointment of a Court expert assistant, and will continue to consult with the legal profession and user groups on issues concerning expert evidence. In addition, the Court consulted the Law Council on the Court's review of its expert witness guidelines.

Recommendation 86. The Council of Chief Justices should continue its efforts in further developing harmonised rules and originating process, where appropriate, for Federal Court and State and Territory Supreme Courts civil matters.

Response: This recommendation is a matter for the Council of Chief Justices, which has advised the Government that its work on further developing harmonised rules is continuing.

Recommendation 87. Federal Court Rules should

- require the respondent to indicate precisely how its case on any issue differs from the case of the applicant and

- permit conclusions of law to be pleaded.

Response: This recommendation is a matter for the Federal Court, which has advised that the recommendation reflects its current practice (see Order 11, particularly rules 9 and 13). The Court may also give directions to the parties for the purpose of clarifying the issues in actual dispute (see Order 10 rule 1).

Recommendation 88. The Federal Court should review its practices in, and arrangements for, ex parte applications. If considered appropriate, a practice note

should be drafted in relation to conduct required and the duty of candour expected of parties and their representatives bringing ex parte applications.

Response: This recommendation is a matter for the Federal Court, which has advised the Government that the recommendation reflects its current practice, through the Court's general power to control the conduct of proceedings.

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

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

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

Response: The Federal Court has advised that Federal Court Practice Note 17, issued by the Chief Justice on 20 April 2000, gives effect to the recommendation.

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

Response: This recommendation is a matter for the Federal Court, which has advised the Government that the recommendation was considered by the Court's Practice and Procedure Committee which decided that no amendment to the Rules was necessary. The Committee considered that it is a matter for the Court in the circumstances of each case to determine whether the costs should be immediately payable.

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

Response: Order 27 rule 6 of the Federal Court Rules was amended on 22 December 2000 by SR 372 of 2000 to provide that subpoenas may only be issued by leave in the manner proposed.

Recommendation 92. The Federal Court should continue to monitor the use and outcomes of court annexed mediation. The Federal Court should develop a practice note requiring parties to inform the Court, at the conclusion of a matter, about their use

of private mediation services and the outcome — that is, whether the mediation assisted to resolve all or a significant part of the dispute.

Response: This recommendation is a matter for the Federal Court, which has advised the Government that it has established a sub-committee of the Practice and Procedure Committee to consider the recommendation as part of its on-going review of the Court's Alternative Dispute Resolution procedures.

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

Response: This recommendation is a matter for the Federal Court, which has advised the Government that the recommendation reflects its current practice, as part of the Court's general power to control the conduct of proceedings.

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

- it considers that
    - that applicant has no real prospect of succeeding on the claim or issue; or
    - that respondent has no real prospect of successfully defending the claim or issue; and
    - there is no other reason why the case or issue should be disposed of at trial.

Response: The Government does not support amendment of the *Federal Court of Australia Act 1976,* as it considers that the existing provisions concerning summary judgments are adequate. The Federal Court has advised that it considers the current Federal Court Rules with regard to summary judgments to be adequate.

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

Response: The Federal Court has advised that it has amended the Federal Court Rules to provide for default judgment to be entered against a respondent or cross-respondent where the claim is for a debt or liquidated damages and the respondent or cross-respondent fails to enter an appearance, or to attend a directions hearing, or to comply with an order of the Court requiring the respondent or cross-respondent to take a step in the proceeding, or to file a defence.

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

Response: This recommendation is a matter for the Federal Court, which has advised that it monitors compliance with directions where it is appropriate to do so.

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

Response: This recommendation is a matter for the Federal Court, which has advised that its Practice and Procedure Committee has considered self-executing costs orders and has foreseen difficulties with this approach. The Court's view is that it is more appropriate to ensure compliance with directions and keep matters on track rather than use self-executing costs orders. The individual docket system is intended to enhance case management, and ensuring compliance with directions and orders is an aspect of this.

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

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

Response: This recommendation is a matter for the Family Court. The Court has, for many years, consulted with members of the profession (both private and legal aid practitioners) when issues of practice, procedure and case management are being considered. Members of the Family Law Section of the Law Council of Australia also regularly attend the Chief Justice's Consultative Committee and Rules Committee meetings. The Future Directions Committee, which was established by the Court in 1998 to steer improvements to case management processes in accordance with the Court's strategic plan, consulted extensively with private and public sector lawyers and with community organisations delivering primary dispute resolution services. The Family Court has advised the Government that the outcomes of the work of this Committee have been adopted into the Court's business operations, of which consultation forms an integral part.

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

Response: This recommendation is a matter for the Family Court. The Family Court's Rules Revision Committee commenced meeting in March 2001 with a brief to completely review the Family Court's rules, procedures and forms. The Committee will consult widely. It is expected that amended rules will be ready by January 2004.

During this process the Court has consulted with the Federal Magistrates Court and State courts of summary jurisdiction and representatives of both the public and private legal profession. The draft of the revised rules, including new forms, was published for extensive and wide ranging consultation in early 2003. The Court will also be organising a number of self represented litigants focus groups. The project has also worked very closely with the Attorney-General's Department. Submissions will be analysed by the Court before revised rules are submitted to the judges for signature.

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

Response: The Government will consider this recommendation. The Government supports simplification of processes that also properly protect the parties, at the same time acknowledging that the processes must adequately protect the interests of the parties without adding unnecessarily to the costs of the litigation. The Family Court, along with other stakeholders, would be consulted on any proposed legislative response.

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

Response: The modification of forms is generally a matter for the Family Court. The Government encourages the use of simplified processes that make the family law system both more accessible and less costly for the parties and encourages early settlement without recourse to complex litigation. However, the Court has raised the issue whether, including for constitutional reasons, legislative amendment is required in this instance. The Government is considering this.

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

Response: This recommendation is a matter for the Family Court, which has advised the Government that the Family Court Rules Revision Committee will examine the use of pro forma documents.

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

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

Response: This recommendation is a matter for the Family Court, which has advised the Government that the Family Court Rules Revision Committee is examining the issues raised through the processes outlined above. The Family Court has reviewed some of its forms and, as an example, a simplified version of the Form 17 Financial Statement was introduced in July 2000. The form now requires the provision only of financial information that is relevant to a matter in the initial stages of the proceedings.

The Council of Chief Justices and the Australian Institute of Judicial Administration have also formed a Harmonisation Committee, on which the Family Court is represented, to consider the harmonisation of court rules dealing, among other things, with discovery.

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

- registrars or the Court have discretion to grant discovery and subpoenas at any time where this will assist the parties to conciliate on an informed basis, or is needed to prepare for hearing

- where appropriate, the Court may grant discovery in relation to documents directly relevant to particular identified issues properly in dispute or by reference to particular documents or defined categories of documents directly relevant to such issues

- where there are many documents, consideration will be given to granting discovery in stages without the need to verify lists of documents

- non compliance with discovery may be dealt with by costs orders in appropriate cases (costs to be taxed and paid forthwith, at the interlocutory stages) or preclusionary sanctions.

Response: This recommendation is a matter for the Family Court, which has advised the Government that registrars have always had power to grant discovery and issue subpoenas and the other powers referred to. However, the Court's Future Directions Committee has concluded that there may be scope to adapt the Family Law Rules to incorporate the "disclosure" rules of the Queensland Uniform Civil Procedure Rules 1999. This recommendation has been referred to the Rules Revision Committee, whose work is well advanced and outlined above. The Committee has taken advantage of extensive research over the last 15 years in relation to disclosure, and referred to the Rules of Court in all Australian jurisdictions, the English Civil Procedure Code, the Ontario Family Law Rules and the rules of court in New Zealand and the United States. The draft rules on disclosure have adopted a number of the elements of this recommendation.

The Council of Chief Justices and the Australian Institute of Judicial Administration have formed a Harmonisation Committee, on which the Family Court is represented, to consider the harmonisation of court rules dealing, among other things, with discovery.

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

Response: While this recommendation is a matter for the Family Court, the Attorney-General will also consider this recommendation, in the context of the Government's response to the recommendations contained in the Family Law Council report on the

separate representation of children, entitled *Involving and Representing Children in Family Law (*August 1996).

Recommendation 106. Parties and the Family Court should, as a matter of course, consider whether an expert (or experts) agreed between the parties should be appointed in a case or to deal with a particular issue. Examples of categories of case where the use of agreed experts will often be appropriate include property disputes where valuation of assets is in issue. The Family Court also should direct parties to agree a joint expert valuer in simple property issues.

Response: This recommendation is a matter for the Family Court. The Court is drafting amendments to its Rules which will enable the Court to control the appointment of experts and, where appropriate, order the appointment of a court expert or that the parties jointly instruct a single expert.

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

Response: This recommendation is primarily a matter for the Family Court. The Court has advised that reports have now been received on two relevant pilot projects. The first, known as the Magellan project, was conducted in Victoria. It gave special management to matters involving allegations of child abuse, both in relation to listing and the early provision of family reports, in addition to a high level of co-ordination with Legal Aid and the state welfare authority. The final report of the project is now available and the findings are very encouraging.

The second pilot is of a Family Report Summary which will make the outcome of the assessment available in an abbreviated form to the parties earlier in the case management pathway. The pilot was conducted in Dandenong, Parramatta and Brisbane in mid-2000 and was evaluated in 2001. The Court reports that results, particularly in relation to earlier settlement of matters, are again very positive. A post implementation evaluation of the FRS is now under way. The Government encourages the reform and simplification of processes that increase access, reduce costs and promote early resolution of disputes for parties in the family law system, particularly those involving children.

In relation to the Magellan project, recommendation 19 of the report of the Pathways Advisory Group noted that cases involving allegations of child abuse require specialist judicial attention and close cooperation between federal and State organisations, as well as a range of other interventions, to minimise the risk to the child. In order to achieve this, the principles and practices underlying the Magellan Project should be extended to other locations.

With the assistance of the Federal Government, the Magellan Project is proposed to be rolled out in all States and Territories except Western Australia, which has its own Family Court.

The Pathways Report expressed support for the implementation of the Court's *Future Directions Committee Report.* One of the innovations contained in that Report is the introduction of a case assessment conference. The Pathways Group saw this as a useful mechanism for screening for such issues as violence and child abuse.

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

Response: This recommendation is a matter for the Family Court. The Court has advised that it considers it necessary to amend the Family Law Act, as recommended by recommendation 109.

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

Response: The Government has implemented this recommendation. In response to the Attorney-General's request, the Family Law Council provided a letter of advice on 16 March 2001. A copy of this letter of advice has been made available to the Australian Law Reform Commission. The advice is being considered by the Attorney-General.

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

Response: This recommendation is a matter for the Family Court. The Court has advised that the Court's new case management directions came into operation on 1

August 2002 and these incorporate some of the strategies identified by the Compliance Committee. The main focus is to ensure that the risk of wasting the costs associated with the most expensive litigation event, the trial, are minimised. This is being done by only committing the parties and the public to the cost of a trial when all procedural steps have been completed and all the evidence of the parties, both lay and expert, has been filed and served. As to non-compliance itself, the available sanctions include the imposition of costs orders on parties or, if appropriate, their lawyers, and the automatic vacation of pre-trial court events where parties have failed to comply with directions. The revised listing system provides for the automatic assignment to a 'Defaulters List' where directions made pursuant to a trial notice have not been complied with.

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

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

Response: This recommendation is a matter for the Family Court. The Court has advised that case conferences (now called Case Assessment Conferences) were introduced as a first return date event in all registries between December 2000 and January 2001. The objectives of the case conference, in keeping with recommendation 111, include providing an opportunity for early settlement negotiations, identifying legal and procedural issues and assessing and recommending appropriate dispute resolution services and case management strategies. Consistent with the recommendation, at the conclusion of the case conference a Deputy Registrar has the discretion to make procedural orders, allocate the appropriate case management pathway, and schedule the next event, including PDR. The Government welcomes this reform.

Relevantly, recommendation 14 of the report of the Pathways Advisory Group recommends that "…courts exercising family law jurisdiction continue to actively review their case management practices to minimise delay and facilitate the early resolution of cases".

The Pathways Report expressed a vision of an integrated family law system, where families can access the help they need with ease and where all service providers are linked, offering seamless support and referral.

The Pathways Report suggested three clear pathways for use by families. Each pathway might offer the whole solution for a particular family, whilst another family might switch between the different pathways as their needs change. These pathways are a self-help pathway for families able to manage their own arrangements by agreement, a supported pathway for families that can reach agreement with assistance and support and a litigation pathway for families where violence is an issue or where all other means of resolving the disputes have failed.

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

Response: This recommendation is a matter for the Family Court. The Court has advised that it has implemented the Future Directions Committee's proposal to stream cases according to their needs. The Court has advised that the two-phased needs approach allows parties to fully explore PDR opportunities during the 'resolution' phase before moving on to the 'determination' phase. The two-phased approach was implemented in the Sydney registry from 31 May 2001 and was rolled out in a staged way to all registries during 2001-2002.

As set out in response to recommendation 111, the Pathways Advisory Group has expressed a vision of an integrated family law system. One of the findings of the Advisory Group was that currently vulnerable individuals and families are falling through the gaps between the services that are available. The Pathways Report expresses a concern that at present service providers throughout the family law system work in isolation from each other.

The Advisory Group sees linkage and integration of services and providers, as well as an appropriate assessment and referral tool, as essential ingredients to establish a holistic family law system.

As mentioned at recommendation 111, the Pathways Report suggested three clear pathways for use by families. Each pathway might offer the whole solution for a particular family, whilst another family might switch between the different pathways as their needs change. These pathways are a self-help pathway for families able to manage their own arrangements by agreement, a supported pathway for families that can reach agreement with assistance and support and a litigation pathway for families where violence is an issue or where all other means of resolving the disputes have failed.

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

Response: The Family Court has advised the Government that the Casetrack system can be used to easily identify and/or consolidate multiple or repeated applications, although it will not do so automatically. In these circumstances it is possible to list these applications to the same sitting or hearing date, if appropriate. It is also possible to refer a matter to a particular officer either urgently or as a routine listing.

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

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

Response: This recommendation is a matter for the Family Court. The Court has reorganised its client services sections within registries and created case coordination units that have responsibility for responding to particular client needs identified at any point along the case management pathway. This, together with the introduction of case assessment conferences by mediators and deputy registrars as the preferred first court event has enabled earlier identification of problematic cases and provided better needs-based resolution or determination options to parties and minimised attendance at unnecessary court events.

Further, the Court has provided in its Case Management Directions for applications which meet certain criteria to be designated to a judicial manager, for example with respect to cases involving allegations of serious child abuse.

All video and telephone systems available in courtrooms have been updated. The Court is receptive to requests by parties to appear by telephone or video particularly in relation to procedural events.

The Government supports and encourages the implementation of more efficient processes that are less costly and complex and that assist parties to early resolution. The Pathways Advisory Group has considered the importance of good assessment and referral processes throughout a more integrated system.

Recommendation 6.1 of the Pathways Report recommends "…that key agencies, professionals and other service providers working with members of separating or separated families commit to a system-wide approach to assessment to assist family members newly entering the family law system, and to review the assistance required by those re-entering the family law system". The Pathways Group referred to the need for generic information products, an assessment tool and appropriate training for service providers to assist in assessment and referral of families.

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

Response: This recommendation is a matter for the Family Court.

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

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

Response: The Government accepts this recommendation and the relevant amendments will be included in future amendments to the *Family Law Act 1975.*

Recommendation 117. Within two years of the release of this report, the Attorney-General should consider establishing an independent review to examine practice, procedure and case management in the Family Court. The review should assess funding needs and measure the performance of the Court, including

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

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

Response: The Government supports the continuous monitoring of practice, procedure and case management in the Family Court. The Government would also encourage a coordinated, system-wide monitoring process.

The Government will therefore give further consideration to establishing such a review along the lines set out in the recommendation. Such a review should be developed in consultation with key players in the family law system and in light of recommendations made by the Family Law Pathways Advisory Group.

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

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

Response: This recommendation is a matter for federal review tribunals.

Members of the Migration Review Tribunal and Refugee Review Tribunal enter into performance agreements. The Social Security Appeals Tribunal has a system of performance appraisal for its members. The Administrative Appeals Tribunal has expressed support for the recommendation and has established a committee to investigate this issue.

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

Response: In 2000, the Government introduced the Administrative Review Tribunal Bill 2000, which would have replaced the Administrative Appeals Tribunal, the Social Security Appeals Tribunal, the Migration Review Tribunal and the Refugee Review Tribunal and established the Administrative Review Tribunal (ART). In February 2001 the Senate rejected the ART legislation. On 6 February 2003 the Government announced that it would not seek to introduce the ART legislation in the current Parliament.

The Government does not agree that multi-member panels are necessary to provide professional development opportunities for tribunal members. Tribunal members can gain developmental experience otherwise than as full and equal members of a multi-member panel with the responsibility of deciding applications.

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

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

Response: This recommendation would have been a matter for the Administrative Review Tribunal, when established. However, as noted above in recommendation 119, the legislation to establish the Administrative Review Tribunal was not passed by the Parliament and, on 6 February 2003, the Government announced that it would not seek to introduce the legislation in the current Parliament.

In any event, the Government notes that it is not clear that such guidelines are required given that ascertaining, and inquiring into, relevant facts is an essential aspect of the work of all merits review tribunals.

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

Response: This recommendation will be considered as part of the review of the *Legal Services Directions on the Commonwealth's Obligation to Act as a Model Litigant* referred to in the response to recommendation 23.

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

Response: The Government supports tribunals having access to all relevant information through formal procedures. Any investigative assistance that may be given by a government agency in a particular case must be consistent with the tribunal's obligation to afford procedural fairness and independence of the tribunals.

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

Response: As noted above in recommendation 119, the legislation to establish the ART was not passed by the Parliament and, on 6 February 2003, the Government announced that it would not seek to introduce the ART legislation in the current Parliament. At the hearing of a proceeding before the Administrative Appeals Tribunal, a party to the proceeding may appear in person or may be represented by some other person.

A person appearing before the Refugee Review Tribunal is not entitled to be represented by any other person but assistance may be provided at all other stages (for example, preparing an application). In the Migration Review Tribunal, an applicant is entitled to have another person present to assist them at a hearing, but the assistant cannot present arguments or address the Tribunal unless the Tribunal is satisfied that, because of exceptional circumstances, the assistant should be allowed to do so. Nothing prevents an applicant from engaging a person to assist or represent them otherwise than while appearing before the Migration Review Tribunal.

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

Response: This recommendation is a matter for the Administrative Appeals Tribunal. The Administrative Appeals Tribunal has indicated that it continues to have some reservations about this recommendation, and these reservations are set out in the Commission's report.

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

Response: This Government is considering this recommendation in relation to the Administrative Appeals Tribunal.

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

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

Response: The Government is considering this recommendation.

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

Response: The Administrative Review Tribunal Bill 2000 was consistent with this recommendation in that it did not envisage a single case management model. As noted above in recommendation 119, the legislation to establish the Administrative Review Tribunal was not passed by the Parliament and, on 6 February 2003, the Government announced that it would not seek to introduce the legislation in the current Parliament.

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

Response: The Government is considering this recommendation.

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

Response: The Government is considering this recommendation. The Administrative Appeals Tribunal has indicated its support for this recommendation.

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

Response: This recommendation is a matter for the Administrative Appeals Tribunal which has indicated its support for the recommendation.

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

Response: As noted above in recommendation 119, the legislation to establish the Administrative Review Tribunal was not passed by the Parliament and, on 6 February 2003, the Government announced that it would not seek to introduce the legislation in the current Parliament.

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

Response: As noted in relation to recommendation 62, the Administrative Appeals Tribunal is currently examining the issue of expert evidence.

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

Response: This recommendation is a matter for the Administrative Appeals Tribunal. The Tribunal has advised that, during the conference process, registrars actively encourage parties to engage a single expert where appropriate. As noted in relation to recommendation 62, the Administrative Appeals Tribunal is currently examining the issue of expert evidence.

Recommendation 134. Legislation should expressly provide federal review tribunals with the power to require parties to agree to the instruction of a single expert for the

case, where the tribunal considers this appropriate. In such circumstances, additional expert evidence on the same matter should be permitted only in exceptional circumstances.

Response: The Government is considering this recommendation.

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

Response: This recommendation is consequential on recommendation 134, which is under consideration by the Government.

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

Response: The Government is considering this recommendation and notes that the Administrative Appeals Tribunal supports the recommendation.

As noted above in recommendation 119, the legislation to establish the Administrative Review Tribunal was not passed by the Parliament and, on 6 February 2003, the Government announced that it would not seek to introduce the legislation in the current Parliament.

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

Response: The Government does not accept this recommendation.

Client legal privilege is an important safeguard for protecting confidential communication between lawyers and clients. Its removal in the circumstances envisaged would require a compelling reason and the Commission has not advanced such a reason in relation to tribunal proceedings.

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

Response: This recommendation is a matter for the Administrative Appeals Tribunal which has indicated its support for this recommendation.

As noted above in recommendation 119, the legislation to establish the Administrative Review Tribunal was not passed by the Parliament and, on 6 February 2003, the Government announced that it would not seek to introduce the legislation in the current Parliament.