Senate Legal and Constitutional Affairs References Committee

The ability of consumers and small businesses to exercise their legal rights through the justice system, and whether there is fair, affordable and appropriate resolution processes to resolve disputes with financial service providers.

Submitter:

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- A former primary producer who was a victim of a non-monetary default by the Bank of Queensland.
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- Member of the advisory panel to the 13,000+ 'Bank Reform Now' group.
- Advocate for 'Equality of Arms'.

The notice of motion to refer the question of whether 'access to justice' via the justice system for consumers and small businesses (SME) is a fair, affordable and appropriate resolution process, to resolve disputes with financial service providers (FSP) be referred to the Senate Legal and Constitutional Affairs References Committee for inquiry is welcomed.

Although this inquiry is not restricted to, it is argued framing it "*in particular the big four banks"* is unfair to victims of FSP's that are not the big four. The devastation to consumers and SME's by other FSP's that are not the big four, where customers and SME's lack timely, proportional and equitable access to our (not the FSP's) legal system is no less devastating. This submission features a second tier FSP, the Bank of Queensland (BOQ).

The Financial Services Royal Commission (FSRC) Commissioner, Kenneth Hayne rightly identified greed along with disproportional monetary and intellectual power within the FSP sector was fundamental to poor practice. That same greed, disproportional monetary and intellectual power pervades the legal sector as well.

The Australian Attorney General's web site identifies on the page titled "Fair Trial and Fair Hearing Rights" in a paragraph "equality" a legal principle called "Equality of Arms" and that it is a human right. The web site states:

> *"What constitutes a fair hearing will require recognition of the interests of the accused, the victim and the community (in a criminal trial) and of all parties (in a civil proceeding). In any event, the procedures followed in a hearing should respect the principle of* ***'equality of arms',*** *which requires that all parties to a proceeding must have a reasonable opportunity of presenting their case under conditions that do not disadvantage them as against other*

parties to the proceedings. The UN Human Rights Committee has found a violation of article 14(1) in a case in which a right of appeal was open to the prosecution but not to the accused."

https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Fairtrialandfairhearingrights.aspx

It is argued that the prime root cause of the inability of consumers and SME's to exercise their legal rights through the justice system is the lack of **'Equality of Arms'** within the legal sector.

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3. The accessibility and appropriateness of the Australian Financial Complaints Authority (AFCA) as an alternative forum for resolving disputes

a. Whether the eligibility criteria and compensation thresholds for AFCA warrant change; and

b. Whether AFCA has the powers and resources it needs; and

c. Whether AFCA faces proper accountability measures; and

d. Whether enhancement to their test case procedures, or other expansions to AFCA's role in law reform, is warranted.

Because AFCA and for that matter Farm Debt Mediation (FDM) and other forms of External Dispute Resolution (EDR) normally precedes court proceedings, the question of whether they are accessible and appropriate, will be dealt with first in this submission.

The fundamental flaw with the EDR process with very few exceptions, if any, is the process relies on the complainant to present the **'real issues'** of their complaint. It is argued, again that with very few exceptions that complainants are extremely emotive, have little ability to be impartial, lack negotiating skills, have little or no legal skills or knowledge and do not have the ability to identify and present the **'real issues'** of their matter.

If an EDR such as AFCA makes a correct determination based on the information before it, and that information does not represent the **'real issues'**, by default that determination cannot be claimed by the EDR to be the correct determination. This makes AFCA as a mechanism for redress ineffective, a tool to be used by the FSP and not fit for purpose.

The power imbalance within the courts, due to the lack of **'Equality of Arms'**, further amplify the flaw highlighted above, because the EDR and FSP know that in the event the matter was to be dealt with by the courts the same constraints would apply to the vast majority of defendants.

There is no incentive for the FSP or AFCA and other EDR's to act as a **'model litigant'**, indeed why would an FSP that was guilty of any of the practices identified by the limited Financial Services Royal Commission (FSRC) voluntarily supply evidence of these practices. AFCA and its predecessor FOS lacked and continue to lack the inquisitorial rigor and resolve to expose the practices identified by the FSRC, as well as many issues the FSRC, due to time and TOR constraints did not expose.

Access to AFCA as opposed to its predecessor FOS, by the raising of the credit limit to $5m and the penalty limit to $1m ($2m for primary producers) covers the vast majority of consumers

and SME's, and therefore is appropriate for contemporary and future cases. Legacy cases are problematic where matters have been dealt with unfairly in the past and are outside AFCA's TOR. Legacy cases will be addressed in item *5. (Any other related matters)*.

With regard to the questions as to whether AFCA has the powers and resources it needs and whether AFCA faces proper accountability measures. AFCA should be an opportunity for the FSP to settle disputes with customers and SME's before matters are subject to the courts. Because AFCA is a pseudo legal body funded by the member FSP's, funding should be a negotiation between the FSP and AFCA. Because AFCA is an industry funded pseudo legal body the question should be one of effectiveness as an EDR, not accountability.

AFCA is not effective because there is no timely, proportional and equitable redress for FSP customers and SME's via the legal system. If customers and SME's had **'Equality of Arms'** in this country's courts, it is argued that it would fundamentally change how AFCA would function and how member FSP's would use and interact with AFCA.

In summary:

- **AFCA is not an effective or appropriate mechanism to resolve disputes, because there is a lack of 'Equality of Arms' in this country's courts.**
- **The AFCA process is FSP centric and also lacks 'Equality of Arms'.**
- **A determination by AFCA that the matter is better dealt with by the courts where there is not "Equality of Arms" is unjust.**
- **AFCA rules in their current metamorphose are FSP centric and penalise the FSP consumer and SME and attempts to subvert the legal system.** *(Please refer to the submission of Philip Sweeny for details)*

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1. Whether the way in which banks and other financial service providers have used the legal system to resolve disputes with consumers and small businesses has reflected fairness and proportionality, including:

a. Whether banks and other financial service providers have used the legal system to pressure customers into accepting settlements that did not reflect their legal rights; and

b. Whether banks and other financial service providers have pursued legal claims against customers despite being aware of misconduct by their own officers or employees that may mitigate those claims; and

c. Whether banks generally have behaved in a way that meets community standards when dealing with consumers trying to exercise their legal rights.

The question is how, not whether, FSP's use their disproportionate advantage within the legal system, put simply there is little, if any fairness or proportionality. The term 'resolve' is not a two way mechanism that has at its heart, fairness or equity, when the legal sector is used by an FSP to 'resolve' a dispute with a consumer or an SME.

To give the committee some perspective from the legal sector itself, attached to this submission is the final report of 'Community Law Australia'. This concise thirteen page report titled **'Unaffordable and Out of Reach'** was published in July 2012 and was written by the legal profession itself, it makes compelling reading. It is an acknowledgement by the legal profession

that largely due to multifaceted disproportionality; the legal sector is not fit for purpose. The report is as relevant today, as it was then. If the committee require further evidence that the legal system is not fit for purpose, the 'Inquiry into Access to Justice Arrangements' carried out by the 'Productivity Commission' contains many relevant and revealing submissions.

FSP's do use the legal system to pressure customers into accepting settlements that do not reflect their legal rights. Indeed one would be hard pressed to find a FSP consumer or SME that was even aware of their legal rights.

The real threat of costs is deployed relentlessly by the FSP and their corporate legal teams. If the FSP is able to get a costs order against a consumer or SME early in litigation, they will use that cost order to bankrupt and in the process disable the consumer or SME from defending themselves in the courts. If the Consumer or SME has a legitimate case and the financial stress is caused by the FSP's unjust actions, the injustice is further amplified.

Example:

> *"…BOQ is confident of being successful at trial against you early next year and ultimately bankrupting you…Further, BOQ is of the view that you Counterclaim against it has no merit whatsoever and is susceptible to being struck out immediately…Similarly, your appeal filed on 4 November 2015 (Appeal) will certainly be dismissed as a matter of law and is of such a nature that BOQ ought to be entitled to an order for security for costs against you. If successful, this means that you will be required to pay into court an amount sufficient to cover BOQ's reasonable legal costs of the Appeal, prior to you being able to proceed with the Appeal…"*

Based on personal experience and anecdotal evidence from other consumers and SME's, FSP's will protect officers and their agents guilty of misconduct rather than sanction the officer or agent and do not condemn the practice.

Examples:

1. *A BOQ officer claims that blank (not filled in) 'Guarantor Details' and 'Business Loan Application' where signed at a particular place and time, however due to the location of the signatories elsewhere on the day this was not possible. The fraudulent falsification of records was a breach of the confidence reposed in the officer and was deliberate, fraudulent and criminal. Initially BOQ must have accepted or was unaware of the documents, neither scenario represent the care and skill of a diligent and prudent banker. When BOQ became aware they chose to protect the officer and attack the Guarantors.*

2. *Prior to serving a claim, BOQ and its agents failed to serve 'Notices of Demand' on the guarantors. This preceded an elaborate attempt to cover up this shortcoming that involved collaboration between an officer of BOQ and its legal representative. Again BOQ chose to support rather than sanction the officer and its agent and attack the Guarantors.*

3. *The BOQ appointed receivers BDO used a valuer that BOQ had taken to court for overvaluations and removed from its panel to undervalue a property in order to justify disposal of the property for a low price and to avoid a potential 420A breach. Clearly BOQ had major concerns with the valuer however did not warn customers and SME's that were subject to potentially over valuations by this valuer. As POA for the borrower BOQ approved a low valuation by the same valuer it took to court. An independent valuation review by*

ASBFEO supports this. It is argued that BOQ would have been comfortable due to its disproportionate advantage in the legal sector and acted with impunity. Yet again BOQ acting as POA for the borrower chose to support rather than sanction BDO's use of a valuer that itself condemned.

One can only come to the conclusion that FSP's act with a sense of impunity in the knowledge that because of the disproportionate advantage they have in the legal sector, there is very little chance that they will be challenged. In the event that an FSP is challenged they have the disproportionate monetary power to settle and gag any potential threat. This not only corrupts consumer and SME legal rights, but also has the consequence of corrupting the legal system and this country's common law.

Post the FSRC, one would have to be incredibly naïve to arrive at a conclusion that FSP's generally have behave in a way that meets community standards and expectations when dealing with consumers and SME's trying to exercise their legal rights. It is not fair or balanced to lay the blame solely at the feet of FSP's, because they are facilitated, aided and abetted by their agents; in particular this includes a significant percentage of the legal sector.

The question whether banks generally have behaved in a way that meets community standards when dealing with consumers trying to exercise their legal rights, can only be answered by a resounding no! The question that the committee also needs to ask, is whether the legal sector generally, have behaved in a way that meets community standards when dealing with consumers trying to exercise their legal rights?

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2. The accessibility and appropriateness of the court system as a forum to resolve these disputes fairly, including:

a. The ability of people in conflict with a large financial institution to attain affordable, quality legal advice and representation; and

b. The cost of legal representation and court fees; and

c. Costs risks of unsuccessful litigation; and

d. The experience of participants in a court process who appear unrepresented.

It can be stated categorically that the contemporary court system is not an appropriate forum to resolve disputes fairly.

There is no ability for financially stressed consumers and SME's to obtain any meaningful legal representation, let alone timely, proportional and equitable legal representation. One has approached over fifty organisations for assistance to no avail.

The legal sector has become monetarised to the extent that it is **'unaffordable and out of reach'** to all but the wealthy and powerful. If one is dirt poor one may get access to some token legal advice and/or representation, but not timely, proportional or equitable legal representation. This is not a reflection of those community and legal aid sectors that offer this support, merely economic and factual reality.

The cost risk is not restricted to unsuccessful litigation; the disproportionate level of costs can pose financial ruin to those that are successful in the courts also. Costs as illustrated above are effective although unjust weapons in the arsenal of monetarised plaintiffs such as a monetarised FSP.

Would a referee of a boxing match allow a competition between a heavy weight boxer and a malnourished paraplegic in a wheelchair to take place? The metaphoric equivalent of such a competition takes place when a self-litigant consumer or SME with no legal experience or knowledge is required to defend themselves against a FSP corporate legal machine in the courts. One has to ask how the referee, being the judge or magistrate, can allow such one sided adversarial competitions to take place and meet their sole function, the **'administration of justice'**. A progressive judge or magistrate could simply rule that they were not prepared to hear a matter until they were satisfied that **'Equality of Arms'** was being observed in their court.

It is also argued that a significant proportion of the contemporary judiciary that has been spawned by the monetarised legal system are themselves out of touch with community standards and expectations. This could be addressed by the use of publically funded juries in civil cases. It was argued by BOQ lawyers that the matters that a jury would be required to consider were to complex. If this was true the matters must also have been too complex for the majority of borrowers and guarantors of BOQ. In civil cases in Queensland, the defendant is required to pay the cost of a jury, making a jury impossible to access for a financially stressed FSP victim.

Unless there is **'Equality of Arms'** in the court, there can be no fair hearing or trial and there is a fundamental breach of the defendant's human rights. **This injustice has been recognised where the ATO engages external legal counsel in the AAT and the SME does not have legal representation. The ATO is now required to cover the cost of providing the SME with equivalent legal representation.**

Experience of the legal system by self-litigants could only be described as abuse. This is not to say that all within the legal system are abusive, like the financial sector it is a monetarised culture that has evolved over decades that is driven by the greed of a minority. In recent times some corporate law firms have been floated on the stock market, where shareholders have little or no appetite for justice over dividends, further subverting the **'administration of justice'**.

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4. The accessibility of community legal centre advice relating to financial matters.

As stated above over fifty identities were approached for assistance to no avail and this included community legal centers. These centers are fragmented, vary in level of experience and expertise and financially constrained because they are generally under resourced. The contemporary funding models leave these centers vulnerable to FSP's that have the ability to match and raise any funding.

These community legal centers are fragmented, operate in different jurisdictions and some jurisdictions do not even cover financial litigation or advice. With the greatest respect, in their current metamorphose, contemporary community legal centers and also legal aid, because of such constraints despite the best intention will never be able to offer timely, proportional or equitable legal representation to consumers and SME's subject to legal action by a monetarised FSP.

It is argued that a radically different funding and national support model is required to establish **'Equality of Arms'** for FSP consumers.

Such a model is detailed below:

Effective Justice Mechanisms for FSP consumers and SME's

Contemporary redress mechanisms for FSP consumers and SME's, after they have fallen off the cliff, fail in every meaningful way. All EDR's and pseudo legal bodies as well as the contemporary justice system it is argued are not fit for purpose. FSP consumers and SME's subject to legal action need timely, proportional, equitable, and affordable access to redress at the top of the cliff, they need **'Equality of Arms'**.

It is proposed that a permanent independent specialist elite federal cell be established that can, by utilising and working with the contemporary legal aid and community legal centers offer all consumers and SME's timely, proportional, and equitable legal representation when pursued by an FSP.

The proposed primary source of funding would be the FSP that has made the decision to use the legal system to pursue a customer. At the point of initiating any legal instrument the FSP will be required the make a non-refundable contribution to the cell equivalent to their total legal budget/costs. Any escalation would require further matching contributions from the FSP. The financial service will only be able to recoup their cost from the customer following an outcome in their favor.

The cell would require initial federal seed funding to ensure employment and day to day continuity, as well as funding for proper preparation of legacy case reviews *(Detailed later in this submission).* The cell should have an oversight body that includes federal government, consumer, legal aid and community legal center group representation, but no FSP, EDR or private legal sector representation to avoid white anting and inappropriate external influence.

Essential Components

Financial service funding – It is essential to the operational effectiveness that the cell is primarily funded by the financial service that embarks on any legal action that is equivalent to their total legal costs. This includes ancillary costs such as expert advice, stationery, etc. **Any variation from this protocol risks a match and raise competition or funding that may not be proportional to the action.** This model is proportional and does not penalise FSP's that act fairly and justly. It is argued that court proceedings would proceed more efficiently.

Must be a public body – The cell should consist of motivated salaried legal professionals that are dedicated to the administration of justice. Any and all linkage and utilization of the private sector should be avoided.

Must be federal – It is critical that the cell collects intelligence nationally in order to disseminate it along with appropriate support and funding to all legal aid jurisdictions and community legal centers. As currency sovereign the federal government is able to setup and fund contemporary, future, legacy and other costs as required.

Autonomy – The federal cell must be autonomous to minimise the risk of both white anting and inappropriate external influence.

Secondary Impacts

Will change bank culture – When the FSP can no longer rely on the disproportionate and monetarised legal system because the customer has **'Equality of Arms'** in the courts, FSP boards, officers and staff will no longer be able to act with impunity. This will drive fundamental cultural change organically.

The FSP controls cost – The FSP and only the FSP makes the decision to use the legal system and to what degree it uses the legal system. The FSP can modify its approach to their customer or make fairer use of EDR's thus avoiding the legal system altogether.

Will make EDR's more effective – When both the financial service and EDR's realise that the customer has equity in the courts in the event that the EDR process is not successful, it will change fundamentally the way the FSP and EDR approach dispute resolution. Both the FSP and EDR body will realise that failure will result in the matter being resolved in the courts where there is now **'Equality of Arms'**.

Will result in better common law – Arguably due to the lack of **'Equality of Arms'** many FSP issues that may well have been won by consumers and SME's are lost, or never come before the courts. This has the effect of corrupting Australian common law.

Will compliment ASIC and APRA – When matters are dealt with in a timely manner by the cell, systemic issues will be identified in a timely manner also. This intelligence can be shared with the appropriate regulator.

Will boost the effectiveness of the contemporary legal aid and community legal center system – All legal aid organisations will be able to assist any FSP consumer and SME knowing that not only funding will be available, but also expert knowledge, support and personnel.

Will put downward pressure on legal costs – Because the FSP's legal cost will potentially double, it is argued that the FSP will be more frugal when making decisions as to what they are prepared to pay for legal action.

Would reduce legacy cases – When matters are dealt with in a timely, proportional and equitable manner, the number of legacy cases would be expected to reduce dramatically. This would reduce the burden on the legal system, EDR's and neutralise the requirement for a future FSRC.

Protects the value of security – Where the security is, say a business or a farm, and a consumer or SME is required to self-litigate, this will use time, capital and resources at the expense of the business or farm. This would likely result in the deterioration of the value of the security property to the disadvantage of the successful party. The disadvantage would be proportionately greater for the consumer or SME.

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5. Any other related matters.

FSP's issuing credit to consumers and SME's to pay for their legal expenses – The practice of FSP's issuing additional credit to a consumer or SME that they are taking to court is wide spread. When a licensed credit issuing FSP adds their legal expenses to the loan account of a consumer or SME that they are pursuing in the courts they are issuing additional credit to their victim and charging them interest. The consumer or SME is literally paying for the FSP's legal cost, prior to any determination by a court. This practice hides the extent of ongoing legal expense from the FSP's shareholders, and may breach other rules and licenses. What would be most galling to a consumer or SME is a scenario

where the issuing of that additional credit to the consumer or SME, would have ensured their financial survival.

Legacy Cases - As a direct consequence of the lack of 'Access to Justice' there are many aggrieved FSP victims, some going back over thirty years, that have been unfairly subjected to the inequity of this country's disproportionate monetarised legal system. These individuals and enterprises do not have the financial means or access to the redress mechanisms to have their matters reviewed so as to establish the **'real issues'**. These cases where not given the appropriate attention deserved from the TOR and time constrained FSRC.

There is an urgent requirement for a Ramsey Review style public Tribunal were aggrieved legacy bank victims can have their matters revisited. It is of critical importance that these individuals and enterprises have appropriate legal representation, firstly to establish a prima facie case and secondly to ensure the **'real issues'** are presented to the tribunal in a concise and impartial manner.

An ideal body to carry out this preliminary work would be an 'independent specialist elite cell' described above. This would enable the cell to develop skills and collect intelligence that would make it more effective in current and future cases. Information and intelligence collected could be passed on to regulatory bodies such as ASIC and APRA improving their effectiveness.

It's likely if such a tribunal was initiated with the appropriate legal support for legacy cases, the FSP's that know they have exposure, would make an attempt to settle with their aggrieved victims rather than be exposed to the expense and scrutiny of a public tribunal.

The fight for 'Equality of Arms' – Realising the inequity of the legal sector and the fact that there was little chance of surviving the court system, never alone getting a fair trial or hearing, an application was made to the court for **'Equality of Arms'**. This was pursued as far as the high court to no avail. It would seem the High Court places a higher priority in 'debt recovery' than a fair and just legal process that establishes if indeed there is a debt to be recovered. The High Court stated the following in its rejection of leave to appeal:

> *"..whereby his Honour refused to stay or dismiss debt recovery proceedings on the basis of the applicants' claim that they lack financial resources sufficient with which to engage legal representation for the trial of the proceedings… in any event, no basis has been advanced that would justify fragmentation of the debt recovery proceedings…"*

It is not the intention to go into the details of that journey in this submission however if the committee is interested via a supplementary submission or verbal testimony both options are available.

The **'Equality of Arms'** journey serves to highlight the resistance from the FSP and legal sectors to proportional equity in our Legal system.

Conclusion

The legal sector is a service and its singular brief is the 'Administration of Justice'. When a service becomes privatised, organically the quality of the service decreases and the cost of that service increases.

Banking is also a service that has been privatised, and predictively service has decreased and the cost of that service has increased. It is a window of where the legal sector is heading, indeed it may for all intent and purpose be already there.

It is critical for both services that the public sector has a significant functional presence so as to combat the private sector and keep them honest.

The biggest and best legal service in Australia should be publically owned, and the country is also crying out for a publically owned bank.

The country is also crying out for politicians that have the public good front and center, politicians that are prepared to make bold and no compromise decisions in the public interest.

Finally in its contemporary metamorphose; consumers and small businesses have little or no ability to exercise their legal rights through the justice system. The contemporary justice system is not fair, affordable and is not an appropriate resolution process to resolve disputes with financial service providers.

Unaffordable and out of reach:

THE PROBLEM OF ACCESS TO THE AUSTRALIAN LEGAL SYSTEM

A REPORT BY

Community Law Australia

www.communitylawaustralia.org.au | July 2012

About Community Law Australia

Community Law Australia is a campaign by a coalition of community legal centre bodies led by the National Association of Community Legal Centres. There are around 200 community legal centres providing Australians with over half a million free legal services each year.

For more information

You can find out more about the Community Law Australia campaign by:

Visiting our website

www.communitylawaustralia.org.au

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Unaffordable and out of reach:

THE PROBLEM OF ACCESS TO THE AUSTRALIAN LEGAL SYSTEM

Executive Summary

In 2009, then Federal Attorney General Robert McClelland said that the "critical test" for our justice system is whether it is "fair, simple, affordable and accessible."[1] For many Australians, our legal system is failing on all these fronts.

The high price of legal services means that many Australians would find it difficult to pay for a lawyer for anything but the most basic legal issues. When people who can't afford a lawyer turn to government funded legal assistance services, they find that due to chronic funding shortages, ongoing help is often restricted to those on the lowest incomes, and then only for a limited range of mainly family law and criminal law issues. Unlike the health and education system in Australia, there is no universal safety net for legal help.

Australians underpaid by their employer, bullied at work or discriminated against, or in debt and facing repossession of their home, involved in a dispute with their insurer over flood damage, or who are elderly and being financially abused by their carer or family, will often find it extremely difficult to access free ongoing legal help if they can't afford a lawyer.

Repeated government and Parliamentary inquiries over the past decade have recognised that the legal system is out of reach for many Australians. Legal assistance bodies, law societies, the courts, community agencies and politicians from all the major parties have highlighted the problem. Yet, despite some worthwhile policy initiatives, the large scale reforms needed to remedy the situation have not been undertaken.

In particular, Australian Government funding for legal assistance services has failed to keep pace with demand, inflation and population growth, and budget figures show falls in real terms in per capita funding for the next three years.

This report highlights the problems faced by many Australians in accessing the legal system. The report synthesizes research, reports and information on access to the legal system from a range of sources over the past decade.

Our goal is to raise awareness of the problem and promote action to ensure that every Australian can access the law, regardless of their financial situation, social circumstances or geographic location.

A national review of legal assistance services is currently underway. The review provides a unique opportunity for the Australian Government to establish a proper safety net so that Australians don't miss out on the legal help they need. This will require a major boost in funding to legal assistance services, targeted so as to maximise its impact. Absent decisive action by government, the crisis in access to the legal system will continue.

1 Attorney-General's Department, *Strategic Framework for Access to Justice in the Federal Civil Justice System*, 2009, Foreword

Many Australians cannot afford a lawyer for anything beyond the simplest legal issues

It is impossible to plan for when many legal issues might arise. People don't budget for legal fees for issues like marriage breakdown, unfair dismissal, eviction, discrimination, getting ripped off or debt problems.

When legal issues arise, often the starting point is to look at paying for a lawyer. Unfortunately, most Australians would find it difficult to pay for a lawyer for anything but the most basic legal issues.

Lawyers normally charge for their work on an hourly basis. So if a legal issue is more complex and takes longer to resolve, the lawyer's fees will be higher. The rate per hour for a lawyer varies depending on factors like experience of the lawyer, whether they are in the city, the suburbs or the country, and the type of legal matter. As a guide, hourly rates can vary from around $200 an hour to more than $600 an hour.[2] Accordingly, anything but the simplest legal matter is likely to cost thousands of dollars in legal fees and sometimes tens of thousands, and most lawyers will ask for a significant up front payment towards the likely costs.

Court costs

Many legal issues don't involve court hearings and often, even where court proceedings are started, cases are settled before the final hearing and the court's decision. So it can be difficult to estimate the cost of resolving some legal issues. However, it is clear that for any issue involving court, legal costs quickly extend beyond the reach of most Australians.

For example, the Australian Government's Attorney General's Department estimated,[3] based on previous studies, that the average cost for an individual undertaking a Federal Court case in 2007/08 would be around $74,000 - 84,000 with disbursements costing an additional $25,000. The Department estimated that the average legal costs including disbursements of bringing a Family Court case would be around $6,500 and the cost of bringing a case in the Administrative Appeal Tribunal would be around $7,300.

Estimated 2007/08 legal fees and disbursements

	Average legal fees and disbursements for applicants	Average legal fees and disbursements for respondents
Federal Court	$111,130	$99,805
Family Court	$6,499	$8,807
Administrative Appeals Tribunal	$7,351	$8,780

Source: Attorney-General's Department, A Strategic Framework for Access to Justice in the Federal Civil Justice System, 2009, 41.

For a mother escaping a violent partner and trying to protect herself and her children with an intervention order and appropriate family law orders, or for grandparents whose retirement home, where they invested their life savings, has gone into administration, or for a pregnant woman discriminated against by her employer, the costs of paying for advice and taking action can be extremely prohibitive.

2 See for example; https://online.slatergordon.com.au/sgo/Wills/Wills_FAQ_Heading/ accessed 9 July 2012; the Law Institute of Victoria Practitioner Remuneration Order, 2012; Ackland R, "Where there's a will there's a chance for wasteful litigation" *Sydney Morning Herald* 13 April 2012

3 Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, 2009, 41

Criminal law costs
The Law Institute of Victoria in its submission to the 2009 Senate Access to Justice Inquiry summarised research on the average legal fees for some criminal law matters.[4] The average lawyer's fee to help a person plead guilty to a minor criminal charge was $2370 and the average fee for a five day County Court trial was $11,290.

Disbursements
Disbursements are costs additional to the lawyers' fees, like court fees and the costs of printing, copying, court transcripts and expert witness reports.

Many law firms charge their clients $1 or more for each page of photocopying and courts allow lawyers to charge even more for photocopying related to litigation, for example the Victorian Supreme Court provides for the recovery of photocopying at the rate of $1.70 per page.[5]

Transcripts are records of what was said in court. The person seeking the transcript must pay for the service "which can amount to up to $1000 a day".[6]

Court fees vary depending on the court and at what stage of the process the legal issue is resolved. As a guide, a divorce application costs $577 in court fees. A family law application, for example in relation to a dispute over access to children or property, costs $255 in court fees to start the application and $638 for each day if a hearing is necessary.[7] For people on low incomes, fees can be waived or reduced. Federal Court data on fee waivers highlights the lack of access to legal aid; less than 10% of fee waivers in 2007-08 represented legal aid exemptions.[8]

What prominent Australians say about the affordability of our legal system

"A first class court system and a first class legal profession are of no avail to a person who cannot afford to access them."

SIR ANTHONY MASON, FORMER CHIEF JUSTICE OF THE HIGH COURT OF AUSTRALIA[9]

"If you are from middle Australia and you want to embark on a substantial piece of litigation, you really have to put your house on the line"

ROBERT McCLELLAND, FORMER FEDERAL ATTORNEY-GENERAL[10]

"Unless you are a millionaire or a pauper, the cost of going to court to protect your rights is beyond you."

GEORGE BRANDIS, SHADOW ATTORNEY-GENERAL[11]

"The difficulties experienced by middle-income earners in accessing the justice system [are] a long-standing failure."

JOHN DOYLE, FORMER CHIEF JUSTICE OF THE SUPREME COURT SOUTH AUSTRALIA[12]

"The cost of litigation in the Supreme Court...has for most South Australians become unattainable."

RALPH BONIG, PRESIDENT SOUTH AUSTRALIA LAW SOCIETY[13]

"Big business can afford access to the courts, but the ordinary Australian can't."

WAYNE MARTIN, CHIEF JUSTICE OF THE SUPREME COURT OF WESTERN AUSTRALIA[14]

4 Law Institute of Victoria, *Submission to the Senate Access to Justice Inquiry*, 2009, 4
5 Victorian Law Reform Commission *Civil Justice Review* 2008, 649-650
6 Victorian Law Reform Commission *Civil Justice Review* 2008, 644
7 Courts Fees (Family Law Courts brochure), 2012, www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Fees/Court+fees/ accessed 12 July 2012
8 Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, 2009, 44
9 Keynote speech to the Public Interest Law Clearing House 10th anniversary dinner, 2004 www.vicbar.com.au/webdata/VicBarNewsFiles/130PILCH.pdf
10 Merritt C "Middle Australia excluded as court costs put 'justice out of reach'" *The Australian* 18 May 2012
11 Brandis G "Lack of access an impending social crisis" The Australian 1 June 2012
12 Merritt C "Middle Australia excluded as court costs put 'justice out of reach'" *The Australian* 18 May 2012
13 Merritt C "Middle Australia excluded as court costs put 'justice out of reach'" *The Australian* 18 May 2012
14 Berkovic N "Fear of justice bypassing middle-income Australians" *The Australian*, 8 June 2012

There is a system to help those who can't afford a lawyer

Like the health system, with its mix of public and private hospitals, community health centres and Indigenous health services, the legal system involves public and private services working together to provide assistance.

People who can't afford to pay for a lawyer can seek help from:
- Legal aid commissions;
- Community legal centres;
- Indigenous legal services; or
- Private lawyers acting pro bono.

Legal aid commissions
Legal aid commissions are state and territory statutory agencies. There are eight legal aid commissions in Australia. The commissions typically have a central head office and regional offices.

Legal aid commissions provide free legal information, advice, duty lawyer and legal representation services. Due to funding shortages, eligibility for legal representation is limited predominantly to people with very low incomes and low assets who need help with serious criminal law matters, or child protection and family matters involving a child's welfare or living arrangements. In some cases, a person may be required to contribute to the legal costs depending on their income and assets.

If a person is eligible for legal representation, they may either be helped by a lawyer employed by the legal aid commission, or receive funds to pay for a private lawyer who does legal aid work.

Legal aid commissions also deliver community legal education and undertake some law reform work.

Community legal centres
Community legal centres are independent, non-profit, non government organisations with a focus on early advice, problem solving and working with other agencies to address connected legal, financial, social and health problems.

Community legal centres focus on helping people who don't qualify for legal aid and mainly help people with civil and family law issues. Due to funding shortages, community legal centres focus on assisting disadvantaged Australians. Over 80 per cent of the people helped by community legal centres receive under $26,000 a year in income.

As well as helping on individual issues, community legal centres provide community legal education to inform Australians about the law and prevent legal problems, and undertake law reform work to fix problems with the law. Thousands of lawyers and law students volunteer in community legal centres, and centres also receive substantial pro bono support from law firms.

Indigenous legal services
Aboriginal and Torres Strait Islander Legal Services (ATSILS) are independent, non-profit, non government bodies that provide culturally sensitive services to Aboriginal and Torres Strait Islander people. There are eight ATSILS around Australia with around 80 office locations.

ATSILS mainly focus on criminal and family law issues. Due to funding shortages, they are forced to limit eligibility for help to those on low incomes.

There is also a network of around 30 Indigenous family violence prevention legal services (FVPLS) around Australia which focus specifically on helping people who are victims of family violence or sexual assault. FVPLS provide legal assistance, court support and counselling.

As well as helping on individual issues, ATSILS and FVPLS deliver community legal education and law reform work to fix problems with the law.

Private legal profession
The private legal profession helps people who can't afford to pay for a lawyer in several ways.

Some law firms do "legal aid work" where they are paid, at below market rates, by legal aid commissions to help people who are eligible for assistance. Law firms can sometimes help people who can't pay up front, by agreeing to "no win no charge" or other deferred fee arrangements, mainly in personal injury claims or family law disputes over property.

Private lawyers also make an important contribution through "pro bono work" - work for free for people who can't otherwise get legal help. Many lawyers and law students also volunteer in community legal centres.

The system is at crisis point

Due to chronic government underfunding, legal assistance services are forced to limit eligibility to people on very low incomes. This means many people who need help, but who can't afford a lawyer, miss out. Unlike the Australian health and education systems, there is no universal safety net for legal help.

National Legal Aid, the body which represents the eight Australian legal aid commissions has recognised that "the legal aid means test...is set at a level that allows only the most poor to be eligible".[15] The Australian Government Attorney-General's Department has noted that "98 per cent of legal aid recipients [receive] an income that could be considered below the poverty line. This leaves much of Australia unable to afford legal representation but nevertheless ineligible for legal aid."[16]

People who don't qualify for legal aid often turn to community legal centres for help. The majority of community legal centre work is in civil law, which reflects the fact help from legal aid commissions is generally not available for many civil law issues. Civil law involves issues like tenancy, debt, employment, elder abuse, consumer issues and social security.

Community legal centres are a good source of early advice and can help people identify what the legal issue is, what can be done about it and can then point them in the right direction to get the ongoing help they need. However, due to funding shortages, it is difficult for community legal centres to provide detailed ongoing assistance themselves. Often people receive limited assistance, which falls far short of the help they need and that they would receive if the community legal sector was adequately funded.

Indigenous legal services and pro bono services are similarly stretched and are not able to help those who need it, meaning many people fall through the cracks.

Australians' access to legal services also varies significantly depending on their geographic location. Some areas across Australia have very poor access to legal assistance services, severely restricting people's access to the legal system.

15 National Legal Aid, Submission to Inquiry into Access to Justice, 2009, 15
16 Attorney-General's Department, *Strategic Framework for Access to Justice in the Federal Civil Justice System*, 2009, 52

The need for better access to the law

There have been a number of government and bipartisan Parliamentary inquiries into access to the Australian legal system in the last decade. These inquiries repeatedly recognise the lack of access to legal help in Australia.

In 2004, the Senate Legal and Constitutional References Committee conducted a significant inquiry into legal aid and access to justice. The committee stated that:

- "more funding is urgently needed for family law matters";[17]
- "the Committee heard significant concerns about the current shortfall in funding of Indigenous legal services";[18]
- "the Committee heard that the inadequacies in legal aid provision are greatly magnified in rural and remote areas. Large areas of Australia are not covered by legal aid or free legal services";[19] and
- there "was compelling evidence that many [community legal] centres are facing a funding crisis...the community legal sector is a crucial part of providing access to justice for all Australians and...centres appear to be under extreme pressure."[20]

In 2007, a joint NSW and Australian Government inquiry into the community legal centre funding program in NSW concluded the program "is underfunded to meet the growing demand for services" and "almost all centres are overwhelmed by demand for their services and cannot sustain their current levels of service, nor meet emerging service gaps."[21]

In 2008, an Australian Government review of the community legal centre funding program found that:

- "community legal centres are experiencing particular problems in meeting demand for services within their current funding allocations;"[22] and
- "community legal centres are generally poorly funded."[23]

In 2009, the Senate Legal and Constitutional References Committee conducted a further inquiry into access to justice. The committee stated that:

- "evidence to the committee overwhelmingly stated that, at present, Australian Government funding levels are not adequate, and inhibit access to justice, including legal representation;"[24]
- "evidence to the inquiry...overwhelmingly suggests...that [community legal centres] need greater funding to provide minimum levels of access to justice;"[25]
- "on the evidence before the committee, [legal aid commissions] do not and cannot adequately cover the legal needs of disadvantaged Australians;"[26]
- "the committee heard significant criticisms of core funding levels [of Indigenous legal services]...The committee is concerned that this adversely impacts on one of the community's highest needs groups, Indigenous Australians and their ability to access justice...The committee also received evidence concerning Indigenous women's chronic disadvantage in their ability to access justice, including in relation to domestic/family violence and sexual assault".[27]

The 2009 inquiry concluded "at present, reforming the legal system might appear difficult, onerous and expensive; but...ultimately, the investment of effort, time and money will result in significant benefits to all concerned. Otherwise, the committee predicts that within a decade it will again be inquiring into a failing, or failed, legal system and asking, 'why wasn't something done about this ten years ago?'"[28]

17 Senate Legal and Constitutional Affairs Reference Committee *Legal aid and access to justice* 2004, xvi
18 Senate Legal and Constitutional Affairs Reference Committee *Legal aid and access to justice* 2004, xvii
19 Senate Legal and Constitutional Affairs Reference Committee *Legal aid and access to justice* 2004, xviii
20 Senate Legal and Constitutional Affairs Reference Committee *Legal aid and access to justice* 2004, xx
21 NSW and Commonwealth Governments *Review of the NSW Community Legal Centres Funding* Program 2007, 5
22 Attorney-General's Department, Review of Commonwealth Community Legal Services Program 2008, 47
23 Attorney-General's Department Review of Commonwealth Community Legal Services Program 2008, 45
24 Senate Legal and Constitutional Affairs Reference Committee *Access to justice* 2009, 10
25 Senate Legal and Constitutional Affairs Reference Committee *Access to justice* 2009, 129
26 Senate Legal and Constitutional Affairs Reference Committee *Access to justice* 2009, 56
27 Senate Legal and Constitutional Affairs Reference Committee *Access to justice* 2009, xix
28 Senate Legal and Constitutional Affairs Reference Committee *Access to justice* 2009 xx

What prominent Australians say about the availability of help for people who can't afford a lawyer

Legal aid has been "grossly underfunded."

FORMER FEDERAL ATTORNEY-GENERAL ROBERT McCLELLAND[29]

"When it comes to measures to ameliorate the cost of access to justice, the record is truly lamentable."

GEORGE BRANDIS, SHADOW FEDERAL ATTORNEY-GENERAL[30]

"The reality is we are a long way short of what we would say is a reasonable amount of funding to be able to even provide the most basic services...We really are at a point, almost at crisis point, in terms of our ability to be able to respond."

GEORGE TURNBULL, DIRECTOR, LEGAL AID WESTERN AUSTRALIA[31]

"There is a complete failure [in the 12/13 Federal Budget] to address the chronic underfunding in legal assistance. All Australians have a fundamental right to access legal advice and services, regardless of their means...the Government's legal assistance sector spending...is now vastly inadequate to meet a real need."

CATHY GALE, PRESIDENT, LAW COUNCIL OF AUSTRALIA[32]

"When [people] do come to the legal profession – particularly the profession working in the legal aid sector – they find a myriad of different services which are often shrouded by an almost impenetrable fog of stringent funding and case criteria, guidelines, and means and merits tests that have been put in place to manage and prioritise legal aid expenditure because the level of government funding is so hopelessly inadequate, so hopelessly disproportionate to the need."

TONY PARSONS, FORMER MANAGING DIRECTOR, VICTORIA LEGAL AID[33]

Funding has not kept pace with demand, inflation or population growth

Federal and State (and sometimes local) governments contribute to the funding of legal assistance services. From the late 1970s until 1997, funding of legal aid commissions was allocated in line with an agreement under which the Australian Government would meet 55 per cent of the funding responsibility and the States and Territories would meet 45 per cent.

In 1997 however, the Australian Government made significant changes to its funding model. Legal aid commission funding was cut by $33 million each year for three years. In 2003-04, for example, the Australian Government contribution to legal aid funding was $130 million, compared to its contribution of $159 million in 1996-97.[34]

These funding changes led to drastic cuts in civil law services which have never been restored. Legal aid commissions "eliminated or drastically reduced their civil law legal aid programs" and "as a result people can no longer as readily obtain legal aid, if at all, in relation to matters such as employment, social security, credit/debt, mortgage, housing and tenancy, consumer protection, and older people's issues."[35]

In 2009, the Australian Government Attorney-General's Department noted there was "now very limited availability of legal aid for civil law matters as [legal aid commissions] focus on family and criminal law matters - a reduction of 78 per cent since 1995-96".[36]

29 Merritt C "Middle Australia excluded as court costs put 'justice out of reach'" *The Australian* 18 May 2012
30 Brandis G "Lack of access an impending social crisis" *The Australian* 1 June 2012
31 Chung M Access to justice ABC News www.abc.net.au/news/2009-12-11/access-to-justice/2590496 accessed 12 July 2012
32 Jennings A "Law Council Slams Federal Budget" *Lawyers Weekly* 10 May 2012
33 Senate Legal and Constitutional Affairs Reference Committee *Access to justice* 2009, 61
34 Senate Legal and Constitutional Affairs Reference Committee *Access to justice* 2009 p 76
35 Senate Legal and Constitutional Affairs Reference Committee *Access to justice* 2009, 50
36 Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, 2009, 43

In 2009, The Law Council of Australia and other organisations engaged Price Waterhouse Coopers ("PwC") to analyse legal aid funding in Australia. The PwC report, *Legal aid funding: Current challenges and the opportunities of cooperative federalism*, identified that, based on budgeted 2010 figures:

- Australian Government legal aid funding per capita in real terms had fallen 22 per cent since 1997; and
- the Australian Government share of legal aid had dropped to 32 per cent.[37]

If people don't get help, they are forced to represent themselves or give up on their rights

If people can't get the help they need, they are forced to either give up on their rights, or go it alone, representing themselves.

Australia's laws are complex and our court procedures are difficult to understand. While some people are capable of dealing with straight forward legal issues themselves, perhaps with the help of some written legal information or advice, for many others, the lack of access to legal help is a major barrier to their ability to exercise their rights.

A legal system too complicated to understand properly

Often legal issues involve disputes with large organisations like insurance companies, banks and government agencies, who are very familiar with the legal issues involved and who pay for the best lawyers who are experts in their area. If people can't access their own quality legal help, the playing field isn't level.

Survey data released in 2012 by the Australia Institute showed that 88 per cent of Australians surveyed agreed that "the legal system is too complicated to understand properly" and 83 per cent agreed that "only the very wealth can afford to protect their legal rights."[38]

Despite the barriers, large numbers of people still represent themselves. This is a major problem for the court system. In the Family Court, around 30 per cent of people are not represented in court hearings.[39] Aside from often being unfair to the person representing themselves, if people can't access legal representation it creates significant costs for the courts.

Worse, for each person who represents themselves, it's likely there are many more simply missing out on their rights because they can't access help and it's too difficult and stressful to continue.

Research shows that lack of access to free legal services is clearly a factor behind the number of people representing themselves in court. A 2003 study of 500 self-represented litigants found "a clear relationship between the unavailability of legal aid and the number of self-represented parties." Less than half of those who applied for legal aid were successful, and of these, "more than a third had subsequently had the grant terminated or not extended before final hearing, or the grant had not covered court proceedings in the first place."[40]

Unresolved legal problems cause significant social, health and financial costs to individuals and the community.[41] If Australians can't protect their legal rights, the law becomes meaningless.

37 Price Waterhouse Coopers, Legal aid funding: *Current challenges and the opportunities of cooperative federalism*, 2009, 19

38 The Australia Institute, *Justice for all: Giving Australians Greater Access to the Legal System*, 2012, 22

39 Family Court of Australia, *Annual Report* 2010-11, 2011, 69

40 Hunter R, Giddings J, Chrzanowski A, *Legal Aid and Self-Representation in the Family Court of Australia*, 2003, cited in Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, 2009, 43.

41 Pleasence P et al, *Civil Justice in England and Wales: Report of the 2007 English and Welsh Civil and Social Justice Survey* Legal Services Commission, 2008 see chapter 3; Pleasence P, Causes of Action: *Civil Law and Social Justice* Legal Services Commission, 2nd ed, 2006, 155; Williams T, *Review of Research into the Impact of Debt* Advice Legal Services Research Centre, 2004, 19-20, cited in Schetzer L, *Courting Debt: legal needs of people facing civil consumer debt problems* Department of Justice 2008, 14

What prominent Australians say about the effects of the lack of access to legal help

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

MURRAY GLEESON, FORMER CHIEF JUSTICE OF THE HIGH COURT OF AUSTRALIA[42]

"If these citizens cannot access legal aid, have no representation in court and do not know their rights, then that makes the job of the courts considerably more difficult in terms of achieving just outcomes"

MELANIE SLOSS SC, CHAIR OF THE VICTORIAN BAR[43]

"This is a social crisis in the making. The courts are the guarantors of our rights, but increasingly the costs of legal representation and court fees mean that ordinary Australians are forced either to abandon their legitimate claims or enter the minefield of self-representation... Self-represented litigants, who cannot hope to master the procedural and substantive learning that lawyers spend years acquiring, themselves add to the cost and delays of litigation and exacerbate these problems for other litigants."

GEORGE BRANDIS, SHADOW FEDERAL ATTORNEY-GENERAL[44]

"Trying to navigate the legal system or accessing legal information about what to do when faced with a legal issue can be overwhelming for many people in the community,"

JUSTIN DOWD, PRESIDENT OF THE LAW SOCIETY OF NSW[45]

"The middle class really can't qualify for legal aid, and they are the ones who end up being a lot of the self-represented litigants – in the family law area it's about 30 per cent, it's a horrendous figure."

BILL GRANT, CHIEF EXECUTIVE, LEGAL AID NSW[46]

"Underfunding of the legal assistance sector creates additional costs downstream, rippling into many different areas, including the justice system, public health system and the broader business community."

CATHY GALE, PRESIDENT, LAW COUNCIL OF AUSTRALIA[47]

More accessible legal services are needed

Research on legal needs has been conducted in Australia and overseas. This research typically aims to measure:

- how often legal issues affect people;
- what types of legal issues affect people;
- what people do in response to legal issues;
- what barriers people encounter when they seek help with legal issues;
- the outcome of legal issues affecting people; and
- people's satisfaction with legal services and the outcome of legal issues.

In 2006, the NSW Law and Justice Foundation (NSWLJF) published the results of a survey of legal needs in six regions with relatively high levels of disadvantage. The survey involved

42 'State of the Judicature' Speech delivered at the Australian Legal Convention, 10 October 1999 www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_sta10oct.htm

43 "Another 26m for legal aid not enough" *The New Lawyer* 2 May 2012 www.thenewlawyer.com.au/govt---regulation/another-$26m-for-legal-aid-not-enough-lawyers

44 Brandis G "Lack of access an impending social crisis" *The Australian* 1 June 2012

45 The Law Society of NSW "Law Week in NSW: Law and Justice in Your Community" 24 April 2012 http://www.lawsociety.com.au/about/news/598243

46 Berkovic N "Demand for legal aid soars as hardship bites" *The Australian* 18 May 2012

47 Jennings A "Law Council Slams Federal Budget" *Lawyers Weekly* 10 May 2012

telephone interviews with 2431 people over the age of 15. The comprehensive report on the survey, Justice Made to Measure, highlighted the following findings:

- People experienced a high number of legal issues, with around two thirds of people reporting at least one legal event in the previous 12 months;
- A third of people did nothing in response to legal issues;
- 16 per cent handled the legal issue on their own;
- Only 12 per cent of people sought help from a traditional legal adviser for the legal issue;
- 51 per cent of people sought help elsewhere, for example from friends, family or other professionals like doctors; and
- Around 40 per cent of people who sought help reported some type of barrier to getting help such as difficulty getting through on the telephone, delays in getting a response, difficulty getting an appointment or lack of local or easily accessible services.[48]

More recently, in 2012 The Australia Institute published the results of survey of 1,001 adult Australians, representative of the broader population by gender and age. While the survey used a different methodology to the NSWLJF survey, the results are helpful in understanding the legal problems people face and what they do in response to them. The report on the survey, *Justice for all: Giving Australians greater access to the legal system* highlighted:

- one third of people reported experiencing some kind of legal problem in the past five years;
- 24 per cent of people said they had sought legal advice for a legal problem;
- around 9 per cent of people had experienced a legal problem but did not seek legal advice for financial reasons; and
- 3 per cent of people had a legal problem but did not seek legal advice due to lack of knowledge.[49]

Based on the survey results, the Australia Institute conservatively estimated that around 1.7 million Australians can expect to encounter a legal problem each year and 490,000 of those people will not receive legal advice due to financial reasons or lack of knowledge.[50]

The research by The Australia Institute and the NSWLJF highlights the need for:

- more accessible free legal services;
- expanded and more targeted community legal information and education;
- working closely with non-legal professionals as gateways to legal services;
- improving coordination between legal services; and
- improving coordination between legal services and non-legal services to address connected legal, health, financial and social issues.

The NSWLJF has undertaken a much larger National Legal Needs Survey. The results of that survey have not yet been published.

Addressing the problem

There is no shortage of reports, analysis and recommendations on how to improve the legal system. There is a shortage of the type of government action required to address this crisis.

Governments around Australia are implementing a range of reforms to improve access to the legal system focused on:

- improving Australians' access to legal information and advice, including through new uses of technology;
- promoting early intervention and prevention legal services that help Australians resolve legal issues early;
- promoting alternative dispute resolution schemes, that enable Australians to resolve legal disputes without lengthy, expensive court proceedings;

48 Coumarelos C, Wei Z & Zhou AH, *Justice made to measure: NSW legal needs survey in disadvantaged areas*, Law and Justice Foundation of NSW, 2006, see in particular xviii to xxii.

49 Denniss R, Fear J & Millane E, *Justice for all: Giving Australians greater access to the legal system* The Australia Institute, 2012, 1-2.

50 This figure doesn't include people who didn't seek help for other reasons, or who sought help, for example from a legal aid commission, and were ineligible for assistance, or who received some limited assistance which fell short of the full service required.

- simplifying court procedures;
- promoting private lawyers undertaking pro bono work; and
- improving collaboration.[51]

Many of these initiatives are sensible and worthwhile and have broad support. However, they fall far short of what is needed to transform the system.

The 2009 Senate Committee inquiry into access to justice advocated for "a decisive commitment on the part of all governments, all legal service providers, the legal profession and all other interested stakeholders if Australia is to have a strong, viable and cost-effective legal system."[52]

Three years on, we have only seen incremental increases in Australian Government funding to legal assistance services. Worse, budget figures from the Attorney-General's Department show that Australian Government spending per capita on legal assistance funding will continue to fall in real terms across the next three years.[53]

If these policy reforms are to succeed, they need to be underpinned by major increases in funding for community legal centres, Indigenous legal services and legal aid commissions.

The Australian Government currently invests around $330 million a year in legal assistance funding. National Legal Aid, in a 2007 report, called for an increase of $165 million in funding.[54] The Law Council of Australia is calling for the Australian Government to fund 50 per cent of legal aid commission funding, requiring an increase of $220 million, in addition to increases in funding to community legal centres and Indigenous legal services.[55] The National Association of Community Legal Centres has called for an immediate increase in investment in community legal centres of around $48 million a year to bring existing centres up to a basic minimum funding level followed by increases targeted towards high needs areas.

A national review of legal assistance services is currently underway.[56] The review provides a unique opportunity for the Australian Government to establish a proper safety net so that Australians don't miss out on the legal help they need. Our shared goal should be for all Australians to be able to access the law, regardless of their financial situation, social circumstances or geographic location. It is up to all governments, working in partnership with legal assistance services, to take decisive action to realise this goal.

51 For example, in 2010, the Federal, State and Territory governments agreed to the National Partnership Agreement on Legal Assistance Services. The agreement aims to resolve legal problems earlier, better target services to people who most need help, improve collaboration and generate a more strategic national response. A review of the agreement is currently underway and is due to report by 30 June 2013.

52 Senate Legal and Constitutional Affairs Reference Committee *Access to justice* 2009 xx

53 Departmental budget figures show that Australian Government total legal assistance spending will increase only 1.0 per cent from 2011/12 to 2014/15, falling well short of likely inflation and population growth.

54 National Legal Aid, *A New National Policy for Legal Aid in Australia* 2007, 16

55 Law Council of Australia, www.lawcouncil.asn.au/lca/index.cfm?04AD6A50-1E4F-17FA-D2D8-012165FE42EA accessed 11 July 2012

56 See footnote 51 above and www.ag.gov.au/Legalaid/PagesReviewoftheNationalPartnershipAgreementonLegalAssistanceServices.aspx