

Justice for all

Giving Australians greater access to the legal system

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Summary

In order to receive fair treatment through the legal system, it is often necessary to seek assistance from a lawyer. This can be an expensive exercise, depending on the matter to be resolved and one's capacity to pay for it. The financial costs of pursuing justice can be so high that a great many people do not do so. In a system in which one rule of law is supposed to apply to all, this has fundamental implications for the rights of citizens.

Since 1973, the system of legal aid in Australia has provided legal assistance for people who would otherwise not be able to afford access to justice. Unfortunately, for much of the time since then the legal aid system has been underfunded. Because funding does not match the level of need in the community, Legal Aid Commissions at the state/territory level use complex mechanisms for rationing legal aid so that only the most deserving cases qualify.

In practice, the tight rationing of legal aid means that only the poorest and the richest Australians can ever hope to receive legal representation. For those who inhabit the vast middle ground between very poor and very wealthy, the legal system can remain forever inaccessible. This is true regardless of the strength of someone's case or the degree of injustice that they are seeking to remediate (unless they are fortunate enough to receive *pro bono* legal help, perhaps because their case has a public interest dimension). But if our legal system effectively excludes the majority of Australians, then we cannot be confident that the system is delivering justice for all.

The starting point for good policy in the administration of justice should be an assumption that legal needs ought to be met, irrespective of an individual's economic or social circumstances. While it might be straightforward to identify someone whose legal needs are met (e.g. when they took a matter to court with the assistance of a lawyer), *unmet need* cannot necessarily be identified precisely or in all situations. Indeed, some of the most important areas of unmet need may relate to problems which people did not know could be solved via legal intervention.

Estimating unmet need

This paper presents the result of survey research by the Australia Institute into unmet legal need. The survey sample consisted of 1,001 adult Australians representative of the broader population by gender and age. The research gave greater focus to legal matters of a non-criminal nature, because such issues are more likely to constitute 'unknown' legal problems (that is, issues that people are unaware can be solved through legal intervention) than criminal matters – which can be more easily defined as 'legal'.

Around one in three survey respondents (33%) reported experiencing some kind of legal problem in the previous five years. One in four respondents (24%) said that they had sought legal advice for a legal problem.

The most common type of legal problem reported by respondents was being treated unfairly by a business (e.g. bank, phone company, tradesman, retail outlet); one in eight people (12%) said they had a legal problem of this kind. The next most common kind of problem was dispute with a landlord or tenant, real estate agent or neighbour (8%), followed by a dispute with an employer over pay, conditions, workplace safety or overtime (7%) and a divorce, a dispute over child custody or support payments, or arguing with family members over inheritance (5%).

Around 9% of respondents had experienced a legal problem but did not seek legal advice for financial reasons. In addition, 3% had a legal problem but did not seek legal advice due to a

lack of knowledge. This means that approximately one in eight respondents (12%) had legal needs in the previous five years which were not met.

These survey results allow us to estimate the actual numbers of people in Australia who have various kinds of experiences with the legal system. Because the survey is a sample of the broader population, the estimates below are broadly indicative of the numbers involved rather than precise calculations, and rely on the definitions set out in this report. Nevertheless, the estimates provide a sense of the scale of the problem of unmet legal need at present in Australia.

Population-based estimates of unmet legal over 5 years

	Per cent of survey sample	Population-based estimate
Experienced some kind of legal problem	33%	5.6 million
Unmet need for legal assistance	12%	2.0 million
<i>Financial reasons</i>	9%	1.6 million
<i>Lack of knowledge</i>	3%	530,000

These five-year estimates can also be converted to yearly estimates (taking into account the fact that a minority of Australians will experience more than one legal problem over a five-year period). *Around 10% of Australians, or 1.7 million people, can expect to encounter a legal problem in any given year. In 29% of cases, or for 490,000 people each year, legal needs are likely to be unmet.*

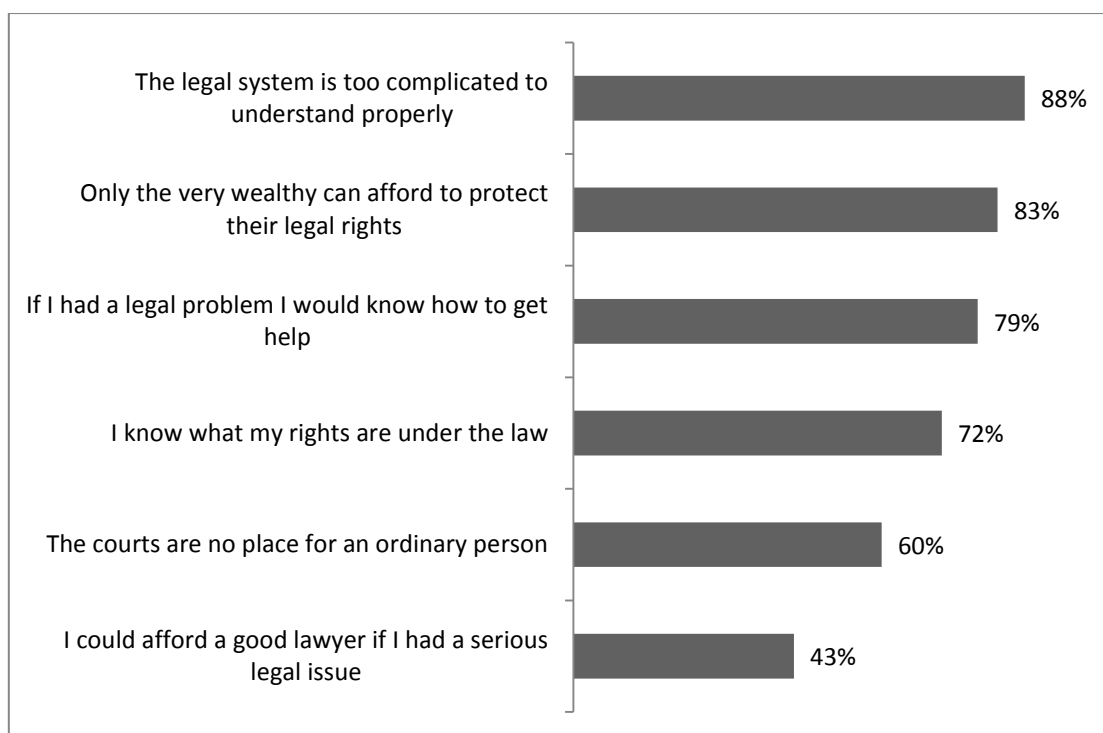
Of course, not all of these problems would involve a substantial legal process, such as going to court; many could be solved via minor interventions such as timely and relevant information and advice. Unfortunately, as our survey results show, many Australians find the legal system so complex and confusing that they are often unable to seek out or find such assistance.

Perceptions of the legal system

Many Australians recognise how difficult it can be for ordinary people to negotiate the legal system, with or without sufficient funding. Survey data provide an indication of community attitudes towards various aspects of the legal system.

Survey respondents were asked whether they agreed or disagreed with a series of statements about the legal system. The vast majority agreed that the legal system is too complicated to understand properly (88%) and that only the very wealthy can afford to protect their legal rights (83%).

Four in five respondents (79%) said that they would know how to get help if they had a legal problem, while 72% said that they knew what their rights are under the law. Most respondents agreed that the courts are no place for an ordinary person (60%). Less than half of respondents (43%) said that they could afford a good lawyer if they had a serious legal issue.



When asked which groups should receive government-funded legal aid, just one in four respondents (26%) said *only the very poor*. Most respondents believed that legal aid should be widely available, either to *everyone, regardless of wealth* (19%) or to *everyone except the rich* (44%). Only 4% of respondents said that *everyone should have to pay for their own lawyer if they need one*. These results suggest that if governments chose to increase access to legal aid then the majority of Australians would support such a move.

The rationale for increasing legal aid funding

Concerns have been raised over many years about the impact on the courts and the broader social fabric of a poorly funded legal aid system. By the same token, a well-funded and more comprehensive legal aid scheme is critical to both the experience and the perception of justice. It would also offer a number of key opportunities for policy-makers, as well as substantial benefits for the many Australians who are currently unable to access legal assistance due to a lack of money or a lack of knowledge.

First, a well-funded legal aid scheme would ensure that citizens are more informed of their legal position and well-represented when a lawyer is needed. Having a lawyer can effectively pre-empt the escalation of disputes and reduce long-term social costs. Rather than necessarily increasing the burden on the courts, facilitating access to legal advice can quickly resolve arguments with the potential to become much bigger if left unresolved.

Second, providing ready access to legal aid for a larger number of cases has the advantage of providing an accurate feedback mechanism for policy-makers considering law reform.

Third, a well-funded and comprehensive legal aid scheme would provide governments with a fiscal incentive to ensure that new laws are as fair, clear and comprehensive as possible, to minimise the likelihood of long and complex litigation.

Fourth, the knowledge that individuals have ready access to professional legal advice and representation would have a significant effect on the behaviour of risk managers (often

lawyers) advising wealthy and corporate clients. Knowing that the other side can fight as well as you can would have the direct effect of encouraging otherwise dominant litigants to engage in earlier negotiation, settlement and general preventative behaviour. These are all outcomes which would lower the overall cost of the legal system.

Finally, a properly funded legal aid scheme is equitable. Under the present system access to justice is determined as much by someone's financial position as by their legal needs. If our legal system is to serve everyone rather than a minority of citizens then funding for legal aid must be substantially increased.

The Legal Expenses Contribution Scheme – a supplementary funding model

There are a range of options open to policy-makers who wish to improve the ability of the legal system to meet the needs of a wide range of participants. In the absence of a significant and continued investment of new funds into legal aid budgets at the state or Commonwealth level, one possible reform might be a complementary funding model. This would be based on an income-contingent interest-free loan scheme akin to the Higher Education Contribution Scheme (HECS). A Legal Expenses Contribution Scheme (LECS) is not a final solution, nor is it a comprehensive legal aid scheme. It is, however, a practical initial step, capable of being put in place during the development of detailed policy and legislative change.

HECS funds undergraduate university degrees with interest-free loans and the government gradually claims back the money through the tax system when a graduate's income goes above a sufficient level. The scheme is effectively a co-contribution arrangement, since the Commonwealth generally still funds the majority of higher education course and infrastructure costs. A similar LECS might operate on the following basis:

- If someone does not qualify for legal aid under a means test, they would have the option of applying for LECS support. If they do qualify for legal aid, they would be able to receive legal aid as under the present system (assuming their matter meets the relevant merit test).
- LECS applicants earning below the top-tax bracket (currently \$180,001) would be able to qualify for an income-contingent loan to cover some or all of their reasonable legal expenses, depending on where their income sits in the tax scale.
- Applications would continue to be subject to a merit test conducted by qualified lawyers to determine eligibility. Only legal matters with a declared 'reasonable prospect of success' would attract LECS funding.
- The merit test for LECS funding would be expansive enough to incorporate a range of situations in which people encounter problems which can only be solved through pursuing civil legal action (for example against governments or corporations).
- Following the conclusion of a matter the recipient satisfies their obligation by paying to the Commonwealth a percentage of their income over the length of the loan, with payments set at a higher rate for recipients on higher incomes. Recipients would also have the option of repaying the loan immediately in a civil action with an advantageous and sufficient award of damages. (HECS also offers an incentive discount for early payment, which could also be applied here.)
- Where a matter ends badly for a LECS recipient who then finds themselves in jail or facing a substantial damages bill, they would be shielded from extreme poverty or bankruptcy and have the opportunity to rebuild and continue to contribute to the community while paying back their loan.

A scheme of this nature would provide much greater access to justice for middle-income Australians who are currently excluded by the present inadequately funded and restrictive

legal aid system. It would also expand the current scheme to cover civil litigation for plaintiffs and defendants. While there is a strong case for providing more comprehensive non-loan based legal aid the introduction of a LECS might be an effective and achievable compromise. In support of such a proposition, around three-quarters of survey respondents (74 per cent) said that they would support an income-contingent loan scheme like LECS for legal advice and representation.

Whatever the funding arrangement, legal aid's problems will best be addressed if they are seen, and acted upon, as part of the wider debate about how to improve the justice system and especially access to justice. The rule of law exists to protect all citizens, not as an instrument of privilege for those with means.

1 Introduction

The Government's aim is that eventually no person anywhere in Australia should suffer injustice because of the unavailability of legal advice or inability to afford the cost of representation in court proceedings.

Attorney-General, Senator Lionel Murphy¹

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.

High Court Chief Justice Murray Gleeson²

In the absence of free or subsidised representation, it is prohibitively expensive for most Australians to adequately defend their legal rights. The costs of seeking legal advice, engaging legal representation and pursuing a legal claim within the court system mean that many people cannot afford access to justice. According to the Law Institute of Victoria, the average cost to private clients who engage a law firm can range between \$2,370 and \$11,290, depending on the type of matter.³ Actual costs to some clients can of course be a great deal higher.

The purpose of legal aid is to ensure access to legal representation for those who cannot afford it. Unfortunately, eligibility for legal aid does not extend to all those in need of funding support. Access to legal aid funding in Australia is governed by tight eligibility criteria, including financial means tests, merit testing, and restrictions on the types of cases which qualify for financial support. Many people who are not eligible for legal aid are still not in a financial position to pursue a legal problem, particularly if this involves lengthy or complex litigation. In the absence of sufficient financial resources, the odds of succeeding within an adversarial legal system are reduced. In effect, the rationing of legal aid means that in many cases only very poor and very wealthy clients receive the legal assistance they need, while those between these two extremes – the great majority of Australians – often miss out.

Without access to legal assistance, self-representation is sometimes the only option, apart from giving up on defending one's legal rights. For those representing themselves, the likelihood of fair consideration of legal arguments by the judiciary can be compromised. In many instances legitimate legal problems are not pursued at all, whether through the courts or alternative forms of dispute resolution.

Data on court lodgements provide a measure of the present level of demands on the legal system in Australia. In 2009/10, around 1.66 million court lodgements were made. Some 51 per cent of these were made in the criminal jurisdiction, 36 per cent in civil jurisdiction courts, with the remaining 13 per cent of lodgements made in family courts, Federal Magistrates

¹ <[² Gleeson, M. Chief Justice, The State of the Judicature, Speech to the Australian Legal Convention, Canberra, 10 October 1999.](http://parlinfo.aph.gov.au/parlInfo/download/hansard80/hansards80/1973-12-13/toc_pdf/19731213_senate_28_s58.pdf;fileType=application%2Fpdf#search=%221970s%201973%22>http://parlinfo.aph.gov.au/parlInfo/download/hansard80/hansards80/1973-12-13/toc_pdf/19731213_senate_28_s58.pdf;fileType=application%2Fpdf#search=%221970s%201973%22> senate Hansard Dec 13 1973 p.2803</p>
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³ Law Institute of Victoria 2009. Submission to the Senate Committee on Legal and Constitutional Affairs Committee Inquiry into Access to Justice, p. 4. http://www.aph.gov.au/Senate/committee/legcon_ctte/access_to_justice/submissions.htm

courts, Coroners' courts and Probate (Supreme) courts. A further 2.3 million infringement notices were processed via electronic infringement and enforcement mechanisms.⁴

One of the most substantial impediments to the satisfactory operation of the justice system is the widely acknowledged shortfall in public funding for legal aid. Another contributing factor in unmet legal need is a lack of awareness on the part of people who could benefit from legal assistance. It may be that these people are unsure how to seek legal help; more fundamentally, they may not know that their circumstances might lend themselves to legal intervention of one kind or another.

This paper provides some new perspectives on the level of unmet demand for legal aid funding in Australia, based on survey research into the legal needs of ordinary Australians. The findings demonstrate that the use of legal services by members of the Australian community would increase dramatically if those whose legal needs are not currently being met were given greater access to justice.

The paper proposes an additional funding option to operate alongside the existing legal aid system: an income-contingent loan scheme to help individuals who do not qualify for legal aid but may still require financial assistance. The loan scheme would allow people who currently fail existing eligibility tests to access a form of funding assistance and, in turn, the justice system.

⁴ Productivity Commission 2011. *Report on Government Services 2011*. Steering Committee for the Review of Government Service Provision, Commonwealth of Australia, pp. 7.16-7.19.

2 Legal aid in Australia

What is legal aid?

There is no universally accepted definition of legal aid. For the purposes of this paper, legal aid refers to money made available through government agencies and other sources to fund legal services which are in turn provided either free of charge or at a reduced cost to recipients. These services are made available through a variety of channels, including Legal Aid Commissions (LACs), Community Legal Centres (CLCs) and private legal practitioners and firms.

LACs are state-based statutory organisations that operate independently from government and are the primary legal aid service providers in Australia. Each LAC is responsible for determining which clients are eligible for subsidised legal assistance, although this process is determined to some degree by legislation and other formal guidelines. Typical forms of legal aid provided by LACs include legal information and referral services, advice and minor assistance, duty lawyers,⁵ and ongoing legal representation where a grant of legal aid is made.⁶

In addition to LACs there are more than 200 CLCs throughout Australia. CLCs are independent, community-managed, non-profit organisations that provide a range of assistance with legal and related matters to people on low incomes and those with particular needs, such as women and indigenous people.⁷ Commonwealth and State funding of CLCs has increased over the last decade, but not in proportion to rising demand, and CLCs continue to rely heavily on volunteers.

Lawyers working in private practice can also access legal aid funding on behalf of eligible clients. In order to access legal aid funding, private practitioners must have regard to similar restrictions to those that apply through LACs and CLCs.

Legal aid is distinct from *pro bono* legal assistance, which is the provision of free legal services by members of the legal profession, often working for disadvantaged groups or on matters of public interest. A key difference between legal aid and *pro bono* services is that legal aid derives from a welfare model of state-based assistance, whereas *pro bono* legal assistance is based upon a charitable model. Accordingly, *pro bono* services rely upon the voluntary participation of members of the legal profession and law firms, while legal aid is government funded.⁸

Despite the differences between legal aid and *pro bono* legal assistance, both rely to some degree on the generosity of the lawyers and legal firms involved. The pressures on legal aid lawyers working in LACs and CLCs can be enormous; there is anecdotal evidence that many

⁵ Duty lawyers are available at local courts or children's courts to advise and assist clients with various matters such as restraint orders, applications for bail, or pleas in mitigation. Duty lawyers are also available in the Federal Court for family law, and in some jurisdictions there may be small duty lawyer schemes for Tribunal civil matters, such as consumer or tenancy matters. Source: Legal and Constitutional Affairs References Committee, *Access to Justice*, Canberra, December 2009, p.96.

⁶ Senate Legal Committee on Legal and Constitutional Affairs, *For Richer and for Poorer - Cost of Legal Services and Litigation Discussion Paper No.7*, April 1992, p.11. See the *Legal Services Commission Act 1977* (SA), *Legal Aid Act 1977* (ACT), *Legal Aid Commission Act 1979* (NSW), *Legal Aid Commission Act 1976* (WA), *Legal Aid Commission Act 1978* (QLD) (Replaced by the *Legal Aid Queensland Act 1997* (QLD)), *Legal Aid Commission Act 1990* (Tas) and *Legal Aid Act 1978* (Vic).

⁷ Senate Legal and Constitutional Affairs References Committee, *Access to Justice*, Commonwealth of Australia, December 2009, p.139.

⁸ National Pro Bono Resource Centre, *Mapping Pro Bono in Australia*, University of New South Wales, Faculty of Law, 2007, p.96.

lawyers underreport the amount of time they spend in order to get the best outcome for their clients. Similarly, private practitioners engaged in *pro bono* work often undertake additional work for little or no material benefit. As the Senate Legal and Constitutional Affairs Committee has observed, this reliance on the personal commitment and generosity of skilled practitioners providing below-cost legal assistance is neither sustainable nor equitable:

*The legal system is currently afloat, arguably badly, due to a considerable amount of goodwill, but ... this could evaporate at any time, creating a crisis in the delivery of legal services and resulting in diminished access to justice for many Australians.*⁹

A brief history of legal aid in Australia

Legal aid began in Australia with the Commonwealth *Judiciary Act 1903*, which provided funds for representation of people without adequate means committed for trial against the Commonwealth. Via the Legal Services Bureaux, established in 1942, the Commonwealth provided aid to members of the armed services and their families; there were also various other ad hoc schemes at the state level providing legal aid up to the 1970s. In 1973 Attorney-General Lionel Murphy established the Australian Legal Aid Office in an attempt to ensure that access to the justice system was not prevented by a lack of funds or advice. Following a review of legal aid in 1976, the Commonwealth *Legal Aid Act 1977* introduced a scheme of arrangements between the Commonwealth and the States.

Under this scheme, state LACs were allocated a quota of legal aid matters that could be referred to the private profession, with the Commonwealth agreeing to meet the full cost of those matters irrespective of cost.¹⁰ Funding of LACs was determined by the *Commonwealth Legal Aid Commission Act 1977*, in which the Commonwealth provided 55 per cent of funding, the remainder being the responsibility of states and territories. Determination of priorities and allocation of revenue by LACs became the responsibility of the LACs themselves.¹¹

Until 1997 the Commonwealth provided funding to state and territory LACs without caveat and they were free to manage their budgets independently. In 1997, Commonwealth funding for legal aid was reduced and applied to a smaller range of matters. For example, matters which were considered 'Commonwealth law matters' (for which someone can receive Commonwealth-funded legal aid) were confined to subjects arising under Commonwealth legislation. Matters which qualified for Commonwealth funding lacked any organising principal beyond this narrow legal definition. This in effect meant that the Commonwealth only provided legal aid funding for a restricted range of matters, including Commonwealth criminal offences, family law disputes and immigration law matters. Assistance provided for other matters by state and territory LACs, including the great majority of criminal matters, were from this time funded through state and territory budgets.

Figure 1 illustrates how the narrowing of Commonwealth responsibilities has affected the breakdown in funding responsibility for legal aid between the Commonwealth and states/territories. Total Commonwealth funding fell between 1996-97 and 1999-2000; from that time Commonwealth funding rose but at a much slower rate than funding by state/territory governments, which were forced to make up the shortfall. Since 2000-01,

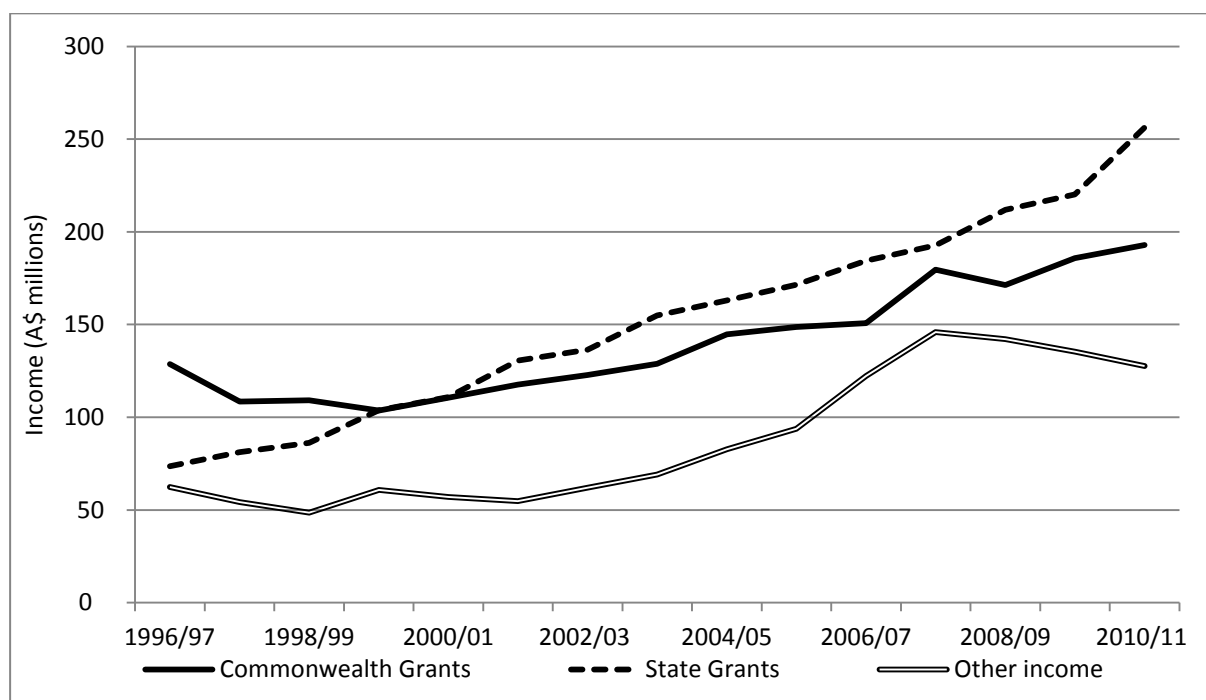
⁹ Senate Legal and Constitutional Affairs References Committee 2009. *Access to Justice*, Commonwealth of Australia, December, p. xx.

¹⁰ Senate Standing Committee on Legal and Constitutional Affairs 1992. *For Richer and for Poorer - Cost of Legal Services and Litigation*, Discussion Paper No.7, Commonwealth of Australia, p.9.

¹¹ Legal Aid Funding: Current challenges and opportunities for cooperative federalism, Final Report 2009, PwC for Law Council, p 15.

states and territories have contributed more to the legal aid system every year than the Commonwealth Government.¹²

Figure 1: State/territory LAC Income by funding source



Source: National Legal Aid. Excludes funding for Community Legal Centres.

In 2007 the Australian Council of Social Services estimated that up to 72 per cent of people seeking assistance from CLCs are turned away because 'services are operating at maximum capacity and CLCs have to ration access in some way'¹³. Like LACs, CLCs need to find ways of rationing their legal assistance in order to target the most deserving clients. This rationing process is discussed in more detail below.

Legal professionals, public servants and bipartisan committees in Federal Parliament have voiced concerns that the current legal aid funding model is inadequate and unjust. For example, the Senate Legal and Constitutional Affairs Committee observed in 2009:

*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?'*¹⁴

¹² National Legal Aid 2011. 'Finance', <<http://www.nla.aust.net.au/category.php?id=9>> accessed 5 December 2011.

¹³ Senate Legal and Constitutional Affairs References Committee 2009. Access to Justice, Commonwealth of Australia, p.151.

¹⁴ Law Council of Australia, 'Calls for legal aid boost in wake of report' (Press Release, 29 March 2010). Available at: <http://www.lawcouncil.asn.au/media/news-article.cfm?article=A791D470-1E4F-17FA-D254-FE7E680FEEB1> (accessed on 21 July 2010).

These comments reflect similar observations made by the same Committee in 1997, 1998 and 2004.¹⁵

Exacerbating the pressures on the legal aid system, the private sector has retreated to some extent from legal aid work in response to changes in market conditions. In recent decades, the incentive for private practitioners to carry out legal aid work has been undermined by increases in the opportunity costs associated with such work. Legal fees for private clients have risen considerably, particularly in certain areas of law, but growth in legal aid fees have lagged behind. As Fleming and Daly observe, 'payments for legal aid work did not keep pace with market rates.'¹⁶ This has led many private practitioners (particularly in larger firms) to reduce their caseload or opt out of legal aid work altogether, leaving smaller firms, LACs and CLCs to pick up the shortfall.¹⁷

Rationing legal aid

Because potential demand for legal aid is greater than the present level of funding allows for, there are a range of mechanisms in place to ensure that legal aid is delivered to the most deserving recipients. This rationing process takes two forms: means tests, which examine someone's capacity to pay for the legal expenses they incur, and merit tests, which assess the legal aspects of a claim for assistance. Rationing of legal aid applies to situations where applicants require substantial legal representation. There are a range of services, including legal information, duty lawyers and the provision of limited amounts of legal advice, which are not rationed in these ways.

Means tests compare applicants' circumstances to specific income and assets thresholds. Applicants who qualify for legal aid are generally both income and asset poor.¹⁸ The thresholds vary from one state to another; for example, the lower income threshold (that is, the level below which a recipient would receive their legal assistance without needing to make any financial contribution) is \$255 per week in Victoria and \$318 per week in NSW.¹⁹ Although Legal Aid Commissions have some discretion, funding is usually available only to those on very low incomes. National Legal Aid has observed that only people in highly disadvantaged circumstances may qualify to receive legal aid, while people who would otherwise benefit from legal assistance but who still cannot afford it miss out.

¹⁵ Senate Legal and Constitutional Affairs References Committee 1997. Australian Legal Aid System: First Report, Commonwealth of Australia; Senate Legal and Constitutional Affairs References Committee 1997. Australian Legal Aid System: Second Report, Commonwealth of Australia; Senate Legal and Constitutional Affairs References Committee 1998. Australian Legal Aid System: Third Report, Commonwealth of Australia; Senate Legal and Constitutional Affairs References Committee 2004. Legal aid and access to justice, Commonwealth of Australia.

¹⁶ Fleming, D. and Daly, A. 2007. 'The retreat of the legal profession from legal aid: labour market change in the Australian mixed model' *International Journal of the Legal Profession*, Vol. 14, No. 1., p.48.

¹⁷ Fleming, D. and Daly, A. 2007. 'The retreat of the legal profession from legal aid: labour market change in the Australian mixed model' *International Journal of the Legal Profession*, Vol. 14, No. 1., pp.21-56.

¹⁸ In certain circumstances people on low incomes can receive legal aid even if their assets are sizeable (eg if they own the family home). In these situations a caveat can be placed on the property title, which means that legal aid funding is repayable if and when the asset is sold.

¹⁹ These figures refer to net disposable income, which takes into account a range of factors such as taxation, housing and financial dependents. Sources: Victorian Legal Aid, Qualifying for Legal Assistance, December 2005. Available at: http://www.legalaid.vic.gov.au/fab.pol_handbook_ch2_.pdf (accessed on 22 July 2010); New South Wales Legal Aid, Means Test Index, <http://www.legalaid.nsw.gov.au/asp/index.asp?pgid=569> (accessed on 22 July 2010).

*The legal aid means test ... is set at a level that allows only the most poor to be eligible for legal aid. There are significant numbers of people who will not meet the test.*²⁰

The use of means tests to determine eligibility for legal aid effectively makes legal assistance financially inaccessible to all those who inhabit the great middle ground between very rich and very poor.

In addition to the means test, a merit test assesses whether the applicant's case has a 'reasonable prospect of success' based on its legal and factual circumstances. The merit test also considers whether, in the absence of legal aid, a prudent person with means would risk their own money on the case. Further, the merit test asks whether the expenditure of legal aid in that case is worthwhile, both to the applicant and the community. This process takes into account a range of criteria, such as the seriousness of the penalties which apply in a criminal matter.²¹ In reality, people who meet the income and assets test often do not qualify for legal aid because they fail the merit test.

LACs have responsibility for how the various tests for legal aid eligibility are applied in their jurisdiction, both among their own clientele and those who receive legal aid through CLCs or private practitioners. Because of the need to direct funding only to those who qualify for legal aid, each LAC must have extensive auditing and monitoring capabilities. These compliance functions can in reality absorb a substantial proportion of the funding that would otherwise be delivered to clients in the form of subsidised legal services.

Under the present arrangements between the Commonwealth and state governments there is a large shortfall in funding for legal aid, which means that LACs have an incentive to restrictively interpret merit tests and to retain means tests to limit spending. To give some indication of the level of extra funds needed, National Legal Aid has called for a doubling of the funding currently provided to LACs (\$164.8 million) simply to ensure appropriate delivery of the legal aid services it is currently expected to provide.²² Substantial additional funding would be required for legal aid to adequately cover civil and other matters which fall outside the Commonwealth jurisdiction.

Exactly how much extra funding is required remains uncertain. In 2004 the Senate Legal and Constitutional Affairs Committee made the following recommendation:

*The Commonwealth Government should fund a national survey of demand and unmet need for legal services, to be undertaken in cooperation with state legal aid commissions and community legal centres. The objectives of the survey should be to ascertain the demand and unmet need for legal services across the country and to identify obstacles to the delivery of such services, particularly to the economically and socially disadvantaged.*²³

The Government disagreed, making the following response in 2006 to the Committee's earlier recommendation:

²⁰ National Legal Aid, Submission to Inquiry, 19 May 2009.

²¹ The criteria described here relate to the merit test for Commonwealth-funded legal aid. State-funded legal aid (which applies to most criminal matters) have different merit tests which can vary by jurisdiction. See for example Victoria Legal Aid 2011. 'VLA Handbook for lawyers' <<http://www.legalaid.vic.gov.au/handbook/Index.htm>>

²² National Legal Aid, A New National Policy for Legal Aid in Australia, November 2007, Available at: <http://www.nla.aust.net.au/category.php?id=11> (accessed on 22 July 2010).

²³ Senate Legal and Constitutional Affairs References Committee 2009. *Access to Justice*, Commonwealth of Australia, p.9.

The Government has undertaken a significant amount of work to ensure that the funds it provides for legal aid services are distributed equitably across the States and Territories, using relevant demographic factors ... The Government will continue to set priorities and guidelines for the provision of assistance in Commonwealth law matters. Governments and legal aid bodies should ensure that available resources are used efficiently and cost effectively to provide services.²⁴

As this statement shows, not only did the Howard Government disagree that additional legal aid funding was required - despite consensus among LACs, CLCs, legal practitioners and their various representative bodies that it was – but it also challenged the notion that research should be undertaken to establish the extent of unmet legal need, beyond any investigations already carried out directly by the Commonwealth Government. This amounted to an official denial that there were any structural problems with the system of legal aid; any problems that arose were therefore attributable to service delivery agencies or to legal practitioners.

In 2009, the Rudd Government appeared to acknowledge the funding pressures in the legal aid system, conceding that ‘the direct legal assistance sector ... is operating in an environment of rising demand and increases in the cost of service provision.’ It also made the following observation:

Viewing access to justice solely as a legal assistance issue is incomplete because it is only part of the solution. Even massive increases in legal aid budgets will not provide any assistance to the vast majority of people who experience legal issues in their day to day lives ... 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.²⁵

The Government’s new *Strategic Framework for Access to Justice in the Federal Civil Justice System* emphasised the importance of alternative dispute resolution and early intervention, given the economic efficiencies associated with such approaches compared with more protracted legal interventions. In mid-2010, the Rudd Government announced some additional funding for legal aid as part of the new National Partnership Agreement on Legal Assistance Services between the Commonwealth and states and territories, including an additional \$92 million allocated in the 2010-11 Federal Budget. The Agreement expanded the range of matters eligible for Commonwealth funding to include areas of particular priority: early intervention legal education, information, advice, assistance and advocacy services, and legal representation in which a mix of Commonwealth and state/territory family law, family violence and/or child protection issues arise.²⁶ Despite this additional funding, the broader problem of insufficient funding of the legal aid system as a whole remains.

What happens if someone does not qualify for legal aid?

When a person cannot afford legal representation and fails to secure legal aid, self-representation may be a last resort. The decision to self-represent is encouraged in some areas of the justice system, such as small claims tribunals where informality is emphasised

²⁴ Senate Legal and Constitutional Affairs References Committee 2009. *Access to Justice*, Commonwealth of Australia, p.9.

²⁵ Australian Government 2009. *Strategic Framework for Access to Justice in the Federal Civil Justice System*. Attorney-General’s Department, September, p. 52.

²⁶ Attorney-General’s Department 2010. ‘National Partnership Agreement on Legal Assistance Services’, Press Release, 2 July.

<http://www.ag.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_ThirdQuarter_2July_2010-NationalPartnershipAgreementonLegalAssistanceServices> accessed 17 November 2011.

and legal representation discouraged. In NSW and Victoria the upper threshold for small claims is \$10,000.²⁷ Self-representation can be problematic, as former High Court Chief Justice Murray Gleeson has written:

*The adversary system assumes, in the interests of both justice and efficiency, that cases will be presented to courts by skilled professionals. To the extent to which that assumption breaks down, so does the system.*²⁸

Another possible avenue for someone who does not qualify for legal aid funding is to pay for legal costs out of their own pocket, perhaps by going into debt. This can be a risky move, depending on the strength of their case and the likelihood of success. There are many examples of ordinary people who have been bankrupted because they took their matter to court and lost.

A further option for someone who is not eligible for legal aid but nonetheless has a legitimate legal problem or claim is simply to do nothing – that is, to not pursue their matter through the legal system.

Available information on unmet legal need

Putting a precise figure on the level of unmet need for legal assistance can be difficult, because it depends on how broadly or narrowly a ‘legal need’ is defined. While it might be straightforward to identify someone whose legal needs are met (e.g. when they took a matter to court with the assistance of a lawyer), unmet need cannot necessarily be identified by asking someone about a legal matter directly. Indeed, some of the most important areas of unmet need may relate to problems which people did not know could be solved via legal intervention. These straddle a wide spectrum of experiences, and may pertain to consumer products, borrowing and investment, education, employment, health, housing, financial problems, family issues or many other aspects of life. However, some attempts have been made to quantify unmet legal need in Australia.

The level of directly measurable unmet demand for legal aid (that is, applications refused under the relevant means and merit tests) ranges from six to 16 per cent of applicants, depending on the type of matter and the state/territory in question. In 2007-08 there were 22,015 case applications refused across all LACs; this figure includes applications refused under both means and merit tests.²⁹ The lowest refusal rate was in Victoria (six per cent), while refusal rates of 15 per cent or more were reported in Western Australia, South Australia and the Australian Capital Territory.³⁰ Depending on the jurisdiction, between 20 and 70 per cent of refusals are made because the applicant does not fall within means test thresholds. Crucially, however, these figures do not include cases for which no application for legal aid was made. This might be because potential applicants knew or suspected they would not qualify, because they regarded the legal system as too hard to negotiate, because they just

²⁷ LawAccess NSW 2011. ‘Debt – Small Claims’, Attorney General and Justice, <http://www.lawlink.nsw.gov.au/lawlink/lawaccess/ll_lawassist.nsf/pages/lawassist_debt_small_claims_home> accessed 17 November 2011; Australian Competition and Consumer Commission 2011. ‘Small Claims: Victorian Civil & Administrative Tribunal (VCAT)’, Commonwealth of Australia, <<http://www.accc.gov.au/content/index.phtml/itemId/288071/fromItemId/815972/quickLinkId/816516/whichType/org>> accessed 17 November 2011.

²⁸ The Hon. Murray Gleeson AC, *The Rule of Law and the Constitution*, ABC Boyer Lectures, 2000, p.118.

²⁹ Legal Aid Commission of Tasmania, *NLA Stats: Case Applications Received 2007/08*. Available at: <<http://www.legalaid.tas.gov.au/nla/reports/20072008/html/Case%20law.html>> (accessed on 22 July 2010).

³⁰ Legal Aid Commission of Tasmania, *NLA Stats: Case Applications Received 2007/08*. Available at: <<http://www.legalaid.tas.gov.au/nla/reports/20072008/html/Case%20law.html>> (accessed on 22 July 2010).

wanted the problem to go away, or because they did not even know they had a legal problem.

It is this complex issue – the comparatively unknown or poorly understood component of unmet legal need – that has led various organisations to acknowledge that further research is required to determine the level of funding required to properly subsidise legal assistance on behalf of those who would not otherwise be able to afford it. The Senate Legal and Constitutional Affairs committee has remarked that ‘relevant statistical data is in short supply’ and that there needs to be ‘a better understanding of the level of demand and unmet need for legal assistance throughout Australia’.³¹

In 2006, the Law and Justice Foundation of NSW published research which aimed to quantify legal needs in certain disadvantaged areas of the state. Its report, *Justice Made to Measure*, adopted a wider definition of legal needs, observing that ‘in some instances, failing to seek a legal resolution does not necessarily imply the absence of legal need, but may merely indicate the individual’s lack of awareness that their issue is a legal one or that the issue has a potential legal resolution.’³² This research uncovered a relatively high incidence of ‘legal events’ over a one-year period (with more than two in three of those surveyed experiencing such an event), a ‘substantial rate of inaction’ on the part of those involved, and large numbers of people who encountered some kind of barrier in seeking help.³³

In 2007 the Foundation, in conjunction with NLA, commissioned the National Legal Needs Survey, which is designed to quantify legal needs in much the same way as in the *Justice Made to Measure* research but on a national scale and for each state and territory. The findings of this research were not available at the time of publication.

This comprehensive picture of legal needs will fill many of the gaps in the present understanding of how many Australians miss out on legal assistance and why. Nevertheless, the Foundation has itself acknowledged that ‘reported incidence and resolution rates are likely to be affected by the number, definition, type and range of legal needs examined’.³⁴ For this reason, it is important to examine the issue of unmet legal need from multiple perspectives, including those based on narrower definitions derived from the present legal aid system as well as those stemming from broader conceptions of how people might have greater access to the justice system and people who can help them negotiate it.

³¹ Senate Legal and Constitutional Affairs References Committee 2009. *Access to Justice*, Commonwealth of Australia, p.8.

³² Coumarelos, C., Wei, Z. and Zhou, A. 2006. *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, Law and Justice Foundation of NSW, March, p.11.

³³ Coumarelos, C., Wei, Z. and Zhou, A. 2006. *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, Law and Justice Foundation of NSW, March, p.xviii-xix.

³⁴ Coumarelos, C., Wei, Z. and Zhou, A. 2006. *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, Law and Justice Foundation of NSW, March, p.12.

3 Estimating unmet need

To better understand the level of unmet need for legal assistance, the Australia Institute conducted survey research in September 2009.³⁵ The survey asked respondents about various kinds of legal problems they may have faced over the previous five years. As explained below, the survey gave greater focus to legal matters of a civil nature, because such issues are more likely to constitute ‘unknown’ legal problems (that is, issues that people are unaware can be solved through legal intervention) than criminal matters – which can be more easily discerned as having a legal dimension.

Those who had experienced a legal problem were asked whether and how they had sought legal advice or legal aid, and about the barriers to doing so if they had not received legal assistance. Respondents were also asked about their perceptions and experience of the justice system.

Defining a legal problem

The survey questionnaire was designed so as to identify people who had experienced a legal problem in the past five years.³⁶ Because not everyone with a legal problem ultimately seeks or receives legal assistance, it was important to identify those who had an unmet need as well as those who sought or received legal assistance.

Survey respondents were presented with a range of scenarios and asked if they had been in such a situation in the past five years; the scenarios are listed in summary form in Table 2 and presented in full in Appendix A. The scenarios included eight situations where a civil legal problem might arise. The questionnaire prompted respondents with these particular scenarios because they made reference to situations where people may have benefitted from legal assistance, but did not seek it due to a lack of money or a lack of knowledge.

Respondents were also given an opportunity to nominate another kind of legal problem if the scenarios provided did not address their personal situation. In addition, they were asked whether they had been in a situation which involved interaction with the criminal justice system.

The survey needed to distinguish between those situations where a legal problem *could* arise and situations where respondents had a bona fide legal problem requiring legal assistance. For the purposes of this study, respondents were defined as having had a ‘legal problem’ of a *civil* nature if they met each of the following criteria:

- having been in one or more of these situations in the past five years;
- made a direct complaint to the person or organisation involved, or complained to an independent body (e.g. ombudsman, tribunal), or took the dispute to court;
- sought legal advice about the issue, or did not seek legal advice but in hindsight thought they should have sought legal advice.

³⁵ The survey was conducted with a sample of 1,001 adult Australians, representative of the broader population by age and gender. Respondents were sourced through a reputable online panel, and were given a small incentive to encourage participation (\$2 each). Respondents who reported experiencing more than four legal problems in the past five years were removed from the sample to improve data quality.

³⁶ A period of five years was chosen (instead of, say, one year or three months) in order to capture a sufficient number of respondents in the survey sample that an estimate of unmet need could be made. The longer timeframe also allowed the survey to take account of the fact that legal problems can in many cases take much longer than a year to resolve.

Respondents were defined as having had a legal problem of a *criminal* nature if they met each of the following criteria:

- had been questioned by police about a criminal matter in the past five years;
- sought legal advice about the matter, or did not seek legal advice but in hindsight thought they should have sought legal advice.

Defining unmet need

Survey respondents who met the criteria for having had a legal problem fell into two categories: those who received the legal assistance they needed, and those whose legal needs were not met. The need for legal assistance was self-defined: respondents who did not receive legal assistance indicated whether this was because they did not need it (in which case they did not have a 'legal problem' as defined), or because lack of money, lack of knowledge or some other reason prevented them from seeking or getting it. For the purposes of this research, 'unmet need' for legal assistance refers to those situations where money or knowledge were barriers to receiving legal assistance.³⁷

How many people experience legal problems?

Around one in three respondents (33%) reported experiencing some kind of legal problem in the previous five years. One in four respondents (24%) said that they had sought legal advice for a legal problem.

If 33% of respondents experienced at least one kind of legal problem in the previous five years, this would suggest that around one-fifth of this figure (approximately 7%) could be expected to experience a legal problem in any given year. However, some respondents reported more than one kind of legal problem over a five-year period, meaning that the annual incidence of legal problems is likely to be considerably higher. Adjusting for those respondents who had multiple legal problems, we estimate that around 10% of Australians experience a legal problem every year.³⁸

The most common type of legal problem reported by respondents was being treated unfairly by a business (e.g. bank, phone company, tradesman, retail outlet); one in eight people (12%) said they had a legal problem of this kind. The next most common kind of problem was dispute with a landlord or tenant, real estate agent or neighbour (8%), followed by a dispute with an employer over pay, conditions, workplace safety or overtime (7%) and a divorce, a dispute over child custody or support payments, or arguing with family members over inheritance (5%).

Table 1: Proportion of respondents with a legal problem in the past five years*

Type of legal problem	Number experiencing legal problem	Proportion of survey sample
Been unfairly treated by a business	117	12%

³⁷ 'Lack of knowledge' includes situations where respondents did not seek out legal assistance because they did not know how to get it, as well as situations where people did not seek legal advice because they didn't think they needed it, but in hindsight believed they should have done so.

³⁸ Of the 1,001 respondents in the survey sample, 327 experienced some kind of legal problem in the previous five years. The survey identified a total of 493 legal problems encountered by these 327 people in the previous five years, or around 99 problems per year on average. This means that approximately 10% of people could expect to experience a legal problem in a given year.

Dispute with a landlord/tenant/real estate agent/neighbour	75	8%
Dispute with an employer	68	7%
Divorce/family matter	49	5%
Criminal matter	41	4%
Parking or speeding fine	36	4%
Dispute with a government agency	32	3%
Healthcare dispute	19	2%
Insurance dispute	16	2%
Other type of legal dispute	40	4%
Any kind of legal problem	327	33%

* Base = 1,001. Because some respondents reported having more than one type of legal problem in the past five years, the sum of the percentages for *particular* types of legal problem exceeds the percentage of people who experienced any type of problem.

How many people have an unmet need for legal assistance?

As Table 2 shows, 9% of respondents had experienced a legal problem but did not seek legal advice for financial reasons. In addition, 3% had a legal problem but did not seek legal advice due to a lack of knowledge. This means that approximately one in eight respondents (12%) had legal needs in the previous five years which were not met.

Table 2: Incidence of unmet need in previous five years

Category	Incidence in survey sample
Had a legal problem in the past five years	33%
Sought legal advice	24%
Unmet need for legal advice	12%
Did not seek legal advice for financial reasons	9%
Did not seek legal advice due to a lack of knowledge	3%
Did not seek legal advice for some other reason	2%
Did not have a legal problem in the past five years	67%
All respondents	100%

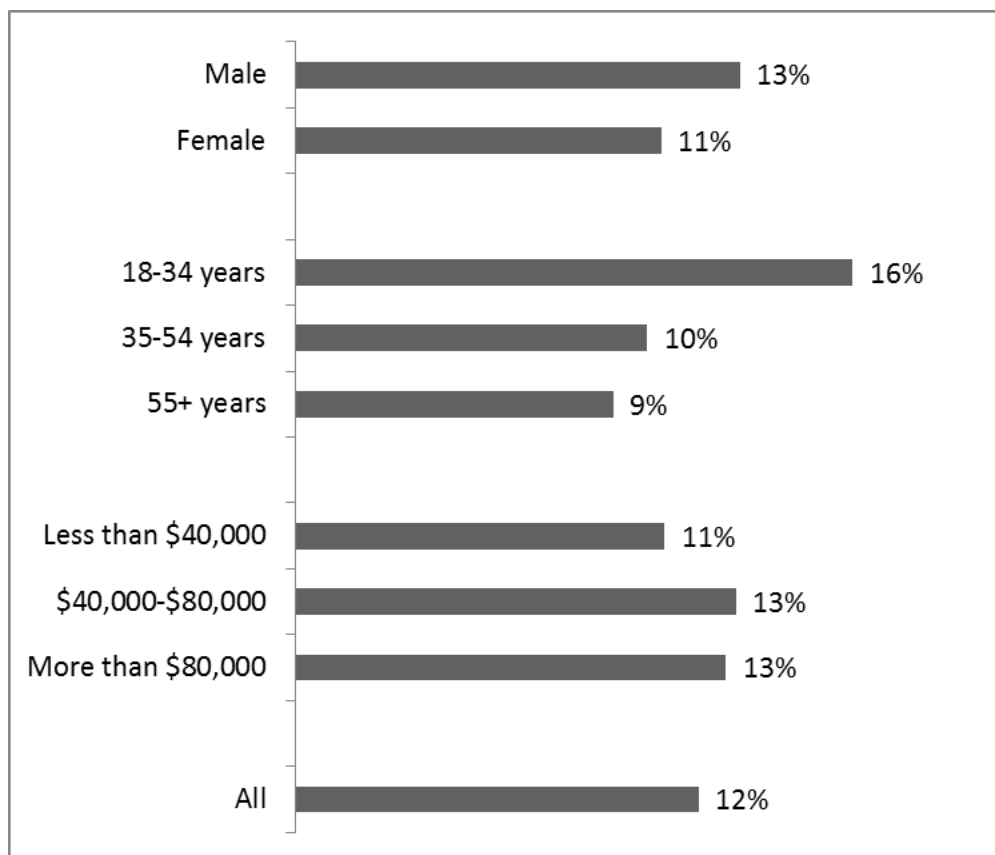
Base = 1,001. This figure refers to the total number of people in the survey sample, not the number of legal problems experienced (as with Table 3). Some respondents reported more than one legal problem, meaning that column percentages do not sum to 100 per cent.

Who misses out on legal assistance?

Figure 2 shows the incidence of unmet legal need over the previous five years by various demographic characteristics. Most notable is the fact that young people (younger than 35 years) were more likely to have an unmet legal need than those in older age groups, underscoring the importance of knowledge and confidence in negotiating the legal system.

The survey results also suggest that age is a bigger factor in contributing to unmet legal need than household income.

Figure 2: Proportion of respondents with an unmet legal need



Base = 1,001.

How many legal problems result in unmet need for legal assistance?

Of the 493 legal problems identified by survey respondents, legal needs were met in 71% of cases. This means that around 29% of legal problems resulted in respondents not receiving the legal assistance they needed. Unmet need was predominantly due to financial factors (22%), while 7% of legal cases resulted in unmet need because of a lack of knowledge.

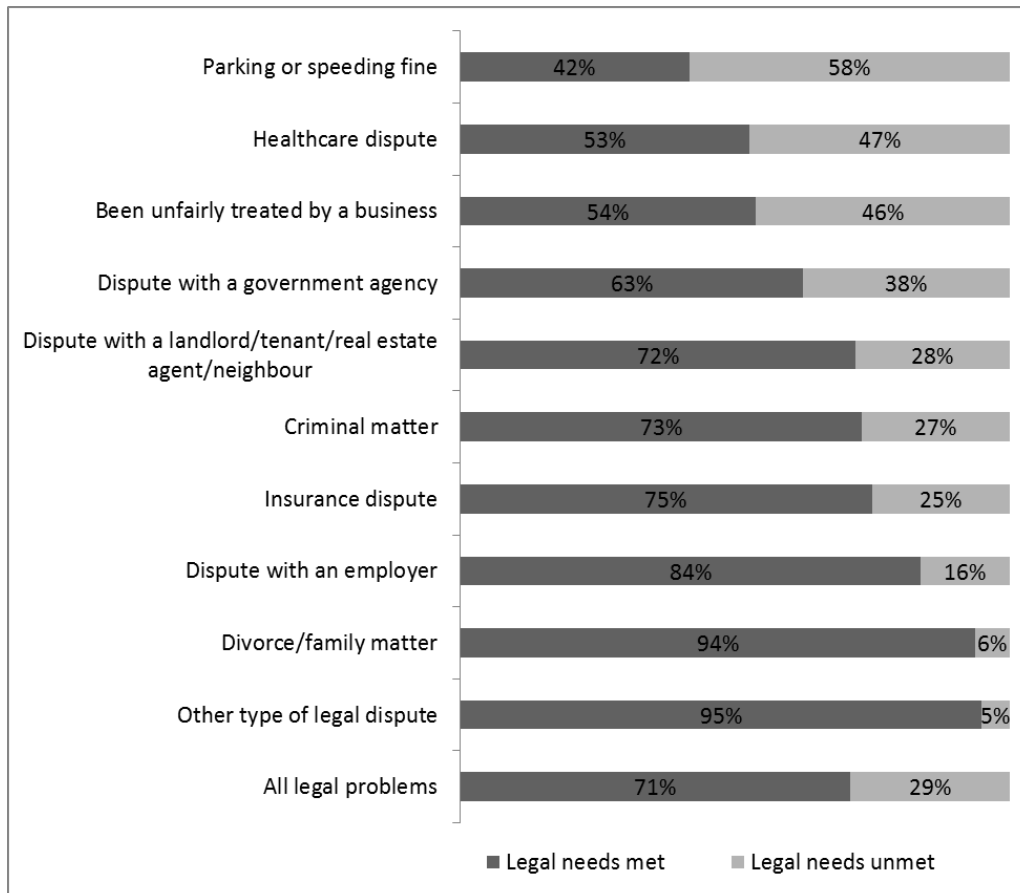
Table 3: Proportion of legal problems where needs were not met

	Number of legal problems	Proportion of legal problems
Legal needs met	350	71%
Legal needs unmet	143	29%
Unmet need - financial reasons	109	22%
Unmet need - lack of knowledge	34	7%
Total legal problems	493	100%

Which kinds of legal problems result in unmet need?

As Figure 3 shows, the most common types of problem where legal needs were not met was parking or speeding fines (58%), followed by healthcare disputes (47%), being unfairly treated by a business (46%) and disputes with a government agency (38%). Interestingly, three of these four types of problems potentially relate to government services, suggesting that unmet need for legal aid is often related to the interaction between citizens and government.

Figure 3: Unmet need for legal assistance by type of legal problem



Base size varies between 16 and 117, depending on the type of legal dispute. Base size for all legal problems is n=493.

How many people receive legal aid?

Respondents identified a total of 331 legal problems where their needs were met. Of these, only 9% resulted in legal aid being granted. In a quarter of cases (27%), respondents did not receive legal aid for financial reasons,³⁹ and in 14% of cases they did not receive legal aid because of a lack of knowledge.⁴⁰ There were various other reasons why respondents did

³⁹ 'Financial reasons' means that respondents did not apply for legal aid because they didn't think they would be eligible under a means test, or were refused legal aid because they failed a means test.

⁴⁰ 'Lack of knowledge' means that respondents were not aware that legal aid was available, or they did not think they would be eligible for legal aid because of the nature of their problem when in fact they may have been eligible (e.g. in having a criminal or family law matter).

not receive legal aid.⁴¹ These other reasons accounted for around half of all legal problems reported by respondents (48%).

Given these results, we can identify another category of unmet need that people encounter when they interact with the legal system. Without taking into account the financial circumstances of individual respondents, we can assert that unmet need for legal aid occurs at least 41% of the time that legal assistance is sought (that is, the combined proportion of respondents who did not receive legal aid for financial reasons or due to lack of knowledge).

Table 4: Proportion of respondents with a legal problem who received legal aid

	n	%
Received legal aid	31	9%
Did not receive legal aid	294	89%
Financial reasons	88	27%
Lack of knowledge	46	14%
Some other reason	160	48%
Not sure/can't remember	6	2%
Total	331	100%

⁴¹ These include cases which failed (or were expected to fail) a merit test, as well as various other circumstances.

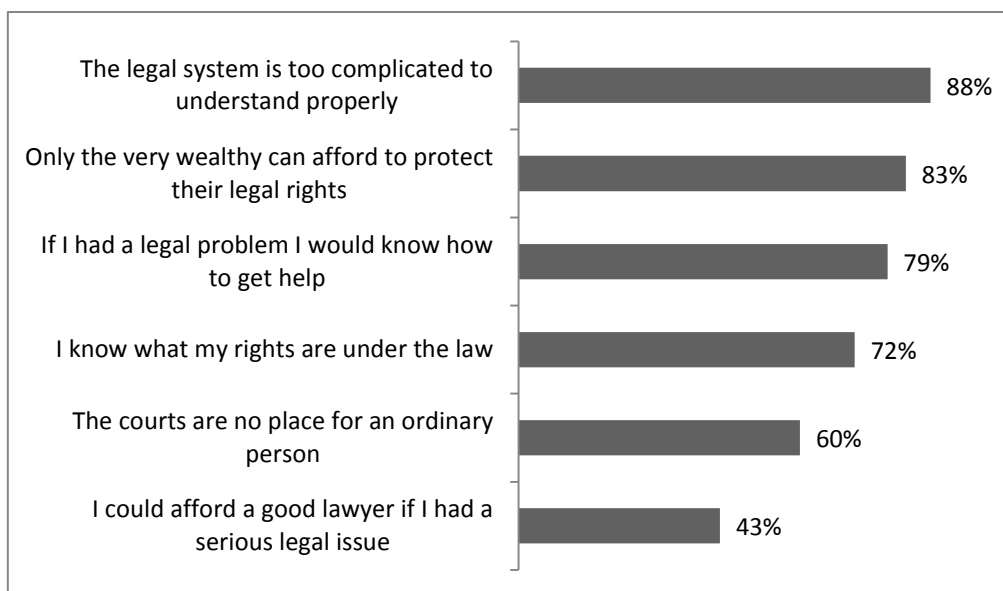
4 Perceptions of the legal system

Many Australians already recognise how difficult it can be for ordinary people to negotiate the legal system, with or without sufficient funding. Survey data collected by the Australia Institute provide an indication of community attitudes towards various aspects of the legal system.⁴²

Survey respondents were asked whether they agreed or disagreed with a series of statements about the legal system. The vast majority agreed that *the legal system is too complicated to understand properly* (88%) and that *only the very wealthy can afford to protect their legal rights* (83%).

Four in five respondents (79%) said that they would know how to get help if they had a legal problem, while 72% said that they knew what their rights are under the law. Most respondents also agreed that *the courts are no place for an ordinary person* (60%).

Figure 4: Levels of agreement with statements about the legal system

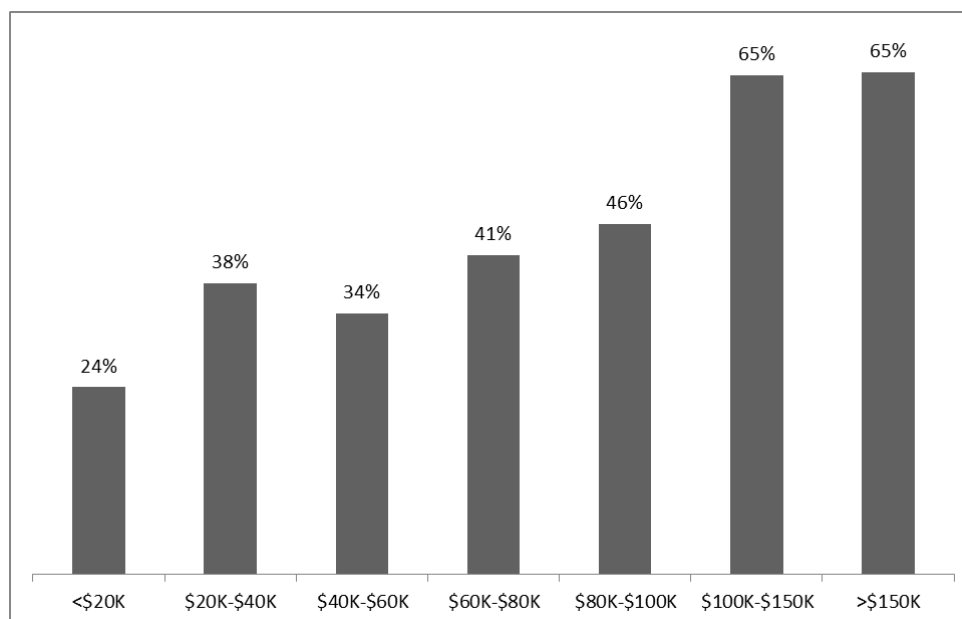


Base = 1,001

Less than half of all respondents (43%) said that they could afford a good lawyer if they had a serious legal issue. As Figure 4 shows, two in three respondents in households with a combined income of more than \$100,000 said that they could afford a lawyer; put another way, one in three of those in affluent households do not think they have the financial means to access the legal assistance they require. At the other end of the income spectrum, just one in four people in households with an income below \$20,000 per year said they could afford a lawyer if they needed one.

⁴² The figures below are based on an online survey of 1,001 respondents conducted by the Institute in September 2009. The survey was conducted both to gauge community attitudes towards the legal system and to explore the nature and extent of unmet need for legal assistance. Further results relating to unmet need are provided later in this paper. Add further details on methodology. Include notes on removing respondents who said they had more than four legal problems in the past 12 months.

Figure 5: Proportion of respondents who could afford a good lawyer if they had a serious legal issue, by annual household income



Base = 1,001.

Attitudes towards reform

When asked which groups the government should fund legal aid for, only one in four respondents (26%) said *only the very poor*. In fact, most respondents believed that legal aid should be widely available, either to *everyone, regardless of wealth* (19%) or to *everyone except the rich* (44%). Only 4% of respondents said that *everyone should have to pay for their own lawyer if they need one*. These results suggest that if governments chose to increase access to legal aid then the majority of Australians would support such a move.

Table 5: In your opinion, should the government fund legal aid for...?

Only the very poor	26%
Everyone except the rich	44%
Everyone, regardless of wealth	19%
Nobody – everyone should have to pay for their own lawyer if they need one	4%
Not sure	8%
Total	100%

Base = 1,001

As discussed below, one possible way to increase access to legal assistance would be by providing interest-free loans to people who would not otherwise be able to afford a lawyer. As Table 6 shows, three in four survey respondents (74%) said they would support such a scheme, while only 11% said they would not support it.

In addition, around half of all respondents (49%) agreed with the statement *If someone is ripped off by a company, the government should pay for their legal costs*. People with a recent unmet need for legal assistance were somewhat more likely to agree (53%).

Table 6: Do you support the government providing interest-free loans to Australians who face unexpected legal problems but can't afford a lawyer?

	Unmet need for legal assistance	No unmet need	All respondents
Support	71%	75%	74%
Do not support	15%	11%	11%
Not sure	14%	14%	14%
Total	100%	100%	100%

Base = 1,001

Table 7: If someone is ripped off by a company, the government should pay for their legal costs

	Unmet need for legal assistance	No unmet need	All respondents
Agree	53%	49%	49%
Disagree	33%	40%	39%
Not sure	14%	11%	12%
All	100%	100%	100%

Base = 1,001

5 Implications

The survey results described above illustrate the nature of the problem of unmet legal need in Australia, and provide an indication of the level of public support that governments could expect if they sought to introduce reforms. They do not deliver a comprehensive picture of the scale or distribution of unmet need, or identify with precision what kinds of legal services would best redress this need. Additional research, including but not limited to research currently underway,⁴³ is needed in order to bring greater clarity to these questions. Further examination also needs to be paid to people who have a legal problem but do not attempt to resolve it, either because they want nothing to do with the legal system or because they don't realise they can pursue their problem through legal means.

In the absence of a more definitive picture, however, these survey results allow us to estimate the actual numbers of people in Australia who have various kinds of experiences with the legal system. Because the survey is a sample of the broader population, the estimates below are broadly indicative of the numbers involved rather than precise calculations, and rely on the definitions used in this report. The figures in Table 8 are based on an adult population of 17,229,344.⁴⁴

Table 8: Population-based estimates of unmet legal over five years

	Per cent of survey sample	Population-based estimate
Experienced some kind of legal problem	33%	5.6 million
Unmet need for legal assistance	12%	2.0 million
<i>Financial reasons</i>	9%	1.6 million
<i>Lack of knowledge</i>	3%	530,000

Some 33% of Australians, or 5.6 million people, have experienced some kind of legal problem in the past five years.

12% of Australians, or 2.0 million people, had an unmet need for legal assistance in the previous five years. This includes 9% (or 1.6 million people) who did not seek legal advice for financial reasons and 3% (or 530,000 people) who did not seek legal advice due to a lack of knowledge.

These five-year estimates can also be converted to yearly estimates. Around 10% of Australians, or 1.7 million people, can expect to encounter a legal problem in any given year. In 29% of cases, or for 490,000 people each year, legal needs are likely to be unmet.

The rationale for increasing legal aid funding

Concerns have been raised over many years about the impact on the courts and the broader social fabric of a poorly funded legal aid system. To achieve individual equality before the law and the outcomes imagined by legislators who have conferred legal rights on citizens, it is necessary to ensure that all parties to a serious dispute have a fair chance to enforce those rights and make their argument before an impartial decision-maker.

⁴³ For example, research being carried out by the Law and Justice Foundation of NSW and National Legal Aid.

⁴⁴ ABS 2010. *Population by Age and Sex, Australian States and Territories*, Cat. No. 3201.0, June.

The starting point for good policy in the administration of justice should be an assumption that legal needs will be met. The next step is to maintain a sustainable level of expenditure by targeting high-cost areas through law reform, encouraging alternative dispute resolution and addressing underlying issues which can lead to legal problems. Put simply, if governments do not wish to fund access to parts of the law then they should reform those laws.

A well-funded and more comprehensive legal aid scheme offers a number of key opportunities for policy-makers and benefits for the many Australians who are currently unable to access legal assistance due to a lack of money or a lack of knowledge.

First, a well-funded legal aid scheme would ensure that citizens are more informed of their legal position and well represented when a lawyer is needed. Having a lawyer can effectively pre-empt the escalation of disputes and reduce long-term social costs. Rather than necessarily increasing the burden on the courts, facilitating access to legal advice can quickly resolve arguments with the potential to become much bigger if left unresolved.

Second, providing ready access to legal aid for a larger number of cases has the advantage of providing an accurate feedback mechanism for policy-makers considering law reform. Rapid escalations of costs in particular areas would quickly highlight problematic laws and provide a direct incentive for governments to change unclear, unfair or poorly applied legislation.

Third, a well-funded and comprehensive legal aid scheme would provide governments with a fiscal incentive to ensure that new laws are as fair, clear and comprehensive as possible, to minimise the likelihood of long and complex litigation. If governments are forced to consider more closely the possibility that new laws may impose a burden on the legal system and result in greater expenditure on legal aid, then they should in theory think more carefully before asking parliament to pass them.

Fourth, the knowledge that individuals have ready access to professional legal advice and representation would have a significant effect on the behaviour of risk-managers (often lawyers) advising wealthy and corporate clients. Knowing that the other side can fight as well as you can would have the direct effect of encouraging otherwise dominant litigants to engage in earlier negotiation, settlement and general preventative behaviour. These are all outcomes which would lower the overall cost of the legal system.

Finally, a properly funded legal aid scheme is equitable. Under the present system access to justice is determined as much by someone's financial position as by their legal needs. If our legal system is to serve everyone rather than a minority of citizens then funding for legal aid must be substantially increased.

There are a range of options open to policy-makers who wish to improve the ability of the legal system to meet the needs of a wide range of participants. These include expanding the funding available to LACs and CLCs for core activities (including administration and compliance), reducing the limitations on Commonwealth-funded legal aid (e.g. expanding the range of matters that can receive Commonwealth grants), and reviewing the means tests for legal aid that apply at both state and Commonwealth levels.

A supplementary contribution funding model

In the absence of a significant and continued investment of new funds into legal aid budgets at the state or Commonwealth level, one possible reform might be a complementary funding model. This would be based on an income-contingent interest-free loan scheme akin to the Higher Education Contribution Scheme (HECS). A Legal Expenses Contribution Scheme

(LECS) is not a final solution, nor is it a comprehensive legal aid scheme. It is, however, a practical initial step, capable of being put in place during the development of detailed policy and legislative change.

HECS funds undergraduate university degrees with interest-free loans and the government gradually claims back the money through the tax system when a graduate's income goes above a sufficient level. The scheme is effectively a co-contribution arrangement, since the Commonwealth generally still funds the majority of higher education course and infrastructure costs. A similar LECS might operate on the following basis:

- If someone does not qualify for legal aid under a means test, they would have the option of applying for LECS support. If they do qualify for legal aid, they would be able to receive legal aid as under the present system (assuming their matter meets the relevant merit test).
- LECS applicants earning below the top-tax bracket (currently \$180,001) would be able to qualify for an income-contingent loan to cover some or all of their reasonable legal expenses, depending on where their income sits in the tax scale.
- Applications would continue to be subject to a merit test conducted by qualified lawyers to determine eligibility. Only legal matters with a declared 'reasonable prospect of success' would attract LECS funding.
- The merit test for LECS funding would be expansive enough to incorporate a range of situations in which people encounter problems which can only be solved through pursuing civil legal action (for example against governments or corporations).
- Following the conclusion of a matter the recipient satisfies their obligation by paying to the Commonwealth a percentage of their income over the length of the loan, with payments set at a higher rate for recipients on higher incomes. Recipients would also have the option of repaying the loan immediately in a civil action with an advantageous and sufficient award of damages. (HECS also offers an incentive discount for early payment, which could also be applied here.)
- Where a matter ends badly for a LECS recipient who then finds themselves in jail or facing a substantial damages bill, they would be shielded from extreme poverty or bankruptcy and have the opportunity to rebuild and continue to contribute to the community while paying back their loan.

It should be noted that client co-contribution schemes already exist in some jurisdictions, including for Commonwealth legal aid grants.⁴⁵ At present, applicants for legal aid who do not meet the relevant income and assets tests may be required to make upfront and/or ongoing payments to contribute to the costs of legal representation, unless their assets and income exceed the estimated costs of representation – in which case they are deemed to not require legal aid. The fact that such schemes are already in place suggests that a LECS-style initiative is not a radical departure from current arrangements, but rather an extension of a proven concept. However, community awareness that legal aid is available on a partially self-funded basis is very low (a fact reinforced by the survey research presented in this paper). If unmet legal need is to be addressed properly, policy-makers need to promote the existence of both the present and any future co-contribution schemes.

There are two key differences between the present system, under which applicants can receive a partial grant of legal aid, and the proposed LECS.

- A LECS would apply to a larger range of civil matters than are typically covered by merit tests at the state/territory or Commonwealth level, which concentrate largely on criminal and family law matters.

⁴⁵ See Victoria Legal Aid 2011. 'VLA Handbook for lawyers' <<http://www.legalaid.vic.gov.au/handbook/Index.htm>> accessed 18 November 2011.

- Because of the short period in which client contributions are made (over a maximum of one year), current co-contribution arrangements can in effect compel applicants to liquidate at least some of their assets (or have a caveat placed on those assets) to fund their case. The proposed LECS scheme, on the other hand, would assume that applicants would make contribution payments over a lengthier period of time, making the costs of legal assistance less of an immediate financial burden.

The provision of income contingent loans for legal advice and litigation would have the distinct advantage of encouraging equity while also ensuring that sufficient personal risk is retained to act as a disincentive for unnecessary legal action. Further, unlike some other forms of income contingent loans, 'adverse selection' would not be a significant issue in a LECS as some form of merit test would still apply. Adverse selection is a generic problem with some economic redistribution schemes where those most likely to benefit will use the scheme while those least likely to benefit will not. Insurance is an obvious example, and screening tests and higher premiums are applied to address the potential inequities. A strong merits test conducted by Legal Aid Commissions for a LECS would achieve the same outcome and would ensure that only meritorious applicants receive a loan.

A scheme of this nature would provide much greater access to justice for middle-income Australians who are currently excluded by the present inadequately funded and restrictive legal aid system. It would also expand the current scheme to cover civil litigation for plaintiffs and defendants. While there is a strong case for providing more comprehensive non-loan based legal aid the introduction of a LECS might be an effective and achievable compromise. In support of such a proposition, around three-quarters of survey respondents (74 per cent) said that they would support an income-contingent loan scheme like LECS for legal advice and representation.

There are of course a number of critical issues which would need to be resolved before a LECS could become fully operational. The scheme might be administered through existing organisational infrastructure, namely Legal Aid Commissions. Alternatively, a new, separate body could be created at a national level for this purpose (with substantial investment required in the initial stages to get the loans scheme underway). Whichever administrative arrangements are put in place, it is important that LECS be overseen by a body independent of government, since it will inevitably make decisions about legal proceedings against government. Moreover, if a LECS-style system were put in place, it should not threaten the ability of LACs and CLCs to continue providing legal assistance to clients in financially disadvantaged circumstances. This means that core funding for administration, compliance and so forth should be maintained (or increased), in addition to any grants that these organisations receive from the Commonwealth for individual clients.

The guidelines for eligibility and the way these are put in place will in turn determine the extent to which LECS does in fact address legal needs that are currently unmet in the community. But rather than considering these questions in detail, it is sufficient at this stage to note that they need to be addressed if policy-makers agree that a LECS-style initiative is worth pursuing.

Conclusion

The legal aid system in Australia confines its application to the very poor and socially disadvantaged. Legal aid, however, should be available to all citizens who genuinely need access to the justice system and cannot otherwise afford legal assistance. The provision of greater Commonwealth funding both for Commonwealth legal aid and for the state and territory Legal Aid Commissions, and the adoption of an intermediary measure such as LECS, will go some way towards achieving this goal.

Whatever the funding arrangement, legal aid's problems will best be addressed if they are seen, and acted upon, as part of the wider debate about how to improve the justice system and especially access to justice. The rule of law exists to protect all citizens, not as an instrument of privilege for those with means.

Appendix A – Survey questionnaire

- 1) In the past 5 years, have you been treated unfairly by a business (e.g. bank, phone company, tradesman, retail outlet)?
 - Yes
 - No
- 2) In the past 5 years, have you been issued with a parking or speeding fine even though you were not at fault?
 - Yes
 - No
- 3) In the past 5 years, have you had a dispute with an employer over pay, conditions, workplace safety or overtime?
 - Yes
 - No
- 4) In the past 5 years, have you had a dispute with Medicare, Centrelink, the Tax Office or any other government agency?
 - Yes
 - No
- 5) In the past 5 years, have you had a dispute with a landlord or tenant, real estate agent or neighbour?
 - Yes
 - No
- 6) In the past 5 years, have you had a divorce, a dispute over child custody or support payments, or argued with family members over inheritance?
 - Yes
 - No
- 7) In the past 5 years, have you suffered an injury or car accident and then had a dispute with an insurance agency over the incident?
 - Yes
 - No
- 8) In the past 5 years, have you had a dispute with a hospital, health care provider, nursing home, private health insurer, doctor, dentist or another health professional?
 - Yes
 - No

- 9)
- a. In the past 5 years, have you been questioned by police about a criminal matter?
 - Yes.
 - No – skip to Q10
 - Not sure – skip to Q10

 - b. Did the police give you an opportunity to arrange for legal advice or representation?
 - Yes.
 - No
 - Not sure/can't remember

 - c. Were you charged with a criminal offence?
 - Yes.
 - No – somebody else was charged
 - No – nobody was charged
 - Other/not sure
 -

10) In the past 5 years, have you had any other kind of legal dispute?

- Yes – please specify
- No
- Not sure/can't remember

[Ask Q11 onwards if yes to any of 1-10, otherwise skip to Q26. If yes to 9a, skip Q11 and Q12]

11) From your point of a view, how serious was the issue or dispute?

- Very serious
- Somewhat serious
- Not very serious
- Not at all serious
- Not sure

12) What did you do?

- Ignored the issue and moved on – skip to Q26
- Made a direct complaint (to the person or organisation involved)
- Complained to an independent body (e.g. ombudsman, tribunal)
- Took the dispute to court.

- Other – skip to Q26
- Not sure/can't remember – skip Q26

13) Did you seek legal advice about this issue?

- Yes – from a lawyer – skip to Q16
- Yes – from a government agency or union – skip to Q16
- Yes – from elsewhere – skip to Q16
- No
- Not sure / can't remember – skip to Q22

14) Why didn't you get legal advice?

- I didn't think I needed legal advice.
- I didn't know where to get legal advice
- Too expensive
- Didn't have an opportunity
- Other – please specify
- Not sure/can't remember

15) In hindsight, do you think you should have sought legal advice about this issue or dispute?

- Yes, I should have sought legal advice – skip to Q22
- No, I was right not to seek legal advice – skip to Q22
- Not sure – skip to Q22

16) Did you apply for legal aid?

- No
- Yes, but I was knocked back – skip to Q18
- Yes, and I received it – skip to Q19
- Not sure/can't remember – skip to Q20

17) Why didn't you apply for legal aid?

- Didn't think I would need it – skip to Q20
- Didn't think I would be eligible because of my income/assets – skip to Q20
- Didn't think I would be eligible because of the nature of the issue or dispute – skip to Q20
- Wasn't aware that legal aid was available – skip to Q20

- Other please specify – skip to Q20
- Not sure/can't remember – skip to Q20

18) Why were you knocked back from receiving legal aid?

- My issue wasn't covered by legal aid – skip to Q20
- My case wasn't strong enough – skip to Q20
- I earned too much and/or had too many assets – skip to Q20
- Other (please specify) – skip to Q20
- Not sure/can't remember – skip to Q20

19) How much legal aid did you receive?

- I received some legal aid but I had to pay the rest.
- Legal aid covered most or all of my costs.
- Not sure/can't remember

20) Did you receive any other form of assistance to cover your legal costs?

- No.
- Yes, family (or friends) helped pay my legal costs.
- Yes - other (please specify)
- Not sure/can't remember

21) How much money did you spend on the legal dispute?

- None - the other side paid all (or most) of my costs.
- None - legal aid paid all (or most) of my costs.
- Less than \$100.
- \$100-\$1,000.
- \$1,000-\$5,000.
- \$5,000-10,000.
- \$10,000-\$20,000.
- \$20,000-\$50,000.
- \$50,000-\$100,000.
- More than \$100,000.
- Not sure/can't remember

22) Was the issue or dispute resolved in your favour?

- Yes
- No
- It hasn't yet been resolved
- Not sure

23) In your view, was the outcome fair?

- Yes
- No
- Not sure/not applicable

24) How long did it take to resolve the issue or dispute from start to finish? If it hasn't yet been resolved, please indicate how long ago the issue began.

- a few days or less
- a few weeks
- a few months
- up to a year.
- 1 to 3 years.
- more than 3 years
- Not sure/can't remember

25) Did this issue or dispute...? Please select all that apply. [multiple response, randomise]

- Create stress or anxiety for you or those involved
- Generate conflict among your family or in your relationships
- Contribute to physical or mental health problems for you or someone close to you
- Create financial problems for you or your family
- Result in time away from work
- Result in time away from family
- Cause a major disruption to your life generally
- None of these

26) Please indicate whether you agree with the following statements. [don't agree/ slightly agree / strongly agree / not sure]

- The legal system is too complicated to understand properly.
- I know what my rights are under the law

- Only the very wealthy can afford to protect their legal rights.
- The courts are no place for an ordinary person.
- I could afford a good lawyer if I had a serious legal issue.
- If I had a legal problem I would know how to get help
- If someone is ripped off by a company, the government should pay for their legal costs

27) In your opinion, should the government fund legal aid for...? Please select one option.

- Only the very poor
- Everyone except the rich
- Everyone, regardless of wealth
- Nobody – everyone should have to pay for their own lawyer if they need one
- Not sure

28) Do you support the government providing interest-free loans to Australians who face unexpected legal problems but can't afford a lawyer?

- Yes – I support this
- No – I do not support this
- Not sure