

CHAPTER 3

The adequacy of legal aid

3.1 Volumes could be written about the Australian legal aid system, and term of reference (b) does little to narrow the potential discourse. For the purposes of this inquiry however submissions and evidence focussed on various topics concerning the Australian Government's legal aid program. This chapter discusses:

- an overview of legal aid commissions;
- the Legal Aid Program;
- the adequacy of funding;
- the Commonwealth/state funding divide;
- funding in the Federal Financial Relations framework; and
- the Legal Aid Priorities and Guidelines.

An overview of legal aid commissions

3.2 Legal Aid Commissions (LACs) are independent statutory authorities, established to provide legal aid to economically and socially disadvantaged people. They provide a comprehensive range of legal services, including information and advice, family dispute resolution, duty lawyer services, and grants of aid for litigation in Commonwealth law matters.¹

3.3 LACs work co-operatively with other legal assistance service providers to maximise access to justice. At a national level, this co-operation is facilitated through the Australian Legal Assistance Forum, comprising representatives of the LACs' peak body, National Legal Aid (NLA), Community Legal Centres (CLCs), Aboriginal and Torres Strait Islander Legal Services (ATSILS), and the Law Council of Australia (Law Council).

3.4 The Australian, state and territory governments fund LACs in each state/territory, with Australian Government funding administered by the Attorney-General's Department (department) through the Legal Aid Program (LAP).

The Legal Aid Program

Australian Government funding

3.5 In 2003-04, the committee examined Australian Government legal aid funding from 1996 to 2004, a period which saw the introduction and implementation of new Legal Aid Priorities and Guidelines (Priorities & Guidelines). Under this policy, from

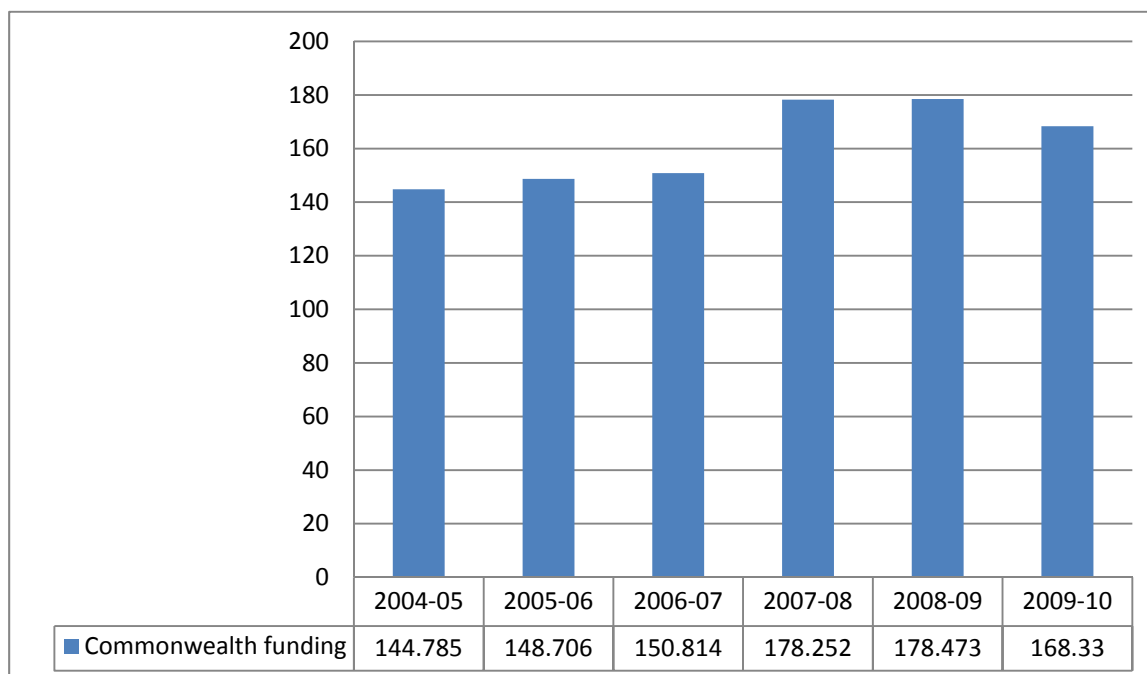
1 Attorney-General's Department, *Submission 54*, p. 2.

1 July 1997, LACs could only allocate Australian Government funding to legal matters arising under a law of the Commonwealth and defined as a Commonwealth Legal Aid Priority.²

3.6 In its 2004 report, the committee noted steady reductions in Australian Government legal aid funding from 1996-2000, followed by a four year funding package which ultimately returned funding to below what it was in 1996-97 (in real terms, \$27 million less).³

3.7 Figure 3.1 below depicts the subsequent history of Australian Government funding for LACs. This funding has steadily increased, except for the last financial year when the funding marginally decreased.

Figure 3.1 – Legal Aid Commission funding: 2004-2009

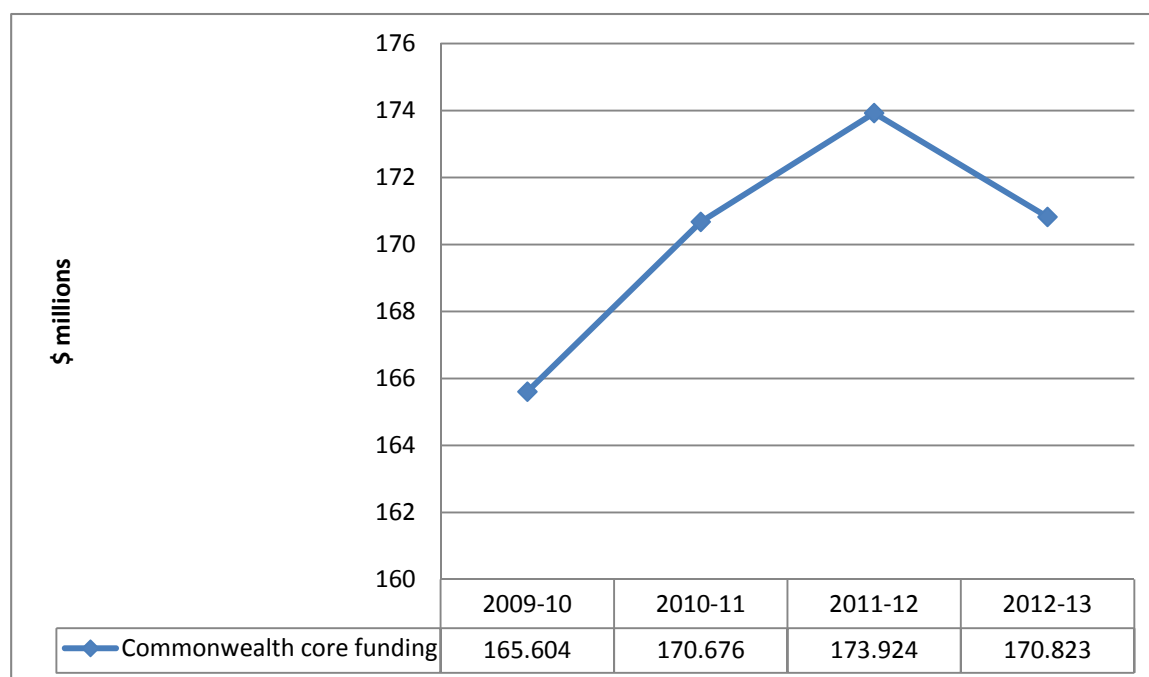


Source: Based on figures from National Legal Aid website, accessed 26 October 2009: <http://www.nla.aust.net.au>

3.8 Figure 3.2 depicts Australian Government core funding provided for in the 2009-10 Budget and to be provided in the 2010-13 budgets, totalling \$681.027 million over the next four years. In Senate Estimates Hearings, the department stated that 2009-10 funding levels have been maintained from 2008-09, with an indexation adjustment.

2 Attorney-General's Department, *Commonwealth Legal Aid Priorities and Guidelines*, July 1997, Guideline 2(1)(a) & (b)

3 Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, pp 3-8.

Figure 3.2 – Commonwealth core legal assistance funding: 2009-2013

Source: Treasury Portfolio, Portfolio Budget Statements 2009-10, p. 27; and Attorney-General's Department, Estimates Answer to Question on Notice (27 May 2009)

(Note: These figures do not include amounts budgeted in the Attorney-General's Portfolio, Portfolio Budget Statements, pp 29-30 or additional funding injections.)

3.9 While there is some confusion evident in this data, Australian Government legal aid funding appears to have generally increased over the past five years. The Australian Government also recently made a \$10.1 million one-off targeted funding injection to address immediate pressures on service delivery and support measures, such as improved mediation conferencing services, upgraded information technology and video-conferencing equipment, and tailored training opportunities focussing on mediation skills and family violence identification and management. Further funding injections have not been budgeted.⁴

Allocation of Australian Government funding

3.10 Australian Government legal aid funding is apportioned between the states/territories using a funding model based on demographic, social and economic variables, and cost factors affecting service delivery in each state and territory (the Rush-Walker funding model).

3.11 In 2009-10, Australian Government LAC funding is expected to be allocated to the states and territories as follows.

4 The Hon. Robert McClelland MP, Attorney-General, 'Funding for Legal Assistance Services', Media Release, 9 May 2009; and Mr Roger Wilkins AO, Attorney-General's Department, Estimates Hansard, 27 May 2009, p. 39.

Table 3.1 – Estimated payments to the states/territories for legal aid

\$ million	NSW	VIC	QLD	WA	SA	TAS	ACT	NT	Total
2008-2009	53.1	35.4	35.4	16.3	13.8	5.8	4.1	4.2	168.1
2009-2010	52.2	35.1	35.5	15	14.1	5.5	4.2	3.7	165.3

Source: Attorney-General's Department, *Estimates Answer to Question on Notice* (27 May 2009)

3.12 The committee has previously heard criticisms of the Rush-Walker funding model,⁵ and in its 2004 Report recommended that:

The Commonwealth Government develop a new funding model to ensure a more equitable distribution of funding between the State [sic] and Territories. This model should be based on the work of the Commonwealth Grants Commission model, but with increased funding for the Northern Territory to account for the special challenges it faces in light of its high Indigenous population and remoteness.⁶

3.13 The committee notes that the Commonwealth Grants Commission subsequently developed a new funding model, which was rejected by both NLA and the department as it did not reflect the operational circumstances of a number of jurisdictions.⁷ However, the committee does not comment further as submissions and evidence presented during the inquiry insufficiently addressed the issue to allow the committee to come to an informed view.

3.14 The committee notes however that the Rush-Walker funding model appears to produce funding inconsistencies. In 2008-09, for example, Victoria Legal Aid reported the lowest funding of all LACs, including an overall operating deficit of \$20.3 million dollars of which \$14.3 million dollars represented the deficiency in Commonwealth funding.⁸

5 Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, pp 9-12.

6 Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, Recommendation 2, p. xxiii.

7 Government Response, *Senate Hansard*, 7 February 2006, p. 63.

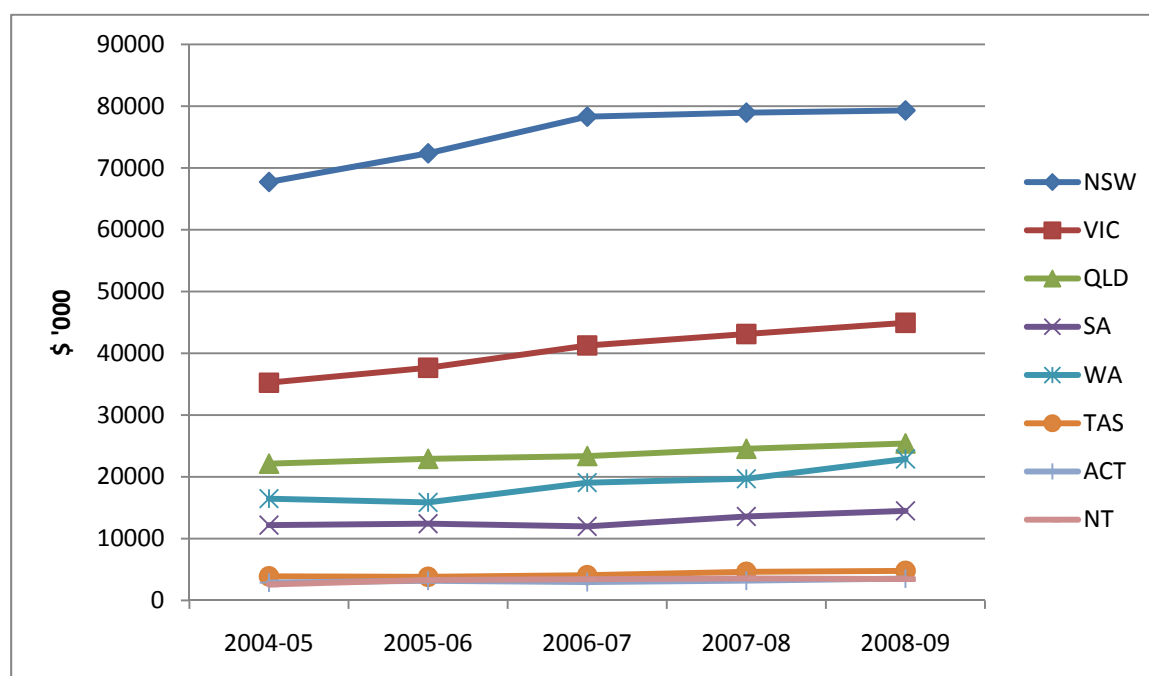
8 Victoria Legal Aid, Annual Report 2007-08, p. 3; and PILCH, *Submission 33*, p. 27.

3.15 When asked about this by the committee, the department responded that LACs are expected to operate in accordance with their budget and not incur a budget deficit. The department added that in earlier years Victoria Legal Aid reported a surplus so substantial that it provided sufficient seed funding for the establishment of the Expensive Commonwealth Criminal Cases Case Fund.⁹

State and territory government funding

3.16 In addition to the Australian Government, LACs receive funding from state/territory governments. Figure 3.3 below details each state and territory's funding contributions from 2004 to 2009. In general, these contributions marginally increased for the period.

Figure 3.3 – State/territory legal assistance funding: 2004-2009



Source: Based on figures from National Legal Aid website, accessed 26 October 2009: <http://www.nla.aust.net.au>

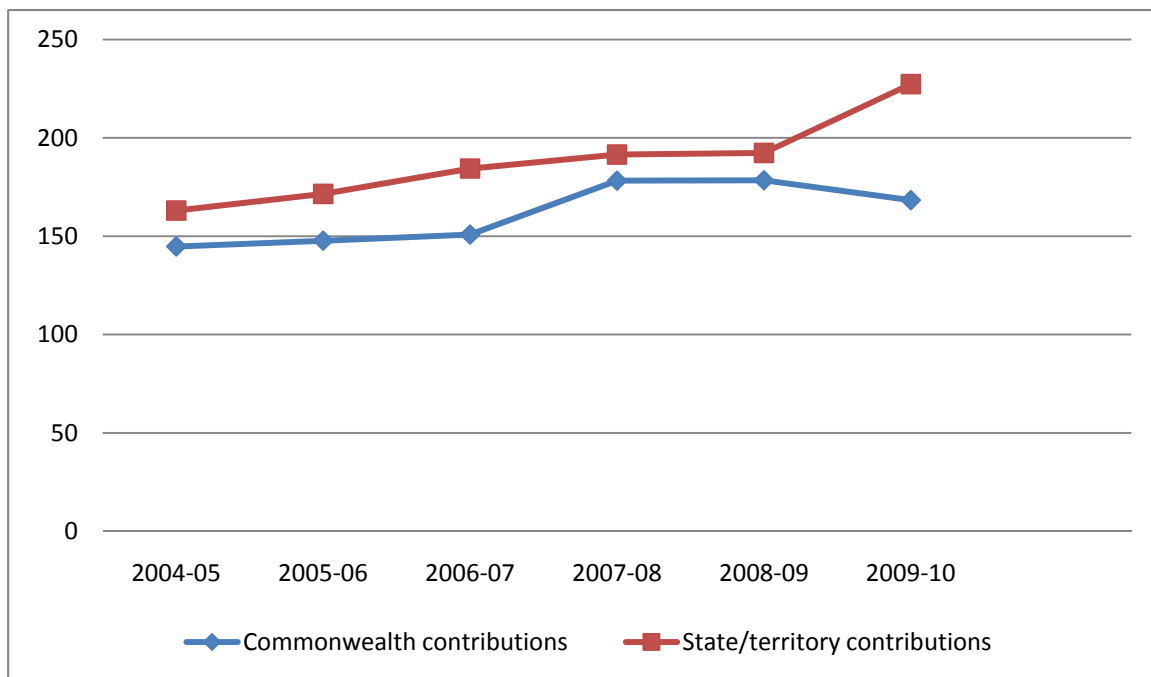
3.17 No state or territory government participated in the inquiry, resulting in evidence only peripherally remarking on their financial contributions to LAC funding. This comment compared Australian Government LAC funding with state/territory and/or other sources of LAC funding.

3.18 At the Melbourne public hearing, for example, NLA described current contributions to LAC funding as follows:

9 Dr Albin Smrdel, Assistant Secretary, AGD, *Committee Hansard*, Canberra, 27 October 2009, p. 44.

In 1996-97 the Commonwealth contribution was \$128½ million out of a total income for legal aid commissions around the country of \$264½ million. So, in 1996-97, you are basically looking at, fractionally, about 50-50 when you take into account all the sources...With the new arrangements the Commonwealth contribution was \$108½ million out of \$244 million, so it went down a bit below 50 per cent. But in this year's budget the Commonwealth contribution is \$168 million out of a total of \$518 million, so it is down to about 33 or 34 per cent-something like that. But, of course, the state contribution has gone up enormously...This year the state figure is \$227½ million.¹⁰

Figure 3.4 – Australian, state and territory government funding for Legal Aid Commissions: 2004-2010



Source: Based on figures from National Legal Aid website, accessed 27 October 2009: <http://www.nla.aust.net.au>

3.19 According to NLA statistics, state and territory government contributions to LAC funding have exceeded those of the Australian Government for at least the past six years.

10 Mr Norman Reaburn, Chair, National Legal Aid, *Committee Hansard*, Melbourne, 15 July 2009, pp 61-62.

Public purpose funds

3.20 LACs also derive a large proportion of their funding from Public Purpose Funds. In 2007-08, for example, Victoria Legal Aid received \$31.9 million (28 per cent) of its revenue from the Victorian Public Purpose Fund.¹¹ In the same period, NSW Legal Aid received \$37.7 million (17.5 per cent) of its funding from the NSW Public Purpose Fund.¹²

3.21 The monies for Public Purpose Funds are primarily generated by the interest earned in solicitors' trust accounts, a revenue source vulnerable to economic fluctuations, and, at present, reduced by the payment of fees on the Guarantee Scheme for Large Deposits and Wholesale Funding.

3.22 The Law Council submitted that LACs over-rely on the Public Purpose Funds, and when these funds are limited, further pressures are placed on the entire legal assistance sector.¹³ NLA acknowledged that part of the funding crisis facing LACs over the next 12-18 months will be a loss of these funds:

17 or 18 per cent of total national funding for legal aid commissions comes from those solicitor trust fund moneys where the interest on trust accounts is put into a special fund...It varies from jurisdiction to jurisdiction. In some jurisdictions it is a really important component of the money they get. That is a funding source which is rapidly drying up. It is drying up because of lower interest rates and it is drying up because of the declining volume of transactions that will lead to moneys being held in trust by solicitors.¹⁴

The adequacy of funding

Impact on service delivery

3.23 In 2003-04, the committee recognised that the significant reduction in Australian Government legal aid funding adversely affected the ability of LACs to provide legal assistance to economically and socially disadvantaged people.

3.24 Accordingly, the committee made recommendations aimed at determining legal needs throughout Australia, and providing the necessary resources to meet those needs. As noted in Chapter 2, many of those recommendations have not been implemented.

3.25 Submitters and witnesses told the committee that, since 2004, legal assistance service providers' funding positions have worsened, with demand for and the cost of

11 Victoria Legal Aid, Thirteenth Statutory Annual Report: 2007-08, p. 4.

12 NSW Legal Aid, Annual Report 2007-08, p. 62.

13 Law Council of Australia, *Submission 12*, p. 5.

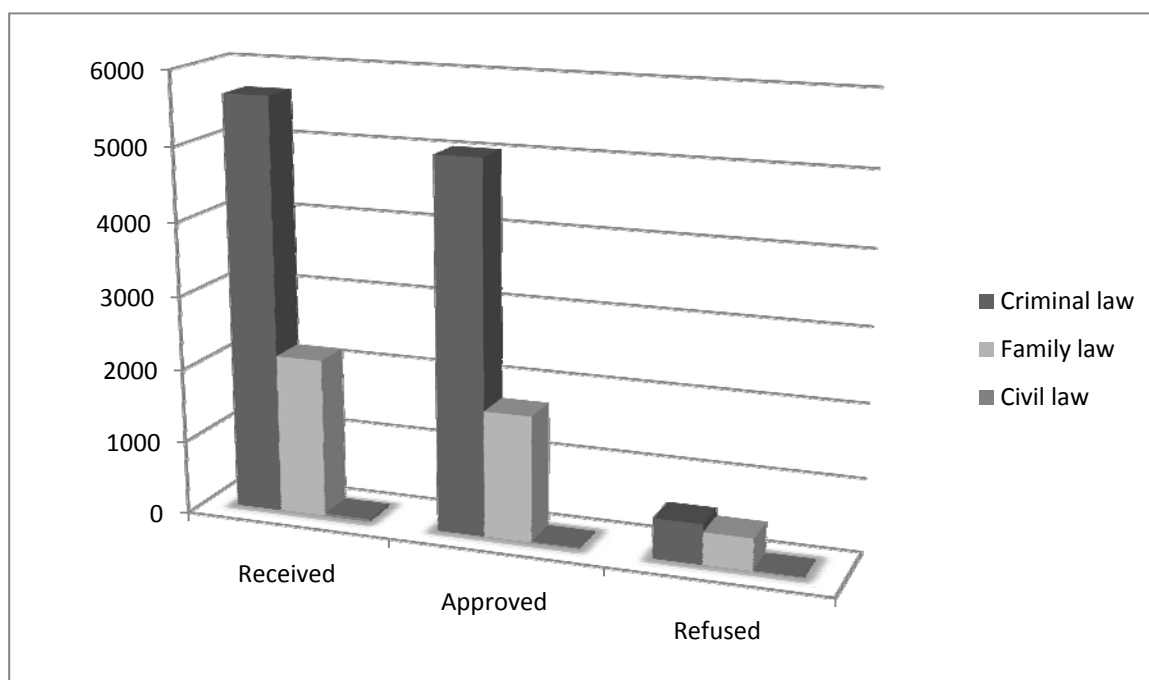
14 Mr Norman Reaburn, Chair, NLA, *Committee Hansard*, Melbourne, 15 July 2009, pp 60-61; and Mr Danny Barlow, President, LIV, *Committee Hansard*, Melbourne, 15 July 2009, p. 76.

legal services rising. Chapter 7 discusses the position of CLCs, and Chapter 8 discusses the position of ATSILS and Family Violence Prevention Legal Services (FVPLS).

3.26 Under this term of reference, evidence suggested that LACs struggle to maintain financial viability whilst meeting the needs of their clients. As a result, a number of coping mechanisms have been implemented, including: prioritisation of matters; strict application of eligibility criteria; and reduction of services. However, these strategies result in many disadvantaged people not securing a grant of legal aid, and being hindered or prevented from accessing justice.¹⁵

3.27 In Tasmania, for example, approximately 10 per cent of applications for legal aid are currently rejected on the basis of a lack of funding.¹⁶ According to Tasmania Legal Aid's 2007-08 Annual Report, it appears that the majority of rejections occur in the areas of family and civil law.

Figure 3.5 – Tasmania Legal Aid: Applications Received, Approved, Refused: 2007



Source: Based on figures from Tasmania Legal Aid website, accessed 24 November 2009: <http://www.legalaid.tas.gov.au>

15 Australian Legal Assistance Forum, *Submission 24*, p. 2; Women's Legal Centre (ACT & Region) Inc., *Submission 51*, p. 3; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission 42*, p. 2; NSW Young Lawyers, Human Rights Committee, *Submission 28*, pp 8-9; and DLA Phillips Fox, *Submission 32*, p. 6.

16 Mr Norman Reaburn, Chair, National Legal Aid, *Committee Hansard*, Melbourne, 15 July 2009, pp 63-64.

3.28 In Queensland, 7.8 per cent of applications for criminal law legal aid were rejected in 2007-08.¹⁷ In Victoria, criminal law legal aid matters in the lower courts have dropped to pre 2004-05 levels.¹⁸

3.29 NLA submitted:

Limited funding to commissions and the requirements of funding agreements (including means and merits testing and priorities and guidelines for granting legal assistance) result in commissions making most grants of legal assistance in family law where children are involved and/family violence is a factor and criminal law where a person's liberty is at risk. Because of these constraints, increased demand, and the rising cost of services, commissions are not able to meet the demand in these areas and even less so in other areas such as civil law which includes matters such as employment, social security, credit/debt, mortgage repossessions, housing and tenancy, consumer protection, and older people's issues.

Currently, Commonwealth funding is insufficient to maintain even the existing level of service in the family law area where children are involved. Some jurisdictions do not have enough Commonwealth money. Others are only just holding their heads above water. An increase in the demand for services as a result of the GFC or for any other reason will mean all commissions will be under water. The Commonwealth should acknowledge this. On top of this there are real problems in having to operate within the current parameters, with the means test being way too restrictive and prioritising matters becoming almost impossible. There will need to be either a substantial reallocation of the types of matters for which people can get assistance or additional funding.¹⁹

3.30 Other submissions warned that clients' perception of the quality of legal aid and the fairness of the justice system might be damaged by limited funding and inadequate resourcing of LACs.

3.31 By way of illustration, Justice Action told the committee:

Legal aid lawyers have huge case loads because there are simply not enough of them. That means they have less time to do their work and to work with their clients in the participation and conduct of their cases. That, in turn, has led to a growing disconnect in the prison yards between prisoners and their lawyers. Complaints range from lawyers spending very little time with their clients—some say five minutes is all they get before they go to court—and not being prepared to properly listen to the client's side of the story. They feel they have not had a chance to ventilate their side of the story. Also, pressure being placed on clients to plead guilty and a complete lack of understanding on the part of clients of the trial process and what they are going through. That means that in very many cases that,

17 Queensland Legal Aid, Annual Report 2007-08, p. 97; and Russo Lawyers, *Submission 58*, p. 4.

18 Law Institute of Victoria, *Submission 11*, p. 6.

19 National Legal Aid, *Submission 34*, pp 18 & 24.

whilst people have actually had their day in court, as the maxim suggests, justice in their eyes and in the eyes of their families and friends has neither been done nor been seen to be done. That causes anger and despair.²⁰

3.32 More broadly, the Law Council submitted that adequately funding the legal aid sector provides a wide range of social justice benefits:

On a broad level, the public's view that the legal system is fair and equitable supports the legitimacy of the legal system as a whole. Equality before the law is meaningless if there are barriers that prevent people from enforcing their rights. The legal assistance sector is therefore critical in maintaining the integrity of the justice system and upholding the rule of law.²¹

3.33 Concluding its argument, the Law Council cited former Chief Justice Murray Gleeson, who 10 years ago remarked:

The expense which governments incur in funding legal aid is obvious and measurable. What is not so obvious, and not so easily measurable, but what is real and substantial, is the cost of the delay, disruption and inefficiency, which results from absence or denial of legal representation. Much of that cost is also borne, directly or indirectly, by governments. Providing legal aid is costly. So is not providing legal aid.²²

Areas of unmet need in legal aid

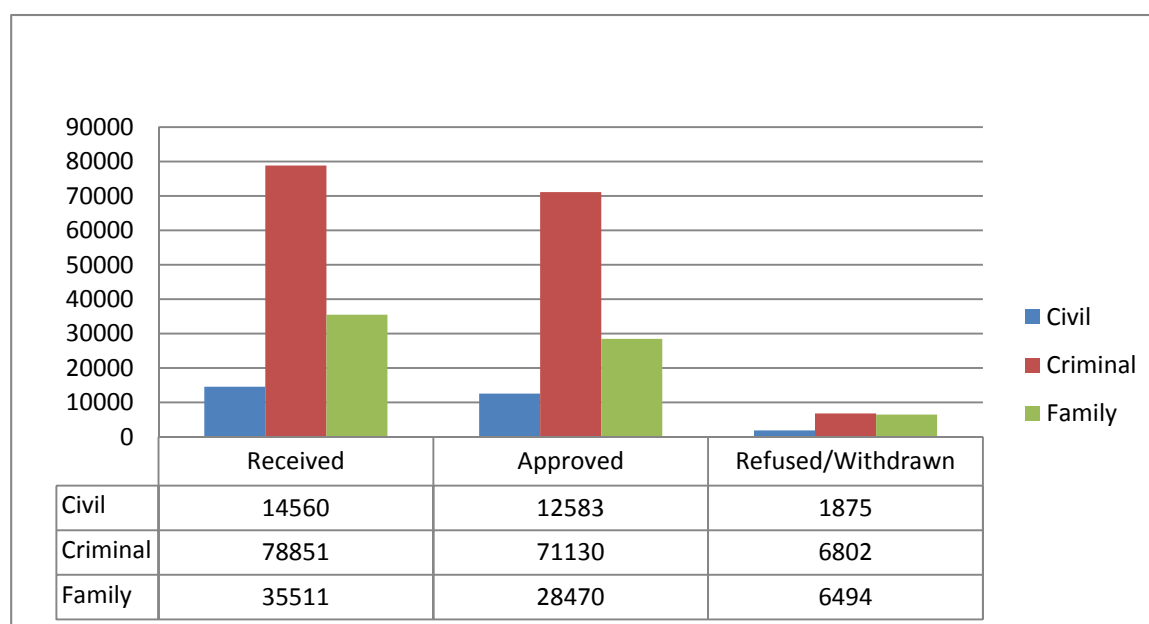
3.34 While the results of the National Legal Needs Survey referred to in Chapter 2 will not be known until mid- to late 2010, evidence presented to the inquiry indicated priority areas in need of legal aid funding. In general, civil law and family law matters drew the attention of submitters and witnesses.

3.35 Figure 3.6 below shows the relative number of civil, criminal and family law applications received by LACs in 2007-08. Criminal law matters comprise the bulk of legal aid applications, with family law matters and civil law matters ranking well behind.

20 Mr Michael Poynder, Co-ordinator, Justice Action, *Committee Hansard*, Sydney, 11 September 2009, p. 71; Law Society of NSW, *Submission 41*, p. 2; and Australian Lawyers for Human Rights, *Submission 43*, p. 3.

21 Law Council of Australia, *Submission 12*, pp 5-6.

22 Chief Justice Murray Gleeson, *State of Judicature* (speech delivered at the Australian Legal Convention, Canberra, 10 October 1999)

Figure 3.6 – Legal Aid Commission applications by matter type: 2007-2008

Source: Based on figures from National Legal Aid website, accessed 27 October April 2009: <http://www.nla.aust.net.au>

3.36 The committee notes that these figures do not accurately portray the true state of the legal aid system: the figures do not take into consideration those people who, for whatever reason, do not apply to LAC for legal assistance.

Family law matters

3.37 The Family Court of Australia (FCA) and the Federal Magistrates Court (FMC) submitted that legal aid funding is crucial for people attempting to access the family law courts.²³ As previously mentioned, NLA advised that low funding levels are significantly and adversely affecting LAC's family law core service delivery.²⁴

3.38 By way of illustration, the family law courts and LIV submitted that the contraction in Australian Government legal aid funding caused Victoria Legal Aid to: cut the number of independent children's lawyers by 600; tighten the means test; and stop funding lawyers to instruct in family law trials (including independent children's lawyers) in early 2008.²⁵

3.39 Independent children's lawyers are lawyers appointed by the court to form a view as to what orders would be in a child's best interests, and make submissions in

23 Chief Justice Diana Bryant, Family Court of Australia & Chief Federal Magistrate John Pascoe, *Committee Hansard*, Melbourne, 15 July 2009, p. 2.

24 National Legal Aid, *Submission 34*, p. 18.

25 Victoria Legal Aid, Annual Report 2007-08, p. 3; Family Court of Australia & Federal Magistrates Court, *Submission 31*, p. 7; and PILCH, *Submission 33*, p. 28.

accordance with that view. They do not represent the child or act on a child's instructions. The types of matters where independent children's lawyers are appointed include where:

- there are allegations of abuse against the child;
- there is intractable conflict between the parents;
- the conduct of the parents is likely to impinge on the child's welfare; and
- both parties are self-represented.

3.40 As a result, the FCA warned that it could be prevented from fulfilling its obligation to further the best interests of children involved in family law proceedings. For its part, the LIV questioned whether Australia was now in breach of the United Nations' Convention on the Rights of the Child.²⁶

3.41 In relation to the funding cap on independent children's lawyers, Her Honour Chief Justice Diana Bryant told the committee:

They have a quota each month for the Family Court and the Federal Magistrates Court. If that quota is reached in a month, despite the fact that the court has made an order for representation, then that representation will not be available, because of the lack of legal aid funds. That really is quite crucial. It is important that parties be represented but, if parties cannot be, then it is essential that there is an independent children's representative for the child.²⁷

3.42 A member of the independent children's lawyer panel told the committee that:
12 months ago or two years ago I would receive three or four appointments per month and three or four requests to act. I now get one request to act every six weeks, one appointment perhaps every two months.²⁸

3.43 In addition, the LIV submitted that independent children's lawyer caps is a disadvantage in lengthy trials where funding expires prior to commencement of final hearings:

26 Mr Robert Stary, Executive Committee, Criminal Law Section, LIV, *Committee Hansard*, Melbourne, 15 July 2009, p. 70.

27 Chief Justice Diana Bryant, Family Court of Australia, *Committee Hansard*, Melbourne, 15 July 2009, pp 2-3, 10 & 12; Chief Federal Magistrate John Pascoe, Federal Magistrates Court, *Committee Hansard*, Melbourne, 15 July 2009, p. 11; Family Court of Australia & Federal Magistrates Court, *Submission 31*, pp 7-8; and Law Institute of Victoria, *Submission 11*, p. 7.

28 Mr Tim Mulvany, LIV, *Committee Hansard*, Melbourne, 15 July 2009, p. 77.

About 10 per cent of my cases would reach cap. Then you have to apply to legal aid and you are customarily knocked back if you are in excess of cap. The one exception is the Magellan process, where the cap does not apply if you are in the Magellan Program.²⁹

3.44 The committee accepts that family law legal aid funding plays an important role in access to justice, including access to justice for children. The committee is concerned that Victoria Legal Aid, and perhaps other LACs also, cannot safeguard or help promote children's best interests with the appointment of independent children's legal representatives due to funding constraints and in circumstances where that representation appears wholly necessary.

3.45 In 2003-04, the committee examined children's representation in the family law courts, recommending that:

A separate pool of funding for child representation ultimately be established so that decisions made by the Family Court and/or the Federal Magistrates Court to appoint child representatives do not impact on the availability of legal aid funds for parents in family law proceedings.

[and]

The Family Court and legal aid commissions closely monitor the new Family Court guidelines on child representatives to determine what impact, if any, they have on legal aid budgets for family law matters generally.³⁰

3.46 The committee is not aware whether the second mentioned recommendation was adopted by the FCA and LACs, but the Australian Government did not accept the first recommendation, stating that it would reduce the flexibility of LACs to manage their budgets according to client needs.³¹

3.47 On the evidence, it is apparent that the appointment of children's legal representatives impacts on family law legal aid funding sufficient to impel, Victoria Legal Aid, at least, to institute some control measures.

3.48 Accordingly, and in view of its above comments, the committee endorses Recommendation 21 from its 2004 Report, and urges state/territory governments to set aside a portion of LAC family law funding for the targeted provision of independent children's representatives in family law matters where ordered by the FCA or FMC.

3.49 The Women's Legal Services (SA) Inc. provided another example of how reductions in family law legal aid funding impact on clients and their access to justice. It argued that the approximate \$10 000 'cap' in family law matters discriminates against women as:

29 Mr Tim Mulvany, LIV, *Committee Hansard*, Melbourne, 15 July 2009, p. 76.

30 Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, Recommendations 21 & 22, p. xxvi.

31 Government Response, *Senate Hansard*, 7 February 2006, p. 71.

- a person may reach the 'cap' at a crucial stage in the proceedings (such as just prior to a hearing), thus losing the benefit of legal aid;
- the 'cap' in criminal law proceedings is much higher, approximately \$15 000-\$60 000; and
- in domestic violence matters, respondents make repeated applications to the court, exhausting a legal aid grant and leaving applicants without the benefit of legal assistance.³²

3.50 Five years ago, the committee endorsed its 1998 recommendation for the Australian Government to act to ensure the necessary data on the operation of the 'cap' in family law matters is collected, analysed, published and acted upon to ensure that capping does not deny justice in particular cases.³³

3.51 This recommendation was partially accepted, with the Australian Government considering that 'there are adequate measures in place to monitor the operation of the family law cost caps.'³⁴

3.52 In 2004, the committee also accepted that there is gender disparity in the practical distribution of legal aid funds, resulting in indirect but significant discrimination against the circumstances and needs of women in their access to justice. The committee expressed concern about the Australian Government's apparent lack of recognition of some of the particularly grave consequences of family law disputes, and the preferential funding given to criminal law matters.³⁵

3.53 The committee recommended that:

The Commonwealth Government address discrimination against the circumstances of women in the application of the current family law legal aid funding guidelines and priorities, by commissioning national research into the perceived gender bias in legal aid decision-making.³⁶

3.54 The Australian Government did not accept this recommendation, stating that the Commonwealth legal aid funding Guidelines and Priorities apply equally to men and women in Commonwealth matters, and LACs are responsible for decisions regarding grants of legal aid.³⁷

32 Women's Legal Service (SA) Inc., *Submission 59*, pp 12-13; and Women's Legal Service Victoria, *Submission 71*, p. 6.

33 Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, Recommendation 16, p. xxv.

34 Government Response, *Senate Hansard*, 7 February 2006, p. 68.

35 Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, p. 48; and Women's Legal Service Victoria, *Submission 71*, pp 4-5.

36 Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, Recommendation 12, p. xxiv.

37 Government Response, *Senate Hansard*, 7 February 2006, p. 66.

3.55 The NACLC observed that while the Guidelines and Priorities appear to be gender neutral, in practice they do not produce the same results for men and women, with women continuing to receive significantly less legal aid than men. This was attributed to the higher level of criminal law legal aid funding where men comprise the vast majority of grant recipients rather than cost capping in individual matters.³⁸

3.56 For this inquiry, the committee received little evidence regarding both cost caps and discrimination against women in the practical application of family law legal aid funding. The committee agrees in principle however with the 2004 Report findings and its Recommendations 12 and 16.

3.57 In relation to family law legal aid funding, the committee has recommended previously that:

The Commonwealth Government increase as a matter of urgency the level of funding available for family law matters.³⁹

3.58 In 2006, the Australian Government advised that it had provided a substantial increase in resources for LACs for Commonwealth law matters, which would predominantly provide additional services in family law, including duty lawyer services and increased remuneration rates for legal practitioners undertaking legal aid work.⁴⁰

3.59 As shown in Figure 3.1 above, a substantial increase in LAC funding occurred in 2006-07 however it is not clear whether this was an increase in real terms. Furthermore, NLA informed the committee that, in its view, the legal aid funding situation has deteriorated further since 2004.⁴¹

38 National Association of Community Legal Centres, Answer to Question on Notice (11 September 2009)

39 Senate Legal and Constitutional References Committee, *Inquiry into legal aid and access to justice*, June 2004, Recommendation 14; and Family Court of Australia & Federal Magistrates Court, *Submission 31*, p. 4.

40 Government Response, *Senate Hansard*, 7 February 2006, p. 67.

41 National Legal Aid, *Submission 34*, p. 24; and Women's Legal Centre (ACT and Region), *Submission 51*, p. 7.

Civil law matters

3.60 LACs eliminated or drastically reduced their civil law legal aid programs upon introduction of the Priorities and Guidelines. 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.⁴²

3.61 Several submissions cited migration law matters as an illustration of how a limited legal aid civil law program creates difficulties for disadvantaged people.

3.62 Part 4 Guideline 3.1(1) allows for grants of legal aid in migration law (and other) matters but only in proceedings before the FMC and only if:

- there are differences of judicial opinion which have not been settled by the Full Court of the Federal Court of Australia or the High Court of Australia and relate to an issue in dispute in the matter; or
- the proceedings seek to challenge the lawfulness of detention, not including a challenge to a decision about a visa or a deportation order.⁴³

3.63 In effect, this limits the availability of legal aid for disadvantaged people in migration matters, resulting in pressure on other legal assistance service providers, self-representation, or abandonment of proceedings.

3.64 In addition to access to justice issues, submissions cited broader benefits that the availability of legal aid in migration law matters might bring to the judicial system. The Law Council, for example, told the committee:

If potential applicants in migration matters were able to apply for grants of legal aid, Legal Aid Commissions would apply a general merits test which may have the effect of reducing the number of unmeritorious applications being brought before the courts. It is also likely that an applicant who is fully advised of his or her legal position is less likely to pursue a claim that is devoid of legal merit.⁴⁴

3.65 The themes of early intervention and triage appeared in other submissions, such as that of La Trobe University who added that there is need for more not-for-profit migration agents:

42 National Legal Aid, *Submission 34*, pp 19-20; Law Council of Australia, *Submission 12*, pp 14-15; National Pro Bono Resource Centre, *Submission 49*, p. 12; Care Inc. Financial Counselling Services and Consumer Law Centre of the ACT, *Submission 9*, p. 3; PILCH, *Submission 33*, p. 27; and Australian Environmental Defender's Office, *Submission 29*, p. 7.

43 Commonwealth Priorities and Guidelines, Part 4, Guideline 3.1(1)

44 Law Council of Australia, *Submission 12*, pp 9-10; Federal Court of Australia, *Submission 57*, pp 1-2; and Mr Norman Reaburn, Chair, National Legal Aid, *Committee Hansard*, Melbourne, 15 July 2009, p. 63.

International research has shown time and time again that some of the most vulnerable groups in a society who have access to justice issues are newly arrived migrants. In addition, when people are granted asylum, anxiety and trauma does not abate until refugees are sure that their family is safe. Migration agents placed in community legal centres that have a high immigrant/refugee demographic would provide legal support in the form of submissions to the DIAC.⁴⁵

3.66 Asylum seekers rarely have funds to pay a migration agent, and in any event, Gilbert and Tobin preferred greater funding and support for organisations such as the Refugee Advice + Casework Service which provide legal assistance in the first stages of applications:

The bases on which those who fail to procure protection visas before the Refugee Review Tribunal (RRT) can seek review in the Federal court system are limited and highly technical. Many failed asylum seekers seek review of their matter without understanding whether they have arguable grounds for review. Often they do so because they have not been able to properly put their claim to the RRT either through their own inabilities or the inadequacy of their migration agent. This results in expending much by way of court and lawyer resources to address review claims through the Federal Court system.⁴⁶

3.67 The Law Council dismissed the efficacy of Guideline 3.1(3), which diverts legal aid applicants in migration matters to the 'under-funded' Immigration Advice and Application Assistance Scheme. Instead:

Commonwealth legal aid guidelines should be amended to expand the migration matters in which Legal Aid Commissions can provide assistance in matters before the courts and review tribunals and adequate funding should be provided to enable them to do so.⁴⁷

3.68 In 2004, the committee expressed the view that services for migrants and refugees would best be provided by LACs, recommending that:

The Commonwealth Priorities and Guidelines relating to the provision of migration assistance be amended such that assistance is available to those applicants meeting the means and merits tests, for preliminary and review stages of migration matters, including challenges to visa decisions and deportation orders.

The Commonwealth provide the necessary funding to legal aid commissions to meet the need for such services.⁴⁸

45 La Trobe University, *Submission 13*, p. 2.

46 Gilbert & Tobin, *Submission 45*, p. 2.

47 Law Council of Australia, *Submission 12*, p. 10; and National Legal Aid, *Submission 34*, p. 25.

48 Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, Recommendations 41 & 42, pp 143 & 146.

3.69 Neither recommendation was accepted on the grounds that the case put forth was neither novel nor persuasive, and also that:

Visa decisions are often challenged in tribunals and courts. In 2003-04, over 20, 900 migration matters were finalised in the Migration Review Tribunal (MRT), Refugee Review Tribunal (RRT) and the Administrative Appeals Tribunal (AAT), including 4, 709 finalised cases in the courts.

Migration applicants thus have the opportunity to have their case considered at two levels —at the primary decision stage and by administrative review in the MRT, RRT or AAT. If applicants choose to pursue their case further by way of judicial review, this should generally be at their own expense, subject to the current exceptions in the Commonwealth legal aid priorities and guidelines.⁴⁹

3.70 The committee promotes efforts to increase access to justice but considers the Australian Government's response to its earlier recommendations to be both reasonable and cognisant of the legal need and resource requirements of the entire legal aid system.

3.71 In relation to civil law generally, submissions argued that the existing limitations of the legal aid program reduce access to justice, and place pressure on other legal assistance service providers in the legal aid system.

3.72 As noted in Chapter 2, the system interconnects legal assistance service providers so that one provider's funding or service delivery can affect other providers. As explained and illustrated by the SCALES Community Legal Centre:

Legal Aid and community legal centres are aligned significantly and when there is a shortfall of funds in one of them, there is likelihood that the shortfall would impact the other one. For instance when legal aid funding is reduced, then legal aid bodies are forced to cut down on the level of their services to keep in line with the new budget. As a consequence, some of the clients that would have been offered legal aid prior to the funding changes would not meet the legal aid criteria. These clients then seek assistance from already stretched community legal centres.⁵⁰

3.73 As discussed in Chapter 7, civil law matters comprise a significant proportion of CLCs' work. The Central Queensland Community Legal Centre Inc. told the committee that, for the period 2006-07, the Community Legal Services Information System recorded this proportion as 62 per cent.⁵¹

49 Government Response, *Senate Hansard*, 7 February 2006, p. 77.

50 SCALES Community Legal Centre, *Submission 39*, p. 8; National Pro Bono Resource Centre, *Submission 49*, p. 11; and Tony Woodyatt, 'Working Together: Self-Representation', paper presented at the National Access to Justice and Pro Bono Conference, November 2008, p. 2.

51 Central Queensland Community Legal Centre Inc., *Submission 47*, p. 4; and Women's Legal Service (SA) Inc., *Submission 56*, p. 6.

3.74 For those jurisdictions with some form of civil law legal aid program, such services also feature in reported statistics of applications for assistance. In Victoria, for example, in 2007-08, out of a total of 42 044 grants of legal aid, 6 457 grants were made in relation to civil law matters (6-7 per cent).⁵² In NSW, its limited civil law legal aid program covers only elder law, coronial inquiries, and other advice services. Over 9 per cent (\$19.835 million) of its overall budget was spent on civil law services.⁵³

3.75 NLA acknowledged that civil law is an important legal area no longer comprehensively covered by LACs under the LAP:

Civil law legal aid has fallen through the cracks, tenancy, consumer, employment and social security legal services...are no longer core commission priorities although problems in these jurisdictions equally have profound consequences on peoples' lives.⁵⁴

3.76 Australian Lawyers for Human Rights agreed with this view, emphasising that access to civil law legal aid is an essential component of Australia's justice system:

There has long been a recognition of the fundamental purpose that legal aid plays in the Australian justice system, not only in ensuring that individuals have adequate representation before the courts, but also to ensure that our marginalised citizens are able to effectively participate in our judicial system and access the rights and remedies available to them in a variety of legal areas. The need for affordable legal services in a variety of areas, beyond the core areas of family and criminal law, is essential to an adequate justice system in a liberal democratic society and is a need which is currently in critical deficit in Australia.⁵⁵

3.77 The NLA's New National Policy set out poverty, or civil law matters, as its second priority area, and costed the restoration of a national civil law legal aid program at \$110,560,447. This included cost components for both legal advice and litigation, and involved an extrapolation to the national level of the NSW civil law legal advice program, and use of litigation data from comparative jurisdictions (England, Wales and Ontario).⁵⁶

52 National Legal Aid, *A New National Policy for Legal Aid in Australia*, p. 17.

53 NSW Legal Aid, Annual Report 2007-08, p. 16.

54 National Legal Aid, *A New National Policy for Legal Aid in Australia*, p. 3.

55 Australian Lawyers for Human Rights, *Submission 43*, p. 8.

56 National Legal Aid, *A New National Policy for Legal Aid in Australia*, November 2007, p. 16; and Law Council of Australia, *Submission 12*, p. 16.

3.78 The Law Council supported the proposal to restore a nationwide civil law legal aid program. It argued that the lack of legal aid in this area comprises a substantial barrier to access to justice, and suggested that a grant of civil law legal aid should be made if an application demonstrates certain criteria.⁵⁷

3.79 At a Senate Estimates Hearing, the department advised that funding for civil law matters was being considered by the Australian Government's Access to Justice Taskforce. However, its report, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, does not specifically discuss or recommend the restoration of civil law legal aid funding.⁵⁸ According to the department, Australian Government funding for civil law matters is being 'looked at' by the Attorney-General.⁵⁹

3.80 The committee acknowledges that there are arguments against restoration of a national civil law legal aid program.⁶⁰ However, the inquiry requires the committee to consider access to justice, and the committee cannot see how this is properly achieved if legal aid funding does not provide for high need areas which intimately affect the lives of disadvantaged Australians.

Recommendation 8

3.81 The committee recommends that the federal, state and territory governments, in conjunction with relevant stakeholders, jointly develop and implement a national civil law program in identified high need areas.

Funding proposals

3.82 As noted in Chapter 2, LACs are the primary source of legal assistance for disadvantaged people and accordingly their best chance of accessing justice. However, submissions questioned whether LACs are adequately funded and resourced to achieve their chartered aims.

57 Law Council of Australia, *Submission 12*, pp 14-15; National Pro Bono Resource Centre, *Submission 49*, p. 12; and PILCH, *Submission 33*, p. 33.

58 Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, September 2009; and Attorney-General's Department, Estimates Answer to Question on Notice No. 132 (27 May 2009).

59 Dr Albin Smrdel, Assistant Secretary, AGD, *Committee Hansard*, Canberra, 27 October 2009, p. 45.

60 Dr Andrew Cannon, *Submission 15*, p. 4; and Mr Maxwell Walker, *Submission 18*

3.83 The Law Institute of Victoria (LIV), for example, submitted:

Cuts over recent years have resulted in a reduction of legal aid services in Victoria and an increasing restriction on access guidelines so that legal aid is becoming assistance of last resort and not the robust safety net that we feel it should be.⁶¹

3.84 Submissions briefly touched on Australia's per capita legal aid funding. In essence, these submissions argued that, comparatively, Australia's legal aid funding is 'grossly' inadequate.

3.85 The National Pro Bono Resource Centre (NPBRC), for example, stated that in 2008 Australia spent \$22 per person, as compared to \$91 per person in England and Wales, \$73 per person in Scotland, and \$52 per person in the Netherlands.⁶² The Law Institute of Victoria (LIV) referred instead to national variance:

Remembering that Victoria receives \$6.22 per head: ACT \$12, New South Wales \$7.23, Northern Territory \$17.77, Queensland \$8.21, South Australia \$8.82, Tasmania \$10.49 and Western Australia \$7.22.⁶³

3.86 The department has rejected such comparisons previously on the grounds that Australian Government legal aid funding is not distributed on a per capita basis but according to the Rush-Walker funding model.⁶⁴

3.87 In late 2007, NLA published its proposal for a new Commonwealth approach to legal aid in Australia. The policy document, *A New National Policy for Legal Aid in Australia* (New National Policy), set out six priority areas designed to deliver comprehensive access to justice to disadvantaged people. It also contained costings for each policy area, amounting to \$404,391,747.⁶⁵

3.88 NLA representatives continued to endorse its policy proposal, arguing that a further \$165.5 million (approximately) must be injected into the Australian legal aid system in order for it to operate efficiently.⁶⁶ This sum does not allow for changes to the costings over the past two years.

61 Mr Robert Stary, Executive Committee, Criminal Law Section, LIV, *Committee Hansard*, Melbourne, 15 July 2009, p. 69; Women's Legal Centre (ACT and Region), *Submission 51*, p. 3; and PIAC, *Submission 50*

62 National Pro Bono Resource Centre, *Submission 49*, p. 11.

63 Mr Robert Stary, Executive Committee, Criminal Law Section, LIV, *Committee Hansard*, Melbourne, 15 July 2009, p. 70; and Mr Mark Woods, Law Council of Australia, *Committee Hansard*, Canberra, 27 October 2009, p. 24.

64 Department of Parliamentary Services, Parliamentary Library, Client Memorandum, 27 May 2009, p. 7.

65 National Legal Aid, *A New National Policy for Legal Aid in Australia*, November 2007

66 Mr Norman Reaburn, Chair, National Legal Aid, *Committee Hansard*, Melbourne, 15 July 2009, p. 57.

3.89 Other evidence raised the issue of who most appropriately funds the legal aid system and to what extent. Submissions supported both joint Commonwealth/state responsibility and funding sufficient to meet the legal needs of disadvantaged people, for example:

Severe budget restrictions over the years have reduced the efficacy of legal aid in providing legal assistance to those who do not have the financial capacity to afford private representation. This situation should not be allowed to continue. The preponderance of self-represented people clogging the courts, creating delays and increasing costs (both to the courts and other parties) is a classic symptom of this parlous condition. There should be an acceptance by Governments, both State and Federal, that additional funding is urgently required for legal aid.⁶⁷

3.90 Precisely how responsibility is apportioned between the Australian, state and territory governments was however a matter of some conjecture. Submissions expressed concern with Australian Government legal aid funding levels but were not able to inform the committee how much funding the Australian Government should be contributing, except to say that it ought to be more or that it ought to be determined according to appropriate principles.⁶⁸

3.91 On the evidence before the committee, LACs do not and cannot adequately cover the legal needs of disadvantaged Australians. There is much confusion regarding precisely what is that need and how best to address it.

3.92 While the commitment of further financial resources must almost certainly play a part in resolving identified issues, the committee considers a system-wide approach necessary. In the first instance, this requires federal, state and territory agreement as to responsibility for the provision and adequate resourcing of the legal aid system.

The Commonwealth/state funding divide

3.93 The Guidelines and Priorities' requirement for LACs to only use Commonwealth funds for grants of legal aid in Commonwealth law matters is known as the Commonwealth/state funding divide.

3.94 In 2003-04, the committee found the Commonwealth/state funding divide to be arbitrary as many legal matters do not fall neatly into either a Commonwealth or state/territory category. The committee considered that the arbitrary distinction: inhibited the effective servicing of legal needs; created unnecessary administration

67 Law Society of NSW, *Submission 41*, p. 2.

68 For example, Liberty Victoria, *Submission 25*, p. 2; and NSW Young Lawyers, Human Rights Committee, *Submission 28*, p. 9.

costs; and resulted, in some instances, in a 'surplus' of funds which could not otherwise be allocated or used.⁶⁹

3.95 Accordingly, the committee recommended that:

The current purchaser/provider funding arrangement be abolished, and that Commonwealth funding be provided in the same 'co-operative' manner as existed prior to 1997.

[and]

If the current purchaser/provider funding arrangement is retained, the committee recommends that the Commonwealth Government amend the funding agreements to allow the legal aid commissions to use 10 per cent of Commonwealth funding at their own discretion.⁷⁰

3.96 Neither recommendation was accepted by the Australian Government, which responded that: the purchaser/provider funding policy was well founded and ensures that disadvantaged Australians with legal problems arising under Commonwealth law have access to assistance; state/territory governments are responsible for ensuring adequate funding for matters arising under their own laws; and then current legal aid agreements allow LACs to determine the most appropriate mix of assistance to provide to clients seeking assistance for Commonwealth law matters.⁷¹

3.97 During the inquiry, submitters and witnesses continued to express doubts regarding the purchaser/provider funding policy, with reiterations of the concerns identified in the 2004 Report. The Australian Legal Assistance Forum, for example, submitted:

Family breakdown can involve both Commonwealth law and State law such as child protection and domestic violence. If a case involves both Commonwealth and State laws, two separate grants of aid are required to be made because of the administrative and financial requirements which result from the Commonwealth/State funding divide.

Commonwealth funding should be available to provide grants of aid to address legal needs arising from family relationship breakdown regardless of whether the specific legal need arises under Commonwealth or State legislation. ALAF believes that a better way to prioritise the Commonwealth legal aid program is to base it on defined legal need and that this approach is more consistent with social inclusion principles.⁷²

69 Senate Legal and Constitutional References Committee, *Legal Aid and Access to Justice*, June 2004, p. 33.

70 Senate Legal and Constitutional References Committee, *Legal Aid and Access to Justice*, June 2004, Recommendations 9-10, p. xxiv.

71 Government Response, *Senate Hansard*, 7 February 2006, p. 65.

72 Australian Legal Assistance Forum, *Submission 24*, p. 3; National Legal Aid, *Submission 34*, pp 23-24; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission 42*, p. 3; and National Legal Aid, *Policy and Position Statement*, July 2008, pp 1-2.

3.98 The LIV was equally blunt:

The rule that Commonwealth funds may only be applied to Commonwealth matters is illogical and arbitrary in its operation. It is this rule that has resulted in the legal aid system failing so abjectly to meet the needs of the very people it is supposed to serve.⁷³

3.99 The Law Council told the committee that the current funding arrangements: dislocate funding responsibility for closely related matters; produce inconsistent expectations of state/territory funding in respect of action taken by Commonwealth authorities pursuant to state/territory law; and restrict available funding for several areas of Commonwealth legislation.⁷⁴

3.100 The Law Council supported the committee's 2003-04 Recommendation 9:

The Commonwealth [should] develop and adopt a mechanism to begin to break down the Commonwealth/State funding divide. This will allow the ability to transfer Commonwealth funds to priority areas of disadvantage rather than depending upon a requirement that the relevant law be enacted by a Commonwealth or State parliament.⁷⁵

3.101 In any event, the Law Council took the view that:

The Commonwealth is the greatest gatherer of tax revenue and that it follows therefore that it ought to provide the majority of the funding for the legal services that are provided by legal aid.⁷⁶

3.102 Due to the contemporaneous events referred to below, the committee makes no recommendations regarding the Commonwealth/state funding divide however the committee notes its predisposition toward revision of the current Australian Government policy and therefore its in principle agreement with Recommendation 9 of its 2004 Report.

Funding in the Federal Financial Relations framework

3.103 In the 2009-10 Budget, the Australian Government announced that in future the majority of legal aid funding will be paid under the Federal Financial Relations framework, with specific purpose payments paid through the Treasury, as well as funding administered by the department.

73 Law Institute of Victoria, *Submission 11*; PILCH, *Submission 33*, pp 48-49; and Australian Lawyers for Human Rights, *Submission 43*, p. 5.

74 Law Council of Australia, *Submission 12*, pp 11-12.

75 Law Council of Australia, *Submission 12*, pp 11-12; and Ms Julia Hall, NACLC, *Committee Hansard*, Sydney, 11 September 2009, pp 31 & 37.

76 Mr Mark Woods, Law Council of Australia, *Committee Hansard*, Canberra, 27 October 2009, p. 25.

3.104 National Partnership agreements for legal aid funding will shortly be negotiated by the federal, state and territory attorneys-general for implementation on 1 January 2010.⁷⁷ According, to the department:

The Government will settle its position on the Commonwealth/State funding divide as part of that process.⁷⁸

3.105 Submissions to the inquiry universally acknowledged that, in the short-term, it would be difficult to provide an immediate solution rectifying all identified problems within the legal aid system. In spite of this cautious approach, evidence continued to call for urgent legal aid funding.

3.106 The Law Council, for example, emphasised the Australian Government's contribution to the current legal aid funding crisis and its concomitant responsibility to develop and implement a solution:

While it is not expected that the current government will be able to alleviate the financial crisis presently facing the legal assistance sector, created by years of under-funding, in one budget, it is imperative that some substantial increase be made in the next Commonwealth budget if this important sector of our justice system is not to be plunged further into crisis. While it is recognised that funding of legal aid is the responsibility of all Governments, the Commonwealth Government has much ground to make up due to the massive cuts to Commonwealth funding from 1997.⁷⁹

3.107 Figures compiled by the Western Australian Government indicate that, in that state alone, the Australian Government share of total legal aid funding declined from 64 per cent in 1996-97 to 45 per cent in 2006-07. Roughly translated, if the Australian Government were to restore the balance of legal aid funding to pre-1996 levels, extra funding of \$177 million would be required for Western Australia alone.⁸⁰

3.108 Again, the committee acknowledges the apparent ramifications that reduced legal aid funding has had on the legal aid system. As economic pragmatists, the committee must also acknowledge that the Australian Government cannot instantly locate and allocate massive and additional amounts of funding for LACs and other legal assistance service providers.

77 Attorney-General's Department, *Submission 54*, p. 2; and Mr Matt Minogue, Assistant Secretary, and Dr Albin Smrdel, Assistant Secretary, AGD, *Committee Hansard*, Canberra, 27 October 2009, p. 41.

78 Attorney-General's Department, Estimates Answer to Question on Notice No. 128 (27 May 2009)

79 Law Council of Australia, *Submission 12*, p. 10; and National Legal Aid, *Submission 34*, p. 23.

80 Law Council of Australia, *Submission 12*, p. 10.

3.109 However, the totality of evidence convinces the committee that further funding must be injected into the legal aid system, commencing with the primary service provider. Accordingly, the committee makes the following Recommendation 9.

Recommendation 9

3.110 The committee recommends that the Australian Government increase the level of funding for the Legal Aid Program with a view to sufficiently resourcing the legal aid system to meet the legal needs of the Australian people, including specific funding for community education programs and telephone advice schemes.

The Legal Aid Priorities and Guidelines

3.111 In the past, the Australian Government entered into a four-year Agreement for the Provision of Legal Assistance Services (funding agreement) with each state/territory. These agreements incorporate the Priorities and Guidelines, and are due to expire on 30 June 2012.

3.112 The Priorities outline family, criminal and civil law priorities, as well as other matters which are taken to be priorities.⁸¹ The 'Guidelines' specify the various bases upon which a LAC may make a grant of legal aid. These overarching criteria are set out in Part 1 of the Guidelines, and family, criminal and civil law specific criteria are set out in Parts 2, 3 and 4 of the Guidelines, respectively.⁸²

The means test

3.113 Part 1 Guideline 3 specifies that a means test must be applied by each LAC. This test assesses an applicant's assessable income and assets. An applicant must satisfy both components of the test, but if either is exceeded, a grant may be made if an applicant contributes toward the legal costs.

3.114 There are two types of means test that can be used in assessing applicants for legal aid. These are the National Legal Aid Means Tests and the Simplified Legal Aid Means Test. The two tests have the same assets test component, but assess income in a different way.

3.115 The Simplified Legal Aid Means Test uses a formula, which takes into account the number of dependent persons in the applicant's household, as well as the employment status of the applicant and his/her partner, if any. The National Legal Aid Means Test allows each state/territory to set monetary limits on items allowed under the test. The rationale for this discretion is to cater for economic factors particular to each jurisdiction, and different regions within a jurisdiction.

81 Clauses 6.4-6.7 of the Commonwealth Legal Aid Priorities

82 Schedule 3 of the Commonwealth Legal Aid Guidelines

3.116 The Australian Government has always preferred the Simplified Legal Aid Means Test on the basis of administrative ease. However, only Queensland and Tasmania use that test. All other states/territories use the National Legal Aid Means Test.

3.117 As noted in Chapter 2, many disadvantaged people cannot afford the services of a private legal practitioner, with a small percentage (12 per cent) turning instead to other legal assistance service providers.⁸³ The former managing director of Victoria Legal Aid, Tony Parsons observed:

When those one in eight 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.⁸⁴

3.118 While application of the means and merits tests might serve a legitimate purpose, ensuring that limited legal aid funding is granted to only the most disadvantaged people, the committee heard that the tests prevent many other disadvantaged people from receiving a grant of legal aid.

3.119 In 2004, the former Chief Justice of the FCA, the Hon. Justice Alastair Nicholson told the committee that the means test is set at such a level that it prevents too many people from qualifying for legal aid, a lot of whom 'have no hope of being able to pay for legal expenses'.⁸⁵ In its submission, NLA acknowledged the accuracy of these comments, adding that those who might be able to afford the costs of private legal representation might not be able to do so without experiencing undue hardship.⁸⁶

3.120 Submissions agreed with this testimony, remarking that this can be the case for persons who are employed part- or full-time, and also for persons who have to make a contribution toward their legal aid:

83 PILCH, *Submission 33*, p. 24; and Law Institute of Victoria, *Submission 11*, p. 5.

84 <http://www.legalaid.vic.gov.au/xfw/364.htm> (accessed 28 October 2009)

85 Justice Alastair Nicholson, Chief Justice, Family Court of Australia, *Committee Hansard*, 10 March 2004, Canberra, p. 5; Mr Julian Burnside QC, *Access to Justice*, Presentation to Access to Justice and Pro Bono Conference, 10-11 August 2006; and Women's Legal Service Victoria, *Submission 71*, p. 9.

86 National Legal Aid, *Submission 34*, p.16; NSW Young Lawyers, Human Rights Committee, *Submission 28*, p. 6; and Australian Environmental Defender's Office, *Submission 29*, p. 7.

Research has shown a significant income difference between those who met the means test and those who were able to afford private representation. Those eligible for legal aid earned less than \$25,000.00 p.a. after tax, yet people are only able to afford private representation once they earned over \$45,000.00 per annum after tax.⁸⁷

3.121 The Women's Legal Centre (ACT and Region) told the committee that the means test restrictions significantly affect access to justice for the most disadvantaged people in Australian society:

Australians who are financially disadvantaged but do not qualify for Legal Aid and cannot afford a lawyer, often go without legal assistance. Such individuals have little or no meaningful access to our legal system. Australians in this situation are often not aware of their rights and entitlements, and have extremely limited capacity when it comes to enforcing them. The effect of this access-to-justice barrier is particularly significant because Australians who are unable to afford to pay for legal services are often Australia's most disadvantaged citizens – Indigenous people, poor migrants and refugees, women – particularly after relationship breakdown, mentally ill people and disabled people.⁸⁸

3.122 To combat the problem, the Law Council suggested that, unless justified by regional economic conditions, there should be a single means test income and assets level throughout Australia, and one which allows the maximum number of disadvantaged people to access the justice system.⁸⁹

3.123 Due to the imminent changes to the legal aid funding structure, it is not clear whether the Priorities and Guidelines will be incorporated into National Partnership agreements. However, there is no reason to believe that a control measure similar to the means test will not be applied in future to applications for grants of legal aid.

3.124 In 2003-04, the committee examined the means test in greater depth, ultimately recommending that:

The state and territory legal aid commissions conduct an assessment of current applications, to ascertain what increase in successful applications would occur if the following changes were made to the merits [sic] test:

extend eligibility to those earning less than \$30,000 after tax; and

in criminal matters, where a person passes the income test, disregard home equity.⁹⁰

87 Women's Legal Service (SA) Inc., *Submission 56*, pp 6-7; Ms Deanne de Leeuw, *Submission 19*, pp 9-10; and Russo Lawyers, *Submission 58*, pp 2-3.

88 Women's Legal Centre (ACT and Region), *Submission 51*, p. 4.

89 Law Council of Australia, *Submission 12*, pp 13-14; Pilch, *Submission 33*, pp 24-25; and Russo Lawyers, *Submission 58*, p. 3.

90 Senate Legal and Constitutional References Committee, *Legal Aid and Access to Justice*, June 2004, Recommendation 3, p. xxiii.

3.125 The committee is not aware whether LACs in each state and territory have actioned this recommendation. On the evidence before the committee, there remains a need for the means test income and assets levels to accurately and realistically reflect the needs of disadvantaged Australians. Accordingly, the committee sees merit in such levels being both revised and nationally consistent. Accordingly, the committee makes the following Recommendation 10.

Recommendation 10

3.126 The committee recommends that the Australian, state and territory governments jointly develop and implement realistic and consistent national means test income and assets levels with an in-built mechanism for ensuring that the levels do not stagnate over time.

