CHAPTER 4

The Cost of Delivering Justice

4.1 Term of reference (c) addresses the cost of delivering justice. In general, submissions and evidence adopted a litigant's perspective of costs or a lawyer's perspective of legal aid remuneration scales. This chapter discusses the following topics examined by the committee:

- the Commonwealth's annual court costs;
- the cost of disbursements;
- exposure to adverse costs orders; and
- the cost of legal representation.

The Commonwealth's annual court costs

4.2 The Attorney-General's Department (department) estimated that the total cost of the federal court system would be $314,047,542.86 for the financial year ending 30 June 2009:

Table 4.1 – Federal court system costs: 2008-09

Item	**Amount**
Total Court Appropriations 2008-09	$291,140,000.00
Cost of Pensions (as at 20 April 2009)	$19,301,542.86
Appropriation for High Court Remuneration & Allowances	$3,050,000.00
Additional Funding to Family Court of Western Australia	$556,000.00
Total	**$314,047,542.86**

Source: Attorney-General's Department, Submission 54, p. 3.

(Note: This sum did not include one-off additional funding for the Family Court of Western Australia to appoint an acting family law magistrate and associated support staff for 12 months).

4.3 According to the 2009-10 Budget, this cost will increase to $355.828 million in the current financial year, an increase of approximately 22 per cent.[1]

4.4 The committee notes that some federal courts have recently considered, or are considering, costs savings measures.

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1 Attorney-General's Portfolio, Portfolio Budget Statements 2009-10, pp 320, 338, 352, 366.

4.5 The Federal Court of Australia (Federal Court), for example, investigated a new model for the provision of Federal Court services, whereby all small registries would report to the Deputy Registrar of a larger 'parent' registry.[2]

4.6 At the Canberra hearing, the Law Society of Tasmania opposed such a move both on principle and due to the potential reduction in court users' ability to access the judicial system:

> The Tasmanian District Registry ought to have a resident, legally qualified registrar. Leading from that, to say that the level of service of the court will not be adversely affected if there is not a registrar present and on the ground on a full-time basis is, quite frankly, illogical. The submission that we have made is that the service as it stood at the time of the submission to this committee was able to provide a timely, convenient and personal service.[3]

4.7 Tasmanian senators, the Hon. Eric Abetz, Guy Barnett and Bob Brown, together with Tasmanian member, the Hon. Duncan Kerr SC have also profiled the issue since the proposal was first raised, illustrating the importance of this matter for the people of Tasmania and the lack of clarity concerning the proposal.[4]

4.8 In evidence, the Law Society of Tasmania acknowledged that these concerns would be moot if Parliament were to pass the Senate's Access to Justice (Civil Litigation Reforms) Amendment Bill 2009, Amendment 5937 Revised 2.[5] However, the Australian Government elected instead to propose its own amendment, that:

> The Registrar must ensure that at least one Registry in each State is staffed appropriately to discharge the functions of a District Registry, with the staff to include a District Registrar in that State.[6]

4.9 The Attorney-General, the Hon. Robert McClelland MP told the Parliament that this amendment would ensure that each state/territory would have an appropriately staffed federal registry while maintaining the flexibility of the court to manage its affairs. The government amendment passed both houses of parliament and is currently awaiting Royal Assent.[7]

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2 Federal Court of Australia, Small Registry Review – Consultation Paper [12 April 2009]

3 Mr Luke Rheinberger, Law Society of Tasmania, *Committee Hansard*, Canberra, 27 October 2009, p. 19.

4 For example, Senate Legal and Constitutional Affairs Committee, *Estimates Hansard*, 19 October 2009, pp 51- 59.

5 Mr Luke Rheinberger, Law Society of Tasmania, *Committee Hansard*, Canberra, 27 October 2009, p. 18; and Senate Journal No. 94, 27 October 2009, pp 2634-2635.

6 Government Amendment No. 1, Proposed Subsection 34(3) of the *Federal Court of Australia Act 1976*

7 The Hon. Robert McClelland MP, Attorney-General, *House Hansard*, 18 November 2009, pp 94-95.

4.10 The committee nonetheless considers that each state and territory should be permanently staffed by a locally-based and legally trained Registrar, and accordingly, makes the following recommendation.

Recommendation 11

4.11 The committee recommends that each state and territory registry of the Federal Court of Australia be permanently staffed by a locally-based and legally trained registrar.

4.12 The cost of delivering justice is not however limited to the annual costs of the federal court system.[8] There are also the annual costs of the state/territory court systems, as well as financial and non-financial costs to court users. Due to the evidence received by the committee, this chapter focuses solely on the financial costs, beginning with the cost of disbursements.

The cost of disbursements

4.13 The Public Interest Law Clearing House (PILCH) provided the following summary of how litigation costs, including the cost of disbursements affects access to justice:

> The cost of delivering and achieving justice is becoming increasingly high and beyond the reach of many sections of the community, particularly disadvantaged and marginalised individuals and groups. For many, litigation costs are so prohibitive that they act as a barrier to accessing the legal system and to having disputes resolved and rights upheld. These costs include: the cost of legal representation; the costs of disbursements, including court fees; and the [sic] exposure to adverse costs orders.[9]

4.14 The committee heard that the cost of disbursements is already high, increasing and effectively preventing people from accessing justice. This argument was especially raised in relation to pro bono matters.

4.15 DLA Phillips Fox, for example, submitted that a lack of disbursement funding acts as a substantial barrier to justice as few pro bono clients or pro bono law firms have the capacity to pay these expenses.[10] Consequently, pro bono clients and pro bono lawyers might be loathe to commence or continue proceedings, thereby denying these clients access to justice.

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8 For example, see Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, September 2009, pp 34-40.

9 PILCH, *Submission 33*, p. 11; and NSW Young Lawyers, Human Rights Committee, *Submission 28*, p. 9.

10 DLA Phillips Fox, *Submission 32*, p. 27; Australian Lawyers Alliance, *Submission 27*, p. 13; Australian Lawyers for Human Rights, *Submission 46*, p. 4; PILCH, *Submission 33*, p. 12; and National Pro Bono Resource Centre, *Submission 49*, pp 12-13.

4.16 The committee considers that this barrier to access to justice can be easily eliminated, and in such a way as to assist the private legal profession to undertake pro bono work. The committee proposes the creation of a disbursements fund for pro bono matters which is accessible to all law firms and/or legal practitioners who provide in excess of 10 hours per legal matter. In setting this threshold, the committee notes that the fund should be most accessible to pro bono matters undertaken in rural, regional and remote (RRR) areas.

Recommendation 12

4.17 The committee recommends that the federal, state and territory governments create and fund a specific disbursement fund for pro bono matters, with eligibility criteria designed to promote the provision of pro bono legal services by the private legal profession.

4.18 In relation to continued proceedings, some submissions focussed on the position of people involved in but unable to extricate themselves from the proceedings. Russo Lawyers cited the example of criminal matters in which psychological and/or psychiatric reports are required but unaffordable, and without which inappropriate sentencing occurs.[11]

Assistance with the cost of disbursements

4.19 In some jurisdictions, various schemes assist litigants with civil law disbursement costs. Each scheme has its own terms and conditions, leading submissions to remark on their 'unattractiveness' due to:

- the limited availability of funding;
- the requirement to apply only after the disbursement cost has been incurred;
- the application of fees, means and merits tests; and
- the limitation of assistance to cases likely to recover damages.[12]

4.20 By way of example, Law Aid, the Victorian disbursement scheme, applies the last mentioned criterion, which stymies applications for disbursement relief in public interest litigation where test case outcomes are largely uncertain.[13]

11 Russo Lawyers, *Submission 58*, p. 5.

12 DLA Phillips Fox, *Submission 32*, p. 28; Gilbert & Tobin, *Submission 45*, p. 6; National Pro Bono Resource Centre, *Submission 49*, p. 13; and PILCH, *Submission 33*, p. 11.

13 PILCHConnect, *Submission 20*, p. 8; and Mr Mathew Tinkler, PILCH (Vic), *Committee Hansard*, Melbourne, 15 July 2009, p. 43.

4.21 PILCH submitted that disbursement funding should be available nationwide in all areas of law,[14] and DLA Phillips Fox suggested that disbursement funding in RRR matters would greatly encourage the provision of pro bono services in those high need areas:

> There is a high level of willingness in the legal profession to deliver services to isolated communities, but this capacity is constrained by the high costs associated with the deployment of resources…If a fund for disbursements in pro bono matters was [sic] introduced, it could be used to divert pro bono capacity to areas where high levels of legal need have been identified. This could be achieved by restricting availability of disbursement funding to specific types of matters, classes of clients, or clients' geographic location.[15]

4.22 The committee considers that more should be done to contain the cost of disbursements and increase access to justice for the Australian community. In this regard, the committee supports the establishment of a disbursement fund with uniform criteria, and which eases the cost of justice for disadvantaged Australians.

Recommendation 13

4.23 The committee recommends that the federal, state and territory governments develop and implement uniform general disbursement funds throughout Australia to be accessed according to defined criteria with a view to easing the cost of justice for disadvantaged Australians.

Exposure to adverse costs orders

4.24 In Australia, legal costs are usually concerned with solicitor/client costs (the fees which a client pays for his/her solicitor's services) and party/party costs (the amount an unsuccessful litigant is required to pay his/her opponent to cover their solicitor/client costs).

Civil law proceedings

4.25 In civil law proceedings, the general rule is that costs follow the event, meaning that a successful litigant can expect a party/party costs order in his/her favour. In general, submissions focussed upon such orders, arguing that the risk of an adverse costs order dissuades potential litigants from engaging with the justice system, thereby affecting their and others' access to justice.

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14 Pilch, *Submission 33*, p. 13.

15 DLA Phillips Fox, *Submission 32*, pp 29-30.

4.26 Gilbert & Tobin illustrated the problem with reference to discrimination matters which originate in a 'no costs' forum but proceed to the Federal Court of Australia (FCA) and Federal Magistrates Court (FMC) costs jurisdictions. At that time, clients do not pursue proceedings but seek alternative and less costly settlement options:

> We have pursued a number of discrimination matters to conciliation level against the same few respondents in respect of the same or very similar issues. Resources are often wasted obtaining outcomes for individuals, or even small groups, in each case that discrimination arises if the parties are forced to accept a conciliated outcome rather than a precedent setting Court determination for fear of suffering an adverse costs order.[16]

4.27 An alternate view posed by the Law Council of Australia (Law Council) focussed on costs incurred by the courts and expenditure of their limited resources. It opposed the notion of charging litigants court fees which reflect the true cost of running and administering the court, warning that a 'user pays' approach is 'philosophically problematic' and inhibits access to justice:

> If a cost recovery system were introduced there would also need to be stringent concessions and exemptions applied to ensure that only large litigators were targeted by the scheme, and that the increased fees did not inhibit individuals and corporations from accessing the justice system.[17]

4.28 The committee acknowledges that the risk of an adverse costs order cost can affect the conduct of litigation, and notes that the Standing Committee of Attorneys-General (SCAG) is currently exploring options for targeted costs recovery in civil law proceedings with particular reference to mega-litigation.[18]

Public interest litigation

4.29 For public interest matters, legal costs are a significant deterrent to litigation, particularly party/party costs and the risk of an adverse costs order in civil law proceedings. In many cases, public interest litigants are required to demonstrate at the outset that they will be able to pay the other party's costs if they are not successful in the proceedings (security for costs).[19]

4.30 According to PILCH, nine times out of ten the risk of an adverse costs order results in meritorious public interest matters not being pursued:

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16 Gilbert & Tobin, *Submission 45*, p. 5.

17 Law Council of Australia, *Submission 12*, p. 28; and Attorney-General's Department, *Submission 54*, p. 4.

18 http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_meetingoutcomes (accessed 20 October 2009); and Attorney-General's Department, *Submission 54*, p. 4.

19 DLA Phillips Fox, *Submission 32*, pp 31-32; PILCHConnect, *Submission 20*, p. 9; National Pro Bono Resource Centre, *Submission 49*, p. 14; Australian Environmental Defender's Office, *Submission 29*, pp 8-9; and PIAC, *Submission 50*, p. 21.

> This is especially the case where the matter involves an unresolved area of law, in the nature of a test case, such that legal advisors are not able to advise with any degree of certainty the likely outcome of the litigation. Such uncertainty increases the risk of an adverse costs order and therefore reduces the likelihood that a disadvantaged or marginalised applicant will pursue the important test case.[20]

4.31 In general, submissions expressed the view that public interest litigants with meritorious claims should be relieved of the risk of an adverse costs order and/or security for costs orders.[21]

4.32 DLA Phillips Fox, for example, suggested that the general rule in relation to costs should be altered by providing an exemption for public interest litigants:

> It would be more appropriate to implement a policy in which costs are not ordered against unsuccessful public interest litigants than make these decision on a case by case basis. Litigants ought to be able to secure declaration as to the public interest nature of the matter, and the protective cost consequences early in any proceedings, and before the other party to the proceeding has incurred substantial costs.[22]

4.33 Some Australian courts already have provision for the type of protective costs orders advocated by DLA Phillips Fox. However, the power is generic and discretionary, for example, subsection 43(2) of the *Federal Court of Australia Act 1976* which grants the FCA the power to award costs.

4.34 In 2001, the Full Court of the FCA considered pro bono legal representation as a relevant factor in the making of a costs order, but affirmed that there is no general principle that public interest litigation should not attract the usual costs orders.[23] This decision was upheld by the High Court of Australia in the 2001 Tampa litigation.[24]

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20 PILCH, *Submission 33*, p. 14; National Pro Bono Resource Centre, *Submission 49*, p. 14; and DLA Phillips Fox, *Submission 32*, pp 32-33.

21 For example, Liberty Victoria, *Submission 25*, p. 2; and Australian Environmental Defender's Office, *Submission 29*, pp 7-8 & 13.

22 DLA Phillips Fox, *Submission 32*, p. 33.

23 *Oshlack v Richmond River Council* (1998) 193 CLR 72

24 *Ruddock v Vadarlis (No. 2)* 115 FCR 229

4.35 While protective costs orders are not common, and there is a paucity of relevant case law, the committee does not consider that there is any need for clarification of the legislation.[25] The committee is confident that the current provisions for determining each matter on a case by case basis function adequately, and there is no need to guide or fetter the court's discretion.

Indemnity principle

4.36 At present, the nature of costs as an indemnity means that if a successful pro bono practitioner is awarded costs, and the other party challenges that award, the unsuccessful party might succeed because there is nothing to indemnify.

4.37 PILCH suggested that the indemnity principle be abrogated to allow parties to recover their costs in successful pro bono matters.[26] Although this would also require state/territory support, the committee considers that such a move would encourage private legal practitioners to provide pro bono legal services, thus increasing access to justice.

Recommendation 14

4.38 The committee recommends that the federal, state and territory governments enact legislation to abrogate the indemnity principle, to the extent necessary, to ensure that litigation costs can be awarded and recovered in pro bono matters.

The cost of legal representation

Private legal representation

4.39 Chapter 2 identified the cost of legal representation as one factor affecting people's ability to access justice. This difficulty arises at the outset as in most cases lawyers require their clients to deposit adequate funds into their trust account or provide evidence of financial means prior to the commencement of a matter. A client unable to meet either requirement is not likely to secure legal representation.

4.40 There may be some situations where a lawyer will agree to a contingency fee arrangement (where billing is deferred until conclusion of a matter), but this option is increasingly not available.[27]

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25 PILCH, *Submission 33*, pp 14 & 16; National Pro Bono Resource Centre, *Submission 49*, p. 14; PILCHConnect, *Submission 20*, p. 9; Australian Environmental Defender's Office, *Submission 29*, pp 9-12; and Mr Mark Blumer, Australian Lawyers Alliance, *Committee Hansard*, Sydney, 11 September 2009, p. 13.

26 Mr Mathew Tinkler, PILCH (Vic), *Committee Hansard*, Melbourne, 15 July 2009, pp 38-39.

27 NSW Young Lawyers, Human Rights Committee, *Submission 28*, p. 10; and Women's Legal Centre (ACT and Region), *Submission 51*, p. 6.

4.41 For clients who secure legal representation, the cost of that representation continues throughout the life of a matter. In some cases, particularly those involving litigation, this cost can be substantial. In evidence, the FCA expressed anxiety about the amounts paid to legal representatives in family law proceedings:

> In many cases there is no proportionality, unfortunately, or little proportionality between what people are fighting over and the costs they are paying.[28]

4.42 His Honour Chief Federal Magistrate John Pascoe concurred, adding that there are additional costs involved in family law (or other) litigation:

> One of the difficulties people often raise is taking time off work and the difficulties of dealing with children during court proceedings. We often start early, for example, at nine o'clock, or try and facilitate people being able to deal with other aspects of their lives. There are costs at a whole range of levels.[29]

4.43 In its submission, Gilbert & Tobin remarked on the number of meritorious claims abandoned due to clients being unable to afford or continue to afford legal representation, for example, matters involving property settlements:

> Our experience has been that there is a significant demand for assistance amongst people whose property is limited. The value of their property would not warrant the payment of legal fees either upfront or on a contingency or delayed fee basis. These are generally the most financially vulnerable of clients so to lose the little that would be entitled to them impacts more than it might in other socio-economic brackets.[30]

4.44 For many Australians, the cost of private legal representation inhibits their ability to obtain justice, hence the *raison d'être* of the publicly funded legal aid sector. However, submissions and evidence revealed, and not for the first time, that the sector has limited ability to bridge the legal needs gap.

4.45 Under this term of reference (d), the committee received evidence directed toward the legal profession's cost of delivering justice under the Legal Aid Program (LAP).

The private legal profession's participation in legal aid work

4.46 In late 2006, the department published results of its *Study of the Participation of Private Legal Practitioners in the Provision of Legal Aid Services in Australia*

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28 Chief Justice Diana Bryant, Family Court of Australia, *Committee Hansard*, Melbourne, 15 July 2009, p. 8.

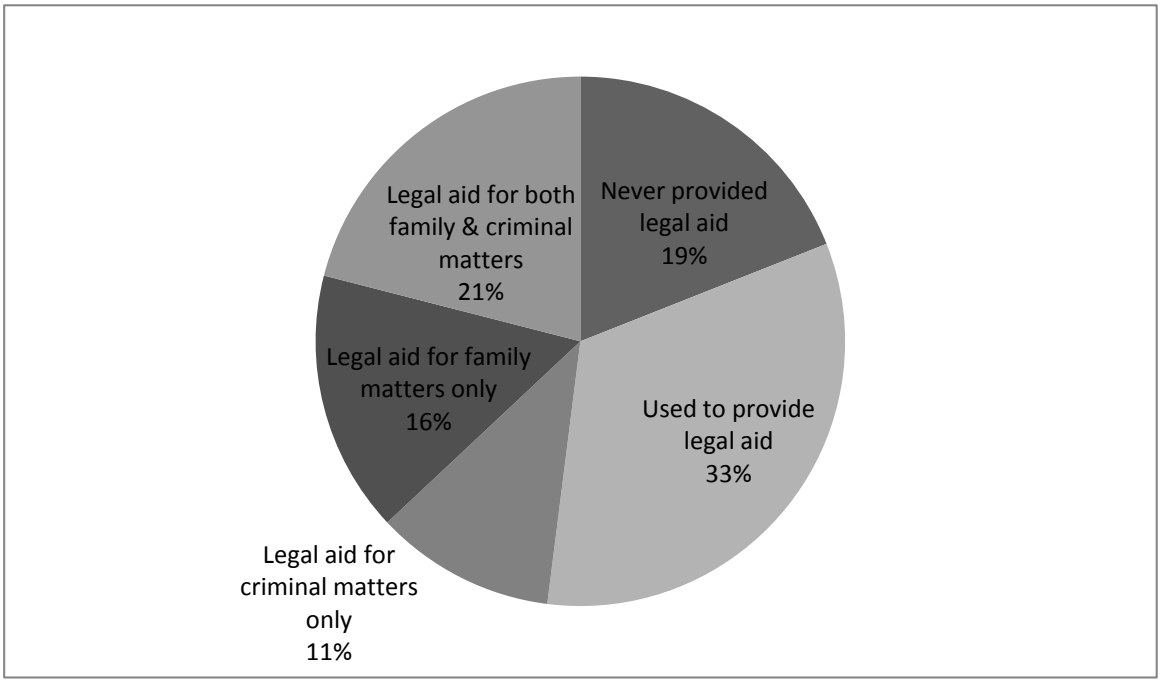
29 Chief Federal Magistrate John Pascoe, Federal Magistrates Court, *Committee Hansard*, Melbourne, 15 July 2009, p. 8.

30 Gilbert & Tobin, *Submission 45*, p. 4; Women's Legal Service (SA) Inc., *Submission 56*, p. 9; and Women's Legal Service Victoria, *Submission 71*, p. 9.

(TNS study), a study whose primary purpose was to understand current and future trends in the supply and composition of the private labour market for legal aid.[31]

4.47 Figure 4.1 below shows that, in 2006: 48 per cent of family and criminal law firms undertook legal aid work in those areas; 33 per cent used to undertake referrals from LACs but no longer do; and 19 per cent have never participated in the legal aid system.

Figure 4.1 – Supply of legal aid by the private profession

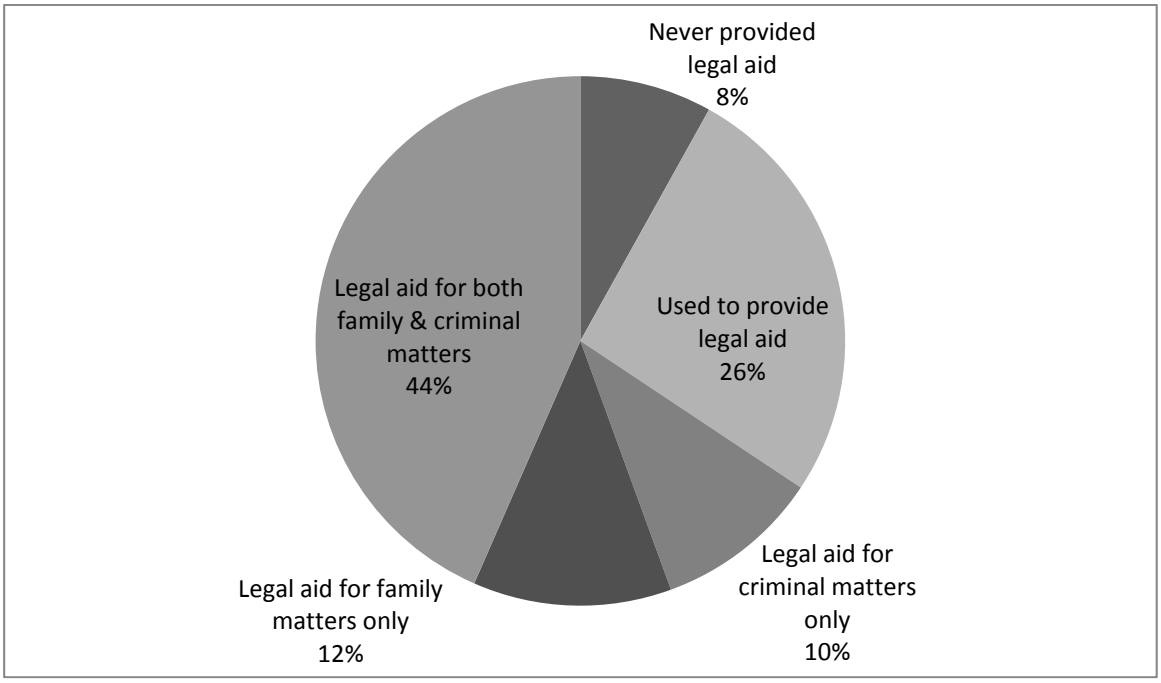


Source: *TNS Social Research, Study of the Participation of Private Legal Practitioners in the Provision of Legal Aid Services in Australia, December 2006, p. 13.*

4.48 In RRR areas, the TNS Study found: 65 per cent of regional and remote law firms assisted LACs with the provision of legal services; a further 26 per cent used to but no longer did so; and eight per cent have never undertaken legal aid work.

31 TNS Social Research, *Study of the Participation of Private Legal Practitioners in the Provision of Legal Aid Services in Australia,* December 2006, p. v.

Figure 4.2 – Supply of legal aid by the private profession in regional and remote areas



Source: TNS Social Research, Study of the Participation of Private Legal Practitioners in the Provision of Legal Aid Services in Australia, December 2006, p. 40.

4.49 The TNS Study remarked upon a strong sense of moral obligation as the key motivator for the private legal profession's acceptance of LAC work. However, the study also commented on law firms' disengagement with the legal aid system:

> Remuneration matters including the low hourly rate, and issues with the number of hours allocated under the stage of matter payment structure were the key reasons for disengagement from legal aid among all firms. Red tape associated with processing a grant of legal aid was also seen as a key reason for disengagement. This was particularly evident among firms that used to provide legal aid but now do not.[32]

4.50 The TNS Study revealed that approximately one in three family and/or criminal law firms have moved away from the provision of legal aid (33 per cent). In RRR areas the proportion was one in four family and/or criminal law firms. However, the relative shortage of legal practitioners in RRR areas (three per 10 000 residents), as compared with legal practitioners in capital cities (10.7 per 10 000 residents) suggests that:

32 TNS Social Research, *Study of the Participation of Private Legal Practitioners in the Provision of Legal Aid Services in Australia*, December 2006, pp vi-vii.

> Providers of legal aid in regional and remote areas are 'keeping the system going' with a small number of lawyers providing significant amounts of legal aid.[33]

4.51 The TNS Study found that while most law firms currently undertaking legal aid work were likely to continue with their current pattern of provision, if nothing were done in terms of making legal aid more attractive to private legal practitioners, these firms' revenues would decrease in the next five years, and this would have a 'deleterious' impact, particularly in RRR areas.[34]

Legal aid remuneration scales

4.52 The Australian Legal Aid Office was created in 1974, at which time it paid 100 per cent of normal fees on matters referred to private practitioners. Two years later, it paid 90 per cent of scale fees, and in 1978, after Legal Aid Commissions (LACs) were established, the LACs paid 80 per cent of scale fees.

4.53 In the early 1980s, Part V of the *Family Law Regulations 1984* instituted a legal aid scale, and each LAC then paid fees in accordance with that specific scale. The regulations did not provide for indexation or inflation, and over time, the scale fees fell well below the 80 per cent of scale fees previously paid by LACs.

4.54 In the early 1990s, LACs were given power to negotiate their own scales. However, no commission was able to make up for the loss of value caused by the omission of an inflator during the 1980s, and the eventual provision of an inflator saw a (further) reduction in the real value of LAC funding.

4.55 As discussed in Chapter 3, from 1 July 1997 the Australian Government introduced major changes to legal aid funding. This led to an immediate reduction in actual expenditure of over $33 million each year for the following three years, and a real reduction in long-term funding. In 2003-04, for example, the Commonwealth's contribution to legal aid funding was $130 million, compared to its contribution of $159 million in 1996-97.[35]

4.56 In addition to reduced scale fees, legal aid fees are subject to lump sum 'stage of matter' funding and capping. According to submissions, this has created a problem in that the fees paid to private practitioners who accept referrals from LACs are neither competitive nor attractive.

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33 TNS Social Research, Study of the Participation of Private Legal Practitioners in the Provision of Legal Aid Services in Australia, December 2006, p. viii.

34 TNS Social Research, Study of the Participation of Private Legal Practitioners in the Provision of Legal Aid Services in Australia, December 2006, p. vii-ix.

35 Law Council of Australia, *Erosion of Legal Representation in the Australian Justice System*, February 2004, p. 24.

4.57 The Law Council reported that the cost per solicitor chargeable hour varies across firms: approximately $140 per hour in a major regional city; approximately $153 per hour in a suburban practice; and approximately $132 per hour in a remote country region. At the same time, legal assistance rates are below $130 per hour, commonly ranging from $88 to $105 per hour. On average, regional, suburban and country law firms do not therefore recover the true cost of employing a practitioner to undertake legal aid. The Law Council concluded that:

> Legal aid is a losing proposition even if the solicitor doing the work is paid a very low salary. As a result "juniorisation" occurs of those private practitioners who undertake legal work. Law firms cannot afford to have their high charging fee earners undertaking significant volumes of legal aid work. The opportunity costs of undertaking legal aid work as against a lower volume of higher paid work means that it makes little sense for experienced practitioners to decline full fee-paying clients in favour of legal aid clients.[36]

4.58 The Law Institute of Victoria (LIV) told the committee that the current levels of criminal law (and family law) legal aid funding in Victoria are 'vastly inadequate and undermines citizens' access to justice'.[37] In 2008, the LIV surveyed criminal law practices in Victoria to determine an average private rate for a range of different types of criminal matters.

4.59 Table 4.2 below shows, inclusive of GST, the average fee charged to private clients in various criminal matters, compared with Victoria Legal Aid's payment for the same matter. Victoria Legal Aid's fees are less than 50 per cent of average private fees, well short of the 80 per cent figure that was traditionally considered a fair proportion.[38]

36 Law Council of Australia, *Submission 12*, pp 18-19; and Law Institute of Victoria, *Submission 11*, p. 5.

37 Law Institute of Victoria, *Submission 11*, p. 4.

38 Law Institute of Victoria, *Submission 11*, p. 5.

Table 4.2 – Private legal fees and legal assistance fees in criminal law matters (Victoria)

Matter type	VLA rate payable	Range of fees (private client)	VLA rate as a percent of the range of private fees	Average fees for private client	VLA rate as a percentage of average private fees	80% of average private fees
Magistrates' Court plea	$602	$110-$3850	16-54%	$2370	25%	$1896
Magistrates' Court contest	$721	$2000-$8450	9-36%	$3884	18%	$3107
Bail application (Magistrates Court)	$444	$1100-$4400	10-40%	$2821	15%	$2256
Committal – 1 day – solicitor/client costs only	$914	$2000-$9350	10-45%	$4600	20%	$3680
County Court plea	$2720	$3000-$10756	25-91%	$6145	44%	$4916
County Court – 5 day trial – solicitor/client costs only	$5077	$6500-$19500	26-78%	$11290	45%	$9032

Source: Law Institute of Victoria, Submission 11, p. 4.

4.60 The LIV highlighted the critical role of private practitioners in the legal aid system, stating that Victoria Legal Aid's in-house criminal lawyers would otherwise not be able to meet existing demand for criminal law casework:

> Without the services of private practitioners the legal aid system would collapse, and yet legal aid fees have declined in real terms over recent years and have not kept pace with the increase in the complexity and seriousness of legally aided matters being conducted by private practitioners.[39]

39 Law Institute of Victoria, *Submission 11*, p. 4.

4.61 In 2008, the Victorian Bar Association also examined the fees paid to criminal law barristers in Victoria. The *Review of Fees Paid by Victoria Legal Aid to Barristers in Criminal Cases* report found that Victoria Legal Aid fee increases have failed to keep pace with both:

- the primary measure of inflation, the Consumer Price Index; and
- the more specific cost index established by tracking the increases in expenses that barristers face in running their practices.[40]

Table 4.3 – Victoria Legal Aid fees paid to criminal barristers

Court jurisdiction	Period	Change in VLA fees	Change in CPI	Change in barristers' costs
Magistrates	1993-2007	16%	44%	56%
County	1993-2007	22%	44%	56%
Supreme	1993-2007	31%	44%	56%

Source: PricewaterhouseCoopers, Review of Fees Paid by Victoria Legal Aid to Barristers in Criminal Cases, April 2008, p. 2.

4.62 The report concluded that the income received by barristers handling Victoria Legal Aid cases declined in real terms from 1993 and by as much as 20-32 per cent, while the income of other legal professionals has increased 15 per cent during the same period.

Table 4.4 – Comparison of legal professionals' income: 2008

Career level	VLA criminal barrister	Public prosecutor	Solicitors at law firm	In-house counsel
Junior	$36,383	$87,200	$85,000	$97,500
Mid-career	$91,478	$196,200	$177,500	$197,500
Senior	$110,241	$287,021	$210,000	$325,000

Source: PricewaterhouseCoopers, Review of Fees Paid by Victoria Legal Aid to Barristers in Criminal Cases, April 2008, p. 3.

4.63 As indicated in Chapters 3, 7 and 8, lawyers employed by legal aid service providers earn substantially less than they would in private employment. According to the Victorian Bar Council, this emphasises the remuneration disparity experienced by criminal law barristers undertaking Victoria Legal Aid work:

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40 PricewaterhouseCoopers, *Review of Fees Paid by Victoria Legal Aid to Barristers in Criminal Cases*, April 2008, p. 2.

> We would expect, that those VLA lawyers being paid between 47½ thousand dollars and $103,000 are themselves working in the legal community for significantly lower remuneration than the general set of solicitors undertaking similar work…barristers working in that area are getting paid even less than the VLA salaried persons…the VLA salaried [persons]...are also getting superannuation, leave loadings, sick leave and things of that nature.[41]

4.64 The *Review of Fees Paid by Victoria Legal Aid to Barristers in Criminal Cases* report notes that some barristers can cross-subsidise their income with private or civil work, but ultimately, this means that they are bearing the cost of providing a public good, a position which is unsustainable:

> Barristers, as rational economic actors cannot be expected to continue this practice and will eventually preference away from the lower paid work.[42]

4.65 The Victorian Bar Council added that, effectively, there is a substantial amount of pro bono work being undertaken in the criminal practice area (and no doubt other areas of law).[43]

4.66 The Law Council advised that, in Victoria, the number of junior barristers who practise 90 per cent or more criminal work (more than 50 per cent of which is legal aid work) has declined by 59 per cent over the last three years and 26 per cent for criminal barristers overall in the same period.

4.67 The Law Council cautioned that, 'to maintain the viability of a fair justice system, it is essential that the under-funding of legal aid barristers be addressed',[44] and the LIV concurred with particular reference to criminal law barristers in Victoria:

> The withdrawal of criminal lawyers from legally aided matters will have a grave impact on Victorians' access to justice. It will lead to a situation where there are two tiers of defendants – those able to access quality, experienced representation by funding their own matters and those who receive limited legal aid or are left to represent themselves.

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41 Mr Geoffrey Digby QC, Victorian Bar Council, *Committee Hansard*, 15 July 2009, Melbourne, p. 32.

42 PricewaterhouseCoopers, *Review of Fees Paid by Victoria Legal Aid to Barristers in Criminal Cases*, April 2008, p. 2.

43 Mr Geoffrey Digby QC, Victorian Bar Council, *Committee Hansard*, 15 July 2009, Melbourne, pp 29-30.

44 Law Council of Australia, *Submission 12*, p. 21; and Mr Geoffrey Digby QC, Victorian Bar Council, *Committee Hansard*, Melbourne 15 July 2009, p. 29.

> It is anticipated that inadequate legal aid funding will have negative consequences for the courts as more mistakes will be made by inexperienced practitioners because senior criminal lawyers are increasingly withdrawing from legally aided work. Cases before the courts will be subject to increased delay and there is a greater possibility that errors will be made that will give rise to more appeals.[45]

4.68 The Victorian Bar Council added:

> The economic benefits when one looks at the very substantial cost of running this component of the administration of justice bring about a situation where it is cost effective to properly fund legal aid to prevent the sorts of additional costs in the overall administration of justice that we have referred to.[46]

4.69 National Legal Aid (NLA) is aware of the debate regarding legal aid remuneration fees, but told the committee that the Australian Government contributed to the problem:

> A few years ago Attorney-General Ruddock instituted a process whereby, on the Commonwealth side of legal aid funding, there was a floor of $120 an hour. In other words, there was no-one in legal aid in Australia paying fees that were less than $120 an hour, or the fee was calculated on the basis of $120 an hour…It depends on whether the commission has a policy of maintaining the same level of fee no matter the work, which some commissions do, or having different fees for different areas of work, which some commissions do. What you find as a consequence of that is that, for example, in some parts of the country the fees for criminal work, because they are supported by state funds, are lower than the fees for family law work, because those are supported by Commonwealth funds and subject to Commonwealth insistence that there should be a floor on the level of the fee.[47]

Modernising the legal aid remuneration scales

4.70 In response to the findings of the *Study of the Participation of Private Legal Practitioners in the Provision of Legal Aid Services in Australia* report, the department reviewed remuneration arrangements for private practitioners providing family law legal aid services. The review found that:

- remuneration must be increased to ensure the sustainability of the legal aid system;

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45 Law Institute of Victoria, *Submission 11*, p. 5.

46 Mr Geoffrey Digby QC, Victorian Bar Council, *Committee Hansard*, 15 July 2009, Melbourne, p. 28.

47 Mr Norman Reaburn, Chair, National Legal Aid, *Committee Hansard*, Melbourne, 15 July 2009, p. 58.

- high volume providers are struggling to maintain sustainable legal practices with the fees received from legally aided matters; and
- high volume providers would agree to an increase in fees to $190 - $200 (GST inclusive) to match court scales.[48]

4.71 The Law Council informed the committee that these findings are consistent with similar studies conducted by the private legal profession, the department, legal aid service providers, and other interested stakeholders.

4.72 The Law Council affirmed that private practitioners are prepared to undertake publicly funded legal aid work for less remuneration than would be payable by a private client.[49] However, submissions and evidence from the legal profession asserted that:

> Practitioners should be paid fairly for the work they do to facilitate access to quality legal representation.[50]

4.73 The Law Council urged that funds be injected into the legal aid system to enable LACs to fully implement their charter, including a component for increased legal aid fees, predicting that an injection will:

- encourage private practitioners to undertake legal aid work;
- encourage experienced practitioners to resume legal aid work;
- reduce the number of self-represented litigants; and
- optimize the delivery of legal aid to the Australian community.[51]

4.74 In its submission, NLA acknowledged private practitioners' important role in the delivery of legal aid, particularly in RRR areas and where conflicts of interest prevent LACs from handling matters in-house. NLA endorsed calls for an increase in both legal aid funding and legal aid fees:

> Those private practitioners who are prepared to do legal aid work are remunerated at levels well below the market rate. NLA policy is that fees paid to private practitioners currently prepared to work at reduced rates should be increased so as to retain those practitioners in the legal aid market place. Even if fees across the country moved over the next few years to a minimum of $165 per hour, the above would still be correct. At present Commissions do not have the funds to provide this increase and do not

48 Law Council of Australia, *Submission 12*, pp 20-21.

49 Law Council of Australia, *Submission 12*, p. 21.

50 Australian Lawyers Alliance, *Submission 27*, p. 15; and Law Council of Australia, *Submission 12*, p. 22.

51 Law Council of Australia, *Submission 12*, p. 22.

> believe that fees should be increased to private practitioners at the expense of the number of grants of aid that can be made available.[52]

4.75 The committee acknowledges the variety of fee scales which have developed nationwide as a result of funding policies, and is concerned that, in some instances, these scales are so low as to discourage private legal practitioners from accepting LAC referrals. Private legal practitioners are a vital component of the legal aid system, assisting publicly funded legal aid service providers to provide access to justice to disadvantaged Australians. Accordingly, the committee makes the following Recommendation 15.

Recommendation 15

4.76 The committee recommends that the federal, state and territory governments, in conjunction with affected stakeholders, review and modernise existing legal aid fee scales including an inflator to promote participation of the private legal profession in legal aid service delivery.

52 National Legal Aid, *Submission 34*, p. 27.