



National Legal Aid

COUNTRY REPORT:

AUSTRALIA

INTERNATIONAL LEGAL AID GROUP CONFERENCE

2015

1. ABOUT LEGAL AID IN AUSTRALIA

1.1 Australia is a federation

Australia is a federation. It has a geographically, culturally and economically diverse population of 23,827,446 spread across six states and two territories:

- New South Wales
- Queensland
- South Australia
- Tasmania
- Victoria
- Western Australia
- Australian Capital Territory
- Northern Territory

The federal government (also referred to as “the Commonwealth”) has Constitutional responsibility for specific national issues. Each state and territory has its own government that is responsible for all other issues.

Commonwealth legislation mainly governs family law upon the breakdown of a relationship (including issues about with whom children should live and the division of property), social security, immigration, employment, consumer protection and certain types of criminal law such as crimes in relation to national security.

State legislation governs all other criminal law, child protection, family violence and some civil law types such as mental health.

1.2 The Australian legal assistance landscape

Legal assistance in Australia is provided by four main groups of providers each of which receives funding from either or both of the Commonwealth and respective state or territory governments. The four main funded providers are:

- Legal aid commissions (LACs)
- Aboriginal and Torres Strait Islander Legal Services (ATSILS)
- Family Violence Prevention Legal Services (FVPLS)
- Community legal centres (CLCs).

Australia also utilises the mixed model of legal assistance service delivery, ie some services are delivered by in-house lawyers whilst other service delivery is outsourced to private legal practitioners acting in receipt of a grant of legal assistance. Various schemes of pro bono assistance and volunteering also exist.

Legal need and legal assistance service provision in Australia have recently been the subject of a number of significant reports:

1. The Australian Government Productivity Commission Inquiry Report, *Access to Justice Arrangements*, 2014 (herein referred to as the Productivity Commission report)
<http://www.pc.gov.au/inquiries/completed/access-justice>
2. The Allen Consulting Group, *Review of the National Partnership Agreement on Legal Assistance Services*, 2014
<http://www.acilallen.com.au/projects/23/justice/126/review-of-the-national-partnership-agreement-on-legal-assistance-services>
3. Law and Justice Foundation of NSW, *Legal Australia-Wide Survey: Legal Need in Australia*, 2012
<http://www.lawfoundation.net.au/ljf/app/6DDF12F188975AC9CA257A910006089D.html>

Attachment “A” to this country report is “Figure 4. The four government funded legal assistance providers 2012-2013”¹ from the Productivity Commission report. It sets out information about each of the providers, their roles and funding. These figures indicate funding per head of population for 2012-13 at \$34.00 per head.

1.3 Relationships between legal assistance providers

Good relationships and co-operative arrangements exist between legal assistance service providers. These relationships and arrangements ensure that services are stretched as far as possible, and that issues such as legal conflict are addressed. They also ensure that people receive the service most appropriate to their individual need.

Nationally, relationships and co-operation are supported by the Australian Legal Assistance Forum (ALAF) constituted by representatives of the peak bodies for all legal assistance providers.

<http://www.nationallegalaid.org/home/australian-legal-assistance-forum-alaf/>

Locally, providers also have legal assistance forums and meet regularly to ensure that services are extended as far as possible, and that referral networks, including in relation to non-legal support for clients, are strong.

1.4 Legal aid commissions and National Legal Aid

There are eight independent legal aid commissions (LACs) in Australia, one in each of the states and territories. Each LAC is set up by statute to provide legal assistance to

¹ Australian Government Productivity Commission Inquiry Report, *Access to Justice Arrangements*, Overview p.25.

disadvantaged people. The LACs provide the majority of legal assistance services to people in Australia, receiving approximately 77.5% of overall funding for the purpose.²

The directors of the LACs combine at a national level to form National Legal Aid (NLA). One of the directors chairs NLA on an annual basis. The purpose of NLA is to lead and encourage a national system of legal aid which allows economically disadvantaged people to obtain access to justice, and to provide a forum for engagement at a national level with government/s, stakeholders, community and each other about best practice of legal aid and related issues.

The current Chair of NLA, and presenter of this report, is Ms Gabrielle Canny, Director of the Legal Services Commission of South Australia. The balance of this report focusses on LACs.

Attachment “B” contains statistics about population, funding and LAC service delivery.

2. LEGAL AID COMMISSION SERVICES

LACs provide the following services:

- Representation services in cases before courts/tribunals
- Family dispute resolution services
- Duty lawyer services at family and criminal law courts and some civil law courts and tribunals
- Legal advice, minor assistance³ and information services face to face, by telephone, and online
- Community legal education, including publications, information sessions and workshops, also via web and social media.

Grants of legal assistance to either an in-house LAC lawyer or to the private legal profession must be made for representation and family dispute resolution, and are subject to a contribution payable by the applicant.

Family dispute resolution is conference based. Conferences are chaired by Family Dispute Resolution Practitioners who are accredited pursuant to family law legislation. At least one of the parties to the dispute must be in receipt of a grant of aid and the legally aided party will be legally represented. Non-legally aided parties may be legally represented or choose to self-represent.

Other legal aid services do not rely on a grant of legal assistance first being made and are generally provided free of charge.

² Based on 2012-13 funding figures as contained in “Figure 4. The four government funded legal assistance providers 2012-2013” from the Productivity Commission report, at Attachment “A” to this report.

³ For example letter writing, advocating on someone’s behalf and assistance with drafting documents.

3. FUNDING TO LEGAL AID COMMISSIONS

3.1 Total funding

The LACs are individually funded from three main sources. In 2013-2014 they received total funding of \$623.8 million AUD (£318.2 million), made up of:

- \$213 million AUD (£108.3 million) from the Commonwealth of Australia
- \$283.8 million AUD (£144.3 million) from state or territory governments
- \$85.9 million AUD (£43.6 million) from public purpose/statutory interest on trust funds
- \$41.1 million AUD (£20.9 million) self generated income.⁴

3.2 Funding arrangements

Funding arrangements are also affected by what is known as the “Commonwealth-State divide” which requires that Commonwealth funding be used on Commonwealth law types. This divide was introduced in 1997 and underpinned a reduction in then Commonwealth funding. Previously the use of Commonwealth funding had not been restricted in this way.

The divide was relaxed in July 2010 when the first National Partnership Agreement on Legal Assistance Services (NPA) between the Commonwealth and all states and territories was introduced. That agreement, which is now due to expire, provided funding for the LACs. Other providers were funded outside the NPA. Signatories to the NPA are the Prime Minister, and the premiers of the states and chief ministers of the territories.

The relaxation of the Commonwealth-State divide enabled spending of Commonwealth funds on “preventative and early intervention legal education, information, advice, assistance, and advocacy services” even where based in state/territory law, and “state/[territory] law matters in which an applicant or child’s safety is at risk and there are “other connected family law priorities”⁵ (Commonwealth).

Each of the states and territories has continued to provide funding direct to LACs in amounts determined by the state and territory which are adjusted each year by respective budget processes.

Commonwealth funding, is distributed on the basis of a “funding allocation model”, which purports to take account of “establishment cost, population, legal needs indicators and cost factors”.⁶ The funding allocation model is applied to a fixed and

⁴ Exchange rate calculated as at 21 May 2015.

⁵ NPA, Commonwealth Legal Aid Service Priorities, Schedule A, Page A-13.

⁶ National Partnership Agreement on Legal Assistance Services 2015-2020 – Funding Allocation, Commonwealth Attorney-General’s Department, May 2015.

limited sum of money, which is widely acknowledged to be insufficient for the purpose with the Productivity Commission reporting in 2014 in relation to civil law alone that “additional funding from the Australian and state and territory governments of around \$200 million a year is needed”⁷ to fill service gaps.

It should be noted that the Commonwealth has constitutional responsibility for Aboriginal and Torres Strait Islander Peoples pursuant to the race power,⁸ and accordingly it funds the ATSILS and the FVPLS. The Commonwealth-State divide therefore does not affect service delivery by them.

To date the Commonwealth-State divide has also not been applied to the CLCs.

3.3 Next Funding Agreement

At the time of preparing this report a new NPA for 2015-2020 was being negotiated between the Commonwealth and the states and territories.

The following issues were of concern:

- With the federal budget handed down in May 2015, overall funding to LACs remained essentially static but was re-distributed across the states and territories with some receiving more funding than previously and others less.
- For the first time, the one agreement with the states and territories purports to cover both LACs and CLCs. CLCs are small community based organisations which to date have had great independence, and been funded directly by Commonwealth and/or respective state and territory governments in response to local issues.
- Also for the first time, it is understood that six monthly funding payments will not be made if a state or territory falls short in reporting requirements including in relation to new performance benchmarks.
- It is understood that there is a proposed benchmark requiring “95% or more of representation services to be delivered to priority clients” with the result to be an aggregate of the performance of each of the LACs and the CLCs. If 94% is achieved, payment will not be made to the state/territory.
- Definitions underpinning agreement content, including in relation to performance benchmarking, are yet to be identified and/or agreed. Whilst nearly all clients are likely to be disadvantaged, definitions will be critical to capacity to meet the benchmark.
- Extra data collection and reporting is required, with substantial associated expense in relation to adjustment of systems, including electronic systems, and training.
- A formal requirement for surveys of LACs’ and CLCs’ clients.

⁷ Productivity Commission Inquiry Report, *Access to Justice Arrangements*, p.703.

⁸ S.51 Commonwealth of Australia Constitution Act 1900.

4. GRANTS OF LEGAL ASSISTANCE

4.1 Mixed model of service delivery

Grants of legal assistance are made by the grants divisions of the LACs to either in-house LAC lawyers or to members of the private profession. This arrangement is known as the mixed model of service delivery.

The Productivity Commission report identified the following benefits to the mixed model:

- Harnessing private sector expertise
- LACs in-house lawyers specialising where the private sector is unable or unwilling to provide services
- Flexibility
- Choice of provider while avoiding issues of quality and information asymmetry (between lawyer and consumer)
- Conflict of interest situations can be managed
- Creation of competition between public and private lawyers, and costs control.⁹

4.2 Financial eligibility

Financial eligibility for grants of legal assistance is assessed by LACs according to means testing which is underpinned by national principles.

The means test takes into account the income and assets of the applicant and any financially associated persons.

“In general, the means test is satisfied where:

- A person receives the maximum rate of an income support payment or benefit administered by Centrelink (social security) as their total income; or
- Income, with deductions in relation to the objectively referred cost of housing and support for dependents, falls below a nationally standardised threshold; and
- Assets, excluding allowable exemptions such as equity in principle place of residence, a used car and furniture, do not exceed a nationally standardised threshold (box 21.3) or an individual cannot reasonably be expected to borrow against assets.

A person not otherwise eligible but unable to afford private representation may still receive assistance provided they make a contribution towards legal costs, based on a sliding scale that takes into account the likely cost of the matter. (ACG 2014d, p.108)^[10]

⁹ Productivity Commission Inquiry Report, *Access to Justice Arrangements*, pp. 724-725.

¹⁰ ACG (Allen Consulting Group) 2014d, *Review of the National Partnership Agreement on Legal Assistance Services: Legal Aid Commissions*, ACIL Allen Consulting.

Despite efforts to standardise means tests, the different resources available to jurisdictions means that in practice they vary.”¹¹

Attachment “C” is “Box 21.3 National means tests thresholds” from the Productivity Commission report.

The Productivity Commission report found that “While the LACs’ income and assets tests are based on the national means tests thresholds, the reality of fixed budgets means that LACs have not been able to keep updating the thresholds to keep pace with inflation”,¹² and that “Client profile data from LACs confirms the welfarisation of legal aid”.¹³

The Productivity Commission concluded that “additional funding from the Australian and state and territory governments of around \$200 million a year is needed”, inter alia, to “better align the means test used by LACs with other measures of disadvantage”.¹⁴

4.3 Other eligibility tests

In addition to passing the means test, a successful applicant for legal assistance must also have met merit and matter type tests in an environment of competing priorities and limited funds.

Each LAC is statutorily required to issue funding guidelines including in relation to matter type. Every effort is made to keep these consistent across the country taking account of local conditions and in particular respective funding situations. To this end NLA maintains a set of “guidelines”, known as the “Commonwealth Legal Aid Guidelines”, which subject to means, merits, and competing priorities and limited funds, are a reference point for individual commissions in developing their respective guidelines about Commonwealth based laws.

LACs must however prioritise those matters where a person’s safety and/or liberty is at risk, and given limited funds, even if a matter falls within the guidelines and has merit, a grant of legal assistance might not be made.

Less intensive work types are however capable of being delivered more widely including across non-family civil law.

Attachment “B” contains statistics for 2013-2014 in relation to grants of legal assistance and other LAC services.

¹¹ Productivity Commission Inquiry Report, *Access to Justice Arrangements*, p.714.

¹² Ibid, p.716.

¹³ Ibid, p.717.

¹⁴ Ibid, p.741.

5. CONCLUSION

Pressing gaps in legal assistance service delivery remain, and without increased funding are likely to widen.

Legal assistance service providers try to remain optimistic that the evidenced legal need will be more widely recognised and that funding will be forthcoming so that providers can extend help to the most disadvantaged people in Australia.

6. MORE INFORMATION

More information about National Legal Aid and links to each state/territory LAC are available at <http://www.nationallegalaid.org/> or please contact Ms Louise Smith louise.smith@leglaid.tas.gov.au

End.

Figure 4 The four government funded legal assistance providers 2012-13

	Legal aid commissions (LACs)	Community legal centres (CLCs)	Aboriginal and Torres Strait Islander legal services (ATSILS)	Family violence prevention legal services (FVPLS)	
Where are they located?	<p>8 LACs</p> <ul style="list-style-type: none"> In all states and territories Metropolitan, regional and remote services including regional offices 	<p>200 CLCs</p> <ul style="list-style-type: none"> In all states and territories Mainly in metropolitan and regional areas 	<p>8 ATSILS</p> <ul style="list-style-type: none"> One in each state, two in the NT; ACT serviced by NSW Majority of outlets in regional and remote areas 	<p>14 FVPLS</p> <ul style="list-style-type: none"> In all states and territories except ACT and Tasmania Service 31 high need regional, rural and remote areas 	
What are their objectives?	<ul style="list-style-type: none"> Provide access to assistance for the vulnerable and disadvantaged Provide the community with improved access to justice and legal remedies 	<p>Contribute to access to legal assistance services for vulnerable and disadvantaged members of the community and/or those whose interests should be protected as a matter of public interest</p>	<p>Deliver legal assistance and related services to Aboriginal and Torres Strait Islander people</p>	<p>Provide legal services and assistance to Aboriginal and Torres Strait Islander victims of family violence and sexual assault</p>	
Who do they target?	<ul style="list-style-type: none"> State and territory communities Focus on vulnerable and disadvantaged people 	<ul style="list-style-type: none"> Local communities (with outreach), except specialist CLCs who service their state/territory community Those who do not qualify for legal aid focusing on the vulnerable and disadvantaged 	<p>Aboriginal and Torres Strait Islander people or a partner or carer of an Aboriginal or Torres Strait Islander person</p>	<p>Aboriginal and Torres Strait Islander people or a partner or carer of an Aboriginal or Torres Strait Islander person, who is a victim of family violence or a child at risk of family violence and in need of protection</p>	
What are their funding arrangements?	Commonwealth	\$212.6 m	\$36.7 m	\$68.2 m	\$19.1 m
	State & territory ^a	\$366.5 m	\$30.9 m	--	--
	Other ^b	\$30.4 m	\$22.0 m	--	--
		National Partnership Agreement (NPA) and funding administered by the state and territory governments	Funding administered by LACs in most states except SA where provided through the Attorney-General's Department (SA). NT and ACT administered by the Australian Government	Funding administered by the Australian Government	Funding administered by the Australian Government

^a Includes contributions from public purpose funds (PPFs). ^b For LACs, 'other' comprises self-generated income. For CLCs, 'other' includes fee income, philanthropic donations and other sources.

Attachment B

2013-2014 Australian statistics at a glance									
	NSW	VIC	QLD	SA	WA	TAS	ACT	NT	TOTAL for Australia
Population ('000)	7,518.5	5,841.7	4,722.4	1,685.7	2,573.4	514.8	386.0	245.1	23,487.6
Funding (\$M)									
Commonwealth	\$62.189	\$49.491	\$46.709	\$17.067	\$22.182	\$6.527	\$4.932	\$3.950	\$213.047
State	\$97.821	\$69.278	\$44.255	\$20.282	\$33.709	\$5.917	\$7.717	\$4.785	\$283.764
Other	\$53.528	\$30.698	\$23.017	\$6.133	\$7.316	\$2.269	\$1.971	\$2.088	\$127.020
Total	\$213.538	\$149.467	\$113.981	\$43.482	\$63.207	\$14.713	\$14.620	\$10.823	\$623.831
Grants - received									
Family	17,250	14,617	14,318	4,409	5,608	2,427	1,564	821	61,014
Crime	25,431	20,909	19,897	13,421	7,624	3,501	1,420	1,637	93,840
Civil	2,032	1,608	807	110	823	346	232	79	6,037
Total	44,713	37,134	35,022	17,940	14,055	6,274	3,216	2,537	160,891
Grants - approved									
Family	13,151	12,690	9,494	2,975	3,529	1,832	998	680	45,349
Crime	21,120	19,294	17,161	11,554	6,040	3,079	1,052	1,504	80,804
Civil	1,209	1,248	496	23	402	313	76	57	3,824
Total	35,480	33,232	27,151	14,552	9,971	5,224	2,126	2,241	129,977
Duty lawyer									
Family	9,778	13,646	2,130	1,486	2,239	221	853	154	30,507
Crime	148,531	53,502	77,738	13,110	47,976	2,286	1,750	2,827	347,720
Civil	14,041	5,591	3	177	136	16	6	65	20,035
Total	172,350	72,739	79,871	14,773	50,351	2,523	2,609	3,046	398,262
Dispute resolution	2,761	1,190	2,203	825	566	372	183	123	8,223
Legal advice/minor assistance	136,042	46,798	46,623	87,574	29,172	25,712	5,372	5,036	382,329
Information/referral	654,943	254,513	169,303	50,111	115,375	28,497	16,701	11,140	1,300,583

Box 21.3 National means test thresholds

In the mid-1990s, a working party comprised of representatives from all the LACs, developed a National Means Test to ensure that eligibility for grants of legal aid were determined with regard to the same factors and took account of an individual's capacity to pay. The income test starts with the applicant's total gross income and then subtracts allowable deductions (including income tax, housing costs, dependant allowances, child care costs and child support paid) up to allowed thresholds. The test then compares the balance with an amount considered reasonable for other living expenses. This amount is based on the Henderson Poverty Line (HPL). Any income above the poverty line is regarded as 'discretionary' income, which is available to pay for legal costs. The income test also sets a limit at which an applicant is eligible for aid with no contribution or with only a minimal contribution.

The asset test takes account of all assets other than 'excluded' assets. Assets such as home equity or motor vehicle equity are excluded up to a threshold. Ordinary household effects and tools of trade are excluded to a 'reasonable' level. Lump sum compensation payments may be excluded as assets, but assessed as deemed income.

While the actual dollar value varies across the LACs, the thresholds for allowable deductions and excluded assets are based on particular benchmarks, which are standardised nationally.

Source of national means test thresholds

<i>Threshold</i>	<i>Source</i>
Housing costs	Median rental of a two bedroom flat, from local real estate institute
Childcare costs	Rate of benefit payable for a child in care 50 hours per week, from Department of Human Services
Dependant allowance (first)	Difference between the HPL figures for 'Head in workforce, cost other than housing, single person,' and 'Head in workforce, cost other than housing, single person plus 1'
Dependant allowance (second and subsequent)	Difference between HPL figures for 'Head in workforce, cost other than housing, single person plus 1' and 'Head in workforce, cost other than housing, single person plus 2'
Child support allowance	As for dependant allowance
Home equity	Median price of established home in capital city, from local real estate institute
Motor vehicle equity	Average price of a five year old six cylinder car, from local automobile association
Farm or business equity	Current allowance applied by Centrelink
Non-contributory income level	100 per cent of HPL, 'Head in workforce, cost other than housing, single person'.

Source: Legal Aid NSW (pers. comm., 21 March 2014).