

LEGAL SERVICES IN FAMILY LAW

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with Ann Genovese, Angela Melville and April Chrzanowski

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Summary of Key Findings

This study compared the services received by legally-aided and self-funded clients, and the services provided to legally-aided clients by private solicitors and Legal Aid Commission in-house solicitors, in family law. The study involved client surveys, a review of solicitors' files and interviews with solicitors. The services provided to family law clients were compared in terms of solicitors' activities and status, outcomes, funding and costs, client satisfaction, and service quality. The detailed data gathered also enabled some comparison of the services received by self-funding clients with higher and lower incomes, and yielded significant insights into family law clients, cases and proceedings, and into the sources and content of the quality standards applied by family lawyers.

In brief, the findings of the study in relation to the basic questions posed were as follows:

- Legal aid clients are systematically disadvantaged by the limited resources available for their cases, restrictions on the types of matters they are able to pursue, the processes of decision-making and surveillance to which they are subject in connection with the grant of aid, and, to a lesser extent, the quantity of services provided. However, legal aid clients do not appear to be disadvantaged in relation to outcomes achieved or the quality of the services they receive.
- Legal Aid Commission in-house lawyers appear to operate more efficiently and effectively than do private sector legal aid lawyers. While they undertake fewer activities per case on average, they achieve quicker outcomes, which are closer to what the client originally wanted, and with no discernible difference in service quality.

- Consistency in the quality of services provided to the three groups of clients, and in the quality commitments expressed by private and in-house lawyers, indicates that different fee arrangements have little impact on lawyer behaviour and effort in this respect. Rather, the close-knit and relatively homogenous community of family lawyers establishes and maintains certain practice standards to which the great majority of family lawyers adhere.
- The major impact of low legal aid rates is not a reduction in service quality, but a reduction in the number of private solicitors prepared to do legal aid work at all.

The more detailed findings on the issues mentioned in the first paragraph are set out below.

Family Law Clients

- The majority of family law clients have low to average incomes. In the study, clients in paid employment earned an average of \$31,000 per annum (around average weekly earnings), while clients not in paid employment had an average income of \$13,000 per annum.
- Clients whose cases were run in the Sydney Registry of the Family Court had the highest incomes and educational levels, while clients whose cases were run in the Dandenong Registry had the lowest incomes and employment levels.
- Nineteen percent of self-funding clients were reliant on social security, but had nevertheless been unable to obtain legal aid.

The Relevance of Funding Status

- Twenty-five percent or less of family law children's matters are legally aided, and almost no property matters receive legal aid funding. Thus, legal aid in Australia funds only a small proportion of family law work overall.

- Legal Aid guidelines preclude solicitors from attending to the entirety of the issues presented by legal aid clients. In addition to property matters, legal aid does not generally fund proceedings in relation to spouse maintenance, child support, dissolution, enforcement, or variations of previous orders.
- Legal aid applicants are vulnerable to a range of adverse experiences in the process of seeking and maintaining a grant of aid, including lengthy and baffling decision-making processes by Legal Aid Commissions, inadequate responses to domestic violence, ready termination of grants due to perceived lack of merit, and inconsistent application of the merits test within and between Legal Aid Commissions. Legal aid clients are also vulnerable to undermining and attrition tactics by self-funded opponents, although only a relatively small proportion of legal aid clients are in this position.
- Solicitors tended to claim that legal aid clients are more demanding, however legal aid clients in the study were no more likely to subject their solicitor to frequent phone calls or correspondence than were self-funding clients, and did not impose a greater number of demands overall on their solicitors.
- The cases of legal aid clients were, however, more likely to involve aggravating factors such as psychiatric disorder, alcohol and/or drug problems, allegations of violence, and literacy problems.
- The kinds of features that tend to occur in legal aid cases, such as difficult residence disputes, child abuse allegations, history of domestic violence, and other party unrepresented, are the same kinds of features that were identified by solicitors as making the running of a case unpredictable. These features make it difficult for solicitors to manage a grant of aid effectively, particularly in the context of the capping of legal aid grants in individual cases.
- The mean amount paid by legal aid to private solicitors prior to hearing was less than \$3,500 per case, whereas the mean amount paid by self-funding clients prior to hearing was almost \$5,000 in children-only cases, and \$6,000 in cases involving both children and property.

Legal aid clients thus have less funds available to spend on their cases than do “ordinarily prudent self-funding litigants”.

- One third of self-funding cases cost over \$10,000. Those costing under \$10,000 were less likely to include interim orders, barristers, or a child representative, involved fewer issues in dispute, less demanding clients and fewer aggravating factors, and tended to settle early. Cases going to hearing cost an average of \$22,000, more than double the amount of the funding cap in legal aid cases. Thus, the cap allows only a limited range of legal aid cases to receive equitable treatment with self-funding cases. The figure of \$10,000 is not an accurate reflection of the funds available even to self-funded parties of limited means.
- The large amounts spent by self-funding clients on their family law cases relative to income, indicate either that the “ordinarily prudent self-funding litigant” values the outcome of family law proceedings extremely highly, or that “ordinary prudence” is an irrelevant touchstone in this context.
- One quarter of legal aid clients thought they would have had a better lawyer if they had been able to pay for one themselves. These clients tended to be very dissatisfied with the results of their cases, although they did not necessarily express dissatisfaction with the service provided by their lawyer.
- In general, however, legal aid clients were more likely than self-funding clients to strongly agree that the result of their case was what their lawyer led them to expect, to strongly agree that they had some control over the result of their case, and to be satisfied overall with the result of their case. The difference between legal aid and self-funded clients in this respect may be due to the operation of the legal aid merits test. That is, self-funding clients are more likely than legal aid clients to be able to run a case with questionable merit, and to be consequently disappointed by the result.

The Relevance of Legal Aid Sector

- Legal Aid Commission in-house lawyers (“in-house lawyers”) are more likely to be female, have fewer years in practice and are less likely to be accredited specialists than private family law solicitors, but are more likely to be practising exclusively in family law.
- The clients of in-house lawyers (“in-house clients”) are more likely to be women, from a non-English speaking background, Indigenous, and living in a metropolitan area. Private solicitors’ legal aid clients are more likely to be male, Anglo-Australian, and living in a regional area.
- In-house clients are also more likely than private solicitors’ legal aid clients to experience serious health problems during the course of their case, and to impose demands on their solicitors in terms of failure to attend court and being difficult to contact. Private solicitors’ legal aid clients impose fewer demands on their solicitors than do in-house clients.
- Private solicitors engaged in more activities, dealt with more individuals and entities, filed more documents, and attended court more often per case than did in-house solicitors. In particular, in-house solicitors tended to ration their work early in the case, whereas the amount of work undertaken by private and in-house solicitors was similar after the interim hearing stage.
- Private solicitors were more likely than in-house solicitors to brief barristers to appear on behalf of their legally aided clients. However in-house cases involved a higher number of solicitors per case, as an in-house solicitor attending court on a given day might appear on behalf of several of the in-house clients with court dates on that day, rather than each individual solicitor making appearances for their ‘own’ clients.
- The differences in case activities between private and public sector legal aid services appear to be due to economies of scale enjoyed by in-house practices, ability to make referrals to other in-house services, and greater efficiency and less client hand-holding on the part of in-

house solicitors, combined with real constraints on in-house solicitors in terms of briefing and engaging experts.

- In-house clients were less likely to agree that their lawyer kept them informed of what was happening in their case, but this was the only difference in service quality between in-house and private legal aid solicitors identified in the client survey.
- In-house cases got to court more quickly, spent less time in court, and were finalised more rapidly than private solicitors' legal aid cases. In-house cases tended to resolve at the directions hearing stage, whereas private solicitors' legal aid cases tended to resolve at or after pre-hearing conference or at final hearing.
- In-house cases were more likely to result in individually tailored contact orders than were private solicitors' legal aid cases. In-house cases were also more likely to result in orders that were the same or similar to those originally sought by the client, and in-house clients were more likely than private solicitors' legal aid clients to feel they had some control over the result of their case, and that the legal system had treated them fairly. These differences in (actual and perceived) outcomes appear to be attributable to the more rapid resolution achieved in in-house cases.

Legal Aid Work By the Private Profession

- Legal aid rates paid to private solicitors varied considerably between States, although greater consistency has been introduced under the July 2000 legal aid guidelines.
- More than half of the legal aid cases handled by private solicitors were subsidised by the solicitor's firm, in terms of the firm incurring costs for disbursements, agent's fees and barrister's fees that were not covered by the legal aid grant, and the solicitor spending more hours on the case than the maximum that could be claimed from Legal Aid. In the majority of these cases the subsidy amounted to at least 45% of the cost of the case.

- In addition to subsidising legal aid cases, private solicitors' firms incur transaction costs in seeking grants and extensions of aid, and in reporting to the Legal Aid Commission at the end of each stage of matter and obtaining payment. On average, almost one third of the correspondence sent by solicitors went to the Legal Aid Commission, and one quarter of correspondence and documents received came from the Legal Aid Commission. These represent substantial proportions of unpaid work on typical legal aid files. The amount of administrative paperwork undertaken by in-house solicitors was considerably less.
- In firms with several family law practitioners, legal aid work tends to be undertaken by the more junior solicitor/s. Solicitors who have been in practice longer undertake a lower proportion of legal aid work. This is a fairly stable practice rather than a recent phenomenon.
- Solicitors appear to spend less time with the client and less time preparing documents in legal aid cases, but otherwise there was no difference in the quantity or quality of services provided by private solicitors to legally aided and self-funding clients. In response to legal aid funding constraints, private solicitors tend to choose either to maintain the standard of their legal aid work as a matter of policy, or to quit legal aid work altogether.
- There has been an absolute decline in the number of firms and solicitors prepared to undertake legal aid work in family law, due to low legal aid rates, difficulties in dealing with the Legal Aid Commissions, and the limited number of legal aid grants available to clients.

The Relevance of Income

- Self-funding clients with higher incomes were more likely to negotiate directly with the other party than those with lower incomes, indicating that the higher income group felt more empowered to attempt to resolve family law disputes themselves.

- Clients with higher incomes and/or assets are advantaged in being able to spend more money on experts, subpoenas, witnesses, discovery and barristers, and are not under such pressure to settle as those with more limited funds available.
- Disparities in the resources available to contest a case were a major source of clients' feelings of injustice. Self-funded clients who said the other party had more money to spend on their case were more likely to feel that they had lost their case, and that the legal system had not treated them fairly.
- The provision of true *pro bono* services is relatively rare in family law cases. Lawyers are more likely to discount their fees than to provide services free of charge, but the provision of a discount is akin to a charitable act, depending not on the client's income or the size of the bill but on the lawyer's subjective assessment of the client's deservingness.

Family Law Cases

- Issues precipitating court proceedings in children's matters included a major relocation of one of the parties (sometimes in order to flee domestic violence), changes of circumstances requiring amendment of previous orders, actual or threatened child abduction, and repartnering by one of the parties.
- The majority of solicitors said that the aim of going to court was to facilitate settlement. The commencement of court proceeding enabled the parties to access formalised procedures for negotiation, or might be used to force a reluctant party to move closer to resolution. The Family Court was seen as an essential part of the settlement continuum.
- The major determinants of the amount of solicitor activities on a family law case were: the number of other individuals and entities the solicitor had to deal with during the case, whether the case involved children only or included property, the number of forms of out-of-

court dispute resolution attempted, and whether the solicitor was in an in-house or private practice.

- The major determinants of time to finalisation were: stage of resolution, number of out of court dispute resolution processes attempted, number of aggravating factors in the case, whether the case involved property, and whether the other party was fully, partially or un-represented. Cases in which the other party was wholly unrepresented resolved more quickly, while cases in which the other party was partly unrepresented took the longest.
- The main cost drivers in self-funding family law cases were: the number of issues in dispute, the amount of correspondence sent by the solicitor, the number of court documents in the case, and the number of legal personnel involved in the case.
- Clients in regional areas also incurred greater costs due to distance from the nearest Family Court.
- The majority of lawyers interviewed were unable to predict the length or the cost of a case near the start. Factors contributing to greater certainty included information about the other party, their case, and who was representing them.
- Delay in family law cases was largely attributed to the limited resources of the Family Court. The time taken to reach a pre-hearing conference and hearing were particularly noted, with the consequence that the outcomes of interim hearings have become very important. The Family Court's case management structure also received some criticism as contributing to delay.
- The outcome of the case and terms of settlement were considered more predictable than time or cost. Solicitors tended to form a view of a reasonable resolution to the case and then attempted to manage their client's expectations in that direction.
- Solicitors' accounts of the 'normal' range of outcomes in property matters varied by Registry. The files indicated that there is indeed a variation by Registry in property outcomes, but that solicitors tended

to overestimate the percentage of the property that would be awarded to the wife.

- Solicitors' notions of expected outcomes in relation to residence (residence to the mother or status quo parent) were generally borne out, but contact orders were more varied. No contact was only ordered in extreme cases, involving some combination of severe violence, drugs, alcohol and psychiatric disorder. At the same time, some residence parents who wished to relocate in order to escape violence were restrained from doing so. In general, the outcomes of children's matters involving violence/relocation, child abduction or holding over after contact, and Aboriginality appeared to be unsatisfactory.
- Cases resolved at the directions hearing stage were more likely to result in orders that were the same as what the client had originally sought, whereas those resolved at or after pre-hearing conference, or at final hearing, were more likely to result in orders that were different from what the client had originally sought.

Clients' Views of the Process

- Client surveys indicated that clients possess limited information and inaccurate perceptions about their cases, especially in relation to methods of dispute resolution. For example, clients overemphasised the role of third party interventions, underemphasised the role of solicitor negotiations, and confused consent orders with judicial decisions. They tended to express opinions about 'the system' as a whole rather than being able to differentiate different elements of it.
- On average, clients were neutral as to whether they thought the methods used to resolve their case were fair, but a majority of clients disagreed that the legal system had treated them fairly. Female clients were more likely to think that the methods used to resolve their case were fair, and that the legal system had treated them fairly.
- Claims that the Family Court is biased in favour of women tended to be made by male clients in cases involving a high number of

aggravating factors, which were resolved at a late stage in the Family Court process, and in which the outcome was different from what the client wanted. However there was often no clear advantage to the mother in the outcome of these cases, and solicitors explained that the result was in the best interests of the child, or was the best that the client could have achieved.

- Clients were generally dissatisfied with the time taken to resolve their cases, more so than any other aspect of their cases. Clients' views on time were unrelated to the actual time taken to finalise the case.
- In general, clients' satisfaction with the outcome of their case was an important determinant of their views on the process of the case.
- Overall satisfaction with the outcome of the case was, in turn, based on subjective expectations and perceptions rather than on objectively observable features of the case.

Quality of Legal Services in Family Law

- Family lawyers received generally high scores from their clients on a range of aspects of client service, and positive comments on personal characteristics and qualities. Clients' satisfaction with their lawyers was related to outcome satisfaction, however clients were generally more highly satisfied with their lawyers than they were with the results of their cases.
- Family lawyers share strong consensus views on what constitutes good legal services, encompassing: client-focused skills; technical skills; management of clients' expectations in accordance with the Family Law Act, Family Court decisions and procedures, and, where relevant, the legal aid merits test; and a conciliatory approach emphasising settlement in preference to judicial decisions.
- These shared views were borne out by the fact that clients' satisfaction with their lawyers was not related to funding or representation status or level of income. Neither was it related to the lawyer's degree of experience, specialisation in family law or accreditation status.

However it was related to client management: lawyers who were compelled to deflate their clients' expectations received lower client satisfaction scores.

- The major source of family lawyers' consensus views on quality was peer exchange, including watching and interacting with more experienced practitioners, and feedback and advice from colleagues. Views on the importance of settlement were linked to the Family Court's expectations.
- The study indicates that externally imposed quality standards for family lawyers undertaking legal aid work are unnecessary, and would be likely to have little impact. Future monitoring of service quality would be desirable, but any proposed intervention in quality standards would need to harness the existing dynamics of family law culture in order to be effective.

Introduction

1. The legal aid system in Australia, as in many Western countries,¹ is in a state of flux. Economic globalisation and the decline of welfare states have resulted in philosophical and policy shifts in a range of areas of state provision, including legal aid. These shifts have been accompanied by often fierce public debates concerning the justifications for new policy positions, and their potential and actual consequences. Such debates have frequently relied upon assumptions, speculations and anecdotal evidence, rather than being informed by systematic, empirical data about what is actually happening “on the ground”.
2. This research project was designed to inject much-needed empirical evidence, and comprehensive, fully-informed analysis, into current policy debates concerning:
 - reasonable levels of legal aid funding;
 - the development of quality assurance standards and benchmarks for legal services (which may underpin and encourage the introduction of new modes of legal aid service delivery, such as franchising, tendering, or block contracting²); and
 - the most effective way of managing Commonwealth Legal Aid expenditure.

1 See generally Francis Regan, Alan Paterson, Tamara Goriely and Don Fleming (eds), *The Transformation of Legal Aid: Comparative and Historical Studies* (Oxford University Press, London, 1999).

2 See literature review on legal aid delivery systems, below.

3. Legal aid funding in Australia is primarily directed towards the areas of criminal law and family law. Family law was chosen as the focus for this study since, as discussed further below, it is the area over which the Commonwealth government has primary funding responsibility and control.
4. In order to address the issues outlined above, it was decided to compare the services received by legally-aided family law clients with the services purchased by self-funding family law clients. Further, comparisons were to be made within the legal aid group between the services provided by private lawyers, Community Legal Centres, and in-house Legal Aid Commission lawyers.
5. First, however, it was necessary to determine whether valid comparisons could be made between the different legal service providers in family law. If different providers dealt with different types of clients, or different types of cases, or dealt with them in quite different ways, then the comparisons might need to be tailored to exclude, or at least control for, such complicating factors. Thus, the first part of the research involved a large-scale profiling exercise, which examined family law files closed during the 1997–98 financial year in four States (NSW, Victoria, Queensland and South Australia), in order to identify the kinds of clients and cases handled by the various types of family law service providers, and the dispute resolution methods used by those providers. In addition, we gained access to data gathered by the Australian Law Reform Commission, which allowed us to profile a sample of cases finalised in the Family Court in May–June 1998.³
6. The profiling exercise yielded a number of important conclusions for the planned comparison study. For example, it emerged clearly that Community Legal Centres (CLCs) dealt

3 Rosemary Hunter, *Family Law Case Profiles* (Justice Research Centre, Sydney, 1999).

with different types of cases from the other service providers (cases that fell through the net of legal aid and privately-funded service provision), and that they dealt with them in a different way (with greater emphasis on non-litigious methods of dispute resolution). As a result, Community Legal Centres were not included in subsequent comparisons. Other results of the profiling exercise, and their consequences for the comparison study, are set out in chapter 2. Having gathered a great deal of valuable background information, and determined the appropriate scope of the comparison study, it was then possible to embark on the study proper.

Objectives of the Research

7. The objectives of the research were, in the light of previous studies and theoretical and policy developments in the field, to compare systematically the legal services received by Legal Aid recipients, with the legal services purchased by private clients, in order to determine:
 - (a) whether Legal Aid recipients are advantaged in being able to pursue their cases free of concerns about cost (do they receive a greater level of service with legal aid funding than the ‘ordinarily prudent self-funding litigant’ is able to afford?);
 - (b) whether, conversely, Legal Aid recipients are disadvantaged relative to private clients because legal aid rates purchase a lower level of service than the ‘ordinarily prudent self-funding litigant’ is able to afford;
 - (c) the relative efficiency and effectiveness of current models of Legal Aid service delivery;
 - (d) the impact of different fee arrangements on lawyer behaviour and effort; and

- (e) the effectiveness and utility of various possible quality standards and quality measures for legal services.
- 8. The research was thus concerned with equity in family law services (objectives (a) and (b)), as well as the relative efficiency of different forms of legal aid service delivery (objective (c)), and the issue of quality control in legal aid services (objectives (d) and (e)). Each of these issues has been the subject of considerable debate overseas, as well as in Australia, as discussed below.
- 9. It should be noted, however, that while the study was concerned with the relative efficiency of different methods of legal aid service delivery, it was not concerned with the relative efficiency of different modes of dispute resolution. Nor was it designed to investigate the extent of unmet needs for legal aid, or to enable systematic comparison of legal aid services before and after 1 July 1997, the date of the current Commonwealth legal aid guidelines, which represented a significant departure from previous funding arrangements. The aim of the research was to provide an up-to-date (post-1 July 1997) rather than a historical or 'before and after' comparison of the services provided to those who do obtain legal representation in family law proceedings.

Family Law Legal Aid in Australia

- 10. Funding for legal aid in Australia is provided by both Commonwealth and State governments, and administered by State and Territory Legal Aid Commissions. Prior to 1 July 1997, the Commonwealth and State governments shared a funding partnership, in which the Commonwealth provided approximately 55% of legal aid funding, and the States 45%. The Legal Aid Commissions in each State and Territory determined their own

funding priorities and the distribution of legal aid between criminal, civil and family law.

11. In practice, the largest proportion of grants of aid in the overall legal aid system were and continue to be made in criminal law.⁴ Criminal matters in which there is a threat of imprisonment are given the highest priority.⁵ In 1992, the High Court held in *Dietrich v R*⁶ that the right to a fair trial for a person accused of a serious criminal offence includes the right to legal representation; thus a person accused of a serious criminal offence who cannot afford their own representation must either be provided with representation at public expense, or their trial must be stayed. This decision further cemented the emphasis of legal aid expenditure on criminal law.
12. The focus on criminal law has a clear gender dimension. Men are much more likely to apply for legal aid in criminal matters, and hence receive more grants of aid overall.⁷ Women, on the other hand, are more likely to receive legal aid for family law matters, due to their lower financial status and greater caring responsibilities, and hence their greater likelihood of passing the legal aid means test (see below).⁸ But although women receive

4 Office of Legal Aid and Family Services, *Gender Bias in Litigation Legal Aid* (Attorney-General's Department, Canberra, 1994), 36. For a similar pattern in Canada (70% criminal, 20% family, 10% civil), see John D. McCamus, 'The Reshaping of Legal Aid', in W.A. Bogart (ed), *Access to Affordable and Appropriate Law Related Services in 2020* (Canadian Bar Association, Ontario, 1999), 42.

5 Office of Legal Aid and Family Services, *ibid.*

6 (1992) 177 CLR 292.

7 Office of Legal Aid and Family Services, *Gender Bias in Litigation Legal Aid*, 36.

8 *ibid.*; Jeff Giddings, 'Women and Legal Aid', in Jeff Giddings (ed), *Legal Aid in Victoria: At the Crossroads Again* (Fitzroy Legal Service Publishing, Melbourne, 1998), 123–24; Regina Graycar and Jenny Morgan, 'Disabling Citizenship: Civil Death of Women in the 1990s' (1995) 17 *Adelaide Law Review* 49, 57; Tom Fisher, Tony Love, Lawrie Moloney, Kaileen Pearson and Damien Walsh, *Traditional Divorce: Perceptions of Legal Aid Clients Choosing Traditional Legal Processes* (National Centre for Socio-Legal Studies, LaTrobe University, 1993), 37. For a similar pattern in Britain, see Sarah Maclean, *Legal Aid and the Family Justice System: Report of the Case Profiling Study* (Legal Aid Board Research Paper No.2, London, 1998), 50; Gwynn Davis and Mervyn Murch, *Grounds for Divorce* (Clarendon Press, Oxford, 1988).

the majority of family law legal aid, men receive the majority of legal aid grants in total.⁹ The gendered distribution of legal aid funding raises questions about social equity which have never been adequately addressed.

13. From 1 July 1997, the legal aid funding partnership between Commonwealth and State governments was replaced with a new regime in which the Commonwealth assumed exclusive responsibility for funding matters under Commonwealth law (primarily family law), while the States were expected to fund matters under State law (primarily criminal law). Rather than Legal Aid Commissions determining the distribution of their legal aid budgets, they were allocated fixed amounts to be devoted to family law legal aid, and to be disbursed according to guidelines imposed by the Commonwealth. At the same time, the total amount of funding committed by the Commonwealth to legal aid was reduced by about 20%.
14. The family law funding priorities and guidelines introduced on 1 July 1997 contained a number of new features. Traditionally, eligibility for family law legal aid had been determined by reference to a means test¹⁰ and a merits test (the applicant's case must have had reasonable prospects of success). The guidelines replaced the former merits test with a more elaborate test, involving, among other things, the requirement that public funds should only be committed in situations where an "ordinarily prudent self-funding litigant" would commit their own funds to the case. The implicit notion that legal aid clients should not be better off (nor, presumably, worse off) than the "ordinarily prudent self-funding litigant" provided the impetus for this research project.

9 Office of Legal Aid and Family Services, *ibid.*; Giddings, *ibid.*, 124.

10 For discussion of the means test, including interstate variations, see Senate Legal and Constitutional Reference Committee, *Inquiry into the Australian Legal Aid System: Third Report* (Commonwealth of Australia, Canberra, 1998), 63–65.

15. Other changes brought about by the guidelines included restrictions on the types of matters that would be funded. In particular, property disputes became generally ineligible for funding, as well as the actual process of obtaining a divorce (dissolution of marriage). In addition, an overall limit, or ‘cap’ was imposed on the amount of legal aid that could be expended by any party represented by a private solicitor in any single matter¹¹ — a maximum of \$10,000 per party in cases involving children.¹² Although each LAC had a discretion to exceed the cap,¹³ the presumption was that this discretion would be rarely exercised.
16. The legal aid priorities and guidelines for family law matters have been amended several times since July 1997. However the majority of the cases discussed in this report were commenced under the July 1997 guidelines, so that version of the guidelines is set out in Appendix 1. Relevant amendments are noted in the course of discussion.
17. One feature of the guidelines is that applicants will only be granted legal aid if recent attempts to resolve the dispute by means of “primary dispute resolution” (PDR)¹⁴ have been unsuccessful. Hence, PDR is a necessary pre-requisite to a legal aid grant, except in certain defined circumstances.¹⁵ This

11 The cap applies only to legal aid cases handled by private solicitors, not to cases handled by in-house solicitors. As discussed further in chapter 5, the actual amounts expended on in-house cases (apart from disbursements) are difficult to determine, as different LACs have taken different approaches to recording and costing the time of in-house solicitors.

12 In addition, there is a maximum expenditure of \$15,000 for a child representative.

13 The extent of the discretion varied: most Commissions had an open discretion; however Victoria Legal Aid and the South Australian Legal Services Commission had a limited discretion to grant no more than an additional \$2,000.

14 In an attempt to emphasise consensual solutions to family disputes, The Family Law Act 1975 (Cth) defines ‘alternative dispute resolution’ processes such as conciliation counselling and mediation, as forms of “primary dispute resolution”.

15 For example, if the other party refuses to participate in PDR, or if circumstances of violence or child abuse make PDR inappropriate. See ‘Commonwealth Priorities: Primary Dispute Resolution’ in Appendix 1.

requirement has been interpreted in different ways by the Legal Aid Commissions included in this study.

18. Most notably, while other Commissions have tended to refer applicants initially to external PDR services, Legal Aid Queensland (LAQ) has instituted an extensive in-house legal aid conferencing service, aimed at early intervention and resolution of family law disputes, which has become a fundamental plank of its family law program. Most family law applicants presenting with a substantial dispute are given an initial grant of aid only to attend a legal aid conference.¹⁶ Where both parties to a case are eligible for legal aid they are required to attend a conference, while if one party is not eligible for legal aid, a conference will be held if that party elects to attend. Conferences are attended by the parties and their legal representatives, and are presided over by a qualified chairperson who acts as a mediator. If agreement is reached at the conference, a further grant of aid will be issued to draw up the agreement into consent orders. If agreement is not reached, the chairperson makes a report including an assessment of each party's prospects of success, and a recommendation as to whether the parties should receive further legal aid funding to commence contested proceedings in the Family Court.¹⁷ In practice, since the great majority of conferences result in some form of resolution, grants of aid for conferences have become the dominant form of family law legal aid in Queensland. The existence of the legal aid conferencing program in Queensland means that the experience of legal aid clients and their lawyers in that State is sometimes different from those in other States.

16 The exceptions are: where there are current proceedings or investigations in relation to sexual abuse of the child/ren; where there are allegations of untreated psychiatric illness; or where there are allegations of behaviour such as violence, intimidation, coercion or control which jeopardises a party's ability to negotiate effectively, even with the assistance of a solicitor. Notably, domestic violence *per se* does not preclude conferencing, although in such situations the conference may be held by telephone or with the parties in different rooms.

17 Sources: Legal Aid Queensland, 'Overview of Conferencing Programme' (n.d.); Legal Aid Queensland, *Assignments Handbook — Family Law* (1 December 1999).

19. Other differences between Legal Aid Commissions that were pertinent to the study included the relative balance between legal aid cases handled in-house or referred out to private solicitors (the NSW Legal Aid Commission has a more extensive in-house family law practice than do the other Commissions); the range of private solicitors to whom cases are referred (LAQ operates a preferred supplier scheme, but the other Commissions do not); fee structures; accounting requirements; and policies on briefing counsel. These differences are noted at relevant points in the discussion. In addition, two of the Commissions experienced cash crises that impacted on the study — the Legal Services Commission of South Australia at the end of the 1997–98 financial year, and the NSW Legal Aid Commission from the commencement of the 1999–2000 financial year. As will be seen, these periods of extra financial stringency made a considerable impression on the solicitors we interviewed in those States.

Literature Review

20. The existing literature relevant to this study covers a range of topics and concerns. First, there have been a series of official reports, independent studies and critical commentaries over the years on the Australian legal aid system, which provide background and some points of departure for this research project. Secondly, reports and studies on legal aid systems in other parts of the common law world place the Australian system in a wider context, and provide information on alternative funding models. Thirdly, there have been a number of reports, pilot studies and commentaries on legal aid delivery systems, addressing the specific issue of whether salaried or private lawyers provide the best value for money in the provision of legal aid services, or moving beyond these alternatives to consider new methods of legal aid service delivery. Some of this literature is relevant to our comparison of the services provided

to legally-aided family law clients by in-house and private solicitors. Fourthly, there have been a small number of studies on costs and cost drivers in civil litigation, and the impact of different fee arrangements on lawyer effort. These studies provide a different angle on the issue of legal aid delivery systems and cost containment. Fifthly, there is a considerable literature on the quality of legal services, and of legal aid services in particular, which has informed our comparisons of the quality of services provided to legally-aided and self-funding family law clients. Finally, there is also a sizeable literature on lawyer-client relations, especially concerning “poverty lawyers” (i.e. lawyers providing either legally-aided or free legal services to poor or indigent clients) and their clients, and family lawyers and their clients, which has provided context, comparisons and contrasts with our own findings.

Legal Aid Reports and Commentaries

21. The Australian legal aid system has been the subject of a succession of official reports, since its formalisation by the Whitlam government in the early 1970s. The earliest document that still retains some currency for our purposes is the National Legal Aid Advisory Committee’s *Legal Aid for the Australian Community* (1990), which reviewed publicly-funded legal aid services in Australia to that date, identified national principles of legal aid for use in the application of legal aid policies, and made various recommendations for the future.
22. This was followed in 1992 by a report by the Senate Standing Committee on Legal and Constitutional Affairs,¹⁸ and then a full-scale Inquiry by the Senate Legal and Constitutional References Committee, which commenced in 1996. This inquiry ultimately yielded three reports, the last of which dealt

18 Senate Standing Committee on Legal and Constitutional Affairs, *Legal Aid: For Richer and For Poorer* (April 1992).

with the situation following the introduction of the new Commonwealth guidelines and the restriction of Commonwealth legal aid funding to federal matters in 1997. The report received many submissions critical of the new arrangements, and was itself highly critical of the Commonwealth's policy and its likely consequences in terms of access to and quality of legal aid services.¹⁹

23. In addition to these reports focusing on legal aid, several reports on the more general operations of the legal system have included consideration of legal aid arrangements as part of their wider brief. In 1994, the Access to Justice Advisory Committee produced a comprehensive report on all aspects of the justice system, including legal aid. Its main criticisms of the legal aid system included inconsistencies between the eligibility criteria applied by different LACs, managerial inefficiencies, and general lack of coordination across the system. It considered that the Commonwealth should maintain its then level of funding commitment to legal aid, but also take a greater role in promoting the efficient use of legal aid resources and in ensuring national equity, and should develop a range of national standards for legal aid provision.²⁰ As outlined above, there is now a set of national legal aid guidelines applying to Commonwealth matters, although as will be seen in subsequent chapters of this report, the degree of consistency and coordination desired by the Committee has arguably not been achieved.

19 Senate Legal and Constitutional References Committee, *Inquiry into the Australian Legal Aid System: Third Report* (1998). The question of access was addressed by a legal needs study released at the end of 1999. See Attorney-General Daryl Williams, News Release, 23 December 1999; cited in ALRC, *Report No.89: Managing Justice — A Review of the Federal Civil Justice System* (Commonwealth of Australia, 2000), 330.

20 Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (Commonwealth of Australia, 1994), chapter 9.

24. Most recently, the Australian Law Reform Commission (ALRC) has scrutinised both the provision of legal aid and the operations of the Family Court, as part of its reference on the adversarial system. Its final report of the reference, issued in early 2000, canvasses a wide range of issues relating to the federal justice system, including education, training and accountability of the legal profession, legal practice standards, legal costs, legal assistance (including legal aid), general issues relating to court procedures and case management, and procedural and case management issues arising in the three major federal tribunals covered by the report: the Federal Court, the Family Court, and the Administrative Appeals Tribunal.²¹ With respect to legal aid, its major recommendations concerned reform of the structure of legal aid grants (stage of matter limits²² and the overall funding cap) to mitigate undesirable consequences, and the need for Legal Aid Commissions to identify priority clients and cases which should be handled in-house.²³ With respect to the Family Court, it recommended reforms to the Court's procedures and case management system so as to promote earlier settlements, more careful streaming of cases, streamlining and tailoring of procedures, and greater consistency of case management, in order to minimise costs and delays and improve practitioner and client satisfaction with the Court.²⁴ The present study focuses on the legal aid system rather than on the operations of the Family Court. Although the Court's role in family law litigation is evidently central, it was not a source of difference in the treatment of legally-aided and self-funded clients.

21 ALRC, *Report No.89*. See also Australian Law Reform Commission, *Discussion Paper No.62: Review of the Federal Civil Justice System* (August 1999).

22 See chapter 5.

23 ALRC, *Report No.89*, chapter 5.

24 *ibid.*, chapter 8.

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25. Several reports from the mid-1990s focused on the experience of legal aid clients,²⁵ and the impact of the legal aid system on particular groups in the Australian community, including women,²⁶ and people of non-English speaking backgrounds.²⁷ As noted earlier, concerns included women's relative access to legal aid funding, and also the potentially adverse effect of Legal Aid Commissions' promotion of alternative dispute resolution procedures in family law on women who have been victims of domestic violence. This is a theme which persists under the 1997 Commonwealth legal aid guidelines.
26. Specific research and commentaries on the winding back of legal aid in the 1990s, and particularly on the effects of the 1997 legal aid guidelines, have been broadly critical of these developments from a variety of perspectives. Frances Regan, for example, has considered the changes in a comparative context in terms of relative expenditure on legal aid by Australia and other Western countries;²⁸ Jeff Giddings and Mary Anne Noone have discussed a broad range of concerns relating to the administration of legal aid in Victoria;²⁹ and John Dewar, Jeff Giddings and Stephen Parker have looked at the impact of legal aid changes on the practice of family and criminal law in Queensland.³⁰ Other research has investigated the results of the

25 Fisher et al., *Consumer Perceptions of Legal Aid Clients Choosing Traditional Legal Processes*.

26 Office of Legal Aid and Family Services, *Gender Bias in Litigation Legal Aid*; Australian Law Reform Commission, *Report No.69, Part I — Equality Before the Law: Justice For Women*, ch.4. See also Graycar and Morgan, 'Disabling Citizenship'.

27 *Accessing Legal Aid: Access to Legal Aid and Assistance by People of Non-English Speaking Background* (Office of Multicultural Affairs, Canberra, 1995).

28 Frances Regan, 'Rolls Royce or Run Down 1970s Holden Kingswood? Australia's Legal Aid in Comparative Perspective' (1997) 22 *Alternative Law Journal* 225.

29 Jeff Giddings (ed), *Legal Aid in Victoria: At the Crossroads Again* (Fitzroy Legal Service Publishing, 1998); Mary Anne Noone, 'Legal Aid: A Return to the Sixties?' (1997) 22 *Alternative Law Journal* 251.

30 John Dewar, Jeff Giddings and Stephen Parker, *The Effect of Changes to Legal Aid on the Practice of Family and Criminal Law in Queensland* (report to the Queensland Law Society and the Family Law Practitioners Association of Queensland, Griffith University, 1998).

imposition of the \$10,000 cap on legal aid grants,³¹ the adverse impact of the restricted availability of legal aid for property proceedings on women with limited marital assets,³² and problems with legal aid experienced by Victorian women in situations of domestic violence,³³ and has sought to link legal aid cuts with the number of unrepresented litigants appearing in the Family Court.³⁴

27. Australia is, of course, not the only welfare state to have experienced legal aid cost cutting and system reviews. The US Legal Services Corporation has been chronically underfunded for much of its history, experiencing successive cutbacks under the Reagan administration, and narrowly escaping abolition by the Republican-dominated Congress of the mid-1990s. A number of studies have chronicled the difficult conditions under which legal services lawyers operate,³⁵ and the limited (or poor) services offered to their clients.³⁶ In a major review essay of the US legal aid system in 1985, Richard Abel identified many of the features that are now being observed in the Australian context.³⁷

31 Springvale Legal Service, *Hitting the Ceiling: Springvale Legal Service Report Into the Impact of Funding Limits in Legally-aided Family Law Matters Which Came Into Effect on 1 July 1997* (August 1998).

32 Nicola Seaman, *Fair Shares? Barriers to Equitable Property Settlements for Women* (Women's Legal Services Network/National Association of Community Legal Centres, 1999).

33 Billie Clarke, *Trial By Legal Aid: A Legal Aid Impact Study* (Crossroads Family and Domestic Violence Unit, Melbourne, 1999).

34 Barry W. Smith, *Study of the Effects of Legal Aid Cuts on the Family Court of Australia and its Litigants* (Family Court Research Report No.19, Canberra, 1998); John Dewar, Barry W. Smith and Cate Banks, *Litigants in Person in the Family Court of Australia* (Family Court Research Report No.20, Canberra, 2000).

35 eg. Eve Spangler, *Lawyers for Hire: Salaried Professionals at Work* (Yale University Press, 1986); Lisa J. McIntyre, 'We Are the Bastard Children of Cook County', in Richard Abel (ed), *Lawyers: A Critical Approach* (The New Press, New York, 1997).

36 eg. Robert C. Hauhart, 'The Legal Aid Sector of the Legal Services Economy' (1989) 9 *International Journal of Sociology and Social Policy* 51.

37 Richard L. Abel, 'Law Without Politics: Legal Aid Under Advanced Capitalism' (1985) 32 *UCLA Law Review* 474.

28. Legal aid schemes in several Canadian provinces also experienced severe cut-backs in the 1990s, which have been the subject of academic and comparative commentary.³⁸ Two reviews of the legal aid scheme in the province of Ontario addressed the problems caused by successive legal aid cuts, ways of controlling costs, and recommendations for change.³⁹ Most recently, the Canadian Bar Association published a series of essays concerning access to affordable and appropriate legal services in the twenty-first century.⁴⁰ An international collection published in the same year offers a global comparative perspective on changes to legal aid systems in Western industrialised countries, in the context of declining welfare state ideologies and increased policy focus on economic rationalism and individual self-reliance.⁴¹
29. The international literature reflects many of the themes of Australian debates, including: concerns about women's access to legal aid funding;⁴² the expectation that legal aid cutbacks

38 eg. Nancy E. Henderson, 'The Dilemma of Choice and the B.C. Experience' (1998) 16 *Windsor Yearbook of Access to Justice* 231; Ruth Lawson, 'The Ontario Legal Aid Plan in the '90s' (1998) 16 *Windsor Yearbook of Access to Justice* 252; D.A. Rollie Thompson, 'Legal Aid Without Conflict: Nova Scotia' (1998) 16 *Windsor Yearbook of Access to Justice* 306; Roger Smith, *Legal Aid Contracting: Lessons from North America* (Legal Action Group, London, 1998).

39 See F.H. Zemans and P.J. Monahan, *From Crisis to Reform: A New Legal Aid Plan for Ontario* (York University Centre for Public Law and Public Policy, 1997); F.H. Zemans and L.T. Smith, 'Can Ontario Sustain Cadillac Legal Services?' 5 *Maryland Journal of Contemporary Legal Issues* 194; Ontario Legal Aid Review, *Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services* (Ministry of the Attorney-General, Ontario, June 1998); Mary-Jane Mossman, 'From Crisis to Reform: Legal Aid Policy Making in the 1990s' (1998) 16 *Windsor Yearbook of Access to Justice* 261.

40 W.A. Bogart (ed), *Access to Affordable and Appropriate Law Related Services in 2020* (Canadian Bar Association, Ontario, 1999).

41 Regan et al., *The Transformation of Legal Aid*.

42 eg. Mary Jane Mossman, 'Gender Equality and Legal Aid Services: A Research Agenda for Institutional Change' (1993) 15 *Sydney Law Review* 30; Mary Jane Mossman, 'Gender Equality, Family Law and Access to Justice' (1994) 8 *International Journal of Law and the Family* 357; New Zealand Law Commission, *Women's Access to Justice: Lawyers' Costs in Family Law Disputes* (Miscellaneous Paper 10, Wellington, 1997); Patricia Hughes, 'Domestic Legal Aid: The Public Means of Redress for Private Matters' (1997) 46 *University of New Brunswick Law Journal* 119.

will result in reduced quality and quantity of legal aid services, greater readiness to settle earlier regardless of client needs, and increasing difficulty in obtaining grants of legal aid;⁴³ and the (potential or actual) withdrawal of senior practitioners from legal aid work and the consequent “juniorisation” of that work.⁴⁴ Although it was not directly part of the brief of this study to determine the impact of legal aid cuts, and the study did not employ a longitudinal methodology designed to reveal such impacts, it did gather data from files and from solicitor interviews that goes to verify or question the various claims and predictions put forward as to the effects of legal aid cuts on the services provided to legally-aided clients.

Legal Aid Delivery Systems

30. There have been a number of overseas studies, particularly in the US, the UK and Canada, which have sought to compare the costs of salaried (in-house) and ‘judicare’ (private solicitor) models of legal aid service delivery.⁴⁵ The situation in some Canadian provinces is probably closest to that in Australia, whereas concerns in the UK have been rather different. The UK has operated on an almost exclusively ‘judicare’ model, and

43 Ernie Lightron and Mary Jane Mossman, ‘Salary or Fee-for-Service in Delivering Legal Aid Services: Theory and Practice in Canada’ (1984) *Queens Law Journal* 109, 116–118.

44 Dewar et al., *The Impact of Changes to Legal Aid on the Practice of Family and Criminal Law in Queensland*, 18–19, 68–69; Springvale Legal Service, *Hitting the Ceiling*, 5; Lightron and Mossman, ‘Salary or Fee-for-Service in Delivering Legal Aid Services’, 116 (Canada); Gwynn Davis, Stephen Cretney and Jean Collins, *Simple Quarrels: Negotiating Money and Property Disputes on Divorce* (Clarendon Press, Oxford, 1994), 199 (UK); Alan Paterson, ‘Financing Legal Services: A Comparative Perspective’, in Alan Paterson and Tamara Goriely (eds), *A Reader in Resourcing Civil Justice* (Oxford University Press, Oxford, 1996), 242 (poverty law generally); Roger Smith, *Legal Aid Contracting*, 23 (result of contracting).

45 A comprehensive review of these studies is provided by Tamara Goriely, *Legal Aid Delivery Systems: Which Offer the Best Value for Money in Mass Casework? A Summary of International Experience* (Lord Chancellor’s Department, London, 1997). See also Legal Services Corporation, *Delivery Systems Study: A Research Project on the Delivery of Legal Services to the Poor* (July 1997); Lightron and Mossman, ‘Salary or Fee-for-Service in Delivering Legal Aid Services’; Thompson, ‘Legal Aid Without Conflict’.

much of the research there has been directed towards explaining escalating legal aid costs in terms of “supplier induced inflation”,⁴⁶ and discussing ways those costs might be contained (by means of capping and otherwise).⁴⁷

31. The first Australian research to compare the costs of legal aid delivery systems was undertaken in 1979 by the Legal Services Commission of South Australia. That research, based on cases handled in-house or referred out over a four month period, showed that family law cases handled by private solicitors cost twice as much as those handled by in-house lawyers.⁴⁸ However the study did not consider any differences between the types of cases handled by the two groups, nor did it include any consideration of the quality of services provided.⁴⁹
32. In 1980, a report by Peat Marwick Mitchell Services argued that the methodology of cost comparisons should look not at what LACs actually paid private lawyers (since this merely measured “the vagaries of the Commission’s own tariff structure”), but at “cost to deliver”, that is, the cost to lawyers of delivering the service in a competitive market.⁵⁰ This argument was not accepted by the LACs. They preferred a “cost to funder” approach, which would determine what

46 See eg. Alastair M. Gray, ‘The Reform of Legal Aid’ (1994) 10 *Oxford Review of Economic Policy* 51; David S. Wall, ‘Legal Aid, Social Policy, and the Architecture of Criminal Justice: The Supplier Induced Inflation Thesis and Legal Aid Policy’ (1996) 23 *Journal of Law and Society* 546. Note also that in the UK, legal aid work has been paid at an hourly rate for work performed, rather than on the basis of a flat or maximum fee per stage of proceedings, as is the case in Australia.

47 eg. Gwyn Bevan, Tony Holland and Martin Partington, *Organising Cost-Effective Access to Justice* (Social Market Foundation, 1994); Robert Dingwall, Paul Fenn and Jackie Tuck, *Rationing and Costs-Containment in Legal Services* (Lord Chancellor’s Department, London, 1998). Cf. Alan Tunkel, ‘Why Fat Cats?’ (1997) 147 *New Law Journal* 1124.

48 Susan Armstrong and Flavio Verlato, ‘Can Legal Aid Afford Private Lawyers?’ (1980) 5 *Legal Service Bulletin* 88–91.

49 *ibid.*, 90; Goriely, *Legal Aid Delivery Systems*, 37.

50 Goriely, *ibid.*, 38.

private legal services actually cost the Legal Aid Commission.⁵¹ Professor Meredith from the University of New England was commissioned to produce a report on this basis, but his report was also considered unsatisfactory. Rather than adopting the required “cost to funder” approach, Meredith focused on the cost of providing a lawyer to deliver the service, and concluded that the costs of employing a salaried and a private lawyer were much the same.⁵² Meredith, and subsequently the National Legal Aid Advisory Committee, concluded that the debate over whether salaried or private lawyers provided more efficient legal aid services was not significant and should no longer be pursued; the mixed system of legal aid delivery in place in Australia should remain.⁵³ The advantages of the mixed model include maintaining client choice of solicitor, avoiding overload for in-house practices, maintaining access to a legal aid lawyer in all areas, and the provision of a “competitive stimulus to private practice”.⁵⁴

33. Another difficulty in the Australian context has been debate and controversy over how LACs should cost their in-house services for the purposes of comparisons. Reports on the costing models that should be adopted by LACs have not been universally approved,⁵⁵ and consistent costings between LACs have proved elusive.⁵⁶ As the authors of one of the reports noted, the subject

51 Susan Armstrong, ‘Legal Services: Comparing Costs’ (1982) 7 *Legal Service Bulletin* 162, 163–64.

52 Goriely, *Legal Aid Delivery Systems*, 39; G.G. Meredith, *Legal Aid: Cost Comparison — Salaried and Private Lawyers* (AGPS, Canberra, 1983), 7.

53 Meredith, *ibid.*, 57–58; National Legal Aid Advisory Committee, *Legal Aid for the Australian Community*, 332.

54 Goriely, *Legal Aid Delivery Systems*, 30–31; Andrew Crockett, *Salaried Legal Aid Service* (LACV, 1994).

55 See eg. Andrew Crockett, *Cost Comparison Project: Final Report* (June 1995); Crockett also summarises a 1994 report by Don Cooper of Sly & Wiegall, at 41–51.

56 See eg. ALRC, *Report No.89*, 340, Table 5.4: in-house figures for Victoria show only disbursements, not professional fees; those for the NT and Qld are estimates, and the Qld figure includes conferencing cases as well as representation work. The WA, SA and Tas LACs did not provide data.

of comparative costs “has generated heat and division but little enlightenment... The debate has been inconclusive partly because of lack of empirical evidence about comparative cost and partly because partisan interest has made agreement on the threshold of methodology difficult to achieve.”⁵⁷ Goriely concludes that the Australian history of cost comparisons “is a story chiefly about the failure of research”.⁵⁸

34. Rather than engaging directly with the debate concerning methodologies for legal aid cost comparisons, the present study provides data concerning the level of activities engaged in by in-house and private solicitors doing legal aid work, the nature of the cases dealt with by each group, and assessment of the quality of the respective services. The focus on activities circumvents the costing issue, while at the same time, any differences in the nature of the cases or the quality of work are controlled for. The research also makes a significant contribution to the cost comparison literature by scrutinising family law work (whereas most of the overseas studies have been undertaken in the criminal law area), and by providing a level of detail that sheds light on some of the findings of the overseas studies. This material is discussed primarily in chapter 3.
35. Other than the issue of cost, research in several jurisdictions comparing the amount of time devoted to cases by private and in-house legal aid lawyers (mostly undertaking criminal defence work, but one study did include family law matters) has generally found that salaried lawyers tend to spend less time per case.⁵⁹ If this is the case, the question then becomes whether the

57 Crockett, *Cost Comparison Project*, 1; see also Armstrong, ‘Legal Services: Comparing Costs’; National Legal Aid Advisory Committee, *Legal Aid for the Australian Community*, 222.

58 Goriely, *Legal Aid Delivery Systems*, 35.

59 *ibid.*, 1, 25–26, 73; Thompson, ‘Legal Aid Without Conflict’, 319 (private lawyers took 50% more time per family law case than staff lawyers); Ab Currie, ‘Legal Aid Delivery Models in Canada: Past Experience and Future Developments’, in *Legal Aid in the New Millennium* (Papers from the International Legal Aid Conference, University of British Columbia, Vancouver, 16–19 June 1999), 8.

extra time spent by private lawyers is worth the money paid for it.⁶⁰ The minimal work that has been done on the quality of services between different legal aid delivery systems has not found private solicitors to be markedly superior. A Canadian review of differences between legally-aided criminal cases handled by in-house and private solicitors concluded that the quality of service offered by in-house staff was equal to, if not better than, that offered by private solicitors.⁶¹

36. Other jurisdictions have departed from the traditional ‘staff’ or ‘judicare’ models to introduce new forms of legal aid delivery, in particular franchising and block contracting. Franchising was introduced in England and Wales in 1994. Law firms wishing to be franchised must meet certain quality standards, and in return obtain a larger market share of legal aid work (since the number of legal aid suppliers is reduced), power to make their own determinations about a client’s eligibility for legal aid rather than having to wait for bureaucratic decisions, and more rapid payment arrangements.⁶² Block contracting, which is now being introduced in the UK, involves law firms tendering for a ‘block’ of legal aid cases, whereby they will receive all cases of a particular type over a particular period, for a fixed contract price. Franchising and block contracting present administrative advantages and potential cost savings to the legal aid funding body, but at the same time reduce client choice, since legal aid clients may only be represented by franchised or contract firms.

60 Goriely, *Legal Aid Delivery Systems*, 42.

61 Goriely, *ibid.*, 17; Currie, ‘Legal Aid Delivery Models in Canada’.

62 For commentary, see Jeff Giddings, ‘Legal Aid Franchising: Food for Thought or Production Line Legal Services?’ (1996) 22 *Monash Law Review* 342. Franchising has taken on a different meaning in the US, referring to law firms providing a low-cost, efficient, standardized service for basic legal problems to middle-income paying clients. See Jerry Van Hoy, ‘Selling and Processing Law: Legal Work at Franchise Law Firms’ (1995) 29 *Law & Society Review* 703.

37. Contracting systems for criminal defence work have been widely adopted in the US, and have been subjected to criticism for driving down the quality of services along with prices.⁶³ Some areas have also found initial contract prices to be unsustainable, and have been compelled to increase prices in order to attract firms back into the market.⁶⁴ The American Bar Association has now established standards to ensure that quality as well as price plays a part in the award of legal services contracts.⁶⁵
38. In Australia, pilot franchising and block contracting schemes have been implemented, but have not proved sufficiently successful to justify continued operation. All of the pilots have concerned criminal rather than family law cases. Victoria Legal Aid ran a franchising pilot for summary criminal matters, but decided that it wished to retain the decision-making function in relation to legal aid grants, and to focus on streamlining administrative processes instead.⁶⁶ Legal Aid Queensland experimented with block contracting in more serious criminal cases, with quality standards built in, but an evaluation of the pilot showed no cost savings (and no difference in outcomes and client satisfaction between contracted cases and cases handled in-house, which indicated that the contracting scheme

63 Goriely, *Legal Aid Delivery Systems*, 57–58; The Spangenberg Group, *Findings Concerning Contracting for the Delivery of Indigent Defense Services* (American Bar Association, 1995); Smith, *Legal Aid Contracting*. Cf. Pauline Houlden and Steven Balkin, 'Quality and Cost Comparisons of Private Bar Indigent Defense Systems: Contract vs. Ordered Assigned Counsel' (1985) 76 *Journal of Criminal Law and Criminology* 176.

64 Smith, *ibid.*, 30.

65 American Bar Association, *ABA Standards for Criminal Justice: Providing Defence Services* (third ed., 1992).

66 Robert Cornall, former Managing Director, Victoria Legal Aid, personal communication; see also Jeff Giddings, 'Preferred Suppliers and Competitive Tendering: The Future of Legal Aid?', in Jeff Giddings (ed), *Legal Aid in Victoria: At the Crossroads Again* (Fitzroy Legal Centre, 1998), 69–88.

did not reduce quality of service, but did not measurably improve it either).⁶⁷

Costs and Fees

39. Another way of tackling the issue of cost containment, for the purposes of legal aid funding and justice system reform more generally, is empirical work into what determines the costs of civil litigation. To date there has been little research done in this area, although the reports that have been produced have made a significant contribution to our understanding of cost drivers in civil cases. One of the best known of these studies is research undertaken by Hazel Genn in the UK, as part of Lord Woolf's *Access to Justice* inquiry.⁶⁸ That research looked at a broad range of civil cases in the English High Court, although family law matters were not included. The Legal Aid Board's profiling study of legally-aided family law litigation did produce information on cost drivers in family law cases.⁶⁹
40. In Australia, Phillip Williams and Ross Williams conducted a study of personal injury claims over a two year period in Queensland and Victoria, which focused on the cost of cases to law firms, and identified a range of cost determinants, most notably the case going to trial.⁷⁰ Following on from this, Phillip Williams was commissioned by the Commonwealth Attorney-

67 Tim Prenzler, Andrew McLean Williams and Hennessey Hayes, 'Quality Control and Contracting Out of Legal Aid' (1997) 56(3) *Australian Journal of Public Administration* 40; Hennessey Hayes, Tim Prenzler and Andrew McLean Williams, 'Evaluating Alternative Legal Aid Delivery Systems' (1998) 23 *Alternative Law Journal*, 125; John Hodgins, 'Surviving Fiscal Cuts: The Purchaser-Provider Paradigm and Beyond', in *Legal Aid in the New Millenium* (Papers from the International Legal Aid Conference, University of British Columbia, Vancouver, 16-19 June 1999).

68 Hazel Genn, *Lord Woolf's Inquiry: Access to Justice — Survey of Litigation Costs* (Lord Chancellor's Department, 1996).

69 Maclean, *Legal Aid and the Family Justice System*.

70 Phillip L. Williams and Ross A. Williams, 'The Cost of Civil Litigation: An Empirical Study' (1994) 14 *International Review of Law and Economics* 73.

General's Department to conduct a review of cost scales in federal jurisdictions.⁷¹ The review recommended the introduction of new scales based on fixed fees for successive case events, varying only according to the complexity of the case (with three levels of complexity specified). The fixed fees were designed to create incentives for early settlement, and the amounts recommended were based on median sums awarded in samples of taxed cases in the Federal and Family Courts in 1998. The Williams review has proved controversial for a variety of reasons, including the relatively low sums allowed for cases proceeding to hearing, and the consequent erosion of the costs indemnity rule.⁷² To date its recommendations have not been implemented, although the ALRC endorsed its approach, with some modifications, especially for family law cases.⁷³ The information we were able to gather concerning costs in self-funding family law cases reinforced the view that Williams' suggested fees for hearings were too low, and also provided quite robust data on cost drivers in those cases. These issues are discussed in chapter 5.

41. There has also been some research which has looked at the incentives created for lawyers by different fee structures, and in particular the possibility of using contingency fees as an alternative to legal aid funding.⁷⁴ Contingency fees are not,

71 *The Review of Scales of Legal Professional Fees in Federal Jurisdictions* (Williams Review) (Attorney-General's Department, 1998). For a different approach, see Lord Chancellor's Department, *Consultation Paper: Justice at the Right Price* (Lord Chancellor's Department, London, 1998).

72 ALRC, *Report No.89*, 286–87. See also Paul Lynch and Roger Quick, 'The Williams Review: Federal Costs and Economic Rationalism' (1998) 73 *Reform* 47.

73 ALRC, *ibid.*, 288–90.

74 eg. Herbert M. Kritzer, William L.F. Felstiner, Austin Sarat and David M. Trubeck, 'The Impact of Fee Arrangement on Lawyer Effort' (1985) 19 *Law & Society Review* 251; Robin C.A. White, 'Contingent Fees: A Supplement to Legal Aid?' (1978) 41 *Modern Law Review* 286; Senate Standing Committee on Legal and Constitutional Affairs, *Cost of Legal Services and Litigation: Contingency Fees* (1991); Herbert M. Kritzer, 'Contingent-fee Lawyers and Their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship' (1998) 23 *Law & Social Inquiry* 795.

however, considered appropriate for family law cases, hence this strand of the literature has little relevance for the present study, although as will be seen in chapter 5, a variety of fee arrangements are actually used in self-funding family law cases.

Quality of Legal (Aid) Services

42. Quality measurements for legal services are not well developed, and this presented an initial challenge to our aim to compare the quality of services provided to self-funding and legally-aided clients. Within the traditional conception of the legal profession as an autonomous and self-regulating body providing a community service,⁷⁵ quality was not considered to be an issue. Legal professional rules, ethical codes and practice standards are directed more towards interactions with professional colleagues than towards duties to clients.⁷⁶
43. The more recent shift to a conception of lawyers as commercial operators providing a market service has been accompanied by questioning of the adequacy of professional standards,⁷⁷ and an increased interest (by both providers and consumers) in other means of quality assurance for lawyers. There has been some effort to take quality management and accreditation processes developed in other parts of the economy, such as TQM methods and ISO quality standards, and apply them to legal services.⁷⁸ These generally involve the adoption of

75 David Weisbrot, *Australian Lawyers* (Longman Cheshire, Melbourne, 1990), 4.

76 *ibid.*, 198.

77 See in particular Bryant Garth, 'Rethinking the Legal Profession's Approach to Collective Self-Improvement: Competence and the Consumer Perspective' [1983] *Wisconsin Law Review* 639, 667. See also Weisbrot, *ibid.*, 197.

78 See eg. Alan Paterson and Avrom Sherr, 'Quality, Clients and Legal Aid', *New Law Journal*, 5 June 1992, 783; G. Howland Blackiston, 'A Road Map for Quality in Legal Services' (1994) 43 *Emory Law Journal* 507; Australian Quality Council and Quality in Law Inc., *The QIL Code: The QIL Approach to Quality Management in the Australian Legal Profession* (1994); Rosemary Howell, 'The Quality Journey: Discovering What's Best for your Practice', *NSW Law Society Journal*, August 1999, 43–44. Cf. Kris Will, 'Formal Quality Systems: An Introduction' (1996) 70(2) *Law Institute Journal* 31.

practice management procedures, on the basis that the quality of services can be indirectly guaranteed by assuring the quality of the system producing them.⁷⁹ While larger national firms have embraced such procedures, their acceptance among small firms remains limited.⁸⁰

44. In the UK, the Legal Aid Board of England and Wales commissioned a group of academics to devise a quality assurance mechanism to be implemented as part of its legal aid franchising scheme, with an emphasis on objectively observable measures to be applied to the performance of franchised legal aid firms. This resulted in *Lawyers — The Quality Agenda*, a major report reviewing the various issues relating to the measurement of quality in legal services,⁸¹ and an extensive set of ‘transaction criteria’ to be used for the purposes of file auditing in franchised firms.
45. *The Quality Agenda* posited a quality continuum, ranging from excellence at the high end of the spectrum, to competence plus, threshold competence, inadequate professional services, and at the low end of the spectrum, non-performance. The authors argued that the standard of service for legal aid work should be pitched at the level of threshold competence, in order to promote greatest access. They analogised this with the specifications for a

79 Mathew Moore, ‘Quality Systems and TQM: An English Firm’s Experience’, *Law Society Journal*, July 1993, 37; Robert Cornall, ‘A Question of Quality’ (1993) 67 *Law Institute Journal* 926, 927. For a critique of the application of these ideas to legal practice, see Hilary Sommerlad, ‘The Implementation of Quality Initiatives and the New Public Management in the Legal Aid Sector in England and Wales: Bureaucratization, Stratification and Surveillance’ (1999) 6 *International Journal of the Legal Profession* 311.

80 C. Mellor, ‘Devising and Implementing Quality Systems’ (1993) 137 *Solicitor’s Journal* 272; Shirley Hamel, ‘Quality Systems for Small Firms — Are They Relevant?’ (1996) 70(2) *Law Institute Journal* 40; John H. Wade, ‘New and Recycled Services by Family Lawyers: Responding to a World of Change’ (1997) 11 *Australian Journal of Family Law* 69, 75–76.

81 Avrom Sherr, Richard Moorhead and Alan Paterson, *Lawyers — The Quality Agenda* (HMSO, London, 2 vols., 1994).

Mini Minor — a cheap, effective form of transport meeting basic standards of safety and comfort.⁸²

46. *The Quality Agenda* also identified four different kinds of quality measures: input, structure, process, and output measures.⁸³ The researchers were dismissive of input measures such as qualifications and experience, arguing that while these factors are easily quantifiable, there is no evidence of any correlation between them and legal competence.⁸⁴ Avrom Sherr's experiment with initial client interviews carried out by lawyers with varying degrees of qualifications and experience supports this conclusion. He found no correlation between expert rating of interview performance and the length of time the interviewer had been in practice. Moreover, as between qualified and unqualified lawyers, and lawyers with less than five years and more than ten years experience, clients perceived no differences, and expert raters found only marginal differences, while in each case the more qualified/experienced interviewers rated themselves more highly.⁸⁵ It has also been suggested that mere experience is of little value without reflection — that professional knowledge develops through critical reflection on experience⁸⁶ — which is somewhat more difficult to measure.
47. Structural measures of quality concern the environment in which the performance of legal services takes place (such as the

82 Paterson and Sherr, 'Quality, Clients and Legal Aid', 783–84. See also Garth, 'Rethinking the Legal Profession's Approach to Collective Self-Improvement', 670.

83 Sherr et al., *Lawyers — The Quality Agenda*, vol.1, 7.

84 *ibid.*

85 Avrom Sherr, 'The Value of Experience in Legal Competence', in Australasian Professional Legal Education Council, *Skills Development for Tomorrow's Lawyers: Needs and Strategies — Conference Papers, Vol. 1* (1996), 133, 153–160.

86 Donald Schon, *The Reflective Practitioner* (Basic Books, New York, 1983); Donald Schon, *Educating the Reflective Practitioner* (Jossey-Bass, San Francisco, 1987). See also John Sprack, 'Certification and Education: Conflict or Constructive Tension?', in Australian Professional Legal Education Council, *Skills Development for Tomorrow's Lawyers: Needs and Strategies — Conference Papers* (Sydney, 1996), 669–71.

existence of TQM or QA processes, for example). While these are useful, and have been incorporated into the Legal Aid Board's franchising scheme,⁸⁷ they do not provide direct assessments of competence.⁸⁸ Output measures include matters such as outcomes, client satisfaction, cost per case, time taken, and impact on the community.⁸⁹ Some of these measures are more meaningful in particular practice areas (eg. crime, personal injuries) than in others (eg. family law⁹⁰), and for reasons explained below, the English researchers were sceptical of client satisfaction measures in any case.

48. Ultimately, then, the authors of *The Quality Agenda* focused on process measures of quality, examining what lawyers actually did as evidenced by their files. After reviewing a number of files and consulting with practitioners, the researchers devised a set of detailed "transaction criteria" — standardised elements that should be included in all work on a particular kind of matter, and which should be recorded in case files as part of the delivery of a competent legal service. The advantages of the transaction criteria were said to be their objective foundation, their observability without the need to exercise professional judgment, and the fact that they would not require any extra work on the part of practitioners.⁹¹ The disadvantage of criteria

87 See Tamara Goriely, 'Debating the Quality of Legal Services: Differing Models of the Good Lawyer' (1994) 1 *International Journal of the Legal Profession* 159, 159.

88 Sherr et al., *Lawyers — The Quality Agenda*, vol.1, 7.

89 *ibid.*, 8–9. See also John A. Tull, 'Assessing Quality and Effectiveness in Legal Service Programs for the Poor' (1994) 1 *International Journal of the Legal Profession* 211.

90 Family law solicitors interviewed during exploratory research for this study were divided on the question of whether 'time' was a relevant or useful measure of legal services in family law: Rosemary Hunter and Ann Genovese, 'Qualitative Aspects of Quality: An Australian Experiment', *Justice Issues* No.12 (June 1999), 9. Sarat and Felstiner argue that legal action in family law cases does not proceed in an orderly way as "individual and organisational agenda are beyond the control of any single party to the case": Austin Sarat and William L.F. Felstiner, *Divorce Lawyers and their Clients: Power and Meaning in the Legal Process* (Oxford University Press, New York, 1995), 59.

91 Sherr et al., *Lawyers — The Quality Agenda*, vol.1, 17, 20, 24–25, 28.

conforming to these specifications is that they emphasise technical and cognitive skills, at the expense of the “implicit” skills (tacit knowledge, instinct, intuition, etc.) which need to work in tandem with them.⁹²

49. File auditing as a means of measuring competence was preferred to interviewing (given the potential unreliability of lawyers’ self-reports⁹³), and to peer review. In relation to the latter, the researchers compared the results obtained by application of their transaction criteria to a group of files, with ‘peer review’ of those files by a small, expert panel of practitioners from the relevant field. Time did not permit panel members to discuss their respective conceptions of ‘quality’, or to agree and define the quality standards to be applied. Rather, they were asked to apply their own, unarticulated definitions of quality to the files, and to express their evaluation of each file in terms of a possible marking range. The researchers found a significant degree of disagreement on particular aspects of quality between panel members, including direct contradictions, whereas auditors using transaction criteria had much higher agreement rates. At best, too, peer reviewers were able to agree only on which files fell below and above a threshold level of competence, whereas transaction criteria produced more nuanced results. The researchers concluded that “a clearer articulation of criteria which could be objectively and consistently applied by practitioners would probably provide a better approach to quality assessment”, but even so, this would be a more costly and less efficient review mechanism than the use of trained, non-lawyer auditors.⁹⁴ Nevertheless, file audits using transaction

92 Hilary Sommerlad, ‘Access to Justice and Quality: A Bespoke Service or the Procedural Approach’, paper presented to the Legal Aid in a Changing World Conference, University College London and Legal Aid Board Research Unit, London, 4–5 November 1999.

93 Sherr et al., *Lawyers — The Quality Agenda*, vol.1, 9.

94 *ibid.*, 53–58, 83.

criteria have proved to be quite a costly procedure.⁹⁵ Moreover, although they do not require extra work of solicitors, the level of surveillance involved in their application, and the business values they convey, have resulted in a less than wholehearted embrace of transaction criteria by the legal profession in England and Wales.⁹⁶

50. In Australia, there has been little emphasis on quality issues within the legal aid system, perhaps, as Giddings argues, due to a more traditional reliance on lawyers as professionals providing a quality service to both legal aid and paying clients.⁹⁷ The LAQ contracting pilot, noted above, did include a set of quality measures derived from the Legal Aid Board's transaction criteria, although in considerably reduced form. The quality controls imposed on contracted firms in the pilot did not result in any measurable improvement in quality, while the transaction costs of file auditing added to the overall cost of contracting out.⁹⁸ The evaluation team considered that 'quality' was almost impossible to assess using the kind of broad, tick-a-box measures employed,⁹⁹ and that there was also a need to include some qualitative assessment of quality in the auditing process.¹⁰⁰ LAQ has subsequently implemented a preferred supplier scheme, including elements of quality assurance for

95 The exact costs have not been made publicly available, but the auditing program is now quite limited.

96 Sommerlad, 'The Implementation of Quality Initiatives and the New Public Management in the Legal Aid Sector in England and Wales'.

97 Jeff Giddings, 'Legal Aid Services, Quality and Competence: Is Near Enough Good Enough and How Can We Tell What's What?' (1996) 1 *Newcastle Law Review* 67.

98 Prenzler, McLean Williams and Hayes, 'Quality Control and Contracting Out of Legal Aid', 49.

99 Andrew McLean Williams, 'The Contract State Agenda', paper presented to the US Law & Society Association Annual Meeting, Aspen, Colorado, 6 June 1998.

100 Prenzler et al., 'Quality Control and Contracting Out of Legal Aid', 51.

firms on the preferred supplier list.¹⁰¹ None of the other LACs covered by this study have any similar requirements, however, and (apart from the work of Jeff Giddings) there has been little Australian literature on the definition or measurement of quality. As a result, we have been compelled to draw heavily, though not uncritically, on the overseas literature in the quality area. In particular, we have tried to think about the qualitative dimensions of quality, rather than reducing the measurement of quality in legal services to purely quantitative terms.

51. As indicated above, the capacity for clients to comment on the quality of services provided by their lawyers is controversial. A number of authors argue that clients are unable objectively to assess the quality of legal services; that clients' perceptions of legal services provide at best a limited view (which must be supplemented by more objective quality measures), and at worst a misleading impression of their lawyer's performance.¹⁰² On the other hand, it has been argued that 'objective' quality measures reveal little or nothing about the experience of the service from the point of view of the recipient,¹⁰³ and there have been calls for Legal Aid Commissions in particular to seek more client input in assessing the quality of their services, and in setting standards for those services.¹⁰⁴

101 Firms are required to comply with specified Practice and Case Management Standards (including the completion of checklists for various proceedings), establish facilities to enable electronic commerce with the Commission, and make files available for audit: Legal Aid Queensland, 'Preferred Supplier Application Form', Legal Aid Queensland, 'Family Law Practice Case Management Standards for Preferred Suppliers' (October 1997).

102 eg. Richard Moorhead, Avrom Sherr and Alan Paterson, 'Judging on Results? Outcome Measures: Quality, Strategy and the Search for Objectivity' (1994) 1 *International Journal of the Legal Profession*, 194. E. Allan Lind and Tom R. Tyler similarly argue that clients are unable objectively to evaluate the justice system, instead providing subjective perceptions of procedural fairness: *The Social Psychology of Procedural Justice* (Plenum Press, New York, 1988), 76.

103 Hilary Sommerlad, 'English Perspectives on Quality: The Client-Led Model of Quality — A Third Way?', in *Legal Aid in the New Millennium* (Papers Presented to the International Legal Aid Conference, University of British Columbia, Vancouver, 16–19 June 1999); Sommerlad, 'Access to Justice and Quality'.

104 Giddings, 'Legal Aid Franchising', 353.

52. English research indicates that ‘communication’ is the key to quality legal service from the client’s perspective, although this needs to be understood very broadly, as a technical and administrative skill, as well as an interpersonal skill merging with empathy and respect. Another element clients look for is personal identification: they want to feel that they really ‘have’ their own lawyer, and that ‘their’ lawyer is really fighting for them.¹⁰⁵
53. Client satisfaction comparisons between in-house and private solicitors to date have produced mixed results. In a small study conducted by Sherr and Domberger of 30 unfair dismissal cases run by a law centre solicitor and a private solicitor, client satisfaction with the case outcome and how the case was handled was not significantly different between the two solicitors.¹⁰⁶ US studies, on the other hand, show that, for a variety of reasons, clients tend to express higher levels of satisfaction with private solicitors.¹⁰⁷ The contribution of the present study to this particular question can be found in chapter 6.

Lawyer–Client (and Lawyer–Lawyer, and Lawyer/Client–Legal System) Relations

54. There appears to be some concern that client satisfaction surveys would not yield results very flattering to lawyers. The troubled state of lawyer–client relations is a particular theme of the US literature.¹⁰⁸ Felstiner and Sarat have outlined widespread

105 Sommerlad, ‘English Perspectives on Quality’, 6–7.

106 Avrom Sherr and Simon Domberger, ‘Measuring Legal Work: The Shy Profession’, *New Law Journal*, 28 January 1982, 80.

107 Samuel L. Brakel, ‘Free Legal Services for the Poor — Staffed Office versus Judicare: The Client’s Evaluation’ (1973) 2 *Wisconsin Law Review* 532; Abel, ‘Law Without Politics’, 585.

108 eg. Alex J. Hurder, ‘Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration’ (1996) 44 *Buffalo Law Review* 71; Clark D. Cunningham, ‘The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse’ (1992) 77 *Cornell Law Review* 1298.

research findings that lawyers silence and subordinate their clients, and lawyer–client interactions occur without shared understandings.¹⁰⁹ Felstiner also claims that “[a]ll too often lawyers are thought to be inattentive, unresponsive, insensitive, non-empathetic, uncooperative, and arrogant”.¹¹⁰ They fail to treat clients with respect and to develop inter-personal relations, are motivated primarily by financial concerns, are inaccessible, unresponsive, poor communicators, do not deal with clients effectively, are indifferent to clients’ feelings and to the pace of clients’ legal affairs. These problems are seen to be deeply rooted in the structure of lawyer training and practice.¹¹¹

55. In Australia, too, it has been contended that there is widespread dissatisfaction with the quality of service provided by lawyers. A previous Justice Research Centre study found that 44% of plaintiffs would not trust their lawyer to act in their best interests.¹¹² Problems relating to lawyer–client communication include inadequate initial interviewing, failing to listen to the client and obtain adequate information, failing to inform clients of all their options, failing to involve clients in their own cases, and failing to provide ongoing information.¹¹³ At the same time, it is thought that clients are becoming more educated consumers and expecting more of their lawyers.¹¹⁴

109 William L.F. Felstiner and Austin Sarat, ‘Enactments of Power’ (1992) 77 *Cornell Law Review* 1447, 1454–58.

110 William Felstiner, ‘Professional Inattention: Origins and Consequences’, in Keith Hawkins (ed), *The Human Face of Law: Essays in Honour of Donald Harris* (Clarendon Press, Oxford, 1997), 122.

111 *ibid.*

112 Marie Delaney and Ted Wright, *Plaintiffs’ Satisfaction With Dispute Resolution Processes* (Justice Research Centre, Sydney, 1997), 73.

113 Robin Handley, ‘Lawyer/Client Communication’, in Kay Lauchland, Robin Handley, Allan Chay and Judy Smith (eds), *Interviewing: Who Cares About the Client?* (APLEC, 1996), 957–58. See also Law Society of NSW, *Access to Justice: Final Report* (1998), 46–47, citing research findings by the Law Society, Keys Young, Frank Profmak Consulting, and Roy Morgan, among others.

114 *eg.* Judy Smith, ‘An Interviewing Model’, in Lauchland et al., *ibid.*, 975; M. Davies, ‘Marketing for Franchisees: Legal Aid in Theory’ (1993) 137 *Solicitors Journal* 17.

56. Studies of poverty lawyers and their clients in particular have tended to paint a fairly bleak picture. While some note that legal aid lawyers share a commitment to social and political goals and a sense of common struggle,¹¹⁵ US staff attorneys are generally described as underpaid and overworked, and occupying a low professional status.¹¹⁶ It is also generally observed that legal aid clients' vulnerability and lack of choices renders them subject to professional domination and control by their lawyers. Rather than taking instructions, these lawyers take charge, 'laying down the law' and forcing clients to cooperate (or constructing them as "difficult" if they resist), a process intensified by bureaucratic constraints and institutional settings. Services are routinised to involve minimal effort and responsiveness on the lawyer's part, and the client's problems and possible remedies are defined narrowly.¹¹⁷ Clients may also face delay or the curtailment of services due to inadequate staffing levels.¹¹⁸
57. On the other hand, some studies have found high levels of client satisfaction with their lawyers. Among these was an evaluation of the NSW Law Society's specialist accreditation program, which included consideration of the services provided by family

115 Eve Spangler, *Lawyers for Hire: Salaried Professionals At Work* (Yale University Press, 1986), 165.

116 eg. Hauhart, 'The Legal Aid Sector of the Legal Services Economy', 51–69; Jack Katz, 'Representing the Poor', in Richard L. Abel (ed), *Lawyers: A Critical Reader* (New Press, New York, 1997), 253.

117 Abel, 'Law Without Politics', 584; Spangler, *Lawyers for Hire*, 167; Michelle S. Jacobs, 'Legal Professionalism: Do Ethical Rules Require Zealous Representation for Poor People?' (Fall 1992) *St Thomas Law Review* 72; Christine Parker, 'The Logic of Professionalism: Stages of Domination in Legal Service Delivery to the Disadvantaged' (1994) 22 *International Journal of the Sociology of Law* 145; Bryna Bogoch, 'Power, Distance and Solidarity: Models of Professional–Client Interaction in an Israeli Legal Aid Setting' (1994) 5 *Discourse and Society* 65; Katz, 'Representing the Poor', 254; Michelle S. Jacobs, 'Lawyers and Concepts of Client Worthiness: How Values and Attitudes About Race and Poverty Can Affect Legal Representation', paper presented to the Law & Society Annual Meeting, Aspen, Colorado, June 1998. See also James W. Meeker, John Dombrink and John Song, 'Perceptions About the Poor, Their Legal Needs and Legal Services' (1987) 9(2) *Law and Policy* 143.

118 Hauhart, 'The Legal Aid Sector of the Legal Services Economy'.

law accredited specialists.¹¹⁹ Neither have studies finding a high level of client satisfaction been confined to self-funded clients. Indeed, Goriely notes that where legal aid evaluations have included a measure of client satisfaction, “there is a startling sameness to the results: between 82% and 89% of clients are satisfied, irrespective of where the service was offered or who acted for the client”.¹²⁰ These findings again cast doubt on the value of client surveys.

58. In order to test these issues, our client satisfaction survey included a range of questions addressed to elements of service, communication and control, and it was possible to compare the results for self-funded and legally-aided clients. The findings from this part of the survey are set out in chapter 6.
59. Apart from how they are treated by their lawyers, there have been a number of studies looking at clients’ views of the legal process.¹²¹ Both Australian and English research has found high proportions of clients dissatisfied with the time taken to resolve their cases.¹²² North American research, largely undertaken by Lind and Tyler, suggests that clients place greater emphasis on

119 Livingstone Armytage, ‘Client Satisfaction With Specialists’ Services: Lessons for Legal Educators’, in Australian Professional Legal Education Council, *Skills Development for Tomorrow’s Lawyers: Needs and Strategies — Conference Papers* (Sydney, 1996), 360–62. See also Emma Clayton, ‘Legal Aid Funding’ (1997) 24(8) *Law Society of Western Australia Brief* 23–24; Sherr et al., *Lawyers — The Quality Agenda*, vol.1, 49–50.

120 Goriely, *Legal Aid Delivery Systems*, 24.

121 eg. Fisher et al., *Traditional Divorce*; Delaney and Wright, *Plaintiffs’ Satisfaction With Dispute Resolution Processes*; Roger James & Associates, *Understanding the Needs of Legal Clients: Sources of Satisfaction and Dissatisfaction — Research Report* (Templestowe, Vic, 1998).

122 Delaney and Wright, *ibid.*, 42: 58% dissatisfied; Sherr et al., *Lawyers — The Quality Agenda*, vol.1, 49: 50% dissatisfied.

procedural justice than on outcomes.¹²³ They found that clients are more satisfied if they feel that their case was treated with procedural justice than they are with the outcome, and that clients are more likely to accept a negative outcome if they feel that their case was treated fairly. Australian and UK studies, by contrast, have stressed the importance of outcomes to overall client satisfaction.¹²⁴ This difference in national results may possibly be explained by US clients' — or researchers' — greater preoccupation with procedural fairness. At the same time, studies across the board indicate that quality of service is a more important factor for clients than outcomes.¹²⁵ Our contribution to these debates is also set out in chapter 6.

60. Finally, there is a well developed literature on the relations between family lawyers and their clients. The two major British studies are by Ingleby,¹²⁶ and Davis, Cretney and Collins,¹²⁷ with a new study by Eekelar and Maclean about to be published at the time of writing.¹²⁸ The two major US studies are by Sarat

123 See E. Allan Lind, Robert J. MacCoun, Patricia A. Ebener, William L.F. Felstiner, Deborah R. Hensler, Judith Resnick and Tom Tyler, 'In the Eye of the Beholder: Tort Litigants' Evaluations of their Experiences in the Civil Justice System' (1990) 24 *Law and Society Review*, 953; Lind and Tyler, *The Social Psychology of Procedural Justice*; Tom R. Tyler, 'Client Perceptions of Litigation' (1988) 24 *Trial*, 40; J.M. Landis and L. Goodstein, 'When Is Justice Fair?' (1986) *American Bar Foundation Research Journal*, 675; E. Allan Lind and R.I. Lissak, 'Apparent Impropriety and Procedural Fairness Judgments' (1985) 21 *Journal of Experimental Social Psychology*, 19; Tom R. Tyler, 'The Role of Perceived Injustice in Defendants' Evaluation of Their Courtroom Experience' (1984) 18 *Law and Society Review*, 74.

124 eg. Delaney and Wright, *Plaintiffs' Satisfaction With Dispute Resolution Processes*, 21; Prenzler et al., 'Quality Control and Contracting Out of Legal Aid', 40; Fisher et al., *Traditional Divorce*, 49; Brian Abel-Smith, Michael Zander and Rosalind Brooke, *Legal Problems and the Citizen* (Heinemann, London, 1973), 203.

125 Felstiner, 'Professional Inattention', 123–24; Armytage, 'Client Satisfaction with Specialists' Services', 360; Roger James and Associates, *Understanding the Needs of Legal Clients*, 4–5.

126 *Solicitors and Divorce* (Clarendon Press, Oxford, 1992).

127 *Simple Quarrels: Negotiating Money and Property Disputes on Divorce*. See also Davis and Murch, *Grounds for Divorce*.

128 John Eekelar, Mavis Maclean and Sarah Beinart, *Family Lawyers: How Solicitors Deal with Divorcing Clients* (Hart Publishing, Oxford, 2000).

and Felstiner,¹²⁹ and Mather, Maiman and McEwen.¹³⁰ Unlike the present project, however, none of these studies looks systematically at the effects of segmentation within the legal profession. They either tend to assume that family lawyers are homogenous, or, in the case of Davis et al., examine client funding status as one variable influencing family lawyers' activities, whereas our research has taken client funding status and the location of lawyers in the private or public sectors as a primary focus.

61. Davis et al. conducted a detailed study of 80 property cases, from initial application to final resolution, including interviewing parties and their solicitors, observing court proceedings, and studying case documents. Issues examined included the formal legal structures in place, eligibility for legal aid, parties' expectations and assumptions, lawyer–client relations, lawyer strategies, court processes, and outcomes. Some of the authors' observations concerning the services provided to legal aid clients are relevant to our study. On the whole, however, there has been little scope to compare Davis et al.'s findings with our own, since the majority of cases in the present study did not involve property.
62. Ingleby's book is particularly concerned with solicitor negotiations and negotiating styles, and the process of "bargaining in the shadow of the law".¹³¹ Through interviews with solicitors, observations and reading of files, he concluded that solicitors were generally non-litigious, preferring to proceed by means of non-contentious negotiation. He explained this

129 *Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process*.

130 "'The Passenger Decides on the Destination and I Decide on the Route': Are Divorce Lawyers "Expensive Cab Drivers"?' (1995) 9 *International Journal of Law and the Family* 286. See also John Griffiths, 'What Do Dutch Lawyers Actually Do in Divorce Cases?' (1986) 20 *Law & Society Review* 135.

131 See Robert H. Mnookin and Louis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale Law Journal* 950.

behaviour in terms of benefits for clients, and for solicitors themselves, particularly in preserving their relationships with professional colleagues.¹³²

63. Mather et al. studied 163 family law practitioners in the US State of Maine, making use of lawyers' self-reports in interviews.¹³³ The authors note of their methodology: "We recognise, of course, that as descriptions of lawyers' actual behaviour, the data may not be entirely accurate or reliable. But as descriptions of lawyers' perceptions of and attitudes towards their work, that data contributes a great deal".¹³⁴ Their respondents' descriptions of their work indicated that they were quite 'directive' of their clients, asserting control over clients in order to "maintain...credibility with colleagues and judges that is crucial to their professional survival". The findings of Ingleby and Mather et al. were very largely reflected in our interviews with solicitors, and we have drawn attention to these parallels throughout chapter 7.
64. Sarat and Felstiner relied on observations and interviews to produce an ethnography of relations between American divorce lawyers and their clients in property matters.¹³⁵ All of the clients in their case studies were self-funding, and often had substantial amounts of property to divide. Sarat and Felstiner focus on power and control in the lawyer-client relationship, taking a Foucauldian view of power as a fluid resource rather than a stable commodity "possessed" and "exercised" by the lawyer. They argue that the circulation of power in the lawyer-client relationship is such that each may be considered more or less powerful at particular points.

132 Ingleby, *Solicitors and Divorce*, 156–63.

133 Mather et al., "The Passenger Decides on the Destination and I Decide on the Route".

134 *ibid.*, 287.

135 Sarat and Felstiner, *Divorce Lawyers and Their Clients*.

65. One of the ways lawyers attempt to exercise power, according to Sarat and Felstiner, is by controlling the meaning of law: by explaining to clients what ‘the law’ requires and defining for them what is legally possible. This is a theme that also recurs in our interviews with lawyers, although we interpret this process somewhat differently (see chapter 7). Sarat and Felstiner go on to argue that in representing legal rules to their clients, lawyers articulate the legitimacy of law, and act as apologists for existing legal arrangements. In the Australian context, a contrasting study by Graycar and the Family Court shows lawyers to some extent resisting rather than enthusiastically embracing the parenting provisions introduced by the Family Law Reform Act 1995.¹³⁶
66. Sarat and Felstiner are also concerned with the ways that lawyers and clients are mutually discursively constituted in the lawyer–client interaction. Yet they do not give the same consideration to the other sets of relations within which lawyers and clients may be embedded (eg. the lawyer’s professional network and duty to the court, the client’s social circumstances). Another study which appears to underestimate the extent of lawyers’ professional interactions is that of Canadians Arnold and Kay.¹³⁷ While they draw attention to the ways lawyers accumulate ‘social capital’ through “networks of social relations that provide ethical obligations, expectations..., information channels and social norms”, they focus exclusively on the accumulation of social capital within large law firms, and see sole and small firm practitioners as more isolated. As discussed

136 Helen Rhoades, Reg Graycar and Margaret Harrison, *The Family Law Reform Act 1995: Can Changing Legislation Change Legal Culture, Legal Practice and Community Expectations? Interim Report* (The University of Sydney and the Family Court of Australia, 1999). See also John Dewar, ‘Reducing Discretion in Family Law’ (1997) 11 *Australian Journal of Family Law* 309.

137 Bruce L. Arnold and Fiona M. Kay, ‘Social Capital, Violations of Trust and the Vulnerability of Isolates: The Social Organization of Law Practice and Professional Self-Regulation’ (1995) 23 *International Journal of the Sociology of Law* 321.

in chapter 7, our interviews indicate that family lawyers are well integrated into local practice communities regardless of firm size. The broad interactions between lawyers, clients, the Family Court and the legal aid system, and the outcomes of those interactions for legally-aided and self-funded clients, are the major concern of this report.

Methodology and Responses

67. As explained in chapter 1, we aimed to compare the services received by legal aid clients with those received by self-funding clients in family law. Within the legal aid group, we were further concerned to compare the services received by clients of private solicitors and clients of Legal Aid Commission in-house practices. Within the self-funding group, we were interested to see if we could replicate the finding from Part 1 of the study that clients of firms in high income areas received a greater quantity of services than clients of CBD firms or firms located in medium and low income areas.
68. We wished to make comparisons between the different groups in terms of inputs (solicitors' activities, time spent on the case, and solicitors' status and experience), costs, outcomes (including time to resolution, method of resolution and degree to which the client 'won' or 'lost' their case), client satisfaction, and quality of services. We intended to make the comparisons across a sample of recent family law cases.
69. In order to gain an 'all-round' picture of each case, we sought to view the solicitor's file, to interview the solicitor, and to elicit the client's views. Files were analysed by means of a standard coding sheet, plus additional notes made by coders on any outstanding features of the case (see Appendix 2). Lawyers were asked a series of questions about the size of the firm and the nature of its family law practice, questions specifically relating to each file that was analysed, plus a series of open-ended questions concerning the time, cost, process and outcomes of family law cases, their general experiences with legally-aided and self-funded clients, and views on quality of legal services

(see Appendix 3). The open-ended interviews were taped and then transcribed. Clients were asked to fill out a survey form consisting mostly of closed questions on the process, outcome and funding of their case, and the service they received (see Appendix 4). They were given the choice of doing this by mail (in which case they would complete the survey form themselves), or by telephone (in which case a researcher would read out the survey questions and fill in the client's answers on the form).

70. The total numbers of lawyers interviewed, files reviewed and clients surveyed are set out in Table 2.1. As explained below, “participating” firms and lawyers were those who contributed clients and/or files to the research, whereas “non-participating” lawyers were those who only took part in an interview.

TABLE 2.1 Sources of Data and Sample Sizes

Data Source	Private sector n	LAC n	Total
Participating law firms/practices	55	6	61
Participating lawyers interviewed	60	23	83
Non-participating lawyers interviewed	20	—	20
Files analysed			
self-funded	58	—	58
legally-aided	26	79	105
both forms of funding	13	—	13
total	97	79	176
Client surveys			
self-funded	62	—	62
legally-aided	22	18	40
both forms of funding	11	—	11
total	95	18	113

71. In order to limit the number of variables that might impact on the factors to be compared, we sought to construct a reasonably homogeneous sample of cases in terms of the matters involved, the process(es) involved in resolving the case, and the time period in which the cases were open. From the post-July 1997 legal aid guidelines and our profiling study, we knew that residence and contact were the most common children's matters raised in family law cases, and that legal aid cases were unlikely to include property matters. Hence, we targeted cases which had involved an issue of residence and/or contact, and excluded property-only cases. Cases involving both residence/contact and property were included, since one obvious comparison between legally-aided and self-funded clients is that the latter may have their property issues dealt with as part of their family law case while the former are generally unable to do so, and we wanted to see how this difference played out in practice.
72. In addition, our profiling study indicated systematic differences between cases initiated by a Form 7 (application for final orders) and cases in which a Form 12A (application for consent orders) was filed,¹³⁸ with the former being in the majority. Accordingly, our sample consisted of cases in which a Form 7 was filed. As it turned out, this limited the number of eligible cases from Queensland, where it appears that there is a higher incidence of Form 12A applications than in the other states covered by the research.¹³⁹ We did not discern this in our profiling study due to the small number of responses we received from Queensland firms, and the non-participation of Legal Aid Queensland (LAQ) in that study.

138 A Form 7 application is essentially a request to the Court to adjudicate a dispute, although in practice most cases are ultimately settled between the parties. By contrast, a Form 12A application is lodged when the parties have already reached agreement, and are asking the Court to formalise the agreement in the form of consent orders.

139 This is particularly so in legal aid cases, due to to emphasis on legal aid conferencing leading to the filing of Form 12A consent orders.

73. Finally, we limited the sample to cases that were closed in the period August 1998–February 1999 (initially we aimed for cases closed in December 1998–February 1999, but in discussions with solicitors, it soon became clear that this period was too short to yield a sufficient number of relevant cases). The profiling study indicated that the median resolution time for legal aid cases was 4–6 months, while the median resolution time for self-funded cases was 11 months. On the basis of these figures, most of the legal aid cases and at least half of the self-funded cases would have commenced after the introduction of the new Commonwealth legal aid guidelines in July 1997. Thus changes in eligibility for legal aid should not have played much of a confounding role in the sample.
74. The parameters set for the kinds of cases to be included in the sample made it unnecessary for us to try to obtain matched pairs of cases (ie cases in which both parties to the case and their lawyers participated in the study), since all the cases had major features in common.

Recruitment of Lawyers

75. In the profiling study, our sampling commenced with a list of “known family law firms”, comprising firms that included an accredited family law specialist (in NSW, Victoria and Queensland) or took family law referrals from the Law Society (South Australia), and/or that undertook a substantial amount of legal aid work (as advised by each State’s Legal Aid Commission). The same list formed the sampling population for Part 2 of the research.
76. The profiling study revealed substantial differences between Family Court Registries in terms of client demographics, matters involved in cases and case processing. In order to even out the effect of local differences (rather than having firms from the

most populous areas dominating the sample), we decided to sample the same number of firms from the vicinity of each Registry of the Family Court in the four states – ie, Adelaide, Brisbane, Dandenong, Melbourne, Newcastle, Parramatta, Sydney and Townsville.

77. We divided the list of known family law firms into eight clusters, each relating to one of the Registries, and at that stage also set geographical limits on the firms to be included, in order to avoid the confounding effect of long distance from the nearest Registry. The Adelaide cluster included the settled areas of South Australia: from the eastern side of the Eyre peninsula to the South Australian/Victorian border. The Brisbane cluster stretched from Bundaberg south to Coffs Harbour, and inland to include Roma, Lismore and Grafton. The Dandenong cluster included the south eastern suburbs of Melbourne, most of the Mornington Peninsula, Westernport, south Gippsland, the LaTrobe Valley and east as far as Sale. The Melbourne cluster stretched north from the CBD to Seymour, and to the west included Bendigo, St. Arnaud, Ararat, Warrnambool, Colac and Geelong. The Newcastle cluster covered the NSW coast from The Entrance to Port Macquarie, inland to Gunnedah and Tamworth, and south down the New England Highway. The Sydney cluster incorporated the coastal strip from Palm Beach in the north to Kiama in the south. The Parramatta cluster stretched from just east of Parramatta along either side of the Great Western Highway to Lithgow and Bathurst. Finally, the Townsville cluster ran up the coast from Mackay to Cairns, and inland to Georgetown and Hughendon. A random sample of up to 50 firms was drawn from each cluster. The total number of firms available in the Adelaide and Newcastle clusters was 40, and in the Townsville cluster was only 20. These were all included in the sample. Because of a low level of responses, the Sydney sample was later expanded to 55 firms.

78. The senior family law practitioner at each firm in the sample was contacted by telephone and asked if they would be prepared to participate in the study. A number of practitioners could not be contacted or did not return our calls. Some did not wish to participate, and some were unable to participate, as they had no files that fell within the parameters of the study, the family law solicitor had left the firm or was too recently arrived to have closed any files, or they were otherwise disqualified due to prior involvement with the study. The ultimate participation rate for each Registry cluster and overall is shown in Table 2.2.

TABLE 2.2 Law Firm Participation Rate

Registry	Not participate	UnableParticipate		Total	Participation Rate
Adelaide	27	4	9	40	22.5%
Brisbane	32	10	8	50	16.0%
Dandenong	37	9	4	50	8.0%
Melbourne	39	4	7	50	14.0%
Newcastle	24	6	10	40	25.0%
Parramatta	27	16	7	50	14.0%
Sydney	34	15	6	55	10.9%
Townsville	12	4	4	20	20.0%
Total	232	67	55	355	15.5%

79. The number of firms participating and overall participation rate was almost identical to the equivalent figures from the profiling study (55 firms; 16% response rate). In this instance, however, the firms were not concentrated in NSW and Victoria. Rather, the highest response rate came from Newcastle, followed by South Australia and Queensland (the latter two having been somewhat under-represented in the profiling study). The lowest response rates came from

Dandenong and Sydney. The different response rates between clusters was not statistically significant, however.

80. The low response rate was disappointing given the importance of the research – many solicitors were not interested or not willing to give any time to the project, or simply did not return calls from the researchers. Certainly they were all extremely busy, but this was true also of the solicitors who did participate. In the course of the recruitment process, the Chief Justice of the Family Court sent personal letters to solicitors in Melbourne, Dandenong, Sydney, Parramatta and Brisbane, who had not responded to our initial contact or had been hesitant to participate, urging them to take part in the study. Victorian firms also received a letter from the Law Institute of Victoria, and a number of Sydney, Parramatta, Melbourne and Dandenong solicitors were personally contacted by members of the project Steering Committee, all to little avail. The problem this creates is that when family lawyers voice complaints – through Law Societies or the Law Council, or in other fora – about the legal aid system in particular, they are open to the accusation of not having been prepared to participate in a project that was designed to investigate and quantify issues that have been raised anecdotally. Fortunately, enough of their colleagues were sufficiently public-spirited to enable the project to proceed.
81. A more technical issue raised by the low response rate was the possibility of response bias. In particular, it may be speculated that the lawyers who agreed to participate were those who felt they had little to fear from a research process that involved researchers viewing their files and talking to their clients. In other words, lawyers who were confident that they provided a good service would take part, and those who were less confident about the quality of their services, and hence less willing to subject them to scrutiny, would not agree to participate.

82. In order to test this proposition, we undertook a series of supplementary interviews with lawyers who had initially said they were not interested in taking part in the study. These lawyers were asked to take part in an interview to assist in the research concerning the services provided to legally-aided and self-funded family law clients, but their clients and files were not accessed. They were asked the same open-ended interview questions as the participating lawyers, and their responses were then analysed alongside those of the participating lawyers, in order to discern any differences in responses between the two groups (particularly to questions concerning quality of legal services).
83. Supplementary interviews were conducted with a total of 20 lawyers, two from each of the Registry clusters, with an additional one each from Dandenong, Newcastle, Sydney and Townsville. The results of this process are discussed below.

Profiles of Participating Firms and Lawyers

84. Profile information gathered from firms included total number of partners and number of partners working in family law, number of employee solicitors working in family law, the estimated percentage of family law work that is legally-aided, and that involves child representation, and the estimated percentage of the firm's income derived from family law. The answers to these questions from the participating firms are displayed in Table 2.3. In 10 cases, solicitors were unable to provide details about the proportion of the firm's income earned in family law, hence the number of firms answering that question was only 45.

TABLE 2.3 Profile of Participating Law Firms

Question	Maximum	Minimum	Mean
Number of partners	16	1	3.3
Number of family law partners	3	0	0.8
Number of employee solicitors in family law	3	0	1.1
% family law work legally-aided	75	0	22.8
% family law work in child representation	25	0	2.7
% income from family law work	100	0.5	40.1

85. As this table shows, the responding firms varied considerably in terms of size, proportion of legal aid work, and proportion of income from family law. There was also some variation between Registry clusters. Dandenong firms earned the lowest proportion of their income from family law work (6%), followed by Newcastle and Parramatta firms (29–30%), while Melbourne, Sydney and Adelaide firms earned the highest proportion of their income from family law (49–52%). These figures suggest, as one might expect, that capital city firms are more likely to specialise in a particular practice area, while regional firms are more likely to be doing a range of work. Sydney firms did the least amount of legal aid work in family law (6%), while Townsville firms did the most (34%). The number of firms in each cluster was too small to determine whether any these variations were statistically significant.

86. The firm profiles overall are quite similar to those of firms that responded to Part 1 of the study. In that Part, responding law firms' family law work involved an average of 26% legal aid work and 2.9% child representation work, and earned an

average of 35% of the firm's income.¹⁴⁰ The distribution of firm sizes between the two parts of the study was also comparable.¹⁴¹

87. The 20 non-participating firms from which solicitors agreed to take part in supplementary interviews had a reasonably similar profile to the participating firms. They had a similar average number of partners (3.2), and earned an identical proportion of their income in family law (40.1%). However they undertook a lower proportion of legal aid work on average (15.1%), and a higher proportion of child representation work (4.4%).
88. In the majority of cases, we dealt with only one lawyer from each firm. One Brisbane firm had three lawyers participating in the study, and five other firms had two lawyers participating: two each from Adelaide and Newcastle, and one from Melbourne, giving a total of 62 participating lawyers from private law firms.¹⁴² We gained information about these lawyers, in terms of their sex, position, number of years in practice, percentage of work in family law and whether they were accredited family law specialists, and percentage of legal aid work in family law.
89. Thirty-three of the participating lawyers from private law firms were male (53%) and 29 were female. Thirty-two were partners (52%), eight were sole practitioners (13%) and 22 were employee solicitors at varying levels of seniority (35%). Accreditation as a family law specialist is not available in South Australia. Of the 51 lawyers from the other three States,

140 Rosemary Hunter, *Family Law Case Profiles* (Justice Research Centre, June 1999), 68.

141 Firms responding to Part 2 consisted of 33% sole practitioner or single partner firms (35% in Part 1), 44% firms with 2–4 partners (51% in Part 1), 20% firms with 5–10 partners (13% in Part 1), and 4% firms with 11 or more partners (2% in Part 1). Thus the firms participating in Part 2 were only slightly larger overall than those participating in Part 1. See *ibid.*, 63.

142 Two of these lawyers were not ultimately interviewed: one could not be located, and the other could not find time for the interview.

29 (57%) were accredited family law specialists. The profile of these lawyers in terms of years in practice, family law work and legal aid work is set out in Table 2.4.

TABLE 2.4 Participating Lawyers from Private Law Firms

Question	Maximum	Minimum	Mean
Number of years in practice	34	3	14.8
% of work in family law	100	20	72.6
% of family law work legally-aided	100	0	25.5*

*information missing in one case

90. The table shows that the participating solicitors tended to be relatively experienced in terms of years in practice, and relatively specialised in family law. Nine of the solicitors did no legal aid work, while 16 did 50% or more legal aid work in family law. Those doing more than 50% legal aid work had been in practice for fewer years on average (9.6 years) than those doing no legal aid work (17.0 years). There was a significant correlation between years in practice and proportion of legal aid work, with those in practice longer tending to undertake less legal aid work.¹⁴³
91. Of the 20 non-participating lawyers who were interviewed, 14 were male (70%) and 6 were female. Twelve were partners (60%), two were sole practitioners (10%) and 6 were employee solicitors at varying levels of seniority (30%). Of the 18 lawyers for whom specialist accreditation was available, 12 (67%) were accredited. The profile of these lawyers in terms of years in practice, family law work and legal aid work is set out in Table 2.5.

143 Spearman's $R = -0.371$, $p < 0.01$. Years in practice and proportion of work in family law were not correlated.

TABLE 2.5 Non-Participating Lawyers from Private Law Firms

	Maximum	Minimum	Mean
Number of years in practice	42	4	18.8
% of work in family law	100	10	78.1
% of family law work legally-aided	50	0	16.4

92. Half of the non-participating solicitors did no legal aid work in family law, while four did 50% legal aid work. None did more than 50% legal aid work in family law.
93. Comparing the profiles of the participating and non-participating lawyers, it can be seen that non-participating lawyers were more likely to be male and to be accredited specialists, had a higher average number of years in practice and were specialised in family law to a higher degree, but did a lower proportion of legal aid work in family law than their participating colleagues. The only difference that was statistically significant, however, was the relative proportions of legal aid work done by the two groups.¹⁴⁴

Legal Aid Commissions

94. In addition to the private solicitors firms, each Registry cluster was intended to include the local office of the relevant Legal Aid Commission. As it turned out, however, there was only a small number of eligible cases available in Brisbane, Townsville, Melbourne and Dandenong, due to the fact that the in-house practices at Victoria Legal Aid (VLA) and LAQ do little party representation work in family law cases, focusing primarily on child representation work. As a result, the Victorian and

144 Mann-Whitney test: $Z=-2.078$, $p<0.05$.

Queensland Commissions were treated as single entities for the purposes of the research. Thus, the participating offices were: Adelaide (Legal Services Commission of SA), Newcastle, Parramatta and Sydney (Legal Aid Commission of NSW), plus LAQ and VLA. Each Commission gave us access to the relevant files, and we subsequently sought to interview all of the solicitors who had dealt with those cases. A total of 28 solicitors were involved with the files: 4 from Adelaide, 7 from LAQ, 4 from VLA, 3 from Newcastle, 3 from Parramatta, and 7 from Sydney. Three of the solicitors could not be located for interview, and another two were not interviewed as they had assisted in the earlier exploratory research on quality of legal services.

95. Twenty of the 28 legal aid solicitors were women:¹⁴⁵ a higher proportion of women than among the private solicitors. The majority were simply identified as employee solicitors, although most of the Parramatta and Sydney lawyers identified themselves specifically as junior solicitors. Two LAQ lawyers were senior solicitors. All but three of the legal aid solicitors worked exclusively or virtually exclusively in family law. The remaining three lawyers did 25% or less of their work in family law: one was from VLA and two were from LAQ.¹⁴⁶
96. Further, few of the legal aid lawyers who were eligible and for whom information was available were accredited family law

145 This matches the overall profile of in-house solicitors engaged in family law litigation in the four Legal Aid Commissions. Figures provided by the Commissions indicate a total of 123 family law solicitors, of whom 74% are women.

146 Again, this matches the overall profile of in-house solicitors engaged in family law litigation. In total, 84% of these solicitors worked exclusively in family law, however there were differences between LACs, with all South Australian and NSW in-house family law solicitors engaged exclusively in family law, while around one third of the in-house solicitors doing family law work in Victoria and Queensland worked in other areas as well.

specialists.¹⁴⁷ By comparison, as noted above, 57% of participating private solicitors were accredited. Finally, the legal aid lawyers' number of years in practice ranged from one to 27, with an average of 9.6 years.¹⁴⁸ This again was lower than the average for private solicitors (15 years).¹⁴⁹ Overall then, the legal aid in-house practices were more feminised than their private counterparts, and their legal staff had been in practice for fewer years and were less likely to be accredited specialists. On the other hand, in-house legal aid lawyers were more likely to be practising exclusively in family law. All of these differences were statistically significant.¹⁵⁰

Recruitment of Clients

97. The private lawyers who agreed to participate in the research were asked to identify those of their files that: had been closed between August 1998 and February 1999, included an issue of residence and/or contact, involved the filing of a Form 7 (either

147 Overall, 79% of in-house solicitors engaged in family law litigation in NSW, Victoria and Queensland were not accredited, although again there was a difference between LACs, with VLA and LAQ solicitors having very low accreditation rates (7% and 3% respectively), while the NSW LAC had a higher rate (38%).

148 The average number of years in practice for all in-house solicitors engaged in family law litigation was 10.6 years – slightly higher than for those in the sample, but still lower than for the private practitioners included in the study. As between the four LACs, NSW, Victoria and Queensland had similar average years in practice (ranging from 9.5 to 10.8 years), while South Australia had a higher average (14 years). The slightly lower seniority and accreditation rate for in-house solicitors in the sample than for all in-house family law solicitors may be attributed to the fact that LACs' more experienced/accredited solicitors are more likely to be doing child representation work, whereas our study focused on casework for adult clients.

149 Richard Abel attributed the younger profile of in-house lawyers in the US to high turnover rates, resulting in the departure of the most experienced personnel: Richard L. Abel, 'Law Without Politics: Legal Aid Under Advanced Capitalism' (1985) 32 *UCLA Law Review* 474, 581.

150 Sex: $\chi^2=4.727$, $df=1$, $p<0.05$; accreditation: $\chi^2=11.056$, $df=2$, $p<0.005$; years in practice: Mann Whitney test $Z=-2.890$, $p<0.005$; percentage of family law work: Mann Whitney test $Z=-3.620$, $p<0.001$; percentage of legal aid work in family law: Mann Whitney test $Z=-7.565$, $p<0.001$.

by the client or the other party), and had been handled by the firm from commencement to finalisation. It did not matter whether the files had been self-funded or legally-aided.

98. Having identified their files matching the above description, lawyers were asked to forward letters on our behalf to the relevant clients. The letters described the research project, and invited clients to participate by allowing the researchers to view their solicitor's file on the case, responding to the client survey, or both. Each letter enclosed a reply form and reply paid envelope, allowing the client to let us know whether and how they wished to participate. In relation to the client survey, clients were able to nominate whether they preferred to undertake the survey by mail or by telephone (or if they did not have a preference). In most instances, law firms also forwarded reminder letters or rang clients who did not initially respond to our request.
99. The majority of clients who responded agreed to participate in relation to both their file and the survey, although some were only prepared to do the survey or to let us view their file. Clients who did not wish to participate tended not to respond at all.
100. Once we began to view files, it became clear that several of the lawyers had included cases that did not meet the specified conditions for inclusion. We excluded those cases that concerned property only or property plus child maintenance, in which a Form 12A rather than a Form 7 had been filed, or that were not yet finalised (or had reactivated prior to viewing the file – this occurred in two cases). We decided, however, to retain cases that had closed more recently than the dates specified, or that had involved previous proceedings handled by a different firm, since these were considered less crucial parameters. Clients who had seen more than one lawyer were clearly asked in the survey to respond in relation to the lawyer who had contacted them to participate in the research.

101. The response rate of clients in each Registry cluster and overall, measured in terms of actual participation compared to the number of letters sent out in valid cases, is shown in Table 2.6. The numbers of letters sent out exclude cases where the file was revealed to fall outside the study's parameters, as outlined above. The numbers of surveys exclude cases in which the client agreed to do the survey by mail, but never returned the survey form.

TABLE 2.6 Private Solicitors' Client Response Rates

Registry	Letters sent out	No. surveys	Survey %	No. files	File %
Adelaide	52	19	36.5%	21	40.4%
Brisbane	55	10	18.2%	9	16.4%
Dandenong	35	6	17.1%	6	17.1%
Melbourne	56	8	14.3%	9	16.1%
Newcastle	97	22	22.7%	25	25.8%
Parramatta	58	14	24.1%	13	22.4%
Sydney	42	13	31.0%	10	23.8%
Townsville	16	3	18.8%	4	25.0%
Total	411	95	23.1%	97	23.6%

102. It can be seen that the highest response rate came from clients in Adelaide and Sydney (for surveys in particular), followed by Newcastle and Parramatta. It will be recalled that Adelaide and Newcastle also had the highest response rates from law firms, although this was not true for Sydney. The lowest client response rates were in Melbourne, Dandenong and Brisbane. Melbourne and Dandenong also had low law firm response rates. Thus it seems possible to discern general attitudes in different geographical areas towards participating in the research. There was no significant difference in the

proportion of survey responses or files from each of the Registry clusters, however.

103. The four participating Legal Aid Commissions gave us access to their files pursuant to their research functions. The same selection criteria for files were used. The letters forwarded to the relevant LAC clients simply asked whether they would participate in the client survey.

104. The overall response rate from LAC clients was similar to that from private solicitors' clients. Table 2.7 sets out the number of valid files and the number of clients who participated in the survey from each legal aid office.

TABLE 2.7 Legal Aid Commission Client Responses

LAC/Office	No. files	No. client surveys	Response rate
Adelaide	10	5	50.0%
LAQ	13	4	30.8%
VLA	6	2	33.3%
Newcastle	17	2	11.8%
Parramatta	18	3	16.7%
Sydney	15	2	13.3%
Total	79	18	22.8%

105. It can be seen that the three NSW offices had the lowest response rate from clients, although the VLA figure is based on very small numbers. One possible explanation for this is that the NSW offices had higher proportions of clients of non-English speaking backgrounds,¹⁵¹ who were less likely to respond to our

¹⁵¹ In the earlier profiling study it was found that the Sydney and Parramatta legal aid offices had relatively high proportions of non-English speaking background clients, while the Adelaide office had a relatively low proportion of such clients: Hunter, *Family Law Case Profiles*, 19.

request to participate in the research. The small numbers involved made it impossible to determine any statistical response bias, although it seems clear that once more, Adelaide files were over-represented, while Newcastle and Sydney files in particular were under-represented in the sample.

Files Analysed

106. In all, 176 files were analysed. In 58 of these the client was self-funded, in 105 the client was legally-aided (26 private sector; 79 public sector), and in 13 the client had both kinds of funding for their case. This section describes the characteristics of the clients and cases in the file sample overall, regardless of funding status or solicitor sector. Differences in these variables by funding status and sector are discussed at the beginning of chapter 3.

Client Demographics

107. Two-thirds of clients whose files were analysed were female.¹⁵² Clients' median age was 35 years, with the youngest aged 19 and the oldest aged 70. Half of the clients resided in metropolitan areas and half in country areas (as defined by Australia Post), although Victorian and South Australian files were significantly skewed towards metropolitan areas, while Queensland files were skewed towards country areas.¹⁵³

108. Only one third of clients were in paid employment at the beginning of their case. Of these, the largest single occupational group was professionals (8% of the total sample), but there was a fairly even spread of occupations represented.

152 Female: 66%, male: 34%.

153 Overall: metropolitan=54%, country=46%; Victoria and South Australia: metropolitan=70%, country=30%; Queensland: metropolitan=20%; country=80%; $\chi^2=16.378$, $df=3$, $p<0.005$.

The largest groups of those not in paid employment were performing home duties (30% of the total sample) or unemployed (24% of the total sample).

109. For some of those in paid employment, social security remained their major source of income. Social security was the main source of income for 57% of clients, while 28% supported themselves.¹⁵⁴

110. Information on amount of income was not available from the file in over one quarter of cases. This was most likely to occur in children-only cases. In cases involving property, parties are required to file a Form 17 (financial statement), which includes information on weekly income. Almost three quarters of clients for whom information was available had an annual before tax income of \$20,000 or less, while a further 18% had an annual income between \$20,001 and \$30,000. Summary figures are shown in Table 2.8.

TABLE 2.8 Files Analysed — Clients' Gross Annual Incomes

Client Group	Mean	Median	Maximum	Minimum	N
All clients	\$17,951	\$13,078	\$121,732	\$0	124
Clients in paid employment	\$30,796	\$24,440	\$121,732	\$2,392	35
Clients not in paid employment	\$12,900	\$11,336	\$36,296	\$0	89

111. The mean for those in paid employment was just under average weekly earnings in May 1998 (\$31,156 p/a; \$31,063 seasonally adjusted).¹⁵⁵

154 Information on income source was missing in 9% of cases.

155 ABS Catalogue No.6302.0, May 1999.

112. Two clients were of Aboriginal or Torres Strait Islander descent, and in two other cases the other party was Aboriginal.
113. Fifteen clients (fewer than 10%) were from a non-English speaking background. Only three of these required an interpreter, who was provided by the court in all cases, and by the solicitor in two of the three cases. This was considerably lower than the proportion of non-English speaking background clients and clients requiring an interpreter found in the earlier profiling study.¹⁵⁶ The difference may be partly due to the fact that the file sample included a higher proportion of clients from Adelaide and Brisbane, and a lower proportion from Melbourne and Sydney than did the profiling sample. A weakness of our recruitment method, however, was that it was not sufficiently tailored to clients from non-English speaking backgrounds. (Although we offered to have letters to clients translated, no solicitors indicated that we needed to do so. There is a difference, however, between clients responding to solicitors' letters written in English, and responding to requests to participate in research.) For these reasons, the file data may not fully represent the experience of non-English speaking background clients.

Reasons for Litigation

114. Most cases involved parties who had either recently separated and wanted to formalise arrangements concerning the children and/or property, or were involved in situations of ongoing dispute. Parties tended to be in conflict, often with one or both refusing to negotiate.
115. The issue precipitating legal proceedings was recorded by coders in 95 of the cases in the file sample. Fifteen of these cases (15.8%) involved one party about to relocate or having just

156 Hunter, *Family Law Case Profiles*, 179.

relocated a substantial distance from their previous home, and wanting orders either permitting relocation, or reflecting the change of circumstances on arrangements for child contact. Several of these cases involved the residence parent having left the child/ren with the other partner during the move, and then trying to regain residence. Relocation was prompted by getting a new job, seeking to escape a violent partner, wanting to live closer to family, or moving to join a new partner. Most cases involved permanent relocation, but some concerned a parent's wish to take the child overseas for a holiday, often to have contact with family overseas which the parent felt was important for the child's sense of cultural identity.

116. A further fifteen cases involved parties returning to court in order to amend previous orders (most usually contact orders).¹⁵⁷ These cases usually involved some form of change of circumstances, such as a party remarrying, changing work hours, or suffering a major illness. In addition, parties also wanted clarification of previous contact orders. Eight of the cases seeking amendment of previous orders (ie. over half of this category) were in Adelaide, and the rest were distributed fairly evenly across the other Registries. An additional four cases involved one party commencing proceedings after the other party had breached previous orders.

117. Thirteen cases (13.7%) began after the other party had "snatched" or threatened to snatch the child or children. These cases involved the non-residence partner taking the child/ren under the pretence of going on holiday (while actually moving permanently), not returning the child/ren after a contact visit, or taking the child/ren from school. In nine of these cases the

157 Twenty-six cases in all (14.8%) had had some form of previous proceedings. These generally had concerned residence and contact, although five also involved property. Most of the previous matters had occurred within the past five years (since 1994), but two matters had been going for over 10 years.

“snatcher” was the father, while the mother took the child in one case, and in another the father was afraid that the mother would do so, although she in fact did not. In one case the child was taken by the mother’s sister (the other party), and in the final case, both parents “snatched” the child at different times.

118. Two cases began after the mother, who had residence of the children, overdosed. The children were then taken by the father. In one the mother filed for recovery orders, while in the other, the paternal grandmother filed for residence. In another two cases the mother of the child had died and the father had left the child with the Department of Community Services (DOCS) in one instance, and with the child’s step-sister in the other. Both of these cases involved another relative applying for residence, with no resistance from the father.
119. Cutting across the above categories were 13 cases (14%) which appear to have been initiated after one of the parties had become involved with a new partner. These cases may have involved relocation because of the new partner, suspicions of the new partner (especially concerning possible violence and/or child abuse), or an antagonistic relationship between the former and new partner. For example in one case, the mother had remarried the father’s brother, resulting in extreme and intractable conflict between the parties.

Case Profiles

120. The majority of files analysed (82%, n=144) concerned children only, with the remainder (n=32) involving both children and property. The issues in dispute in the cases are set out in Table 2.9

TABLE 2.9 Files Analysed — Issues in Dispute

Issues Percent	Number of Cases	
All Cases	176	100.0
contact	167	94.9
residence	119	67.6
parental responsibility	35	19.9
specific issues	31	17.6
injunctions/restraining orders	47	26.7
child support	16	9.1
enforcement proceedings (relating to children)	11	6.3
dissolution	10	5.7
property	32	18.2
Property Cases	32	100.0
matrimonial home	31	96.9
sale of matrimonial home	14	43.8
cars	24	75.0
household possessions	17	53.1
bank accounts	16	50.0
superannuation	13	40.6
debts	7	21.9
business	5	15.6

121. The average number of issues in dispute was 2.7. This is very close to the average number of issues in dispute per case found in the profiling study (2.5).¹⁵⁸ The majority of cases (52%) involved only one child, with a further 31% of cases involving two children. On average, there were four forms of property involved in each property case.

122. The client was the applicant in two thirds of cases, and the respondent in the remaining one third. In the great majority of

158 Hunter, *Family Law Case Profiles*, 185.

cases there were only two parties.¹⁵⁹ Thirty-two percent of cases involved a child representative. This is a considerably higher proportion of cases with a child representative than was found in the profiling study (around 13%).¹⁶⁰ The most likely explanation for the higher proportion of cases with a child representative is the higher concentration of children-only (residence/contact) Form 7 cases in this data set. There were no notable differences in the proportion of cases with a child representative between legally-aided and self-funded cases, nor, in the legal aid group, between cases handled by LACs or by private solicitors.

123. Twenty-nine cases had already begun before the solicitor whose file was read became involved in the case. In 16 of the cases the client began by representing themselves, in 14 the client had already filed a Form 7 before obtaining legal representation, and in the remaining 13 the client had changed solicitors in the course of the matter. There was no evident pattern in the distribution of these cases by funding status or sector in which the case was ultimately handled.

Dispute Resolution

124. The majority of cases (66%) involved only the Family Court. Twenty-four percent of cases began in the Local or Magistrates Court but were transferred to the Family Court, while a further 9% of cases were run only in the Local or Magistrates Court. (One case had no court involvement, as the client lost contact before the Form 7 prepared on her behalf could be filed.) Most Local/Magistrates Court cases were conducted in NSW.¹⁶¹ The breakdown of Family Court cases by Registry is shown in Table 2.10.

159 Eighty-eight percent of cases involved two parties, while 11% involved three parties.

160 Hunter, *Family Law Case Profiles*, 206.

161 NSW Local Court cases=49 (including 12 in the Local Court Family Matters, Sydney, 6 in Parramatta, 6 in Picton and 4 in Port Macquarie); Qld Magistrate Court cases=9; Victorian Magistrates Court cases=3.

TABLE 2.10 Files Analysed – Family Court Registries

Registry	Number of cases	Percent
Adelaide	31	17.6
Brisbane	19	10.8
Canberra	1	0.6
Dandenong	10	5.7
Melbourne	11	6.3
Newcastle	36	20.5
Parramatta	28	15.9
Sydney	24	13.6
Townsville	5	2.8

(Note: total \neq 100% since some cases heard in more than one Registry, and some cases had no Family Court involvement)

125. Of cases involving the Family Court, 30% (n=47) were assigned to the standard track, 6% (n=9) were assigned to the direct track, and one was assigned to the complex track. The bulk of cases (64%), however, either settled before being assigned to a case management track, or did not have the designated case management track recorded on the solicitor's file.

126. As found in the profiling study, solicitor negotiations were the most frequently attempted form of dispute resolution, while Family Court counselling was the predominant form of PDR.¹⁶² The range of dispute resolution methods recorded in the cases is set out in Table 2.11. The percentage figures in the Table add up to more than 100%, since more than one dispute resolution method might be attempted in any case.

TABLE 2.11 Files Analysed – Dispute Resolution Methods

Method	Number of cases	Percent
Negotiations between solicitors	139	79.0
Family Court Counselling	111	63.1
Negotiation between parties	101	57.4
Solicitor negotiations with other party	64	36.4
Legal Aid Conference	24	13.6
Community-based mediation	14	8.0
Family Court mediation	6	3.4

127. Overall, an average of 2.6 dispute resolution methods were attempted per case.

128. The other party's funding status could not be discerned from the solicitor's file in 35% of cases (n=61). The other party was wholly self-funding or wholly legally-aided in around 15% of cases each, while the other party was wholly self-representing or partly self-funding and partly self-representing in around 10% of cases each. In most cases (78%) where the other party had legal representation for all or part of their case, they were represented by a private solicitor.

Client Surveys

129. A total of 113 clients completed the client survey. Of these, 62 were self-funded, 40 were legally-aided (22 from the private sector and 18 from the public sector) and 11 had both kinds of funding for their case. Since we had a smaller survey sample than the file sample (mostly due to the small number of surveys received from Legal Aid Commission clients), the profile of clients and cases in the survey sample potentially differed from the profile of clients and cases in the file sample. The profiles

from the survey sample are set out here, both in total and by funding status.

Client Demographics

130. Sixty-one percent of the clients participating in the client survey were women. A higher proportion of legal aid clients (65%) than of self-funding clients (57%) were women, but the difference was not statistically significant.
131. Clients' median age was 36 years, with a similar spread of ages as in the file sample. Legally-aided clients (median age 34 years) were significantly younger than self-funded clients (median age 39.5 years).¹⁶³
132. As in the file sample, around half of clients came from metropolitan areas and half from country areas (as defined by Australia Post), with no difference by funding status. Again, there was a skew towards metropolitan areas in Victoria and South Australia, and towards country areas in Queensland.¹⁶⁴
133. Thirty percent of clients were in full-time employment, 20% were in part-time or casual employment; 26% were engaged in home duties, and the remaining 24% were unemployed, full-time students, retired, or other pensioners. Unsurprisingly, self-funded clients were more likely to be in paid employment (69%) than were legal aid clients (28%). Of those in the workforce, the largest group (as in the file sample) were professionals (14%), followed by tradespersons and related workers (11%).
134. Two thirds of clients reported an annual before tax income of \$20,000 or less, including 42% of those in the workforce. Only 11% overall reported annual before tax incomes over \$50,000.

163 F=8.655, df=1, p<0.005.

164 Overall: metropolitan=54%, country=46%; Victoria and South Australia: metropolitan=65%, country=35%; Queensland: metropolitan=25%, country=75%.

The majority (80%) of those not in the workforce reported an annual income of \$10,000 or less. These reports indicate a fairly low income group of clients, consistent with a relatively high proportion of female, part-time workers. When compared with the clients' files, however, almost half of the clients reported a lower income than was recorded in their file.¹⁶⁵

135. Around half of the clients had ceased their education at or before the end of secondary school, while the other half possessed a post-secondary qualification.¹⁶⁶ Although legal aid clients were more likely to have no formal schooling or to have completed only primary school, and were less likely to have a bachelor degree or higher, they were more likely than self-funding clients to possess a certificate or diploma. Thus there was no clear linear relationship between level of education and funding status.
136. Only one client was of Aboriginal or Torres Strait Islander descent, and five were from non-English speaking backgrounds. Two said they had needed an interpreter when in court and/or when speaking to their lawyer, but in neither case had an interpreter been provided for them. The majority of clients were either Australian-born (81%), or born in another English-speaking country (14%). Clients from non-English speaking backgrounds were even more significantly under represented in this data set than in the files data set. This was presumably because of the greater level of communication involved in participating in a survey. This skew in the client data needs to be borne in mind when reading our results. The client survey data can be taken to be valid only for clients of English-speaking backgrounds.

165 Of the 62 cases in which information was available from both sources, 21 cases (34%) fell within the same income band, 13 clients (21%) reported a higher income in the survey than was recorded in their file, and 28 clients (45%) reported a lower income in the survey than was recorded in their file.

166 Highest grade of schooling or other education—at/before end of secondary school (53%), certificate or diploma (20%), bachelors degree or higher (15%), trade qualification (12%).

Case Profiles

137. Sixty-eight percent of the cases in the client survey concerned children only, while 31% concerned both children and property. Only one of the latter was legally-aided; as explained in chapter 1, Commonwealth guidelines virtually preclude legal aid funding for property matters. In one case, the client did not answer this question, and it was not possible to check the answer since there was no permission to view the client's file.
138. A child representative was appointed in 32% of cases, consistent with the high proportion of cases with a child representative found among the files analysed (see above).
139. The Family Court Registries involved in the cases included in the client survey are set out in Table 2.12. The three cases which did not involve a Family Court Registry were dealt with exclusively in a Local Court (in regional NSW).

TABLE 2.12 Family Court Registries in Surveyed Cases

Registry	Number	Percent
Adelaide	24	21.2
Brisbane	14	12.4
Canberra	1	0.9
Dandenong	8	7.1
Melbourne	8	7.1
Newcastle	17	15.0
Parramatta	17	15.0
Sydney	18	15.9
Townsville	3	2.7
No Family Court	3	2.7
Total	113	100.0

140. In terms of dispute resolution processes, clients reported that 75% of cases involved Family Court counselling, 69% involved lawyer negotiations with the client's former partner and/or their lawyer, 50% involved a judicial decision, 50% involved mediation, 25% involved a conciliation conference, 17% involved a Legal Aid Conference, and 11% involved discussions between the parties and/or other family members. The only, predictable, difference by funding status in this respect was that legal aid clients were more likely than self-funded clients to report that their case involved a Legal Aid conference. Clients' reports of dispute resolution processes used do not accord with the data from files. The significance of this discrepancy is discussed below, and in chapter 6 in relation to client satisfaction with dispute resolution processes.

141. Clients were finally asked about the other party's funding status. Ten clients (9%) did not know the answer to this question. Forty-four percent said their former partner had paid their own lawyer, 40% said their former partner had received legal aid, and 21% said their former partner had represented themselves. There was some overlap between these categories, as clients were asked to indicate all that applied rather than choose only one category. Three clients said their partner had not appeared or responded to their case, three said their partner had been represented wholly or partly *pro bono*, and one said their partner was represented by a Community Legal Service. Again, these responses do not wholly correspond with available file data, although usually this was in a situation where the other party had had a combination of funding/representation, and the client listed only one of the options.

Reliability of Data

File Data

142. Files represent the most superficially “objective” source of data in this study. There were two potential problems arising from the file data, however.
143. The first problem was that of missing data. This was apparent to the coder in around one quarter of the files. Most commonly, information about the case was incomplete because the case had already commenced before the client came to see the solicitor (typically after the Form 7 had been filed). Hence, the solicitor’s work did not start until the post-filing stage. Two files had been completely stripped by the solicitor before being made available to the researchers, making it very difficult to reconstruct what had occurred in those cases. In other cases, one or more documents was evidently missing (especially documents filed by the other party), and there were sundry other pieces of information missing. As noted above, information on clients’ income and source of income, and on the other party’s funding status, was frequently unavailable. The missing data tended to impact on the ‘inputs’ and ‘time’ elements of cases.¹⁶⁷
144. A further issue in relation to file data was possible variability between coders, particularly when elements of the coding form required the coder to make judgements rather than record “facts”. The bulk of the files were analysed by two separate coders, with a further four separate coders working on the remainder. The major issue of variability that emerged was that of coder bias in identifying the solicitor’s approach to the client, in scoring the solicitor on a number of client communication/

167 It was not possible to ‘fill in’ the missing data by reference to Court files, due to (a) the logistical difficulties of identifying and retrieving the Court files from the relevant Registries, and (b) the fact that even if this was achieved, the court file would only provide court documents, not the information on solicitors’ activities that was of most value.

case management questions, and in assessing the demands placed on the solicitor by the client and/or the other party. These questions were included on the coding form to provide a check against solicitors' self-reported approaches, practices and impressions gained from the interviews. It emerged, however, that the two main coders and the "other" coders collectively produced significantly different results on these questions. Steps were then taken to examine the data while controlling for coder bias. The results of these questions are reported where relevant, however the material gained from files on 'quality' of services yielded little information of value.

Survey Responses

145. In 102 cases the client both participated in the survey and allowed the researchers to view their file, hence in these cases it was possible to compare clients' answers on the survey to the factual information obtained from their files. In general, there were considerable discrepancies between the two sources. Sometimes these were readily explicable, due to answers being given at different points in time, or the client responding in relation to their whole history of family law proceedings, whereas the file only covered a part of those proceedings. In relation to clients' funding status, the design of the survey form did not adequately cater for clients who were both legally-aided and self-funded, leading to under-reporting of the latter status. In many instances, however, clients' responses revealed their possession of limited information and inaccurate perceptions about their cases.
146. We divided the factual discrepancies into two categories – those relating to major test variables, in which case, unless there was a defensible reason for the difference, we corrected the client's response; and those relating to other variables, in which case we allowed the difference to remain, but comment upon it at relevant points. The primary item in the first category was the

client's funding status. The second category included the dispute resolution method/s used, the other party's funding status, and details concerning the client's legal aid funding.

147. In addition, there was a small number of cases in which the client's (negative) assessment of the processes and outcome of their case, and of their lawyer, differed markedly from the impressions gained from the file and from the solicitor. The majority of these were self-funded cases. Clearly there is nothing that can be done to 'correct' for this kind of incompatible data, but it does demonstrate that in at least some cases where clients expressed strong dissatisfaction with processes, outcomes or lawyers, their view was based on debatable interpretations of what had occurred in the case.
148. A final issue that arose in the client surveys was the fact that we gave clients the option of answering by telephone or by mail. This was designed to maximise response rate, but potentially affected the nature of the responses. Fifty-eight percent of clients responded by telephone and 42% responded by mail. There was no statistical difference between the two groups in terms of funding type, representation type or type of case.
149. In theory, telephone interviews may introduce biases not present in mail responses, due to the way in which questions are asked, or a desire to please the interviewer in answering.¹⁶⁸ However there proved to be no statistical difference between telephone and mail respondents in terms of clients' reported level of satisfaction with their lawyers, with the processes used or time taken to resolve their case, or with the outcome of the case.
150. There were a few questions that clients found difficult or that required explanation over the telephone. On the questions

168 Robert B. Burns, *Introduction to Research Methods* (Longman, Melbourne, second ed., 1994), 363.

regarding funding for the case, telephone respondents whose cases had involved multiple applications over a lengthy period of time were asked to respond in relation to the most recent issue or round of litigation, whereas this additional instruction was not available to mail respondents. This may help to explain some of the discrepancies between files and survey responses in relation to funding and the nature of the case. On the question concerning the methods used to try to resolve the case, clients interviewed by telephone had trouble differentiating between methods, which sheds further light on discrepancies between surveys and files. There were some significant differences between mail and telephone responses in this respect, which suggests that interviewers tended to resolve clients' queries by recording a 'yes' response, while mail respondents took the opposite approach.¹⁶⁹ Clients responding by telephone also required a few of the 'quality' questions to be read over and needed to think about their answers, but this merely replicated the process a client responding by mail would go through themselves in answering the relevant questions.¹⁷⁰ Hence, it appears that client survey responses were not biased by the methodology in any consistent way.

151. Finally, it is generally the case that answers to open ended questions are more difficult to obtain on mail surveys.¹⁷¹ Predictably, then, clients responding by telephone were significantly more likely than clients responding by mail to make additional comments in the space provided at the end

169 Clients responding by mail were significantly less likely to say that their case had involved mediation ($\chi^2=5.312$, $df=1$, $p<0.05$), discussions between their lawyer and the other party and/or their lawyer ($\chi^2=6.357$, $df=1$, $p<0.05$), and a judge's decision ($\chi^2=6.066$, $df=1$, $p<0.05$). This issue is discussed further in chapter 6.

170 The questions that tended to slow clients down in telephone interviews were: "my lawyer handled the other side well", "the result in my case was what I expected before I saw my lawyer", and "the result in my case was the same as my lawyer led me to expect". In each instance the client was asked to indicate their response to the proposition on a 5 point scale ranging from "strongly disagree" to "strongly agree".

171 Burns, *Introduction to Research Methods*, 363.

of the survey.¹⁷² Nevertheless, 83% of clients overall made additional comments — all but one of the telephone respondents and 62% of the mail respondents — so those responding by mail were well represented in the qualitative data derived from the surveys.

Lawyer Interviews

152. As noted above, 20 supplementary interviews with non-participating lawyers were conducted, which enabled us to test the hypothesis that our participating lawyers had higher standards than those who did not agree to participate (hence were more willing to allow their clients to be questioned and to open their files to researchers). If this was the case, the lawyers interviewed could not be said to be a representative sample of family lawyers, and consequently, the interview data may not be generalisable. As discussed earlier, the profile of the non-participating lawyers turned out to be somewhat different from that of participating lawyers, although the only difference that was statistically significant was the amount of legal aid work undertaken by the two groups (non-participating lawyers undertaking a considerably lower proportion of legal aid work in family law).
153. In responses to the interview questions concerning quality of legal services, some distinguishing trends did emerge. Non-participating lawyers tended to value “experience” more highly in becoming a good family lawyer, while participating lawyers tended to see the characteristics of a good family lawyer as developing from both experience and innate qualities. This difference is no doubt attributable to the fact that non-participating lawyers were generally more “experienced” (in terms of years in practice and accreditation) than their

172 $\chi^2=26.554$, $df=1$, $p<0.001$.

participating counterparts. Participating lawyers were more likely to say that clients would expect to settle their cases if educated about the system, whereas non-participating lawyers were more likely to think that clients do not necessarily expect to settle (and were less likely to intervene in these perceived expectations). Participating lawyers were also more likely to have some kind of quality assurance system in their practice than were non-participating lawyers. None of these trends reached statistical significance, however.

154. The only significant difference between the two groups related to the means by which lawyers thought they had developed their skills. Participating lawyers were significantly more likely to say that other lawyers had been important in their skill development (through mentoring, peer exchange or seeking advice from counsel), while non-participating lawyers were significantly more likely to say that no other lawyers had been important in their skill development.¹⁷³ This factor was not affected by the proportion of legal aid work undertaken in family law. Its import in terms of the research is somewhat difficult to gauge. One possible interpretation is that the participating lawyers possess a particular professional ethos, which involves gaining from other members of the profession, and “giving back” to the community in the form of both legal aid work and participation in research. This may help to explain why the participating lawyers were prepared to participate while others were not, but it does not suggest any difference in practices between the two groups in relation to clients.
155. Of course, due to the study parameters, the one group of lawyers we did not reach were those who handle exclusively property matters. The research findings clearly apply to family lawyers doing children’s matters, but may not extend to the ‘property only’ group.

173 $\chi^2=17.631$, $df=1$, $p<0.001$.

Inputs

156. Case “inputs” include both client and case characteristics, and lawyer characteristics and activities. The latter may obviously be related to the former. This chapter therefore considers, in relation to self-funded and legally-aided cases, legal aid cases handled by in-house and private solicitors, and the incomes of self-funded clients,¹⁷⁴ whether there are any differences in: client demographics, the nature of the cases, the ‘difficulty level’ and complexity of cases, solicitors’ activities and the distribution of those activities, time spent with the client, and solicitors’ status and experience. The majority of this information is derived from case files, with some additional material from lawyer interviews.

157. As set out at in chapter 2, 105 of the clients whose files were analysed were legally-aided (60%), 58 were self-funded (33%), and 13 were both legally-aided and self-funded (7%). Among the legal aid group, 79 were in-house cases (75%), due to our guaranteed access to Legal Aid Commission files.

Client Demographics

158. Legal aid clients were significantly younger on average (mean age 33 years) than self-funding clients (mean age 41 years),¹⁷⁵ and (not surprisingly) less likely to be in paid employment.¹⁷⁶

174 Income was treated as a continuous variable for the purpose of statistical testing, since there were too few clients with incomes over \$40,000 (n=7) to allow categorical comparisons between “high” and “low” income clients.

175 $F=27.432$, $df=1$, $p<0.001$.

176 $\chi^2=52.705$, $df=1$, $p<0.001$.

Nevertheless, 10% of legal aid clients had their major source of income as their own earnings (evidently very low), and 19% of self-funding clients were primarily reliant on social security.¹⁷⁷ The average annual income of self-funding clients was \$33,108 (median \$23,400), while that for legally-aided clients was \$13,233 (median \$11,362).¹⁷⁸ The average annual income for clients with mixed funding was \$14,196 (median \$12,428) — only slightly above the average for legal aid clients. All of the non-English speaking background clients whose files were analysed, and all of the cases involving Aboriginal parties, were legally-aided.

159. Within the legal aid group, in-house clients were significantly younger on average (mean age 32 years) than private solicitors' clients (mean age 36 years),¹⁷⁹ and all but one of the non-English speaking background clients and cases involving Aboriginal parties were handled by an in-house practice. In-house clients were also more likely to be female, while private solicitors' legal aid clients were more likely to be male.¹⁸⁰ This accords with the findings of the profiling study.¹⁸¹ Further, in-house clients were more likely to live in metropolitan areas, while private solicitors' legal aid clients were more likely to live in country areas.¹⁸²

177 This was similar to the proportion of self-funding clients found to be dependent on social security in the profiling study (17%): Rosemary Hunter, *Family Law Case Profiles* (Justice Research Centre, Sydney, 1999), 73.

178 cf. Julian Gardner, 'Areas of the Legal System Which Cause Excessive Demands on Legal Aid' (1985) 15 *Queensland Law Society Journal* 19 at 21, who notes that 75–85% of legal aid applicants have household incomes below the poverty line.

179 $F=5.028$, $df=1$, $p<0.05$.

180 $\chi^2=5.235$, $df=1$, $p<0.05$.

181 Hunter, *Family Law Case Profiles*, 176.

182 $\chi^2=8.847$, $df=1$, $p<0.005$. This is consistent with overseas research findings that access to in-house legal aid services can be a problem in rural areas. "There is substantial evidence that, in salaried schemes, those living close to a staffed office make much greater use of it than those who are far away": Tamara Goriely, *Legal Aid Delivery Systems: Which Offer the Best Value for Money in Mass Casework? A Summary of International Experience* (Lord Chancellor's Department, Research Series No.10/97, December 1997), 4.

160. There were no significant differences in the sex, age or geographical location of self-funding clients on the basis of income.

Cases

161. There were systematic differences between the issues involved in legally-aided and self-funded cases, arising from restrictions in the legal aid guidelines on the types of matters that will be funded. The guidelines effectively preclude solicitors from attending to the entirety of the issues that a legal aid client may present.

162. The great majority of cases involving both children and property, for example, were self-funded.¹⁸³ The one legally-aided case that involved property had commenced prior to the legal aid guidelines introduced in July 1997. Three cases involving property were both legally-aided and self-funded. Not all self-funded cases involved property, however: 28% concerned children only.

163. In relation to other issues, spouse maintenance was only dealt with in self-funding cases (2 cases), and child support was significantly more likely to be dealt with in self-funding than in legal aid cases.¹⁸⁴ Dissolution was also more likely to be dealt with by the solicitor in self-funding cases, although there was a greater difference between public and private sector solicitors in this regard, with in-house cases least likely to include

183 Note that at the time these cases were run, eligibility for legal aid for property proceedings relating to the matrimonial home was confined to cases in which the applicant's equity in the matrimonial home was less than \$20,000 (and if the equity was less than \$10,000, aid would be granted for negotiations only). On 1 November 1999, the maximum equity in the matrimonial home an applicant could have and still be eligible for legal aid for property proceedings was increased to \$100,000.

184 $\chi^2=14.219$, $df=1$, $p<0.001$.

dissolution.¹⁸⁵ Enforcement proceedings were somewhat more likely to be taken in cases involving both legal aid and private funding, although again the total number of such cases was small (11 cases). Indeed, the need for enforcement might have been one of the reasons why a case was funded in both ways (with legal aid not covering the enforcement proceedings — see chapter 5). All of the legally-aided cases involving enforcement proceedings were run by a private solicitor (none by an in-house practice).

164. As would be expected from the above, self-funded cases had an overall higher mean number of issues in dispute (3.0) than did legal aid cases (mean 2.5).¹⁸⁶ However when only private sector cases were considered, there was no significant difference by funding type. The major difference was between private sector cases (mean 2.9 issues in dispute) and those handled by in-house solicitors (mean 2.3 issues in dispute).¹⁸⁷ Cases involving both forms of funding were similar to other private sector cases in this respect (mean 3.1 issues in dispute).

165. Whether clients were applicants or respondents to cases did not vary significantly by funding status, representation type or client income. Cases seeking variations of previous orders were more likely to be self-funded or to have both types of funding than to be solely legally-aided.¹⁸⁸ Again, legal aid guidelines restrict the availability of grants for this type of case.

166. In relation to Court usage, legal aid cases were somewhat more likely to use a Local Court only, while self-funded cases were

185 Case involved dissolution by private/public sector: $\chi^2=3.456$, $df=1$, $p=0.063$ ($n=10$ cases). LAQ was the only Legal Aid Commission in the sample to handle dissolution matters. There was no significant difference between self-funded and legally-aided cases handled by private solicitors.

186 Mann-Whitney test: $Z=-2.463$, $p<0.05$.

187 Mann-Whitney test: $Z=-3.292$, $p<0.005$. There was no significant difference in the mean number of issues in dispute between Legal Aid Commissions.

188 $\chi^2=15.152$, $df=2$, $p<0.005$.

somewhat more likely to use both a Local Court and the Family Court, but the difference did not reach statistical significance.¹⁸⁹ Within the legal aid group, in-house cases were more likely to involve the Family Court or a Local Court alone, while cases handled by private solicitors were more likely to use both a Local Court and the Family Court.¹⁹⁰ Indeed, usage of both courts was strongly associated with private solicitors, while use of a Local Court only was associated with in-house solicitors (particularly in NSW).¹⁹¹

167. Only one case in the sample was assigned to the complex track in the Family Court, and that was a self-funding case.¹⁹² All of the direct track legal aid cases were handled by in-house solicitors.¹⁹³ Cases with both types of funding were somewhat more likely to have a case management track assigned, indicating that they tended to advance further in the Family Court process than other cases (another potential cause for having both types of funding).
168. In terms of dispute resolution processes, cases handled by private solicitors were more likely to involve negotiation between solicitors than were cases handled by in-house solicitors.¹⁹⁴ A relatively high proportion of cases with both legal aid and private funding included solicitor negotiations, legal aid conferences and Family Court counselling. While the

189 $\chi^2=5.252$, $df=2$, $p=0.072$.

190 $\chi^2=9.445$, $df=2$, $p<0.01$.

191 $\chi^2=12.652$, $df=2$, $p<0.005$.

192 Few cases overall are assigned to the complex track. According to the ALRC, for example, only 7% of cases listed for hearing in the Adelaide Registry in 1997–98 were complex track cases: ALRC, *Discussion Paper No.62: Review of the Federal Justice System* (1999), 359. It is therefore not surprising that few complex track cases appeared in our sample.

193 It should also be noted that allocation to the standard or direct track is not uniform across Registries. Among cases listed for hearing in 1997–98, less than 25% in Sydney and Melbourne, compared to 26% in Parramatta and 42% in Brisbane were direct track cases: ALRC, *ibid*.

194 $\chi^2=5.153$, $df=1$, $p<0.05$.

numbers were too small to discern statistical significance, these findings are again consistent with cases with both types of funding travelling further in the Family Court process. This is reinforced by the fact that cases with both types of funding had the highest mean number of dispute resolution processes attempted per case (3.4), followed by self-funding cases (2.7) and legal aid cases (2.5).¹⁹⁵

169. Self-funding parties who attempted to negotiate directly with the other party had significantly higher mean annual incomes (\$41,000) than those who did not (\$18,000).¹⁹⁶ This suggests that higher income clients feel more empowered than those with lower incomes to attempt to resolve their family law dispute themselves.

170. In summary, the major differences in case profiles emerging from the file analysis were not between self-funding and legally-aided cases but between those handled by private sector or in-house solicitors, with the latter having fewer issues in dispute. Cases with both types of funding tended to go further in the court process and to involve a greater number of dispute resolution processes, even though the demographic data indicated that clients in these cases were financially in a similar position to legal aid clients.

Demands and Difficulties

171. Private solicitors were asked in the interviews whether there were any differences in the kinds of demands they received from their legally-aided and self-funded family law clients. The majority (80%, n=48) felt that legal aid clients were more demanding, and most commonly did not elaborate further.

195 Kruskal-Wallis $\chi^2=6.507$, $df=2$, $p<0.05$.

196 Man-Whitney test: $Z=-2.340$, $p<0.05$.

Where demands were specified, solicitors predominantly claimed that legal aid clients ring more and often expect immediate attention or action, as if they are the only person in the world. To a lesser extent, solicitors also claimed that legal aid clients take a greater amount of time, are unreliable or less cooperative, require more reassurance, are unreasonable, and cost more money. The most popular explanation for why legal aid clients are more demanding was that they are not paying for their service, so they have no idea of the costs of their demands.¹⁹⁷ Some also asserted that legal aid clients had nothing else to do, so they could spend more time harassing their solicitor: "...they will be at home and they have got nothing else to do or worry about than this case"; "they are down the street with nothing to do..."

172. The next most popular explanation for why legal aid clients are more demanding was that they came from situations of poverty, with related health and social relationship problems and fewer support systems, thus they have special needs and require more time. A smaller number of solicitors explained that the issues and cases related to legal aid clients were more complex and emotional, and thus more demanding. Their cases also involved children's issues as opposed to property issues, and children's issues were usually more demanding cases. Some also considered that their legal aid clients had more difficult personalities and were less intelligent, hence were unable to resolve issues, make decisions or take responsibility for their own lives without help:

A lot of legal aid clients are not very bright and they have no ability to resolve a dispute or think something through themselves. A lot of...privately funded clients are brighter and just don't need their hand held so much or can work things out for themselves.

197 This "moral hazard" argument is also found in the literature on the costs of legal aid. See eg. Gwyn Bevan, Tony Holland and Martin Partington, *Organising Cost-Effective Access to Justice* (Social Market Foundation, 1994).

173. Two solicitors noted that female legally-aided clients are particularly demanding because of their exposure to domestic violence. These women were described as first appearing in a “raw state”, “very fragile” and “terrified”. Their cases are more demanding because of the difficulties of obtaining succinct instructions “from a shaky woman who is barely coherent”, protecting the children, providing reassurance, and just dealing with the “unbelievable soap opera” of their lives.
174. Several solicitors explained their strategies for reducing or dealing with the demands of legal aid clients, either by having the client deal with the secretary rather than themselves, attempting not to take on “extreme” legal aid cases, or referring cases back to the Legal Aid Commission. The files also revealed instances of solicitors going out of their way to provide support and assistance to clients in particularly difficult situations.
175. Self-funding clients were seen to be less demanding and to have a greater awareness of costs. They were described as better able to understand family law, better able to resolve issues themselves and to take responsibility for their own lives, more focused, more selective with their demands, more appreciative of the service they received, and more reliable and responsible because they were employed:

If they're working, by and large, they have a reasonable social relationship. They have a fixed residence, rented or owned. They demonstrate to some degree reliability and responsibility because they're fulfilling their employer's demands.

176. Solicitors explained that if a self-funded client was too demanding, then the main strategy in response was to send them an account. A number of solicitors also noted that as the client had been provided with a costs agreement, they are aware of the costs of ringing constantly, and can do so if they wish, but will be charged accordingly.

177. When analysing the client files, coders indicated the presence or absence of a range of possible demands upon the solicitor from the client and/or the other party. These included whether there were frequent letters or phone calls from the client or the other party, whether the client failed to attend interviews or court, whether the client or the other party had been difficult to contact, whether the client or a child of the client had experienced significant illness, whether the other party had been particularly difficult, or had been unrepresented for part or all of the case, and whether there had been particular difficulties or frequent correspondence with the Legal Aid Commission. The last of these issues is discussed in chapter 5. There was an element of coder bias in the responses to most of these questions, which was taken into account either by analysing each coder's responses separately, or excluding the responses of the minor coders, as appropriate.
178. There were no significant differences by funding type in relation to the issue of the client's or child's illness, nor in relation to whether the other party was partially or wholly unrepresented, or whether the other party was particularly 'difficult'. The latter category included cases where the other party was especially difficult to deal with, particularly vexatious, deliberately increased costs for the client, fabricated allegations, manipulated the child and/or was generally unreasonable.¹⁹⁸ In relation to illness, the coding category included illness of either the client or a child. However when these alternatives were disaggregated, it emerged that all clients suffering from some form of illness or serious injury during the case (n=6) were legally-aided, with the

198 For example in one case, the other party filed six affidavits for the final hearing, necessitating considerable work in preparing responses, and then withdrew all evidence just before the hearing began; in another, the other party secretly initiated a psychiatric report to ascertain the children's wishes concerning residence; in a third, the other party had previously worked in a law firm, and so was able to exploit delays: he deliberately caused set backs, pushed up costs, was manipulative, nasty, had unrealistic expectations, ensured that the conflict was intractable, and in the words of the solicitor, maximised his "nuisance value".

majority (n=4) represented by in-house solicitors. Three of the cases required the client to be hospitalised.

179. Contrary to the solicitors' impressions noted above, legally-aided clients were not more likely than self-funding clients to subject their solicitor to frequent phone calls and correspondence (n=27). In the private sector, self-funding clients, legally-aided clients, and clients with both types of funding were equally likely to make frequent contact with their solicitor, while in-house legal aid clients were much less likely to do so.¹⁹⁹ Further, although legally-aided clients may not be cost conscious, sanctions are available against them. In the three cases in the sample in which a legally-aided client could be identified as "excessively" demanding, the client's grant of aid was eventually terminated.
180. Although in-house legal aid clients were less demanding in relation to phone calls and correspondence, they accounted for almost all cases in which the client failed to attend conferences or court,²⁰⁰ or was difficult to contact.²⁰¹ This lends support to the more empathic view of legal aid clients outlined above, although it is confined to those dealt with by in-house solicitors. Difficulties in contacting or serving the other party were also more likely to arise in in-house than in private sector cases.²⁰² Conversely, major problems with the other party were

199 Frequent phone calls/letters from client were recorded in 26% of private sector cases but only 3% of in-house cases. Within the private sector, frequent phone calls/letters from clients were recorded in 28% of self-funding cases, 25% of legally aided cases and 23% of cases with both types of funding. Note that the assessment regarding frequent phone calls to solicitors was based on all records of phone calls on the solicitor's file, including phone messages that might not have been returned. There is no reason to believe that the files give a misleading impression of the level of contact from clients in legal aid cases.

200 Client failed to attend conferences or court in 25% of in-house legal aid cases, but no legal aid cases handled by private solicitors, no self-funded cases and only 1 case involving both private and legal aid funding.

201 The client was difficult to contact in 30% of in-house legal aid cases, but no legal aid cases handled by private solicitors and only one self-funding case.

202 $\chi^2=4.413$, $df=1$, $p<0.05$.

significantly more likely to arise in legal aid cases handled by private solicitors.²⁰³

181. When the different types of demands imposed by clients were totalled (leaving aside difficulties in dealing with the Legal Aid Commission), the average number of demands on the solicitor per case was 1.2 (out of a possible total of 8). There was no significant difference between the mean number of demands per case imposed by legally-aided and self-funding clients on private solicitors (0.94 and 0.96 respectively). There was a significant difference, however, between private sector clients (mean 0.96 demands per case) and in-house clients (mean 1.4 demands per case).²⁰⁴ At the same time, female clients were on average significantly more demanding (mean 1.3 demands per case) than male clients (mean 0.8 demands per case).²⁰⁵
182. This data indicates that legal aid clients do not impose greater demands on private solicitors than self-funding clients. Solicitors' assertions that they do so may arise from a perception that self-funding clients are more independent and sophisticated than legally-aided clients,²⁰⁶ from a tendency to hold legal aid clients to a higher standard of "reasonableness", given that they

203 $\chi^2=6.978$, $df=1$, $p<0.01$.

204 Mann-Whitney test: $Z=-2.689$, $p<0.01$. There was no significant difference between Legal Aid Commissions in this respect. Again, there is no reason to believe that the files analysed may have created a misleading impression — in-house lawyers do not appear to have kept more extensive records than private solicitors, and private solicitors do not appear to have varied their recording practices according to the funding status of their clients.

205 $Z=-2.950$, $p<0.005$. This was particularly evidence in relation to excessive contact with the solicitor, with six of the seven clients so identified being women.

206 See Gwynn Davis, Stephen Cretney and Jean Collins, *Simple Quarrels: Negotiating Money and Property Disputes on Divorce* (Clarendon Press, Oxford, 1994), 80, 97; Christine Parker, 'The Logic of Professionalism: Stages of Domination in Legal Service Delivery to the Disadvantaged' (1994) 22 *International Journal of the Sociology of Law* 145.

generate little revenue and are in receipt of public money,²⁰⁷ or from solicitors' inability to solve many of the problems presented by legal aid clients. Legal aid clients do, however, impose greater demands on in-house solicitors than they do on private solicitors. The nature of those demands is quite particular — relating to other difficulties in the client's life, and tending to make communication with the client more difficult rather than creating an issue of 'excessive' communication. There may also be an independent influence of client gender. Within both the private and public sector, cases with female clients involved a higher mean number of demands per case.²⁰⁸

183. A number of solicitors pointed out that legal aid clients also tend to be more demanding because they are “social victims”, eg. non-English speaking, illiterate, or from a background of severe domestic violence. In analysing the files, coders also recorded the presence of a range of potentially ‘aggravating’ factors in a case, such as alcohol, drug, psychiatric, English language or literacy problems, allegations of violence and child abuse, cultural or religious issues, persistent non-compliance with agreements or breaches of orders, and acting independently of the solicitor (eg. the client filing applications on their own, without the solicitor’s knowledge). An ‘other’ category was also included, which yielded such matters as gambling and criminal charges. The incidence and gender breakdown of these factors is shown in Table 3.1. (M and F = male and female; o.p. = other party)

207 Davis et al., *ibid.*, 77; Jack Katz, ‘Representing the Poor’, in Richard L. Abel (ed.), *Lawyers: A Critical Reader* (New Press, New York, 1997), 253–54; Parker, *ibid.*, 145–168.

208 Private sector clients: male mean = 0.7, female mean = 1.2 demands per case; in-house clients: male mean = 1.2, female mean = 1.5 demands per case. While the in-house difference was not significant, the private sector difference was significant: Mann-Whitney test: $Z=-2.217$, $p<0.05$.

TABLE 3.1 Aggravating Factors in Family Law Cases

Factor	M client	F client	M o.p.	F o.p.	Both	cases	% cases
Alcohol problems	4	4	16	7	4	35	19.9
Drug problems	3	3	16	8	3	33	18.8
Psychiatric problems	6	9	11	9	3	38	21.6
Violence allegations ²⁰⁹	15	3	49	7	15	89	50.1
DV Order	4	36	4	9	6	59	33.5
Child abuse allegations	5	4	14	4	9	36	20.5
Substantiated child abuse	1	3	6	2	1	13	7.4
English language problems	2	1	0	0	0	3	1.7
Literacy problems	2	2	0	0	0	4	2.3
Cultural/religious issues	0	5	3	4	4	16	9.1
Non-compliance	3	4	22	17	17	63	35.8
Acting independently	8	7	6	2	3	26	14.8
Other factors	0	0	8	2	0	10	5.7

184. It can be seen that other parties tended to be the subject of allegations of antisocial behaviour (alcohol, drugs, violence, child abuse, non-compliance with agreements or orders) more than clients. The most likely explanation for this is that the clients who agreed to participate in the research tended to be fairly functional (the issue of the limited response from NESB clients has already been discussed), and perhaps also felt themselves to be 'in the right' in their cases. It can also be seen that most of the factors were more likely to arise in cases involving female clients than in cases involving male clients.

185. When factors affecting the *client* (rather than the other party alone) are considered, there was no significant difference in the

209 Domestic violence was raised as an issue but not recorded here in six further cases. In three of these cases the violence was allegedly perpetrated by a third party; in two cases the solicitor asserted that violence was important in the case, but there was no evidence of this on the file; and in one case the client said that domestic violence was important in the case but the solicitor had never asked about it.

incidence of psychiatric problems, domestic violence orders, substantiated child abuse, or acting independently of the solicitor, by funding status. Nevertheless, all the cases in which the client's psychiatric disorder made it difficult for them to convey clear instructions to their solicitor and to understand the court process (n=5) were legally-aided, with most (n=4) represented by in-house solicitors.

186. Alcohol problems²¹⁰ and allegations of violence against the other party²¹¹ were significantly more likely to occur in legal aid cases, and these cases also accounted for all of those involving English language problems, eight of the nine cases involving drug problems, three of the four involving literacy problems, and a predominance of those in which the client persistently failed to comply with agreements or orders.²¹² While allegations of child abuse (against any party) were least likely to occur in self-funding cases, however, they were most likely to occur in cases involving both forms of funding.²¹³

187. As noted in the previous chapter, all of the clients with English language problems were dealt with by in-house practices. In-house solicitors also dealt with all of the legal aid cases involving cultural or religious issues, and most of those in which the client acted independently of the solicitor. In addition, although these categories were not included on the coding sheet, in-house solicitors dealt with most of the cases in which the client was isolated and suffered from problems associated with having no stable support system (4/5), and in which the client was identified as being particularly "needy" or "high maintenance", ie. anxious, hesitant, uncertain, very distressed by the proceedings, and needing extra reassurance (3/5).

210 $\chi^2=4.314$, $df=1$, $p<0.05$.

211 $\chi^2=8.582$, $df=1$, $p<0.005$.

212 $\chi^2=3.020$, $df=1$, $p=0.082$.

213 $\chi^2=6.846$, $df=2$, $p<0.05$.

188. The mean number of coded factors affecting the client per case was 1.5, with legal aid cases having a mean (1.8) twice that of self-funding cases (0.9). Cases with both legal aid and self-funding resembled pure legal aid cases in this respect (mean 1.8).²¹⁴ There was no overall significant difference between legal aid cases handled by in-house and private solicitors. Neither was there any significant difference between Registry clusters, although Dandenong cases had the highest mean number of factors affecting the client per case (2.3).
189. In terms of factors (allegedly) affecting any of the parties to the case, the mean number operating per case was 2.5, with again a significant difference between legal aid cases and cases having both types of funding (2.8) and purely self-funded cases (1.7),²¹⁵ and Dandenong cases having the highest mean (3.6).
190. This data indicates that the problems raised and experienced by clients in legal aid cases tend to be more extensive than those in self-funding cases. The data also demonstrates no overall difference, but some different patterns of aggravating factors between in-house and private solicitors' legal aid cases. The ALRC has recommended that LACs should implement streaming procedures to ensure that the most vulnerable and/or dysfunctional clients should be dealt with in-house.²¹⁶ The file analysis indicates that this is already occurring to a large extent, although it also suggests that there are far more clients with special needs than in-house practices alone can handle.

214 Kruskal-Wallis $\chi^2=13.306$, $df=2$, $p<0.005$.

215 Kruskal-Wallis $\chi^2= 9.704$, $df=2$, $p<0.01$.

216 Australian Law Reform Commission, *Report No.89: Managing Justice — A Review of the Federal Civil Justice System* (Commonwealth of Australia, 2000), 335–36, 348.

Phone Calls, Correspondence and Personal Attendances

191. In interviews, solicitors asserted that legal aid clients receive a poorer service than self-funded clients, in relation to matters such as the number and length of phone calls, and the amount of correspondence sent. In addition, as noted in chapter 1, previous research comparing the amount of time devoted to cases by private and in-house legal aid lawyers has generally found that salaried lawyers tend to spend less time per case.²¹⁷ Although we were unable directly to measure time spent per case due to the absence of time recording on legal aid files, we were able to make detailed records of solicitors' activities on each file, including phone calls and correspondence, and this in turn provided an indirect measure of time spent per case.
192. In the cases in our file sample, solicitors generated an average of 23.3 pages of correspondence, perused 27.6 pages of documents, engaged in 20 short phone calls (of 5 minutes or less) and 17 long phone calls (of more than 5 minutes), and had four personal attendances with the client per case. However, these figures varied significantly by funding status, and other key variables.
193. The mean number of each type of activity was higher in self-funding cases than in legally-aided cases, although when looking at the private sector alone, contrary to solicitors' claims, there was no significant difference between self-funding and legally-aided cases. Cases with both types of funding had the highest means of all, as shown in Table 3.2

217 Goriely, *Legal Aid Delivery Systems*, 1, 25-26, 73; Ab Currie, 'Legal Aid Delivery Models in Canada: Past Experience and Future Developments', in *Legal Aid in the New Millennium* (Papers from the International Legal Aid Conference, University of British Columbia, Vancouver, 16-19 June 1999), 8.

TABLE 3.2 Private Solicitors' Activities on the Case by Funding Status

Activity	SF mean	LA mean	Both mean
Letters from solicitor (pages)	33.1	24.5	44.2
Perusal of documents (pages)	44.6	26.5	68.4
Short phone calls	23.8	32.2	35.5
Long phone calls	22.4	17.8	33.3
Personal attendances with client	5.8	4.2	6.5

194. Within the legal aid group, however, there was a significant difference between cases handled by private solicitors and those handled by in-house solicitors, with the latter involving fewer activities across the board. This contrast is set out in Table 3.3.

TABLE 3.3 Solicitors' Activities on the Case by Representation Type in Legal Aid Cases

Activity	Private sol mean	LAC sol mean
Letters from solicitor (pages) ²¹⁸	24.5	12.3
Perusal of documents (pages) ²¹⁹	26.5	9.1
Short phone calls ²²⁰	32.2	11.3
Long phone calls ²²¹	17.8	9.3
Personal attendances with client ²²²	4.2	2.7

195. The difference between the two groups is quite striking, with private solicitors undertaking twice or nearly three times the

218 Mann Whitney test: $Z=-3.749$, $p<0.001$.

219 Mann Whitney test: $Z=-4.142$, $p<0.001$.

220 Mann Whitney test: $Z=-3.384$, $p<0.005$.

221 Mann Whitney test: $Z=-3.426$, $p<0.005$.

222 Mann Whitney test: $Z=-2.396$, $p<0.05$.

amount of activities of in-house solicitors on their legal aid files. Possible reasons for these differences are discussed at the end of this chapter. As between in-house practices, VLA solicitors had a relatively low proportion of activities across the board, while LAQ solicitors had a relatively high proportion, possibly reflecting the fact that their cases would generally have involved an unsuccessful legal aid conference before the commencement of contested proceedings. However, the fact of the LAQ conferencing program did not have an obvious impact on the level of activities undertaken by private solicitors handling legal aid cases in Queensland relative to those in other states.

196. Apart from the solicitor's location in the public or private sector, there were a number of other factors correlated with the level of solicitors' activities. These included: the solicitor's geographical location (metropolitan or country),²²³ whether the solicitor was an accredited specialist,²²⁴ the number of issues in dispute,²²⁵ the court or courts used (Family Court, Local Court or both),²²⁶ the

223 Country solicitors had a significantly higher mean number of pages of letters, documents perused, and phone calls, than their metropolitan counterparts. Pages of correspondence: metropolitan mean = 18.2, country mean = 29.4, Mann-Whitney $Z = -3.401$, $p < 0.005$; pages of documents perused: metropolitan mean = 17.2, country mean = 40.1, Mann-Whitney $Z = -3.785$, $p < 0.001$; short phone calls: metropolitan mean = 14.5, country mean = 25.9, Mann-Whitney $Z = -4.280$, $p < 0.001$; long phone calls: metropolitan mean = 14.0, country mean = 19.6, Mann-Whitney $Z = -2.033$, $p < 0.05$.

224 Cases run by accredited specialists involved significantly higher mean numbers of letters (Mann Whitney $Z = -2.881$, $p < 0.005$), pages of documents perused (Mann Whitney $Z = -2.973$, $p < 0.005$), short phone calls (Mann Whitney $Z = -2.852$, $p < 0.005$), and personal attendances with the client (Mann Whitney $Z = -2.501$, $p < 0.05$) than did cases run by solicitors who were not accredited (South Australian cases excluded).

225 This issue was tested for the private sector only. Pages of letters: Spearman's $R = 0.283$, $p < 0.01$; pages of documents perused: Spearman's $R = 0.318$, $p < 0.01$; long phone calls: Spearman's $R = 0.334$, $p < 0.01$; personal attendances: Spearman's $R = 0.330$, $p < 0.01$.

226 Cases run in the Local Court had significantly lower mean numbers of activities per case, other than personal attendances with the client (6.3 pages of letters from the solicitor, 2.4 pages of documents perused, 4.4 short phone calls, 3.3 long phone calls) than did cases run in the Family Court. Cases involving both courts had the highest mean number of activities per case. Pages of letters: Kruskal-Wallis $\chi^2 = 39.178$, $df = 2$, $p < 0.001$; pages of documents perused: Kruskal-Wallis $\chi^2 = 36.945$, $df = 2$, $p < 0.001$; short phone calls: Kruskal-Wallis $\chi^2 = 23.087$, $df = 2$, $p < 0.001$; long phone calls: Kruskal-Wallis $\chi^2 = 29.891$, $df = 2$, $p < 0.001$.

stage of resolution,²²⁷ the number of other individuals or organisations the solicitor dealt with (see next section),²²⁸ Registry cluster,²²⁹ the issues involved in the case (children only or children and property),²³⁰ the number of forms of dispute resolution attempted in the case,²³¹ the other party's representation status,²³² and the number of aggravating

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- 227 Cases resolved at the directions hearing stage had the lowest mean number of activities, followed by those resolved at/after pre-hearing conference, followed by those resolved at hearing (unresolved cases excluded). Pages of letters: Kruskal-Wallis $\chi^2=52.257$, $df=2$, $p<0.001$; pages of documents perused: Kruskal-Wallis $\chi^2=35.014$, $df=2$, $p<0.001$; short phone calls: Kruskal-Wallis $\chi^2=23.610$, $df=2$, $p<0.001$; long phone calls: Kruskal-Wallis $\chi^2=37.835$, $df=2$, $p<0.001$.
- 228 Pages of letters: Spearman's $R=0.684$, $p<0.01$; pages of documents perused: Spearman's $R=0.633$, $p<0.01$; short phone calls: Spearman's $R=0.648$, $p<0.01$; long phone calls: Spearman's $R=0.620$, $p<0.01$; personal attendances with client: Spearman's $R=0.476$, $p<0.01$.
- 229 Melbourne solicitors had particularly high mean numbers of short phone calls, pages of documents perused and personal attendances per case: means of 44, 80 and 7 compared to the overall means of 20, 28 and 4 respectively. Dandenong solicitors also had a high mean number of short phone calls per case (46). By contrast, Adelaide solicitors had a low mean number of short phone calls (10) and pages of documents perused (19) per case, while Parramatta solicitors had low means across all three activities (14 short phone calls, 11.2 pages of documents perused and 3 personal attendances with the client per case). Differences between Registries in relation to these activities were significant. Short phone calls: Kruskal-Wallis $\chi^2=24.316$, $df=6$, $p<0.001$; pages of documents perused: Kruskal-Wallis $\chi^2=17.829$, $df=6$, $p<0.01$; personal attendances: Kruskal-Wallis $\chi^2=13.365$, $df=6$, $p<0.05$ (Townsville excluded from calculation due to small numbers).
- 230 Cases involving both children and property involved a significantly higher mean number of each activity than did cases involving children only. Pages of letters: Mann Whitney $Z=-4.306$, $p<0.001$; pages of documents perused: Mann Whitney $Z=-4.880$, $p<0.001$; short phone calls: Mann Whitney $Z=-2.990$, $p<0.005$; long phone calls: Mann Whitney $Z=-3.283$, $p<0.005$; personal attendances with client: Mann Whitney $Z=-4.018$, $p<0.001$.
- 231 Pages of letters: Spearman's $R=0.409$, $p<0.01$; pages of documents perused: Spearman's $R=0.346$, $p<0.01$; short phone calls: Spearman's $R=0.334$, $p<0.01$; long phone calls: Spearman's $R=0.429$, $p<0.01$; personal attendances with client: Spearman's $R=0.263$, $p<0.01$.
- 232 Cases in which the other party was wholly unrepresented had the lowest mean number of activities, while cases in which the other party was partially unrepresented had the highest mean number of activities. Pages of letters: Kruskal-Wallis $\chi^2=30.473$, $df=2$, $p<0.001$; pages of documents perused: Kruskal-Wallis $\chi^2=45.059$, $df=2$, $p<0.001$; short phone calls: Kruskal-Wallis $\chi^2=23.073$, $df=2$, $p<0.001$; long phone calls: Kruskal-Wallis $\chi^2=25.796$, $df=2$, $p<0.001$; personal attendances with client: Kruskal-Wallis $\chi^2=14.638$, $df=2$, $p<0.005$.

factors involved in the case.²³³ Whether the client was the applicant or respondent in the case impacted only on the number of pages of documents perused, with respondents' solicitors perusing a higher mean number of pages (34.0) than applicants' solicitors (24.6).²³⁴

197. Backwards stepwise regression analysis of the above factors yielded slightly different models for each type of activity,²³⁵ but the most frequently occurring explanatory factors for the level of solicitors' activities were the number of other individuals and bodies with whom the solicitor had dealings;²³⁶ whether the case involved children and property or children only;²³⁷ the number of forms of dispute resolution attempted in the case;²³⁸ and whether the solicitor was located in the private or public sector.²³⁹ Registry,²⁴⁰ stage of resolution,²⁴¹ and the other party's

233 Pages of letters: Spearman's $R=0.241$, $p<0.01$; pages of documents perused: Spearman's $R=0.254$, $p<0.01$; short phone calls: Spearman's $R=0.264$, $p<0.01$; long phone calls: Spearman's $R=0.307$, $p<0.01$; personal attendances with client: Spearman's $R=0.183$, $p<0.05$.

234 Mann Whitney $Z=-2.159$, $p<0.05$.

235 Pages of letters from solicitor: $R^2=0.726$, $F=54.309$, $df=8$, $p<0.001$; pages of documents perused: $R^2=0.723$, $F=44.436$, $df=9$, $p<0.001$; short phone calls: $R^2=0.534$, $F=27.041$, $df=7$, $p<0.001$; long phone calls: $R^2=0.607$, $F=31.665$, $df=8$, $p<0.001$; personal attendances with client: $R^2=0.430$, $F=25.053$, $df=5$, $p<0.001$ (outliers removed). Note that all but the last of these models have fairly high predictive power (explaining 53%–72% of the variation in the data).

236 Pages of letters from solicitor: $t=7.450$, $p<0.001$; pages of documents perused: $t=5.209$, $p<0.001$; short phone calls: $t=7.641$, $p<0.001$; long phone calls: $t=5.461$, $p<0.001$; personal attendances with client: $t=6.675$, $p<0.001$.

237 Pages of letters from solicitor: $t=3.059$, $p<0.005$; pages of documents perused: $t=5.357$, $p<0.001$; short phone calls: $t=3.644$, $p<0.001$; long phone calls: $t=3.241$, $p<0.005$; personal attendances with client: $t=3.633$, $p<0.001$.

238 Pages of letters from solicitor: $t=4.951$, $p<0.001$; pages of documents perused: $t=2.793$, $p<0.01$; short phone calls: $t=2.555$, $p<0.05$; long phone calls: $t=5.097$, $p<0.001$.

239 Pages of letters from solicitor: $t=5.620$, $p<0.001$; pages of documents perused: $t=4.456$, $p<0.001$; long phone calls: $t=2.517$, $p<0.05$; personal attendances with client: $t=2.309$, $p<0.05$.

240 Parramatta cases involved fewer pages of letters from solicitors ($t=-2.608$, $p<0.05$), pages of documents perused ($t=-4.098$, $p<0.001$), and personal attendances with clients ($t=-2.922$, $p<0.005$), but not fewer phone calls. Adelaide cases involved fewer short phone calls ($t=-2.254$, $p<0.05$), but more long phone calls ($t=4.001$, $p<0.001$) and

representation status²⁴² also recurred as explanatory factors in relation to some of the activities.

198. Thus, activities are clearly related to service sector, both directly, and indirectly to the extent that several of the explanatory factors are also correlated with private or in-house service delivery. The only explanatory factors not related to sector are the matters involved (children-only or children and property), the number of forms of dispute resolution attempted, and Registry, but the first of these is clearly related to funding status.

Dealings with Others

199. On average, solicitors dealt with seven other individuals, organisations or entities in handling the cases in the sample. The incidence of such dealings is set out in Table 3.5. The maximum number of separate dealings in any one case was 18.

240 personal attendances with clients ($t=2.762$, $p<0.01$), while Dandenong and Melbourne (cont.) cases involved more short phone calls ($t=3.315$, $p<0.005$, $t=2.494$, $p<0.05$ respectively).

241 Cases resolved at the directions hearing stage involved fewer pages of letters from solicitors ($t=-3.695$, $p<0.001$) and fewer long phone calls ($t=-2.726$, $p<0.01$), while cases that went to hearing involved more pages of documents perused ($t=2.403$, $p<0.05$).

242 Cases in which the other party was fully represented involved more pages of letters from the solicitor ($t=2.690$, $p<0.01$) and more long phone calls ($t=3.218$, $p<0.005$), while cases in which the other party was wholly unrepresented involved fewer pages of documents perused ($t=-3.249$, $p<0.005$).

TABLE 3.5 Solicitors' Dealings with Others

Dealings with...	Number of cases	% of cases
Client	176	100.0
Family Court	163	92.6
Other Party's Solicitor	147	83.5
Other Party	77	43.8
Family Member/s of Party/ies	63	35.8
Government agencies	61	34.7
Legal Aid Commission	60	34.1
Health/Medical Practitioner/s	59	33.5
Local Court	56	31.8
Child Representative	54	30.7
Barrister/s	47	26.7
Solicitor Agent	44	25.0
Filing Service	41	23.3
Process Server	41	23.3
Social/Community Worker/s	31	17.6
Order 30A Expert	30	17.0
Friends of Client	19	10.8
School Teachers	13	7.4
Third Parties	13	7.4
Valuer	12	6.8
Estate Agent/Conveyancer	4	2.3
Child Contact Service	4	2.3
Interpreter Service	3	1.7

200. The incidence of dealings with different organisations and entities varied according to funding and representation status. Cases with both legal aid and private funding were most likely to include dealings with a child representative²⁴³ (consistent with

243 $\chi^2=6.365$, $df=2$, $p<0.05$. This occasionally included fruitless attempts to contact the separate representative, which occurred in three cases in the file sample. In one, the solicitor rang the separate representative five times without any reply or return of messages. All of these cases occurred in Newcastle.

the relatively high levels of child abuse allegations in such cases, as noted above), dealings with a Legal Aid Commission,²⁴⁴ and dealings with health or medical practitioners.²⁴⁵ Private solicitors were more likely than in-house solicitors to deal with the Family Court,²⁴⁶ barristers,²⁴⁷ valuers,²⁴⁸ and filing services.²⁴⁹ Private solicitors handling legal aid cases were most likely to deal with government agencies,²⁵⁰ while in-house legal aid solicitors were most likely to deal with interpreter services.²⁵¹ There was no significant difference in the mean number of solicitor dealings between children-only and children and property cases, suggesting that funding and solicitor type rather than case type played the largest role.

201. Within the legal aid group, in addition to barristers and government agencies, private solicitors were more likely to deal with a Local Court,²⁵² social/community workers,²⁵³ solicitor agents,²⁵⁴ and child representatives.²⁵⁵ They were also, of course, far more likely to have dealings with the Legal Aid Commission.²⁵⁶
202. Not surprisingly then, there were significant overall differences in levels of dealings with others by funding and representation type. Private solicitors handling legal aid cases had a higher

244 $\chi^2=27.492$, $df=2$, $p<0.001$.

245 $\chi^2=5.013$, $df=2$, $p=0.082$.

246 $\chi^2=4.580$, $df=1$, $p<0.032$.

247 $\chi^2=12.262$, $df=1$, $p<0.001$.

248 $\chi^2=11.375$, $df=1$, $p<0.005$.

249 $\chi^2=2.975$, $df=1$, $p=0.085$.

250 $\chi^2=12.361$, $df=2$, $p<0.005$.

251 No cases handled by private solicitors involved interpreters.

252 $\chi^2=4.899$, $df=1$, $p<0.05$.

253 $\chi^2=7.551$, $df=1$, $p<0.01$.

254 $\chi^2=20.051$, $df=1$, $p<0.001$.

255 $\chi^2=3.315$, $df=1$, $p=0.069$.

256 $\chi^2=62.354$, $df=1$, $p<0.001$.

mean number of dealings with others (8.6 per case) than did in-house solicitors (6.0).²⁵⁷ Within the private sector, legal aid cases had a higher mean number of dealings with others than did self-funded cases (7.3), with cases involving both types of funding having the highest level of dealings with others (mean 9.5 per case).²⁵⁸ Overall, there was a significant difference between private and public sector solicitors (means 7.9 and 6.0 respectively).²⁵⁹ The relatively low number of dealings with outside agencies and individuals by in-house solicitors may indicate a greater degree of efficiency or focus, the presence of in-house social workers to whom clients can be referred rather than having to deal with an outside agency, and/or greater constraints on in-house solicitors in dealing with their clients' cases. There was also a significant difference between LACs, with LAQ in-house solicitors having a higher mean number of dealings with others than the average (7.9), and LSCSA and VLA in-house solicitors having a lower mean number of dealings with others than the average (4.4 and 3.8 respectively).²⁶⁰

Court Documents and Attendances

203. The mean number of court documents filed by the client per case was 6.7. There was no significant difference between the mean number of documents filed by clients who were applicants or respondents. Within the private sector, there was no significant difference in the mean number of documents filed by clients by funding status, although the greatest number of documents was filed by clients in cases involving both types of funding (mean 10.9). Again, however, there was a difference between legal aid

257 $F=17.274$, $df=1$, $p<0.001$.

258 Kruskal-Wallis $\chi^2=8.610$, $df=2$, $p<0.05$.

259 $F=16.871$, $df=1$, $p<0.001$.

260 Kruskal-Wallis $\chi^2=14.005$, $df=3$, $p<0.005$.

cases handled by private solicitors (mean 8.1 documents filed by the client) and by in-house solicitors (mean 5.0 documents filed by the client).²⁶¹ As was the case in relation to dealings with others, the lowest in-house means for documents filed were found in South Australia and Victoria (4.0 and 4.2 documents filed by the client respectively), and the highest was found in Queensland (5.7 documents filed by the client), but the difference between LACs in this instance was not significant.

204. Cases run in the Dandenong Registry of the Family Court involved the highest mean number of documents filed by the client per case (11.4), while those run in the Parramatta Registry involved the lowest mean (5.3). Cases with no Family Court involvement had a mean of 3.2 court documents filed by the client per case. The same pattern occurred in relation to total number of court documents per case (filed by any party), with Dandenong having the highest mean (24.5) and Parramatta the lowest (12.3) of the Registries, and cases with no Family Court involvement having a lower mean number of court documents still (6.4 per case).

205. Other factors impacting on the number of court documents filed by the client included the geographical location of the solicitor (country solicitors filed a higher number of documents than metropolitan solicitors),²⁶² the number of issues in dispute,²⁶³ whether a child representative was appointed,²⁶⁴ the number of dispute resolution processes attempted in the case,²⁶⁵ whether a barrister was briefed,²⁶⁶ the stage of resolution²⁶⁷ and time to

261 Mann-Whitney test: $Z=-1.925$, $p=0.054$.

262 Mann-Whitney test: $Z=-2.052$, $p<0.05$.

263 Spearman's $R=0.286$, $p<0.01$.

264 Mann-Whitney test: $Z=-7.349$, $p<0.001$.

265 Spearman's $R=0.196$, $p<0.01$.

266 Mann-Whitney test: $Z=-6.874$, $p<0.001$.

267 Kruskal-Wallis $\chi^2=44.241$, $df=3$, $p<0.001$.

finalisation,²⁶⁸ the other party's representation status,²⁶⁹ the number of demands imposed on the solicitor,²⁷⁰ number of aggravating factors in the case²⁷¹ and number of other individuals and agencies dealt with by the solicitor.²⁷² In addition, where a case had commenced with the client represented by another solicitor or self-representing, the number of documents filed on behalf of the client was significantly increased.²⁷³

206. A backward stepwise regression indicated that the salient factors increasing the number of court documents filed by the client were the number of individuals/agencies dealt with by the solicitor,²⁷⁴ if the case proceeded to hearing,²⁷⁵ the number of demands imposed by the client on the solicitor,²⁷⁶ the number of issues in dispute,²⁷⁷ and if the solicitor first took instructions from the client after the first court date.²⁷⁸ Conversely, some aspects of case location decreased the number of court documents filed by the client — if the case was dealt with in the Parramatta Registry²⁷⁹ or in a Local Court,²⁸⁰ or if the client

268 Spearman's $R=0.398$, $p<0.01$.

269 Kruskal-Wallis $\chi^2=16.103$, $df=2$, $p<0.001$.

270 Spearman's $R=0.170$, $p<0.05$.

271 Spearman's $R=0.299$, $p<0.01$.

272 Spearman's $R=0.598$, $p<0.01$.

273 First document filed prior to first instructions (applicants only): Mann-Whitney $Z=-3.259$, $p<0.005$; first court date prior to first instructions (all cases): Mann-Whitney $Z=-2.125$, $p<0.05$.

274 $t=5.747$, $p<0.001$.

275 $t=3.613$, $p<0.001$.

276 $t=2.229$, $p<0.05$.

277 $t=2.091$, $p<0.05$.

278 $t=2.0862$, $p<0.05$. The other measure of prior activity available — whether the first document was filed before the solicitor took instructions — could not be used in the regression, as it was meaningful only in cases in which the client was the applicant.

279 $t=-3.827$, $p<0.001$.

280 $t=-2.576$, $p<0.05$.

resided in a metropolitan as opposed to country area.²⁸¹ The overall model containing these eight factors accounted for 54% of the variance in the data.²⁸² While public/private sector did not emerge as a separate determinant, it was associated with several of the factors that did emerge.

207. Court attendances on behalf of the client also varied by representation and funding status. The overall mean number of court attendances per case was 5.5.²⁸³ Within the private sector, there was no significant difference between attendances on behalf of legally-aided and self-funded clients, although clients with both types of funding had the highest mean number of attendances per case (8.5). There was a significant difference between the private and public sectors, with cases handled by private solicitors (excluding those with both types of funding) having a higher mean number of court attendances (5.7) than those handled by in-house solicitors (4.7).²⁸⁴ There was a higher mean number of attendances by South Australian in-house solicitors (6.7) and a lower mean number of attendances by VLA solicitors (2.0), but the difference between LACs in this respect was not significant.

208. Several other predictable factors impacted on the number of court attendances, including the number of issues in dispute,²⁸⁵ whether a child representative was appointed,²⁸⁶ which court/s were involved in the case,²⁸⁷ stage of resolution²⁸⁸ and time to

281 $t=-2.046$, $p<0.05$.

282 $R^2=0.539$, $F=22.203$, $df=8$, $p<0.001$ (6 outliers removed).

283 The median number of interlocutory court attendances was four. This was higher than the median number of interlocutory case events for Form 7 children's matters (3) found in the ALRC's survey of Family Court files: ALRC, *Report No 89*, 542.

284 Mann-Whitney test: $Z=-2.090$, $p<0.05$.

285 Spearman's $R=0.227$, $p<0.01$.

286 Mann-Whitney test: $Z=-6.307$, $p<0.001$.

287 Kruskal Wallis $\chi^2=22.717$, $df=2$, $p<0.001$.

288 Kruskal Wallis $\chi^2=64.994$, $df=2$, $p<0.001$.

finalisation.²⁸⁹ The number of court attendances was also affected by the other party's representation status,²⁹⁰ the number of demands imposed on the solicitor,²⁹¹ the number of aggravating factors in the case,²⁹² and whether the case commenced (by the client filing documents or attending court) before the solicitor was engaged.²⁹³ The model resulting from a backwards stepwise regression of these observations emphasised stage of resolution (hearing,²⁹⁴ or pre-hearing conference²⁹⁵), time to finalisation,²⁹⁶ and, interestingly, the number of aggravating features of the case,²⁹⁷ as factors increasing the number of court attendances on behalf of the client,²⁹⁸ rather than public/private sector differences *per se*.

Distribution of Solicitors' Activities

209. In the interviews, solicitors were asked what they found to be the most time-consuming aspects of family law work, and where their work clustered in a case.

289 Spearman's $R=0.566$, $p<0.01$.

290 Kruskal-Wallis $\chi^2=25.772$, $df=2$, $p<0.001$.

291 Spearman's $R=0.169$, $p<0.05$.

292 Spearman's $R=0.379$, $p<0.01$.

293 First court date prior to first instructions: Mann-Whitney $Z=-2.382$, $p<0.05$; first document filed prior to first instructions (applicants only): Mann-Whitney $Z=-3.387$, $p<0.005$.

294 $t=6.172$, $p<0.001$.

295 $t=3.688$, $p<0.001$.

296 $t=4.355$, $p<0.001$.

297 $t=3.833$, $p<0.001$.

298 Other factors in the model were: other party fully represented: $t=2.810$, $p<0.01$; other party partially un/represented: $t=2.530$, $p<0.05$; first court date prior to first instructions: $t=2.376$, $p<0.05$; total number of dispute resolution processes attempted: $t=2.335$, $p<0.05$; and case used both Local and Family Courts: $t=2.081$, $p<0.05$. The overall model explained 61% of the variance in the data: $R^2=0.611$, $F=28.312$, $df=9$, $p<0.001$.

210. The most frequent response to the question about the most time-consuming aspect of family law work was preparation of affidavits and other court documents (38%). Getting information from clients, drafting, typing, checking back with clients and correcting were all seen as time-consuming tasks. Order 30A affidavits, Forms 17A and Forms 12A were mentioned in particular. In-house legal aid solicitors were relatively more likely to nominate preparation of documents as the most time-consuming aspect of family law work, perhaps because they lack the administrative support available to private solicitors.
211. Thirty-five percent of interviewees said that dealing with clients was the most time-consuming aspect of family law work. In particular, social aspects of managing the client, such as listening, understanding, developing rapport, dealing with the emotional aspects of the case, and ensuring that the client understands the process were seen to be the most time-consuming, followed by obtaining instructions, background details and a sense of the client's history, personal attendances (especially the first interview), telephoning, and managing the client's expectations. There was no difference between in-house and private solicitors, or between solicitors undertaking varying amounts of legal aid work in these responses. However, the solicitors nominating dealing with the client as the most time-consuming aspect of family law work were significantly more specialised in family law.²⁹⁹ Those doing a lower proportion of family law work were more likely to nominate types of cases, such as difficult or urgent children's matters, contact issues, or complex property matters, as most time-consuming.
212. Solicitors were divided on where their work clustered in a case. Around half replied that their work tended to cluster at the beginning of a case: in the initial interview and obtaining instructions, in preparing documents, gathering information and

299 Mann-Whitney test: $Z=-1.974$, $p<0.05$.

negotiating or corresponding with the other party, or in preparing the interim application.

213. The other half responded that their work clustered in the middle and towards the end of a case, around court attendances. In-house legal aid solicitors, in particular, explained that they concentrated their work around court dates because of the demands of their workloads:

You can't really spend the time on a case until it's coming up for a deadline because you've got so many other things happening in other cases, so I think that it tends to cluster around when you've got deadlines.

214. Particular court events around which work was said to cluster were the interim hearing (especially for in-house solicitors and private solicitors doing legal aid work/children's matters), conciliation conference, pre-hearing conference, and final hearing.

215. Several solicitors claimed that while work tended to cluster for legal aid clients, it was more even for self-funded clients. This was because with self-funded clients they were able to determine the workload themselves, but with legal aid clients, the way their work was structured was largely determined by the grant of aid:

It tends to cluster especially with legal aid matters because you only have so many hours to do things. For example...Legal Aid will give you funding of two hours from between a directions hearing to a pre-hearing conference. Now, you spend an hour sometimes on your pre-hearing conference...and then you have only an hour for basically, it can be up to six months of work, and so you tend to really try and cut down conversations with your client...

216. File analysis indicated that most types of solicitors' activities increased as the case progressed. The mean number of letters sent, phone calls, pages of documents perused and court appearances was relatively low prior to the filing of the Form 7

or 7A (stage 1), higher between Form 7 and interim orders, or settlement without interim orders (stage 2), and highest between interim orders and final hearing, or settlement after interim orders (stage 3). In the case of documents filed on the client's behalf, however, while the mean number of documents remained highest in stage 3, the next highest was in stage 1, with the lowest number in stage 2. And in the case of personal attendances with the client, the mean number of attendances was highest in stage 1, followed by stage 3, and again lowest in stage 2. These figures give credence to both sets of solicitors' views about where work clusters in a family law case.

217. In relation to each type of activity, there was no significant difference at any stage between legally-aided and self-funded cases run by private solicitors. The significant difference noted earlier between the activities of public and private sector solicitors in legal aid cases, however, did vary by stages. In relation to pages of letters written by the solicitor, the difference remained significant only in stage 1.³⁰⁰ In relation to phone calls and pages of documents perused, the difference remained significant in stages 1 and 2,³⁰¹ but was not significant in stage 3. And in relation to personal attendances with the client, documents filed and court attendances, while there was a significant difference overall, there was no significant difference at any of the individual stages. This suggests that in-house solicitors tend to ration their work other than client interviews and court-connected activities in the early stages of a case, but if the case gets past an interim hearing, in-house solicitors will devote an equivalent amount of work to the case as will private solicitors in legal aid cases.

300 Mann-Whitney test: $Z=-2.306$, $p<0.05$.

301 Short phone calls: stage one: Mann-Whitney $Z=-2.776$, $p<0.01$; stage two: Mann-Whitney $Z=-3.074$, $p<0.005$. Long phone calls: stage one: Mann-Whitney $Z=-2.889$, $p<0.005$; stage two: Mann-Whitney $Z=-2.799$, $p<0.01$. Pages of documents perused: stage one: Mann-Whitney $Z=-2.279$, $p<0.05$; stage two: Mann-Whitney $Z=-2.712$, $p<0.01$.

Briefing Counsel

218. A barrister was briefed in 47 cases in the file sample (27%), with an average of two briefs per case. The most frequent reasons for briefing a barrister were for final hearing (25 cases) and interim hearing (14 cases), followed by mentions (7 cases) and all court appearances (6 cases). A barrister was briefed for advice in only one case.
219. The involvement of barristers in cases run by private solicitors was not related to funding status. However, legal aid cases handled in-house were significantly less likely to involve a barrister than those dealt with by private solicitors.³⁰² Nevertheless, if the case did involve a brief, there was no significant difference in the *number* of briefs by funding or representation type.
220. Solicitors interviewed provided a variety of reasons why they would brief counsel. The most common explanation (mentioned 31 times) was that counsel would be used for particularly difficult or complicated matters, or for their specialist expertise when the solicitor wanted advice or a second opinion. Barristers were said to be more familiar with obscure points of law, and better at keeping track of changes in the Act. This distinction might not be true for specialist in-house solicitors who do all of their work in family law, although three in-house solicitors from the NSW LAC noted that they did not have the experience to run a case at final hearing by themselves, so relied on the expertise of an in-house solicitor advocate. More generally, solicitors considered that it was more appropriate that the client be represented at final hearing by someone with the expertise and experience in presenting a case to the court. The phrase “horses for courses” occurred frequently in this context.

302 $\chi^2=5.431$, $df=1$, $p<0.05$.

221. The next group of explanations for briefing counsel (mentioned 25 times) involved using the barrister to help manage the client. While solicitors will engage counsel if the client instructs them to do so and the client can afford to pay, they may also engage counsel if their client is particularly difficult, or if they see the need for a client to be presented with a different perspective. Solicitors explained, for example, that towards a final hearing they are often “too close” to the client, so using counsel allows for an objective point of view from someone who has greater emotional distance from the client. The barrister may be able to negotiate a resolution after the solicitor has failed, because they can see the case from a fresh point of view:

I find his negotiations skills and his ability to be objective in a matter and get a resolution are absolutely invaluable. Absolutely invaluable. ...I need the objectivity of counsel sometimes because I am getting all the emotions, I am getting the client on the phone...I am getting their wants and I am telling them what I think is reasonable. But sometimes you just need counsel to put it into a bigger picture. Their objectivity to me is absolutely invaluable.

It also I think in some cases helps when the client has become a bit too close to their solicitor. It provides a barrier, and I mean you often get cases where the counsel will settle a matter, where solicitors even with all the best intentions can't. I think that is because the solicitors, while being as objective as they can, are still also trying to make sure that the client is comfortable with them and they are just too close.

222. In this context, solicitors may also engage counsel to provide the client with someone else to blame if the client is unhappy with the result, thus preserving their relationship with the client.

223. The third group of explanations for engaging counsel (mentioned 17 times) involved using a barrister as a cost or time saving strategy. Solicitors explained that it is sometimes cheaper to have a barrister waiting in court for a matter to get on, allowing the solicitor to attend to other matters and thus use their

time more effectively. Solicitors also said that they engage counsel if they have a demanding workload, or are overbooked in court.

224. Finally, six solicitors explained that they brief counsel because the Court expects it, because the use of counsel in final hearings is “custom and practice”, because of the weight of their reputation, or because the court is less likely to be convinced by a solicitor:

Because it seems to be the court's perception that is very important a lot of the time. I think [judges] don't take younger and less experienced solicitors seriously.

Judges won't listen to the solicitor, in any jurisdiction. You've got to be in the club.

225. The interaction of these explanations with legal aid guidelines depended on the solicitor's geographical and sectoral location. Guidelines on briefing counsel varied considerably between the four Legal Aid Commissions, with NSW being the most restrictive, and Victoria and South Australia the most permissive. NSW did not allow briefing of counsel for Local Court matters or for interim hearings in the Family Court. For final hearings, counsel would only be authorised in exceptional circumstances, and where the other party was represented, and where the matter was listed for hearing for three days or longer. LAQ would approve a separate grant of aid for counsel fees where this was considered necessary — generally for trials, but only for interim hearings in complex matters.³⁰³ The South

303 Queensland solicitors interviewed by Dewar et al. considered that loss of legal aid for counsel at interim hearings was one of the most disadvantageous results of cuts to legal aid funding. This was particularly the case since some clients were unable to obtain aid beyond the interim hearing, so the interim orders effectively became the resolution of the case. John Dewar, Jeff Giddings and Stephen Parker, *The Impact of Changes to Legal Aid on the Practice of Family and Criminal Law in Queensland* (report prepared for the Queensland Law Society and Family Law Practitioners Association of Queensland, 1998), 83.

Australian Commission authorised payment of counsel fees for most trial work, and otherwise depending on the complexity of the matter. The fact of a fused profession in South Australia, however, generally resulted in solicitors attending for most court appearances. VLA made “broadbanded” grants of aid for the early stages of a matter, within which it was left to the solicitor how the grant was spent, with an indicative scale of counsel fees provided for this purpose. There were no published restrictions on the briefing of counsel for defended hearings.

226. Thus, while a number of in-house solicitors felt that their ability to brief counsel was becoming increasingly restricted, this was emphasised strongly as a concern by those from NSW, somewhat less by those from Queensland, less so again by those from South Australia and not at all by those from Victoria. In relation to interim hearings, for example, VLA solicitors said they would brief counsel when they were overwhelmed by their caseload, in order to spend more time in the office. One solicitor explained that they only did their own court appearances if instructing counsel at trial, or for divorce applications. Another noted that they had been told they should be briefing more often, as they were spending too much time away from the office. LSCSA solicitors also considered there to be no particular restrictions on when they briefed counsel, and they did so if they were overloaded with work, so using counsel allowed them to spend more time in the office. In general, they said they briefed counsel for difficult matters or difficult clients, and this included for interim hearings.
227. By contrast, most LAQ solicitors said they instructed counsel very rarely for interim hearings, or not at all. In the rare instance there must be a very serious matter such as a child at risk. One LAQ solicitor, however, claimed that they instructed counsel for half their interim hearings. None of the NSW LAC solicitors said they were able to brief counsel for interim hearings.

228. The differences between LACs can be illustrated by comparing replies from an Adelaide solicitor who said they used counsel for a range of reasons, including allowing them to deal with a greater workload in the office, and a Newcastle solicitor who explained that the number of cases they can take on is becoming increasingly restricted as they can no longer engage counsel for any matters:

Generally, if we're overloaded, it's an economic thing, where is your time best placed. Where there are really difficult interlocutory arguments, where so much hinges on getting it right and where you feel you need someone with more skills to argue a complex matter. Where I think I am losing balance. Where I don't have the time and also where it's really complex and so much rides on getting it right. Or where you've got a really difficult client, who you know is being unreasonable, is very caught up with their own emotional stuff and you can't free them from that... And always at trials, I don't do my own trials.

In final matters I was briefing counsel virtually all the time and I've been told that that's got to stop... Because we can't afford it any more apparently... Because that is obviously one of the most costly parts of litigation, that's an obvious way to stop the hemorrhage. And so to stop that that means all that additional work you have to do as well. But it means that if we are not going to work 18 hour days, we are going to have to give somewhere else. We are either going to have to have more people and therefore we have to...a combination I guess of more effectively delivering our services, and literally I suppose reducing our services in some areas because you can't not appear in a matter.

229. In relation to final hearings, 45 private solicitors said they briefed counsel for practically all final hearings, while six in-house solicitors and only four private solicitors said they briefed only for some final hearings. The in-house solicitors, all of whom were from NSW or Queensland, explained that they briefed only for complicated matters, cases that were expected to last a number of days in court, or when there were exceptional

circumstances. The private solicitors who briefed only for some final hearings, by comparison, were relatively experienced solicitors who said they felt comfortable running some hearings unassisted. They used counsel for more complicated matters, longer cases, or if the client could afford it.

230. Similar reasons were given by private solicitors for briefing for interim hearings. Few briefed for all interim hearings. Most said they would use counsel for interim matters that were complicated or difficult, or where the outcome was particularly important, or if instructed to do so by the client and if the client could afford it.

231. Only 12 private solicitors (20%) commented on legal aid funding for counsel, and half of these were from Queensland. Eight explained that they were now restricted to being able to brief counsel for final hearing only rather than interim hearing. Two South Australian solicitors noted that whilst they could get funding for an interim hearing, this would then limit the amount of funds available should the case reach a final hearing, so they preferred to preserve the grant until then. The remaining two solicitors, both from NSW, asserted that legal aid funding guidelines for counsel did not restrict the way they ran a legal aid case; they were able to engage counsel at the necessary stage regardless of funding status:

I don't think it makes a lot of difference because you would only get counsel authorised in legal aid matters in the same kind of instances where you would need them in privately funded matters.

So far as children's issues are concerned, no, I wouldn't brief counsel much earlier than is allowed for in legal aid matters than in other matters.

232. It appears, then, that the decision to brief a barrister is based upon a combination of legal aid guidelines and solicitors' own judgements on the need to brief, with legal aid guidelines tending to restrict in-house solicitors to a greater degree than

private solicitors. Differing legal aid rules and local practices were borne out by the fact that matters heard in the Dandenong and Melbourne Registries were more likely to involve a barrister (and a greater number of briefs), whereas those heard in Adelaide, Parramatta or Sydney were less likely to involve a barrister being briefed.

233. In summary, as with solicitors' activities, legal aid in-house cases were leaner when it came to court documents, appearances and briefs than were private solicitors' legal aid cases. Private solicitors treated their legal aid clients very similarly to their self-funding clients in these areas.

Number of Lawyers Involved in the Case

234. In addition to whether one or more barristers was briefed in a case, coders recorded the number of solicitors, clerks, and solicitor agents involved in each case, and also whether the other party's solicitor dealt directly with the client at any stage. These were then added to the number of barristers briefed, to produce the total number of legal personnel involved in the client's case.

235. The overall average number of lawyers involved in each case in the file sample was 2.34. The majority of cases (60%) involved only one solicitor, however 24% involved two solicitors and 11% involved three solicitors. The highest number of solicitors involved in any one case was seven. Twenty-four percent of cases involved at least one solicitor agent.

236. There was no difference in the overall mean number of lawyers per case between private and public sector cases; the lower mean number of barristers involved in in-house cases was offset by a higher mean number of solicitors. Self-funded cases and private sector legal aid cases had a similar mean number of solicitors per case (1.3–1.4), while in-house legal aid cases involved an

average of 1.9 solicitors per case.³⁰⁴ Having more than one solicitor in a private sector case usually meant that the original solicitor had left the firm, the client's file had been passed on to another solicitor for some other reason, or the client had shifted firms. On the other hand, in-house clients often found themselves represented by a different solicitor for court appearances, as the in-house practice rationalised its appearance work by sending one solicitor to court to appear for all the clients whose matters were listed on a particular day. This practice was particularly common in the NSW LAC, which had a significantly higher mean number of solicitors per case than did the other LACs involved in the study.³⁰⁵

237. Conversely, private sector cases were more likely to involve solicitor agents than were public sector cases,³⁰⁶ due to the fact that private solicitors' firms were more likely to be located at some distance from a Family Court Registry.

Status and Experience of Solicitors

238. The solicitors handling legal aid cases in our sample had fewer years in practice on average,³⁰⁷ and were less likely to be accredited, than their counterparts handling self-funded cases.³⁰⁸ Moreover, public sector legal aid lawyers had fewer years in practice on average³⁰⁹ and were less likely to be accredited than

304 Mann-Whitney test: $Z=-3.300$, $p<0.005$.

305 NSW: 2.28; VLA: 1.17; LAQ: 1.46; LSCSA: 1.30. Kruskal Wallis $\chi^2=13.948$, $df=3$, $p<0.005$.

306 Mann-Whitney test: $Z=-4.133$, $p<0.001$. Virtually all public sector usage of solicitor agents occurred in Queensland.

307 Mean years in practice for solicitors handling self-funded cases = 16.2 years, compared to a mean of 10.7 years for solicitors handling legal aid cases. Mann Whitney test: $Z=-3.901$, $p<0.001$.

308 $\chi^2=6.491$, $df=1$, $p<0.05$.

309 Mann Whitney test: $Z=-2.079$, $p<0.05$.

private sector legal aid lawyers.³¹⁰ On the other hand, the mean number of years in practice of private solicitors handling legal aid cases was 13.3 years, and of in-house lawyers was 9.8 years. These could not be classified as inexperienced practitioners.³¹¹ Further, legal aid lawyers in both public and private sectors were relatively more specialised in family law than the solicitors dealing with self-funded clients.³¹²

239. Other research has suggested a recent trend towards the “juniorisation” of legal aid work,³¹³ that is, the departure of experienced solicitors from the legal aid scene, leaving legal aid work in the hands of relatively junior and inexperienced practitioners. For example, Dewar et al.’s interviews with selected family law practitioners identified a “flight” from legal aid over the previous five years (1994–98), which appeared to be turning into a “stampede”.³¹⁴

240. There are two ways in which juniorisation might occur. First, solicitors interviewed suggested that senior practitioners are delegating legal aid work to junior employees rather than undertaking such work themselves. In fact, however, further questioning yielded little concrete evidence of this.

241. We asked the solicitors during the interviews how family law work was distributed in their firm. Of the 55 participating firms,

310 $\chi^2=8.807$, $df=1$, $p<0.005$.

311 This reflects an earlier finding by Sherr et al., that the majority of English solicitors undertaking legal aid advice work in their sample had more than six years’ experience in practice: Avrom Sherr, Richard Moorehead and Alan Paterson, *Lawyers — The Quality Agenda, Vol.I* (HMSO, London, 1994), 62–63.

312 Mean percentage of family law work undertaken by private sector legal aid lawyers = 81.3%, compared to a mean of 64.7% for private sector lawyers handling self-funding cases. Mann Whitney test: $Z=-2.433$, $p<0.05$. Mean percentage of family law work undertaken by in-house lawyers = 97%.

313 Dewar et al., *The Impact of Changes to Legal Aid on the Practice of Family and Criminal Law in Queensland*, 18–19, 68–69. See also Springvale Legal Service, *Hitting the Ceiling* (1998), 5. And see chapter 1 for similar arguments in overseas jurisdictions.

314 Dewar et al., *ibid.*, 18–19, 68–69.

18 had only one family law partner or employee (or one in each of the firm's offices), so issues of distribution did not arise. Eleven distributed work as it came in the door, according to solicitors' availability. Four worked on a combination of specific referrals and availability. In a further four firms, the family law partner took primary responsibility for all cases, but delegated appropriate work to junior solicitors. Two firms distributed work according to client preference. One firm had two offices, each with one family law employee, who did respectively Local Court and Family Court work. Thus, in 40 of the 55 firms (73%), the distribution of work was not related to the nature or funding status of the work.

242. In 13 firms (24%), work was distributed according to funding status or matter type. In six firms, it was explicitly stated that legal aid work was done by an employee solicitor, not by the principal, although in one firm the reverse was the case, with most legal aid work being done by one partner. In four firms, the partner or experienced solicitor tended to do most of the property work, with children's work either being done by the employee/s or distributed according to availability or referrals. In the remaining two firms for which information was available, the partner tended to take on the more difficult cases.
243. This data does not tell us about changes over time, but it does indicate that proportionately few firms have policies that might directly or indirectly result in legal aid work being undertaken by more junior solicitors. This is borne out by the fact that there was no significant difference in positions (partner, employee solicitor or sole practitioner) between private solicitors handling self-funding and legal aid cases in the file sample.
244. Interestingly, too, the six firms with an explicit policy on legal aid work were not distributed evenly across the Registry clusters. Three of the firms were in the Townsville cluster, two were in Adelaide, and one was in Melbourne. Further, firms with such policies did not specifically mention this as a recent trend.

Rather, legal aid work tended to be seen as a ready made market for junior solicitors until such time as they could attract their own referrals and build up their own personal self-funding practices.

245. It is possible, then, that the movement from legal aid to self-funding work with increased years in practice — with legal aid providing the training ground for junior solicitors, while partners take on the more lucrative and/or complex property matters — is a natural and fairly stable phenomenon, rather than a recent trend.³¹⁵

246. A second possibility is that relatively experienced sole practitioners, and firms in which experienced solicitors undertook legal aid work, have ceased performing legal aid work altogether.³¹⁶ Our data indicates that this is the case, as discussed further in chapter 5. A recent survey undertaken by National Legal Aid reached a similar conclusion.³¹⁷ That survey found that 52% of family law firms surveyed did less legal aid work in 1998/99 than they had done in 1994/95, with many reporting that they no longer did any legal aid work at all. The survey also found a decline from 1994/95 in the proportion of family law partners and employee solicitors of more than 10 years experience doing legal aid work, from approximately 86% to approximately 65%. However, this was commensurate with the overall decline in the proportion of all family law solicitors doing legal aid work (which fell from 90% to 70%), so that the relative proportions of family law partners and employee

315 Richard Abel, for example, identified the practice of private firms in the US assigning legal aid work to junior members of staff in the mid-1980s: Richard L. Abel, 'Law Without Politics: Legal Aid Under Advanced Capitalism' (1985) 32 *UCLA Law Review* 474, 580. The same argument would also apply to another form of "juniorisation" identified by Dewar et al.: relatively inexperienced lawyers setting up practices and taking on legal aid work as part of their start-up strategy.

316 This was also identified by Dewar et al. as one of the strategies employed by lawyers in response to falling legal aid rates.

317 'National Legal Aid Survey of Legal Firms Doing Legal Aid Family Law Work', communication from National Legal Aid, 29 November 1999.

solicitors of more than 10 years experience doing legal aid work remained the same (approx. 37% and 28% of all family law practitioners doing legal aid work respectively).³¹⁸ In other words, there was an absolute decline in the number of experienced family law practitioners doing legal aid work. But among those doing legal aid work, there was no decline in the proportion of experienced solicitors.

Conclusions

247. The average income of self-funding clients in the file sample (where this information was available) was just over \$33,000 — close to average earnings for Australian wage and salary earners. The only discernible income difference between self-funding clients was that direct negotiations between the parties were significantly correlated with higher incomes.
248. The kinds of matters raised in self-funded and legally-aided cases differed as a result of the restrictions on matter types in the legal aid guidelines. Thus, issues such as property, child support, variations of previous orders and enforcement were largely confined to self-funded cases. Legal aid clients were also more likely than self-funded clients to experience problems with mental illness, alcohol, drugs, violence, literacy and non-compliance with orders. The latter problem is compounded by the unavailability of legal aid for enforcement proceedings. Overall, legal aid cases involved a higher mean number of aggravating factors than did self-funding cases.

318 National Legal Aid, *ibid.*; National Legal Aid, 'National Legal Aid Survey of Legal Firms Re Legal Aid Family Law Work: Preliminary Charts' (prepared by the National Institute for Governance, University of Canberra, October 1999), 2-3.

249. The issue of child abuse, however, was most likely to be raised in cases that were partially legally-aided and partially self-funded. Indeed, cases with both forms of funding involved the greatest number of issues and dispute resolution processes, and consumed the greatest amount of solicitor resources. While these cases were clearly very difficult, they were only subsidised by legal aid: at some point the client was compelled to fund the case themselves, from very meagre financial resources.
250. There were systematic differences in inputs between legal aid cases handled by private and in-house solicitors. In terms of client characteristics, in-house clients were younger, and more likely to be from a non-English speaking or Indigenous background. Correspondingly, in-house cases involved a higher proportion of English language problems and cultural and religious issues. In-house clients were also more likely to suffer illness, and were more likely to cause problems by acting independently of their solicitor, being difficult to contact, and failing to attend interviews or court. On the other hand, legal aid clients of private solicitors were more likely to reside in country areas, so that in one quarter of these cases the legal aid grant had to stretch to cover a town agent as well as the fees of the primary solicitor. Private solicitors' legal aid clients were also more likely to demand attention from their solicitors in the form of frequent phone calls and letters
251. Despite the greater complexities in-house clients brought to their cases, and problems they experienced, in-house cases were more minimal in terms of issues raised and dispute resolution. No in-house case involved dissolution or enforcement, and in-house clients were likely to encounter only one court (either the Family Court or a Magistrates Court). By contrast, legal aid cases handled by private solicitors had a higher mean number of issues in dispute, and were more likely to involve proceedings in both a Magistrates and the Family Court. This may be connected to geographical location, with solicitors in regional areas

perhaps filing first in the local Magistrates Court, and then seeing the case transferred to the Family Court.

252. In terms of solicitor activities, in-house clients also experienced a more minimal level of service. In comparison with private solicitors handling legal aid cases, in-house solicitors engaged in fewer negotiations with opposing solicitors, had fewer phone calls and personal attendances with the client and others, and fewer dealings with outside agencies and individuals, wrote less correspondence, prepared fewer court documents, and made fewer court attendances per case, and were less likely to brief barristers for court appearances. The pattern of in-house solicitors' activities suggested that they were more likely to ration their work early in a case, with differences between in-house and private solicitor activities tending to even out after the interim hearing stage. The nature of the rationing involved was also revealed by in-house solicitors' responses to questions about work organisation. In-house solicitors were more likely to identify document preparation rather than dealing with clients as the most time-consuming aspect of their work, and were more likely to say that their work clustered around court attendances rather than around the initial interview, gathering information and negotiation. While in-house solicitors thus appeared to be more court-centred, they nevertheless resolved their cases more quickly, as discussed in the next chapter.

253. The extent to which barristers were briefed varied between LACs as well as between sectors, according to local guidelines. Solicitors cited cogent reasons for briefing barristers, including efficiency, better management of workload, and helping to achieve settlement. Where this option was not available, particularly in NSW, the in-house practice had developed alternative strategies for rationalising court work, which could result in the client having a number of solicitors handle their court appearances.

254. Possible explanations put forward for overseas research findings that salaried lawyers spend less time per case include: staff offices may select easier cases, salaried and private lawyers have different incentives, staff lawyers are more specialist, staff offices enjoy economies of scale,³¹⁹ or staff lawyers resolve cases in a more timely manner.³²⁰ It has also been suggested that in-house lawyers may tend to routinise their cases and give them only cursory treatment, due to high case loads.³²¹
255. Our data does not support the hypothesis that in-house lawyers select easier cases. While their cases involve fewer issues, they are faced with more needy clients whose cases involve more demands and aggravating factors.
256. The different incentives hypothesis is based on private lawyers being paid to undertake legal aid work at an hourly rate, which does not apply in the Australian system, although private firms may have an incentive to “carry out all the work for which they [can] legitimately claim”.³²² This point is discussed further in chapter 5.
257. In-house lawyers in our sample were certainly more specialised than the private lawyers handling legal aid cases, in family law generally, and particularly in legally-aided children’s matters, which may have enabled them to handle such cases more efficiently. Economies of scale were also evident in the rationalisation of court appearances, and may also have been operating in relation to time spent on the case that we were unable to measure. As noted above, in-house solicitors did resolve their cases more quickly than private solicitors handling legal aid cases. When looking only at cases resolved at the

319 Goriely, *Legal Aid Delivery Systems*, 2.

320 Currie, ‘Legal Aid Delivery Models in Canada’.

321 Abel, ‘Law Without Politics’, 574, 584.

322 See Goriely, *Legal Aid Delivery Systems*, 27; Currie, ‘Legal Aid Delivery Models in Canada’, 8.

directions hearing stage, however, the difference in the level of activities between in-house and private lawyers persisted.³²³

258. In relation to routinised treatment, two overseas studies (one in the Canadian Province of Manitoba, and one in the UK) concluded that private legal aid lawyers did more “hand-holding” for clients, whereas in-house lawyers tended to simply get on with resolving the case.³²⁴ Private solicitors interviewed for our study claimed that they and/or other solicitors provided a “no frills” service to legal aid clients, effective but with nothing additional: “your service has to be dealing with what has to be dealt with and nothing else, there’s no frills to it. You deal with the point in hand and that’s it”. However, as the difference between the way in-house and private solicitors said they organised their work might suggest, it is possible that an element of “hand holding” may be operating in the Australian family law context as well. Conversely, it may be that in-house solicitors take a narrower view of “what has to be dealt with”, and are more able or prepared to refer clients to other services to deal with non-family law issues. If true, this would further help to explain the difference between the inputs of private and in-house solicitors.
259. Finally, differences between the activities of in-house and private legal aid solicitors must be partly attributable to very real constraints (for example in relation to briefing counsel and engaging experts) on what in-house solicitors are permitted to do for their clients.

323 Pages of letters from solicitor: Mann-Whitney $Z=-2.965$, $p<0.005$; short phone calls: Mann-Whitney $Z=-3.176$, $p<0.005$; long phone calls: Mann-Whitney $Z=-2.175$, $p<0.05$; pages of documents perused: Mann-Whitney $Z=-2.565$, $p<0.05$. Differences for resolution at the pre-hearing conference stage did not reach statistical significance, while there was almost no difference for cases resolved during hearing or by court decision.

324 Goriely, *ibid.*, 27, 73.

260. Overall, significant differences between the services offered to legally-aided and self-funding clients by private solicitors were notable by their absence. Predictions elsewhere that the payment of fixed fees would lead private solicitors to cut corners, or to provide an inadequate service in order to secure a profit,³²⁵ were not borne out in the evidence from the files. To the contrary, it appears that legal aid funders are able to rely on private solicitors' professionalism to do the work required for minimal remuneration. Solicitors who are not prepared to maintain this situation tend to take the option of abandoning legal aid work.³²⁶ (See chapter 5 for further discussion of this point).
261. If private solicitors engage in more activities per case than in-house solicitors, the question then becomes, as Goriely notes, "whether staff lawyers...are providing the same quality of service to the client",³²⁷ and conversely, whether the extra time spent in (putative) hand-holding by private solicitors provides measurably better outcomes, or is an inefficient use of resources.³²⁸ The answer to these questions in the present study is discussed in detail in chapters 4, 6 and 7.

325 John Baldwin and Sheila Hill, 'Legal Aid: Efficiency Scrutiny' (1986) *Civil Justice Quarterly* 283; Roger Smith, 'What is to be Done?' (1992) 142 *New Law Journal* 211; Senate Legal and Constitutional References Committee, *Inquiry into the Australian Legal Aid System: Third Report* (1998), 52.; Ernie Lightron and Mary Jane Mossman, 'Salary or Fee-for-Service in Delivering Legal Aid Services: Theory and Practice in Canada' (1984) *Queens Law Journal* 109, 113.

326 Alastair Logan, 'Legal Aid in the Balance' (1992) 142 *New Law Journal* 309–311.

327 Goriely, *Legal Aid Delivery Systems*, 3.

328 *ibid.*, 42.

Outcomes

262. Outcome measures include time to resolution, stage of resolution, method of resolution, and how successful the client was in achieving their objectives. Client ‘success’ is a notoriously difficult thing to judge in family law, since potential outcomes are infinite (in terms of what arrangements are made for children and how property is divided — compared, for example, to personal injury or breach of contract cases) and depend very largely upon the facts of the individual case. In addition, there is an overriding concern for the best interests of the child, rather than simply the wishes of the client. Further, the time taken to resolve a case may not be within the solicitor’s control. It may depend upon the nature of the relationship between the parties, possible court delays, and so forth.³²⁹ Nevertheless, we included a range of outcome measures in our analysis of files, to determine whether any patterns emerged between different groups of cases. We also asked questions on the client survey concerning satisfaction with time and outcomes, the results of which are also reported in this chapter.

329 See Rosemary Hunter and Ann Genovese, ‘Qualitative Aspects of Quality: An Australian Experiment’, *Justice Issues* No.12 (June 1999), 9; Austin Sarat and William L.F. Felstiner, *Divorce Lawyers and their Clients: Power and Meaning in the Legal Process* (OUP, New York, 1995), 59.

Time

Predictability of the Length of the Case

263. One reason why time might not be a useful measure for family law cases is that such cases tend to be fluid, and to develop over time rather than having a determinable trajectory from the start. In order to explore this possibility, solicitors were asked in the interviews how often new elements arise during a case.
264. Approximately one quarter of respondents replied that new elements arise almost all the time, while a further 40% considered that new elements arise fairly often. The main explanation for why new elements arise is that the client only tells the solicitor one side of the story, does not provide adequate initial instructions, or only tells the solicitor what they think the solicitor should know, and it is not until the solicitor has received information from the other side that they have a full picture of the case. New information may also be obtained from court appearances, family reports, expert reports, subpoenas, valuations and cross-examination, or from the client themselves, if they change their story.
265. A number of solicitors noted that new elements are more likely to arise during cases involving children's issues. In particular, children's cases may change due to issues associated with arranging interim contact, the appearance of a new partner, change in residence, relocation, snatching of children, parties reconciling, children changing their minds, or unexpected allegations being raised by the other party. Children's issues were described as being more fluid and associated with more uncertainty. In addition, unexpected factors such as car accidents or major changes in employment circumstances were more likely to impact upon children's matters.
266. Property matters were less likely to be associated with new elements, although such elements could include the solicitor

becoming aware of other assets, changes in financial circumstances, parties defaulting on a mortgage, or unexpected valuations. Property cases involving trusts or businesses may be most likely to give rise to new elements during the course of the case.

267. Several solicitors also commented that the likelihood of the client's circumstances changing depended on the length of the case. In particular, the delay in reaching a final hearing was resulting in new elements arising.
268. The remaining respondents replied that new elements did not arise very often, and some mentioned strategies for reducing the likelihood of new elements arising. The most common of these was to obtain good first instructions to get an idea of all the issues from the very beginning. One solicitor asked clients to provide a full history of the marriage and financial arrangements at the first interview. Another solicitor asserted: "if work is done properly at the beginning it doesn't happen". Solicitors also commented on the need to anticipate new issues, to be able to know if the client is holding something back, and to make the client aware of issues all the way along. This group agreed, however, that new elements were more likely to arise in children's matters than in property matters.
269. It appears from these responses that some new elements are unavoidable (particularly if the case is subject to court delays), although strategies exist to reduce the likelihood of others arising. However, if restrictions on legal aid funding lead solicitors to cut corners (for example taking limited instructions or minimising contact with the client during the course of the case — see next chapter), these preventive strategies may not be deployed, which might have the effect of adding to the length or complexity of the case in the long run.
270. In terms of how solicitors responded to new elements, about one third said they would talk to their client or obtain further

instructions, and give the client new advice or options. Smaller groups said they would communicate with the other side, obtain additional evidence, or go to court. Those who thought additional evidence was necessary also noted the additional cost and time of taking such a course, particularly in regional areas:

The problem with [engaging experts] when you are dealing with a town like Mackay is that we don't have those resources so we have to then look at resources and trying to organise people in Brisbane or people in Townsville and that sort of stuff, so it does add extra cost. And secondly, it adds extra time in making all those arrangements...we [have to] get the stuff organised in Brisbane, got to get the client down to Brisbane, all those sorts of things.

271. Evidently, filing or amending a court application and/or affidavit material — eg. for interim orders, contempt or enforcement proceedings, notice of risk, or asking the court to appoint a child representative — is also costly and time-consuming. Private solicitors doing legal aid work were least likely to go to court in order to deal with new elements. Several of these commented that their first response to new elements was to apply for an extension of their legal aid grant, which was often rejected, or applications for urgent proceedings would be delayed. In the words of one: “ask[ing] Legal Aid to spend more money...doesn't seem to work. Everything swings around Legal Aid”. In-house solicitors were, however, somewhat more likely to say they would respond to new elements by going to court. This may be explained by the fact that they were not required to apply for extensions of aid in the same way as private solicitors. Going to court was also a response particularly associated with more junior solicitors, while those more senior tended to have little expectation that the court would be able to provide solutions to clients' ongoing relationship problems.

272. In light of these factors, solicitors were also asked in the interviews whether they could predict how long a case would

take near the start of the case, and if not, at what point were they able to make such a prediction. The majority of solicitors who responded to this question (57%) felt that they could not predict the length of a case with any accuracy near its start.³³⁰ Explanations for this included that unexpected elements may arise, issues change as the case proceeds, court dates may be delayed or adjourned, the solicitor does not initially know how the other party will react, and parties change their minds:

All sorts of things can happen, and sometimes a matter that looks simple can blow out into a huge matter, and sometimes a huge matter can diffuse into nothing when parties withdraw or reach an agreement. I find it hard to predict.

273. Some solicitors explained that they often find that cases initially appear as if they will not “settle down”, but once the parties have had some time to deal with the emotion of the issues, and have been encouraged by their solicitors to view the case more objectively, they will then settle down and achieve a resolution. In this context, solicitors might convey to their clients how long their case *could* take (eg. by reference to the court’s timeframe), in order to give clients an incentive to settle earlier, although this would not be appropriate in all cases:

Well, if it’s a children’s issue case and it’s opposed and there’s issues of sexual abuse or violence and what the children want, well you know you are going to get a sep. rep. and you know no matter how quickly you do your documents it’ll take two months for the employment of a sep. rep., another two months for an assessment to take place, and then you can come back for your first major argument in five or six months.

330 Similarly, in a submission to the Australian Law Reform Commission, the Family Court noted that while the general profile of outcomes is known, it is not possible to predict which individual cases will or will not settle: ALRC, *Discussion Paper No 62: Review of the Federal Civil Justice System* (Sydney, 1999), 359.

274. Solicitors were generally prepared to identify factors that would determine whether a case was going to settle earlier, or if it would last for “the long haul”. The most frequently identified factor (42%) was the nature of the parties — their “reasonableness”, if their expectations were fairly close, and they knew what they wanted. Twenty-seven percent of respondents thought that the length of the case depended on the issues involved. For example, negotiating child contact where residence was agreed or the distribution of relatively few assets can be dealt with more quickly. Issues taking longer include intractable residence disputes, complex property matters, allegations of domestic violence, medical issues and criminal behaviour. Allegations of child sexual abuse were seen as most likely to be dealt with at a final hearing.³³¹
275. Thirteen solicitors (16%) said that they begin to predict the length of a case once they have received some form of answering documentation from the other side, eg. affidavits, valuations, expert reports, or discovery, as well as further evidence from their own client. These solicitors explained that they can only predict the length of the case when they know both sides of the story. All but one of these solicitors were from the private sector. This may reflect the fact that answering documents are more useful as a basis for prediction in property cases, or it may be that in-house clients and their opponents have more restricted access to experts or extensive documentation. The private solicitors holding this view also tended to be accredited specialists.

331 In research undertaken by Monash University, child abuse matters made up 5% of cases filed, but half of the children’s matters reaching a pre-hearing conference, and one third of those reaching final hearing. The authors concluded that the Family Court had “unwittingly become part of the child welfare and the child protection system”, and that child abuse cases, because of their low drop-out/resolution rate, had become “the core business of the court”. Thea Brown, Margaret Frederico, Lesley Hewitt and Rosemary Sheehan, *Violence in Families, Report Number One: The Management of Child Abuse Allegations in Custody and Access Disputes Before the Family Court of Australia* (Family Violence and Family Court Research Program, Monash University and Australian Catholic University, Clayton, 1998), 35, 87.

276. Twelve solicitors (15%) considered that they can only get an idea of the length of a case once they know who is representing the other side. If the other party's solicitor is reasonable, provides sensible advice, and is able to manage their client's expectations, then it would be expected that the case would take less time to settle. On the other hand, incompetence on the part of the other solicitor, deliberately dragging out the case in order to increase fees, or refusing to settle and raising their client's expectations, would be likely to extend the length of the case:

Occasionally you will have a matter...with a practitioner on the other side that is not going to settle. Either through incompetence, or one practitioner here, for example, will spin a case out as long as he can. It's a real cost generation exercise and you know that the majority of those are going to probably go to trial, go close, risk going to the point where the client runs out of money. Occasionally you will actually have a matter...with people who I don't think are very competent in their areas, take simple cases and make complex cases out of them. And they won't settle until it's probably set down for trial, and a barrister gets the brief and then it will settle instantaneously. And they're simple house and garden cases that shouldn't be running there.

277. Another five solicitors replied that the length of a case will depend on whether the other party has legal representation or is a litigant in person, in which case it is much harder to make an accurate prediction, except that the final hearing will take longer.

278. Thirteen solicitors (16%) thought that it is generally easier to predict the length of property cases than children's cases. This might be because children's issues are more emotive, and there is a greater likelihood of new elements; or because property matters have the advantage of early discovery and a conciliation conference, which makes it easier to know when they may resolve; or because simple property matters can often be reduced to a cost-benefit exercise, which cannot be applied in

children's matters. Only two solicitors claimed that it is easier to predict the length of a case in children's matters.

279. In terms of the point when it becomes possible to predict the length of a case, several solicitors claimed that they can make a prediction during early negotiations, since it is then that they develop an idea of the nature of the parties involved. More often, however, solicitors nominated interlocutory stages — the interim hearing in children's matters, and the conciliation conference in property matters — since it is then that applications have been filed and responded to, and further evidence has been submitted, so it is possible to perceive both sides of the story, and the possibilities for a resolution. One solicitor also commented that it is at the interim hearing stage that clients receive an insight into how protracted and expensive a case may become if they are not prepared to be reasonable: "they get a taste of how dreadful court proceedings can be". Another noted that if there appears to be little chance of settlement at the conciliation conference stage of property proceedings, "then you are in trouble".

280. In conclusion, solicitors appeared to make distinctions between cases that are relatively simple to predict, and those where predictions are at best "guesstimates". A typical case that was simple to predict would involve a reasonable client whose expectations were close to those of the other party, a straightforward property settlement ("house and garden"), or an application for contact orders for parties who did not have a considerable level of animosity. The other party would be represented by a sensible solicitor, and everyone involved would be focused towards resolving the case with a minimum of costs. If possible the case would not reach the court, but if it did, it would become apparent at the conciliation conference or interim hearing that it would soon settle.

281. By contrast, a case that was difficult to predict would involve an intractable residence dispute, with allegations of child abuse, and perhaps a history of domestic violence. The parties would be unreasonable, unable to communicate with each other, and unprepared to negotiate on even the smallest of issues. The other party would be either represented by an aggressive or incompetent solicitor, or they would be a litigant in person. The other party would be slow in providing documents such as affidavits, and the full story of the case would not be disclosed until the case was well on the way to trial, such as via a late expert report. The client's circumstances may dramatically change mid-case, and there may be unexpected court delays.
282. Although solicitors did not identify funding status as a factor in predicting the length of a case, it is clear that legally-aided cases are more likely to fall into the unpredictable category, by virtue of the legal aid guidelines that confine legal aid to children's matters and require there to be a substantial issue in dispute between the parties. This then makes it more difficult for private solicitors to manage the grant of aid effectively, especially in the context of capping (the need to preserve a grant because of the possibility that the case may proceed to trial). Two possible interventions to alleviate this situation might be to raise the cap on legal aid grants (see chapter 5 for further discussion of this issue), and/or to facilitate and encourage the earlier exchange of information through the Family Court's case management processes.³³²

Delay

283. Solicitors were further asked what were the major causes of delay in family law cases, in order to understand the circumstances in which the time taken to resolve a matter might

332 See Australian Law Reform Commission, *Report No.89: Managing Justice: A Review of the Federal Civil Justice System* (Commonwealth of Australia, 2000), 555–59, 573–82.

be unnecessarily prolonged. The great majority (85%) attributed delay to the Family Court, particularly in reaching a pre-hearing conference or final hearing. Other sources of delay in the court included the court not being sufficiently interventionist, being too reluctant to make interim orders, overlisting matters, making too many administrative adjournments, and being too ready to vacate a hearing date where parties had not complied rather than giving *ex parte* orders.

284. By far the most common explanation for court delay was that there was insufficient judicial staff, especially judges, although also support staff, Registrars and Family Court counsellors.³³³ This had a particular impact in regional areas reliant on the court circuit, since there were now longer waiting times between sittings. (The options of sending an agent or travelling to the city were often not available due to cost, particularly in legal aid cases.)
285. The next most popular explanation for court delay was the Family Court's case management structure, which was seen to require too many unnecessary attendances, to be too inflexible (requiring the same steps regardless of the case), and to involve too many forms and too much paperwork.³³⁴ Within this

333 The Family Law Section of the Law Council of Australia has also argued that the main cause of delay in the Family Court is the insufficient number of judges available to hear contested matters, due to both delay in the filling of vacancies, and the failure to increase the number of judges to match the increased workload of the Court: *Delay in the Family Court of Australia* (Law Council of Australia, Family Law Section, Submission to the ALRC's Review of the Adversarial System of Litigation, Canberra, 1998), 1–9. The Senate Legal and Constitutional References Committee noted that increased waiting times due to the failure to fill vacancies on the Family Court bench, in combination with funding limits on family law cases, have made it more likely that funds will be expended prior to hearing: *Inquiry into the Australian Legal Aid System: Third Report* (Commonwealth of Australia, Canberra, 1998), 176.

334 The same criticisms were made by Julian Gardner 15 years earlier: 'Areas of the Legal System Which Cause Excessive Demands on Legal Aid' (1985) 15 *Queensland Law Society Journal* 19, 25; and were taken up by the ALRC, *Report No.89*, 341–43. The responses we received put the issue of the Court's case management processes in context, however – ie second in perceived importance to shortage of judges and court staff.

structure, there were complaints that the court gives a higher priority to property matters (through the direct track) than to children's issues. "There is no justice whatsoever in getting property cases decided within a matter of months and having to wait years for children's cases. It just seems wrong to me".

286. A number of effects of court delay were identified. Some solicitors explained that delay can in some instances be positive. It may allow parties time to deal with emotional issues, allow negotiation, and even keep costs down.³³⁵ Consistent with solicitors' responses in relation to predicting the length of a case, one solicitor said that she explains the possibility of delay to clients in order to encourage them to settle.

287. More commonly, however, delay was seen to be a negative.³³⁶ First, the delay between interim and final hearings means that one party gains an advantage in children's matters. Interim orders establish a status quo that is unlikely to be overturned in final orders:

And when you are talking about interim residency matters, a person who snatches the kids in effect doesn't get penalised for that, because by the time the matter is actually heard the kids have been with that person four or five months, and the law says well, the status quo has changed, well we don't want to change it back and disturb the children. And whilst they may

335 See also Gwynn Davis and Mervyn Murch, *Grounds for Divorce* (Clarendon Press, Oxford, 1988), 165. Carole Brown notes that parties' needs to take time in order to be able to resolve issues may sometimes be in conflict with conciliation counsellors, mediators and managers wanting cases to resolve quickly: 'Integration of Dispute Resolution Services within the Family Court', paper presented at the Second World Conference on Family Law and the Rights of Children and Youth, San Francisco, 1999, 3-4.

336 See also Robert Dingwall, Paul Fenn and Jackie Tuck, *Rationing and Costs-Containment in Legal Services* (Lord Chancellor's Department, London, 1998), who note that delay up to a point may be positive, in that it allows clients to deal psychologically with the case, but after that point delay leads to frustration and oppression.

*be penalised at the final hearing it is harder, so that tactical advantage of trying to get interim contact or the tactical advantage of snatching the kids, with the long lists that they've got and the incredible delays the courts have got, is quite significant.*³³⁷

Consequently, interim hearings become much more important. Some solicitors felt that they now need to do as much preparation for an interim hearing as they do for the final hearing.³³⁸

288. Secondly, applications and documents done earlier in the case need to be redone for a final hearing that is often two years after the first application was heard. Within this timeframe the parties' circumstances have changed and the children are two years older:

People can normally wait for one year. They can put up with a heck of a lot for one year. But two years is too long, particularly in children's matters and matters where there is property which might change in value.

But then once you get to matters set down in the list for final hearing you are waiting two years. The case, to some extent, it loses meaning... The kids

337 See also Helen Rhoades, Reg Graycar and Margaret Harrison, *The Family Law Reform Act 1995: Can Changing Legislation Change Legal Culture, Legal Practice and Community Expectations? Interim Report* (University of Sydney and Family Court of Australia, 1999), 61, who note that following the Family Law Reform Act, interim contact is more likely to be granted, pending the testing of allegations of violence or abuse at trial, including in situations where the trial results in an order for no contact. For similar points, see further Senate Legal and Constitutional References Committee, *Inquiry into the Australian Legal Aid System: Third Report*, 177–78.

338 The ALRC has also noted that demand for interim hearings appears to be driven by the perception that there will be a long delay in listings for final hearings. Practitioners consulted by the ALRC said that in many cases they file proceedings to reserve the parties' place in the queue, and apply for interim orders because they expect to wait up to two years for a hearing. Judges then pointed out that the increased workload in relation to interim matters was itself a cause of delay in contested hearings. In response, the ALRC suggested that individual case management by a single judicial officer would help to expedite interlocutory matters and avert the need for interim hearings. ALRC, *Discussion Paper No 62: Review of the Federal Civil Justice System* (1999), 381–82. See also Law Council of Australia, Family Law Section, *Delay in the Family Court of Australia*, 7.

are two years older; all the reports and stuff have to be updated as well. You regularly find that practitioners...need an updated family report because the one that they did previously is two years old or 18 months old or things have changed.

289. Thirdly, delay causes clients additional trauma, they find it difficult to understand the delay, it adds to the expense of the case, and clients are unable to get on with their lives:

In some matters it sorts itself out and they are able to be settled but in other matters it just gets worse and worse and worse. People keep focusing on the small issues, the contact changeover hassles and things like that. [Once a judge has dealt with case] then people get on with their lives and away they go.

290. Six of the solicitors who made additional comments at the end of the interview (10%) also expressed concerns about court delay, predicting that increased delays would lead to problems such as increased frustration and desperation, and snatching of children.

291. Several solicitors commented that there had been some improvement in court delay. Brisbane solicitors noted that the appointment of new Registrars in Brisbane had improved the situation, especially in terms of reducing delay in interim hearings, however there was still much room for improvement. Brisbane and Newcastle solicitors praised recent callovers in dealing with backlogs and forcing solicitors to address cases that had been put on hold. Other solicitors also considered that interim and urgent proceedings were running smoothly, compared to later stages of the process. By far the most common suggestion for improving the situation of court delay was the appointment of more judicial staff and the allocation of greater resources to the Family Court.

292. Other sources of delay listed by respondents included the other party (32%), the client (15%), and legal aid (10%). Most comments relating to the other party concerned the other party

failing to act in some way (not responding, not providing information, not complying with orders, not filing court documents) or being recalcitrant. The next most common cause of complaint was litigants in person, who were described as being more aggressive, unreasonable, defensive, disorganised and more likely to fail to comply with court orders. Litigants in person were seen to cause delay as correspondence with them had to be in writing, they were more difficult to negotiate with, and they took up more time in court.³³⁹ Solicitors also felt that sometimes the solicitor representing the other side was the cause of delay, due to incompetence, inexperience or reluctance to initiate litigation, or for tactical advantage (eg. having status quo residence of the children), or occasionally in order to run up costs (to their own benefit as well as the discomfort of the opposing party).

293. Clients might cause delay by being slow in responding, providing information or giving instructions, failing to attend at court, not following advice, or simply “not getting their act together”. Several solicitors explained that the main cause of delay in family law proceedings was clients who did not want a resolution:

*Sometimes they don't want to bite the bullet and this will mean the end. They don't want to let go of the relationship, even though they do. I've had them turning up, or not turning up until the eleventh hour, and we've been put behind because even though you have been trying to get them in they won't do it.*³⁴⁰

294. The main way in which legal aid was said to cause delay was in waiting for aid to be granted or for the decision from a legal aid

339 For a similar argument from Canada, see John D. McCamus, ‘The Reshaping of Legal Aid’, in W.A. Bogart (ed), *Access to Affordable and Appropriate Law Related Services in 2020* (Canadian Bar Association, Ontario, 1999), 45.

340 See also Sarat and Felstiner, *Divorce Lawyers and their Clients*, 68; Gwynn Davis, Stephen Cretney and Jean Collins, *Simple Quarrels: Negotiating Money and Property Disputes on Divorce* (Clarendon Press, Oxford, 1994), 79–80.

appeal. Three in-house solicitors claimed there could be substantial delays in their availability for appointments, and one also considered that the requirement that legal aid clients attend a legal aid conference before initiating court proceedings was a major source of delay.³⁴¹

295. Solicitors' perceptions of the reasons for and nature of delays in family law were tested by reference to information gathered from files concerning court dates and adjournments.

296. Of the 176 files in the sample, 65% involved interim orders, although around one fifth of these were interim orders in a Local Court rather than the Family Court.³⁴² The remaining cases were either settled without an interim order (26%), received a default judgment (3%), were withdrawn (1%), or the outcome could not be determined because the solicitor ceased to act or the information was otherwise missing (5%). Where interim orders were made, 57% of cases subsequently settled, 5% received a default judgment, 2% were withdrawn, 2% went only to further interim orders, while 24% proceeded to final hearing. In the remainder of these cases (10%) the solicitor ceased to act following the interim orders.

297. Times between first court date³⁴³ and interim orders in the Family Court ranged from 0 months (ie. interim orders were

341 Similarly, Queensland practitioners interviewed by Dewar et al. claimed that the requirement to undergo initial legal aid conferencing, combined with other aspects of the procedure for obtaining grants, led to delay that could work to the disadvantage of the legally-aided party, especially with regard to the establishment of a 'status quo' in children's matters, or in cases which ought to go to trial: John Dewar, Jeff Giddings and Stephen Parker, *The Impact of Changes to Legal Aid on the Practice of Family and Criminal Law in Queensland* (report prepared for the Queensland Law Society and Family Law Practitioners Association of Queensland, 1998), 83, 21.

342 This was a higher proportion of interim orders than found in the ALRC's sample of Family Court cases, suggesting that interim orders are particularly concentrated in children's matters. ALRC, *Discussion Paper No 62*, 381. Contrary to the claims of some solicitors, there was no difference in the proportion of interim orders between legally aided and self-funded cases.

343 Time from first court date rather than from first instructions was calculated, to eliminate the considerable degree of variability in times before litigation commenced.

made on the first court date) to 16 months, with a median of 0.4 months (mean 1.8 months). There was no difference in time by case, funding or representation types, but there was a significant difference between Registries.³⁴⁴ Newcastle and Sydney both had medians of 0 months and also relatively low means, while Brisbane cases took the longest time before interim orders (median 3.7 months; mean 5.4 months) — the impact of the recent changes mentioned by solicitors may not have been reflected in our file sample.

298. Times between interim orders and final hearing in the Family Court ranged from 3.5 months to 46 months, with the median being 12.6 months (mean 15 months). This tends to bear out solicitors' complaints about the long delays before hearing, compared to the relative efficiency of interim orders. Again, there was no difference between case, funding or representation type, and numbers were too small to discern statistically significant differences between Registries. However, among the Registries, Sydney and Parramatta tended to have relatively short median times to hearing, while Newcastle had a relatively high median time between interim orders and final hearing.

299. The average number of adjournments overall was 2.2 adjournments per case (minimum 0, maximum 11). Eighty percent of cases involved at least one adjournment. Adjournments were coded according to whether they were caused by the client, the Court, the other party or both parties. Again, solicitors appear to have been right in their ascriptions of causes of delay. The highest proportion of adjournments in cases with at least one adjournment were attributable to the Court (an average of one adjournment per case). These adjournments occurred because the court refused to make orders, because the matter was not reached and had to be

344 Kruskal-Wallis $\chi^2=14.834$, $df=6$, $p<0.05$.

relisted, or because the other party had not appeared and the court was unwilling to make *ex parte* orders.

300. The other party was the next greatest cause of adjournments (mean 0.64 adjournments per case). Both parties were responsible for an average of 0.5 adjournments per case, and the client alone was responsible for an average of 0.2 adjournments per case.
301. There were no significant differences in number of adjournments by case or funding type. Some trends were evident in relation to other variables, however. The Melbourne and Parramatta Registries had the lowest mean number of adjournments caused by the Court (0.70 and 0.75 respectively), while Adelaide had the highest mean (1.7). Cases in which a legal aid client was represented by an in-house solicitor tended to have a lower mean number of adjournments caused by the Court than did cases in which legal aid clients were represented by private solicitors, suggesting that in-house solicitors may have worked harder to persuade the Court not to make administrative adjournments, or that judicial officers may have tried not to adjourn when a Legal Aid Commission solicitor was before them. Self-representing other parties caused a significantly higher mean number of adjournments per case than those who were represented by a solicitor.³⁴⁵
302. Qualitative information from files gave further insight into court delays. Delay was the subject of specific comment by the solicitor in 7% of cases, and at a number of different junctures, especially obtaining a date for the pre-hearing conference, but also getting a date for final hearing, directions hearing, Family

345 Kruskal-Wallis $\chi^2=6.929$, $df=2$, $p<0.05$. When the other party was wholly represented, they caused an average of 0.4 adjournments per case, but when the other party was wholly self-represented, they caused an average of 0.9 adjournments per case. Other parties who were partially unrepresented caused an even higher average of 1.2 adjournments per case.

Court counselling, and transferring from the Local Court to the Family Court. In one case, delay in getting a directions hearing meant that the client was unable to obtain a location and recovery order. In several cases, the solicitor felt that the parties would settle once they reached court, but delays in obtaining court dates meant that this resolution was deferred. One solicitor, for example, thought that the parties would settle at the door of the court (as indeed they did), and was frustrated by court waiting times. There is no evidence, however, that solicitors attempted to settle these cases out of court.

303. Despite solicitors usually seeing court delay as a problem, there was one case in which a considerable delay in reaching the final hearing allowed the parties to “mature and cool down”.
304. In 17 cases in the sample (10%), administrative errors by the court caused delays. For example, dates were muddled, orders took months to be issued or returned, or were sent to the wrong address, matters were not listed, or were incorrectly removed from the list. In one case, the other party’s Form 7 and the client’s Form 7A had been removed from the list in error, and the client was required to file a Form 7 and Form 8 in order to have the matter reinstated. In another, although the solicitor had lodged a Form 7, the court did not allocate dates for the matter to be heard. The solicitor wrote to the court requesting dates to be set as a matter of urgency. Once the case was heard, the court decided that due to long delay, it would be better to file a fresh application than to try to make a decision on the existing application.
305. By contrast, there were also a number of cases (7%) in which the court assisted the parties to resolve their case relatively quickly, or was otherwise sympathetic and flexible. In one case, the court originally listed directions hearings for residence and recovery orders separately, but as the other party needed to travel to attend, and had to take leave from work, the court agreed to list the two contemporaneously. The status conference was also

brought forward by the court, as the issues involved would influence the children's education, and the school term was about to begin. In another case, the judge allowed a litigant in person to talk about how much he loved the child, and gave him time to cry, and therefore defused the adversarial situation, before gently suggesting that the orders the client was seeking were in the best interests of the child. The other party then consented to the client's proposals.

306. Qualitative information from files also revealed child representatives and government departments as minor causes of delay. The child representative caused delay in three cases. In one, the parties were ready to sign consent orders, but the child representative went on holidays, resulting in an eight week adjournment. Then the child representative lost the minutes of consent orders, and the documents had to be resigned. In another case the child representative was in a different State from the client and child, and was therefore compelled to appoint an agent to conduct interviews with the child, which took additional time. In the third case the child representative insisted on gathering information that was not directly relevant to the case, which added time to the proceedings.
307. In two cases the parties' involvement with DOCS caused delay, and another two cases were delayed due to the involvement of the Department of Housing. In one of these, the house that was the subject of the property dispute was originally purchased via the Department, so the solicitor needed to renegotiate finance for the client with the Department. The Department refused to assist until there were court orders transferring the house to the client. This meant that the issue had to go to court, whereas the parties had been prepared to settle following negotiations, without court proceedings.

308. Delays are also a problem over which solicitors in legally-aided cases have little control, but which complicate the management of a grant of aid.

The Impact of Funding Status

309. Solicitors gave divergent responses to the question whether the fact that one side was legally-aided or self-funded made any difference to the length of the case. Thirty-seven percent considered that some legally-aided cases are longer; 28% thought that legal aid cases tended to be shorter; 16% thought the client's funding status made no difference; and the remainder argued that timing was most affected not by whether a party was self-funded or legally-aided, but by whether they received legal aid or were forced to abandon their case or represent themselves.

310. The majority of solicitors who thought legal aid cases could take longer attributed this to the client or solicitor being able to drag the case out due to lack of cost constraints and hence incentive to settle:

Sometimes if the other party is legally-aided it seems to be the case that there is no impediment to them taking very single point they can possibly come across.

I feel that sometimes clients who are legally-aided don't have the same sense that they're spending lots of money, and so they might have to make some tough decisions and give in on a few issues if they were privately funded. Whereas they are not, so they're quite happy to let things drag on.

311. Most of these solicitors pointed out that not all legal aid clients are so unreasonable. In some cases, too, the notion of legally-aided clients dragging out their cases appeared to be based on hearsay rather than direct experience, suggesting the possibility that the "unreasonable" legal aid client who is "bloody minded

about the issues that are not important” may sometimes be more myth than reality.

312. Several solicitors directly contradicted the existence of unreasonable legal aid clients, pointing out that the merits test would prevent unreasonable cases being funded. In-house solicitors were more likely than private solicitors to hold this view; private solicitors had less confidence in the operation of the merits test (see also next chapter). Some private solicitors did acknowledge, however, that the reality of legal aid funding mitigates against clients dragging out their cases:

There was a period of time five years ago when you always felt the party with legal aid could afford to run a matter indefinitely, because their client didn't have the hip pocket nerve and this was always sensed. And now, legal aid is so tight all around and it's just so difficult to do...

There are people around who don't seem to give serious consideration to compromise because they are legally-aided. I think that's probably significantly reduced because of the slashing of legal aid funding.

I don't think many solicitors will put up with clients who are like that, if they genuinely think the client is being unreasonable. Because I mean, frankly, the solicitor is not making a profit out of legal aid anyway, so there is no point in doing it if he has a client who is being ridiculous.

313. Other solicitors who thought that legal aid cases might take longer attributed this to restrictions on the grant of aid. For example legal aid cases are not given the same attention as self-funded cases, so issues are not properly addressed and the case may eventually get out of control; or the resources needed to resolve cases quickly and efficiently, such as expert reports, are not funded and hence are unavailable when needed.³⁴⁶ Alternatively, the possibilities for negotiating might be limited:

346 See also Senate Legal and Constitutional References Committee, *Inquiry into the Australian Legal Aid System, Third Report*, 49–51.

If it is legally-aided on the other side then you generally don't get correspondence answered, you don't get telephone calls answered. You don't have the opportunity. If you ring someone up and say "this is a silly case isn't it? Really what we ought to do is get some instructions and convene a round table conference" — well, you won't get that with a legally-aided case because the practitioners can't possibly do that within the paltry amount that they are paid. So the only time that you are going to have any discussion will be at court, and they will be absolutely minimal discussions because they are not getting any money for it.

314. Solicitors who thought that legal aid cases were often shorter than self-funded cases tended to be those doing a greater proportion of legal aid work in family law. They explained that legal aid cases might be shorter because the grant limits the stage to which a case can proceed. Solicitors feel they should settle earlier due to the uncertainty that the grant will continue, and in particular will become very ready to settle once the grant gets close to running out. A country solicitor claimed that they would attempt to settle as early as possible to avoid having the case transferred to the Family Court, when travel expenses and agent's fees would blow out the costs.

315. By contrast, self-funding clients were seen to be able to draw on greater resources and to continue the case "as far as it will go":

Parties who are self-funded have the ability to fund the matter as long as they like. So therefore they can indulge in counsel, taking a longer time, asking all the questions they wish to, which may or may not be relevant. Legal aid is given a very limited grant.

316. Solicitors who thought that being self-funded or legally-aided made no difference to the length of a case were either in-house legal aid solicitors, or were private solicitors who had a policy (as noted earlier in relation to inputs) of giving equal service to legal aid clients:

I suspect it is a case that lawyers doing legal aid, as we have done, have accepted it on the basis that I am going to do more or less the complete job and just write it off rather than do the shoestring thing.

317. The last group of solicitors considered that the most important factor in determining the length of a case was whether the other party was a litigant in person. Litigants in person were described as being more difficult to deal with, unprepared, unwilling or unable to negotiate, and having unrealistic expectations. They do not trust the solicitor, make every small issue harder, are unsure of court procedures, and will either bombard the solicitor with unnecessary correspondence or not respond at all.³⁴⁷ Several solicitors also noted that the court tends to “bend over backwards” for unrepresented litigants, giving them advice, extending time limits, making extra adjournments, and generally allowing the case to drag on.³⁴⁸ This observation appears to be borne out by the data on adjournments caused by unrepresented litigants discussed above.

318. Finally, a few solicitors pointed out that in some circumstances, no legal aid funding meant that the case would never get off the ground, and the client would simply be forced to settle:

If you have inequality of bargaining power and you act for a woman who's being beaten every second week and you can't get her on legal aid, then she's going to bow out.

319. The profiling study found that self-funded cases took longer to resolve than legal aid cases,³⁴⁹ and that while cases with a

347 See also Richard Ingleby, *Solicitors and Divorce* (Clarendon Press, Oxford, 1992), 44 (noting that the advantage for solicitors of dealing with a represented spouse is a greater likelihood that documents will be dealt with and more predictable responses).

348 Similar comments were made by the Senate Legal and Constitutional References Committee: *Inquiry into the Australian Legal Aid System: Third Report*, 33–35, and to the ALRC: *Discussion Paper No 62*, 379.

349 Rosemary Hunter, *Family Law Case Profiles* (Justice Research Centre, Sydney, 1999), 200.

partially unrepresented applicant tended to take longer, those with an unrepresented respondent tended to resolve more quickly.³⁵⁰ These findings would not necessarily be expected to hold true in the comparison study, since they related to the broad range of family law cases, while the comparison study focused on residence/contact matters.

320. Cases in the file sample did in fact display a similar pattern, with legal aid cases having the shortest median time to finalisation³⁵¹ (9.1 months), followed by self-funded cases (10.8 months), and cases with both types of funding (16.0 months). These differences were statistically significant.³⁵² On closer examination, however, it emerged that the shorter finalisation time for legal aid cases was largely attributable to in-house cases. Private solicitors' legal aid cases in fact took a longer median time to finalise (13.8 months) than self-funded cases. There was no significant difference in finalisation times by funding status in the private sector. In-house cases, on the other hand, were finalised significantly more quickly (median 8.5 months) than private solicitors' legal aid cases.³⁵³ It appears, then, that

350 *ibid.*, 171–72.

351 Measured as time between date of first instructions, and date of the last item on the file or file closure date, whichever was the soonest. The file was closed before the date of the last item in 15% of cases, the file was closed after the date of the last item in 38% of cases, the file was closed on the same date as the last item in 35% of cases, and 12% of cases had no closure date. Unresolved cases were excluded from this calculation.

352 Kruskal-Wallis $\chi^2=10.005$, $df=2$, $p<0.01$. Fisher et al.'s study of Victorian legal aid cases also found that these cases were relatively short (the majority taking less than 12 months to complete), although that study did not explicitly compare the lengths of legally-aided and self-funded cases: Tom Fisher, Tony Love, Lawrie Moloney, Kaileen Pearson and Damien Walsh, *Consumer Perceptions of Legal Aid Clients Choosing Traditional Legal Processes* (National Centre for Socio-Legal Studies, LaTrobe University, 1993).

353 Mann-Whitney test: $Z=-2.432$, $p<0.05$. Median finalisation times also differed between the four LACs, with Qld and SA having the longest median finalisation times (12.5 and 10.3 months respectively), and NSW and Vic having shorter mediation finalisation times (8.3 and 6.3 months respectively), although the differences overall were not significant. The longer times in SA and Qld could be due to greater delays experienced in the Adelaide and Brisbane Registries of the Family Court – Hunter, *Family Law Case Profiles*, 166 (although that study also found delays in Melbourne, which are not reflected in this data).

solicitors' varying assessments of the impact of funding status on the length of the case all contained an element of truth: legal aid cases took longer if they were handled by private solicitors, but not significantly so; while legal aid cases were shorter if handled in-house.

321. Solicitors' varying views on the impact of unrepresented litigants also proved to be justified. Cases in which the other party was partially unrepresented took considerably longer to finalise (median 17.0 months) than cases in which the other party was represented throughout (median 9.9 months). On the other hand, cases in which the other party was wholly unrepresented were finalised more quickly (median 6.6 months).³⁵⁴

322. In exploring the reasons for the different finalisation times of self-funded, private solicitors' legal aid, and in-house legal aid cases, a number of possibilities arise. First, time to finalisation may be broken down into three elements: pre-court (time between first instructions and first court date), in court (time between first and last court dates), and post-court (time between last court date and finalisation). The pre-court element is complicated by the fact that some cases in the file sample reached the solicitor after the first court date, although these cases were evenly distributed by funding and representation status. Leaving aside these cases, the median time between first instructions and first court date was 1.3 months, although this figure varied significantly by sector.³⁵⁵ Cases handled by in-

354 Kruskal-Wallis $\chi^2=21.028$, $df=2$, $p<0.001$.

355 Mann-Whitney test: $Z=-2.102$, $p<0.05$.

house solicitors got to court more quickly (median 1.0 months) than cases handled by private solicitors (median 1.8 months).³⁵⁶

323. Differences within the public sector were also close to significant.³⁵⁷ VLA cases took the longest median time to get to court (4.3 months), followed by LAQ cases (2.8 months), and LSCSA and LAC NSW cases (0.8 months and 0.7 months respectively). The relatively long times in Victoria and Queensland may reflect the impact of the requirement imposed by those LACs that applicants attend primary dispute resolution before proceedings can be commenced. In Victoria, applicants are referred to external PDR services, while in Queensland legal aid conferencing is offered in-house, perhaps explaining the different times between these two LACs.

324. The median time in court (excluding unresolved cases) was 5.2 months, although cases with both types of funding had a median court time more than double this figure (14.7 months). Again, there was a significant difference between private and public sector cases, even leaving aside those with both types of funding,³⁵⁸ with cases handled by in-house solicitors spending a shorter time in court (median 4.0 months) than cases handled by private solicitors (median 5.8 months). And again there was a significant difference between LACs,³⁵⁹ with Queensland and South Australian in-house cases taking the longest median times in court (6.4 months and 5.8 months respectively), while NSW and Victorian in-house cases had shorter median court times

356 The cases in the file sample do not replicate Hazel Genn's finding that legal aid cases had an average duration longer than self-funding cases, and that this was due to legal aid cases having a longer period of delay between instruction and issue of proceedings (although Genn's research did not include family law cases): *Lord Woolf's Inquiry: Access to Justice – Survey of Litigation Costs* (Lord Chancellor's Department, London, 1996), 81–82.

357 Kruskal Wallis $\chi^2=7.493$, $df=3$, $p=0.058$.

358 Mann-Whitney test: $Z=-2.611$, $p<0.01$.

359 Kruskal Wallis $\chi^2=9.371$, $df=3$, $p<0.05$.

(3.4 and 1.7 months respectively). These differences may be attributable in part to longer court delays in the Brisbane and Adelaide Registries of the Family Court,³⁶⁰ but local in-house case management practices may also play a part.

325. The median time post-court (leaving aside unresolved cases) was 1.6 months, with no significant difference by funding or representation status.
326. Other factors impacting on time to finalisation included whether the solicitor was located in the country or a metropolitan area (country cases took longer),³⁶¹ whether the case concerned children only or included property (those including property took longer),³⁶² whether there was a child representative appointed,³⁶³ whether the case involved enforcement proceedings,³⁶⁴ which court/s were used,³⁶⁵ whether a barrister was briefed,³⁶⁶ the number of different types of out of court dispute resolution processes attempted in the case,³⁶⁷ the number of demands imposed on the solicitor,³⁶⁸ the number of aggravating factors present in the case,³⁶⁹ the number of other individuals and organisations the solicitor dealt with,³⁷⁰ the stage

360 See Hunter, *Family Law Case Profiles*, 166.

361 Mann-Whitney test: $Z=-2.665$, $p<0.01$.

362 Mann-Whitney test: $Z=-2.687$, $p<0.01$. This replicates the findings of the profiling study (Hunter, *Family Law Case Profiles*, 94), and the English profiling study of family law cases: Sarah Maclean, *Legal Aid and the Family Justice System: Report of the Case Profiling Study* (Research Paper No 2, Legal Aid Board, London, 1998), 43.

363 Mann-Whitney test: $Z=-4.923$, $p<0.001$.

364 Mann-Whitney test: $Z=-2.416$, $p<0.05$.

365 Kruskal Wallis $\chi^2=20.479$, $df=2$, $p<0.001$.

366 Mann-Whitney test: $Z=-4.916$, $p<0.001$.

367 Spearman's $R=0.336$, $p<0.01$.

368 Spearman's $R=0.160$, $p<0.05$.

369 Spearman's $R=0.230$, $p<0.01$.

370 Spearman's $R=0.519$, $p<0.01$.

the case was resolved,³⁷¹ and how the other party was represented.³⁷²

327. Backwards stepwise regression analysis of these factors excluded solicitor sector as an independent determinant of time to finalisation. The factors that emerged as significant in increasing finalisation time were: if the case went to final hearing³⁷³ or reached a pre-hearing conference,³⁷⁴ if the case involved property,³⁷⁵ if the case involved a higher number of out of court dispute resolution processes,³⁷⁶ if there was a higher number of aggravating factors in the case,³⁷⁷ and if the other party was fully or partially represented.³⁷⁸ The overall model explained 40.7% of the variance in the data.³⁷⁹ Thus, as was found in the profiling study, the length of the case tends to be related to other aspects of the dispute resolution process, rather than to case or client characteristics, apart from the fact that property cases take longer. However, the number of aggravating/complicating factors relating to the client or the other party clearly impacted on the time taken to finalise the case.

Clients' Views of Time

328. In the client survey, clients were asked: "Considering what had to be done in your case, were you satisfied with the total time it took to resolve?" Responses were scored on a five point scale, ranging from very dissatisfied (1) to very satisfied (5).

371 Kruskal Wallis $\chi^2=40.097$, $df=3$, $p<0.001$.

372 Kruskal Wallis $\chi^2=19.000$, $df=2$, $p<0.001$.

373 $t=4.236$, $p<0.001$.

374 $t=2.869$, $p<0.01$.

375 $t=3.239$, $p<0.005$.

376 $t=3.143$, $p<0.005$.

377 $t=2.869$, $p<0.01$.

378 Fully represented: $t=2.653$, $p<0.01$; partially represented: $t=2.387$, $p<0.05$.

379 $R^2=0.407$, $F=14.295$, $df=7$, $p<0.001$ (unresolved cases excluded).

329. The mean score on satisfaction with time was 2.4, firmly at the “dissatisfied” end of the scale.³⁸⁰ The breakdown of responses is shown in Table 4.1

TABLE 4.1 Client Satisfaction with Time Case Took to Resolve

Response	Number	Percent
Very dissatisfied	47	42.0
Somewhat dissatisfied	22	19.6
Neither	9	8.0
Somewhat satisfied	17	15.2
Very satisfied	17	15.2
Total	112	100.0

330. Time was, indeed, the element of their case with which clients were least satisfied. They gave higher mean scores to the fairness of the methods used to resolve the case, the result of the case, and their lawyer. Nevertheless, responses to the time question were correlated with satisfaction with the outcome,³⁸¹ and even more so with clients’ views on the fairness of dispute resolution methods.³⁸² They were not, however, correlated with clients’ degree of satisfaction with their lawyers.

331. There was no difference in the responses of legally-aided or self-funded clients, or in the responses of clients of in-house or private solicitors, despite the fact that the files revealed that cases

380 See also Tania Matruglio, *Plaintiffs and the Process of Litigation* (Civil Justice Research Centre, Sydney, 1994), 15; Marie Delaney and Ted Wright, *Plaintiffs’ Satisfaction with Dispute Resolution Processes* (Justice Research Centre, Sydney, 1997), 42; Avrom Sherr, Richard Moorhead and Alan Paterson, *Lawyers – The Quality Agenda, Vol.1* (HMSO, London, 1994), 49.

381 Kendall’s $\tau_b=0.178$, $p<0.05$.

382 Kendall’s $\tau_b=0.238$, $p<0.01$.

handled by private solicitors took longer to resolve. The only notable finding in this respect was a somewhat different pattern of responses from clients whose cases involve both legal aid and private funding. None of these clients were neutral as to the time taken to resolve their case, and none were very satisfied. The great majority (9/11 — 82%) were either somewhat or very dissatisfied, reflecting the fact that these type of cases took by far the longest time to finalise. Overall, however, there was no correlation between clients' satisfaction with the time taken to resolve their case and the actual time to finalisation. This suggests that clients generally perceive family law proceedings to take too long, regardless of differences at the margins. Other studies of client satisfaction have also found that conformity with clients' expectations (about outcome, delay and cost of litigation) is more important than actual outcomes.³⁸³

332. Clients were further asked, if they thought their case took too long to resolve, who they thought was most responsible for the delay. Responses were as follows:

TABLE 4.2 Who Clients Blamed for Delay

Response	Number	Percent
The Family Court	27	32.1
Their former partner	42	50.0
Their lawyer	8	9.5
Other	5	5.6
Don't know	2	2.4
Total	84	100.0

383 See Delaney and Wright, *Plaintiffs' Satisfaction with Dispute Resolution Processes*, 73, and references cited therein.

333. It can be seen that former partners were held to blame most often,³⁸⁴ followed by the Family Court, with all other options a distant third. Again, there was no difference by funding or representation status in these responses. In additional comments at the end of the survey, however, more clients commented on the slowness of the Family Court (n=13) than on the role played by their former partner (n=7). All of those who made further comments on the Court had held the Court most responsible for delay, and clearly wished to elaborate. Clients complained that court delays were unnecessary, caused undue stress, meant that they had to put their lives on hold for the duration of the case, or allowed for a status quo to be established in residence cases and so damaged their prospects of succeeding. Clients also said that they were unprepared for the length of time it took for issues to resolve, or the length of time between court dates, especially in getting dates for conciliation conference, pre-hearing conference and final hearing. Some clients felt that they had been treated fairly, but nevertheless the system was still too slow. Notably, those who made additional comments on the slowness of the Court process were more likely to be very satisfied with the result of their case, or if they were not satisfied with the result, blamed their former partner rather than the Court for that. Clients who made additional comments about the length of time the court took in dealing with their cases were also overrepresented in the Newcastle and Melbourne Registries.

Conclusions on Time

334. To summarise, legal aid cases by virtue of their focus on children's issues, appear to be subject to greater uncertainties with regard to timing, and thus to present potential problems in managing the grant of aid. Consequently, legal aid funding arrangements need to provide sufficient incentive for solicitors to take thorough instructions at the outset and to gain

384 See also New Zealand Law Commission, *Women's Access to Justice Report: Miscellaneous Paper 10* (The Law Commission, Wellington, 1997), 4–5.

information about the opposing case, in order to minimise the possibility of new elements arising. The prospect of lengthy delays in the Family Court, particularly between interim and final hearings, and the resulting greater significance of the interim hearing, also suggest that sufficient resources need to be available at the beginning of a case.

335. The files once more showed a difference between legal aid cases handled by private and in-house solicitors, with the latter getting to court more quickly, and spending a shorter time in court, although the requirement to attempt PDR before a grant to commence proceedings will be made inevitably delays the time taken to get to court for those cases in which PDR is unsuccessful.

336. As well as the solicitor's efforts, the other party's representation status has a clear impact on the length of the case. The least desirable situation in this respect is for a represented party to face a partially (un)represented opponent, whereas if the opponent is wholly unrepresented it is likely that the case will resolve more quickly.

337. Finally, regardless of the actual time taken, clients seemed to expect their Family Court proceedings to take less time than they did, and hence they were generally dissatisfied with the time aspect of their cases.

Stage of Resolution

338. The largest group of cases in the file sample (46.6%) resolved at the directions hearing stage. The full list of stages at which cases resolved is shown in Table 4.3.

TABLE 4.3 Stage of Resolution

Stage of Resolution	Number	Percent
At/after filing	5	2.8
At/after directions	82	46.6
At/after Family Court counselling	10	5.7
At/after interim orders	5	2.8
At/after conciliation conference	7	4.0
At/after pre-hearing conference	20	11.4
At/during hearing	12	6.8
Judgment	17	9.7
Partially or wholly unresolved	18	10.2
Total	176	100.0

339. The major reason for cases remaining unresolved was termination of the client's legal aid grant (n=11). In the other seven cases the client lost contact (n=3), the lawyer ceased to act (n=1), or there was no agreement between the parties and the matter could not be pursued further (n=3). The majority of these cases (n=14) were handled by an in-house practice,³⁸⁵ although none of these were in South Australia. In some instances the solicitor was aware of what had happened after they stopped handling the case. In three of the cases in which the client's legal aid grant was terminated (due to lack of merit), the client continued with the case, in two as a litigant in person, and in the other with the intention of funding the case themselves. In two cases the client ran out of funds. One simply dropped out and lost contact with their solicitor. The other decided they could no

385 $\chi^2=8.768$, $df=1$, $p<0.005$. The profiling study also found a high proportion of unresolved cases among those handled by in-house practices: Hunter, *Family Law Case Profiles*, 198.

longer contest the case, despite advice from both their solicitor and counsel that their case had merit and that the outcome would go against them if they did not continue.

340. For the purposes of analysis, the stages of resolution in resolved cases were collapsed into three: directions (prior to pre-hearing conference, n=109); at/after pre-hearing conference (n=20); and hearing (from door of court to judgment, n=29).
341. Cases with both types of funding were disproportionately likely to go to hearing (54%), however when cases with both types of funding were excluded, there was no significant difference in stage of resolution between self-funded and legally-aided cases. There was, however, a close to significant difference between cases handled by private and public sector solicitors, with the former more likely to go to pre-hearing conference or to hearing, while cases handled in-house were more likely to resolve at the directions hearing stage.³⁸⁶
342. Cases in the Sydney and Newcastle Registries of the Family Court were most likely to go to hearing, although numbers were too small to discern statistical significance. Cases involving a child representative³⁸⁷ and cases involving enforcement proceedings³⁸⁸ were more likely than others to go to pre-hearing conference and to hearing. Cases in which the other party was wholly unrepresented were less likely to go to hearing, but cases in which the other party was partially un/represented were more likely to go to pre-hearing conference and to hearing. Cases that reached a pre-hearing

386 $\chi^2=5.672$, $df=2$, $p=0.059$. In Britain, Davis et al. found that legal aid solicitors, being more hard-pressed and less experienced and organised, tend to drift into adjudication “rather in the manner of twigs in a sluggish, weed-locked stream, reliant upon the occasional brush with the bank to keep them on course”: *Simple Quarrels*, 137–38. This is evidently not the true of the cases we studied.

387 $\chi^2=38.054$, $df=2$, $p<0.001$.

388 $\chi^2=6.854$, $df=2$, $p<0.05$.

conference or went to hearing involved a higher number of aggravating factors,³⁸⁹ and the solicitor dealing with a higher number of other individuals and organisations.³⁹⁰

343. Interestingly, too, cases handled by male solicitors were significantly more likely to go to hearing than those handled by female solicitors. This observation across both sectors³⁹¹ may have been due to the fact that in-house solicitors, who were less likely to take cases to hearing, were predominantly female. However the same pattern was also observed in the private sector alone.³⁹² Logistic regression analysis indicated that solicitor sector was not an operative factor here. The number of other individuals and organisations the solicitor dealt with was most highly correlated with a case proceeding to hearing, but the sex of the solicitor was the next most significant factor.³⁹³

389 Kruskal Wallis $\chi^2=57.803$, $df=2$, $p<0.001$.

390 Kruskal Wallis $\chi^2=8.010$, $df=2$, $p<0.05$.

391 $\chi^2=7.160$, $df=2$, $p<0.05$.

392 $\chi^2=7.164$, $df=2$, $p<0.05$.

393 Number of people solicitor dealt with: $B=0.5171$, $p<0.001$; solicitor sex: $B=1.0037$, $p=0.0621$; model: $c^2=52.745$, $df=1$, $p<0.001$.

Method of Resolution

344. The means by which the children's and property matters in the file sample were resolved are set out in Table 4.4

TABLE 4.4 Means of Resolution

How resolved	n children	% children	n property	% property
Informal agreement between parties	5	2.8	2	6.7
Form 12A	3	1.7	3	10.0
Parenting plan	1	0.6	0	0.0
Consent orders	116	65.9	21	70.0
Judgment following contest	17	9.7	2	6.7
Default judgment ³⁹⁴	11	6.3	1	3.3
Withdrawn ³⁹⁵	4	2.2	0	0.0
Other	3	1.7	0	0.0
Not resolved	16	9.1	1	3.3
Total	176	100.0	30	100.0

345. It can be seen that (as previously found in the profiling study³⁹⁶) consent orders were by far the most common form of resolution for both types of matters. However in cases involving both children and property, the two issues did not necessarily resolve in the same way. In 19 of the 30 cases involving both issues (63%) the two were resolved in the same way (16 by consent orders, two by judgment following contest, and one by Form 12A), but in the remaining 11 cases, the two issues were

394 In two of these cases the other party left their solicitor and attempted to represent themselves, but did not then appear at subsequent court appearances.

395 In one of these cases the other party withdrew after they ran out of funds.

396 Hunter, *Family Law Case Profiles*, 198.

resolved differently (eg. property by consent orders, children by judgment (3 cases); children by consent orders, property by informal agreement (2 cases)).

346. Whether children's matters were resolved by consent orders (including Form 12A and Parenting Plans) or by judgment (including default judgments) did not vary by funding or type of representation, or any characteristics of the client or solicitor, or the other party's representation status. Cases run in the Dandenong and Parramatta Registries were more likely to result in a judgment, while cases run in Adelaide and Brisbane were less likely to do so, but numbers were too small to permit statistical testing. Cases with a child representative were significantly more likely to result in a judgment,³⁹⁷ and once more, cases ending in a judgment involved the solicitor dealing with a significantly higher number of other people,³⁹⁸ and being subjected to a significantly higher number of demands by the client.³⁹⁹

Terms of Resolution

Predictability of Outcomes

347. Solicitors were asked in the interviews how often cases settled in the way they had foreseen earlier in the case. In general, solicitors expressed far more confidence in predicting the outcome of a case than the time it would take. Only 11 solicitors (13%) replied that cases typically did not settle in the way they may have foreseen, or that it was impossible to predict the

397 $\chi^2=6.530$, $df=1$, $p<0.05$.

398 Mann-Whitney test: $Z=-2.931$, $p<0.005$ (mean 6.8 people for consent orders; 9.3 people for judgment).

399 Mann-Whitney test: $Z=-2.037$, $p<0.05$ (mean 0.93 demands for consent orders, 1.4 demands for judgment).

outcome of a case early on. The majority of respondents (n=71, 87%) considered that cases do settle in the way they foresee fairly often or most of the time.

348. Twenty-three solicitors said they can predict the outcome of a case once they have sufficient information from both parties to get a complete picture; the solicitor is then able to test the merits of their client's case. Nineteen solicitors explained that they can predict the outcome from the start, depending on the client's expectations. If the client has reasonable expectations, or they can be managed so that their expectations match those of the solicitor, then the outcome will be relatively straightforward. The dynamics of this process appear to involve the solicitor forming a view as to a reasonable outcome, and then informing the client that this is the expected outcome. Running the case then consists of managing the client's expectations until they agree with the solicitor's "prediction". Once this stage is reached, it is possible to settle:

I try to give them an idea of their outcome and I don't pump them up with wild ideas about, of course I can get you the whole house, and of course he will get nothing. I tell them straight what I think the answer is.

All of my matters settle. They must settle if I am being realistic. You can see the outcome from the beginning, it's just a matter of getting there, or getting the client there.

349. A more difficult client is one who refuses to accept the solicitor's advice, and who wants to determine the outcome of the case for themselves. Solicitors might then stress a cost-benefit analysis, pointing out that it would be less expensive to agree to a reasonable settlement than to spend money on solicitors' fees. They might also tell the client that should the case proceed to court, the orders will most likely match the solicitor's initial advice. In this context, it can be seen why, as discussed in chapter 6, clients responding to the survey did not have particularly strong feelings of being in control of their cases.

350. By contrast, one solicitor explained that while they may be able to foresee the outcome of a case, they do not allow that to influence their running of the case:

I try not to let [my prediction about the outcome] cloud my judgement... It really is none of my business... There have been a variety of [cases in which] what I think is important is the last thing on [the clients'] minds. Crazy things — things that I just think are crazy — they forego the settlement of the sale of the house provided they get their old second-hand fridge from under the house, or the Hammond organ or something.

351. As was observed in relation to predictions of the length of the case, some solicitors (particularly in-house solicitors) tend to conceptualise their cases in terms of, and organise their activities around, court stages. Consequently, these solicitors (n=15) answered this question in terms of the stage at which it becomes possible to predict the outcome. Again, for property matters this was the conciliation conference, and for children's matters, the Family Report.⁴⁰⁰

352. Fourteen solicitors based their predictions of the outcome of a case on what they thought the court may order. This prediction was based on factors such as the usual types of orders handed down, the particular court in which the case was to be heard, and the identity of the presiding judge. These solicitors tended not to be accredited specialists, and to do a higher proportion of legal aid work. They also tended to communicate their expectations of the outcome of the case to the client by reference to the court's likely decision, in order to encourage the client to settle:

400 The perceived importance of the Family Report has led the ALRC to argue that Family Reports should be made available at an earlier stage, in order to promote more rapid settlement. In response, some members of the Court have expressed concern that a problem could arise with "counsellor decided outcomes": ALRC, *Discussion Paper No 62*, 351. Information from the files in our sample revealed, however, that even where cases went to hearing, the Family Report was a major piece of evidence that was heavily relied upon by the court, although in three of the cases, solicitors felt the Family Report misrepresented the facts of the case, and successfully challenged the Family Report at hearing. All of these cases were run in the Newcastle Registry.

So in an ideal world, as you know, the child has contact with both parents. I say that's what the court will expect, and you can simply agree to it now or you can come back in three months time after Family Court counselling and Family Reports etc., and a judge will just lean forward and say the same thing. In fact, I say, most likely we will get in there and all agree before the judge hands down his decision anyway.⁴⁰¹

353. These solicitors also explain to their clients that whilst they are reasonably certain of the way that the court will act, judges' decisions are always somewhat unpredictable, so it is better to settle rather than take that risk (this point is discussed further in chapter 7). Clients were also encouraged to settle in order to have some input into the decision:

I always try and tell people along the way that a possible outcome that the court would take if the court was called on to make a decision would be A, B, C. Part of the strategy is to try to get people to compromise or settle and say, "well, at least you're going to have a lot more input in this than if a judge makes a decision, and remember they are your children, they are not the judge's children, they're never going to see them again". That sometimes works.

354. The invocation by solicitors handling legal aid cases of the court as a forum to be avoided may reflect the possibly greater efforts of these solicitors to ensure that their cases settle early.
355. Finally, ten solicitors distinguished between children's and property cases, claiming that the outcome of children's matters is easier to predict, since major issues such as residence are set by the status quo. Hence the only matters to be resolved are minor details concerning contact.

401 See also Sarat and Felstiner, *Divorce Lawyers and their Clients*, 57: "defining the legally possible is one of the divorce lawyer's basic devices in efforts to exercise power in lawyer-client interaction". See further discussion of this point in chapter 7. Note, however, that there is no research evidence supporting the proposition that contact with both parents is best for children "in an ideal world": Rhoades et al., *The Family Law Reform Act 1995*, 7.

Normal Range of Outcomes

356. In view of the possibility that solicitors may predict outcomes by reference to general norms rather than the features of individual cases, we also asked whether there was a normal range of outcomes in family law cases. Twenty solicitors (24%) were perplexed by the question, or felt there was not a 'usual' range. Rather, they thought that outcomes depended on the individual circumstances of each case:

I keep telling [clients] there is no answer like that, don't ask that question because there is no such answer.

I mean a lot of people come in and say, "my neighbour got 60%" or whatever it might be, but every case is different.

357. These solicitors tended to do a greater proportion of family law work than those who were prepared to specify a normal range of outcomes. They also tended to work with clients with restricted funds (either legal aid clients, or self-funded clients of limited means), and to encourage their clients to settle early rather than engage in court proceedings. It is possible, then, that these solicitors' rejection of the notion of a normal range of outcomes may result from the fact that their practices are less court-oriented, and more focused on finding individual solutions for their clients.

358. Most respondents, however, did provide what they viewed as the normal range of outcomes, while explaining that their answers were generalisations, or represented the majority of cases rather than the invariable rule.

359. Fifty-eight solicitors described the 'normal' outcome for property cases, and 84% of these did so in terms of the percentages that would go to each party in a typical "house and garden" case, that is, one involving a house with a mortgage, a car, a modest amount of superannuation, furniture, a relatively

long term marriage (10 years or more), the wife either not working or with a part-time job, still the primary carer of the children, and with a lower earning capacity than the husband. Solicitors might then cite a range of factors reflecting s.75(2) of the Family Law Act:

So you tend to use those rules of thumb, and I think that generally within an hour long conference, you can pretty much cover those things, work it out and give a client a pretty good idea as to the range.⁴⁰²

360. Suggested settlement for the wife in these cases ranged from 55% of the assets to 80%, with a mean of 65.5%, although with a strong bifurcated pattern (18 solicitors nominated 60% while 16 nominated 70%). Solicitors who gave the lower amount tended to do less family law work, and to have fewer years in practice.

361. The percentages nominated by solicitors also varied by Registry as shown in Table 4.5:

TABLE 4.5 Usual Proportion of Assets to Wife in ‘House and Garden’ Cases, by Registry

Registry	Mean %	Number	Std Deviation
Adelaide	59.4	8	1.77
Brisbane	65.7	7	6.07
Dandenong	75.0	4	5.77
Melbourne	67.9	7	2.67
Parramatta	63.3	6	4.08
Newcastle	65.4	7	5.44
Sydney	70.0	4	0.00
Townsville	60.0	2	0.00
Total	65.5	45	5.87

402 See also Sarat and Felstiner, *ibid.*, 123–24.

362. It can be seen that solicitors in the Adelaide and Townsville Registries gave the lowest ‘normal’ settlement figure of around 60%. Although only two Townsville solicitors responded, both gave the same answer, and solicitors from Adelaide also showed only a little variation in their answers (all were 55–60%). Brisbane, Parramatta and Newcastle solicitors gave ranges around 65%, although their answers were more variable. Melbourne solicitors gave figures of 65–70%, with less variation. All four Sydney respondents gave a figure of 70%. Dandenong solicitors gave the highest mean figure, although there was considerable variation in their answers.
363. Sixty-seven solicitors (81% of interviewees) explained what they considered to be normal orders in children’s cases. All were of the view that residence normally goes to one parent only. Just under half (45%, n=30) claimed that children normally reside with their mother, and the father almost always gets contact, while 39% (n=26) did not specify which parent was likely to get residence. In-house solicitors were more likely to be in the latter category. The remaining solicitors either thought that residence would go to the status quo parent, or would go to the primary carer of the children, regardless of gender, although women were more likely to be primary carers.
364. Fifty-five solicitors noted that contact orders are usually given in children’s cases, and most of these (73%, n=40) explained that normal contact orders consist of alternate weekends and half school holidays. In addition, 10 solicitors commented that mid-week contact, in the form of telephone contact, a meal, late night shopping, or an overnight visit, were common orders. Six solicitors also mentioned that special days such as Christmas, birthdays, Father’s and Mother’s Day were included in normal contact orders.
365. Whilst solicitors identified several factors influencing the outcome of children’s matters, such as age of children, status quo, how close the parents live, etc., only 10 solicitors raised

issues such as drug or alcohol abuse, or allegations of sexual abuse. Six of these were in-house solicitors, while the other four were private solicitors who had a mix of legally-aided and self-funding clients. These solicitors noted that where such aggravating factors are present, contact may initially be short and supervised, with longer and unsupervised contact being gradually phased in. These types of orders were also described as being more typical for very young children. Contact may be denied in very extreme cases, although solicitors stressed that this was quite rare.⁴⁰³

366. It appears, then, that most solicitors do work from a notion of what orders could be expected in any given case, which helps them to predict the likely outcome of the case, and might lead them to encourage clients to reach the same or a similar conclusion without court intervention. It also seems there is considerable room around the edges of 'normal' orders to deal with individual features of the case, eg. contact details, specific issues, particular items of property, and so on. Galanter explains the tension between referring to expected outcomes and taking a variety of factors and circumstances into account, in terms of the increasing contingency and complexity of law, coupled with the continuing need for law to establish formal rationality. Thus legal work is still routine and aimed at predictable outcomes, while outcomes are actually rendered less certain and predictable.⁴⁰⁴

Actual Outcomes

367. To what extent, then, did the settlements reached and orders made in the cases in the file sample reflect the normal range of outcomes articulated by solicitors, or display a greater

403 See also Rhoades et al., *The Family Law Reform Act 1995*, 59–61.

404 Marc Galanter, 'Law Abounding: Legalisation Around the North Atlantic' (1992) 55 *Modern Law Review* 1, 19–20.

degree of variability? Given that the majority of cases were resolved by means of consent orders, one would expect a high degree of congruence with solicitors' statements, since the formulation of these orders would have been largely within solicitors' own control.

368. It was difficult to assess the degree of congruence in property cases, since it was relatively rare for the terms of property settlements to actually specify a percentage split between the parties. This occurred in only 7 of the 32 property cases in the file sample (22%).⁴⁰⁵ However the average percentage paid to the wife in these 7 cases was 59% — lower than the average figure given by solicitors when specifying the normal range of outcomes in property cases. A similar scale did emerge, with the Adelaide and Townsville cases resulting in a lower percentage for the wife (50% and 55% respectively) than the two Parramatta cases (60%), and the two Sydney cases (65–66%). The one case decided by a judge, in Melbourne, resulted in an order for the wife to receive 55% of the property. In most of these cases, too, the division of assets was exclusive of superannuation (each party kept their own superannuation, which would generally be greater for the husband). It is possible, then, that solicitors' assessments of the normal kinds of outcomes in property cases

405 In 18 cases, terms of settlement specified actions to be taken and/or amounts of money to be paid by one party to another; in 5 cases the terms of settlement were unavailable, and in the remaining two cases, the property issue was not resolved (in one of these cases due to the parties reconciling). The small number of cases specifying a percentage split may reflect the point made by Jackson et al., that negotiated property outcomes tend to consider the needs of the clients rather than focus on legal entitlements: Emily Jackson, Fran Wasoff, Mavis Maclean and Rebecca Emerson Dobash, 'Financial Support on Divorce: The Right Mixture of Rules and Discretion' (1993) 7 *International Journal of Law and the Family* 230. It is arguable that property division expressed in percentage terms involves a focus on past contribution, whereas property division that caters for future needs is more likely to be expressed in terms of the disposal of particular amounts of money or items of property.

may have been inflated in favour of wives, who do not in fact receive quite the level of assets that solicitors suggested.⁴⁰⁶

369. The outcomes from the files did, however, reflect solicitors' perceptions of normal residence orders, with 80% of cases involving residence orders giving residence to the mother. In the 17 cases (12%) in which residence went to the father, either the father had status quo residence already, and/or there were other factors that brought into doubt the mother's ability to care for the children. Twelve of these cases involved women who suffered from a mental illness (as well as other problems including drug and alcohol abuse), or who had allegedly abused the children. In the remaining cases, two women had new partners who were either violent or had been proved to have abused the children, one woman was physically ill and was close to a breakdown when she relinquished residence, and the other did not challenge the father's application. In four cases, siblings were split between their parents (three by consent, one by court judgement), and four orders were made for residence to grandparents. There were only two cases which resolved with shared residence orders.⁴⁰⁷ In one of these, both parties resided in a small town, and in the other the orders reflected, in part, the wishes of the children.

406 This may be due to women accepting settlements that are lower than their solicitors would expect or advise. For example Mather et al. note that women tend to have unrealistically low expectations of what they can achieve from a property settlement, while the English profiling study found that 20% of family law cases settle where the solicitor advises the client not to, and the highest incidence of such cases was among those involving property and money. Lyn Mather, Richard J. Maiman and Craig A. McEwen, "The Passenger Decides the Destination and I Decide the Route": Are Divorce Lawyers "Expensive Cab Drivers?" (1995) 9 *International Journal of Law and the Family* 286; Maclean, *Legal Aid and the Family Justice System*, 48.

407 This reflects the findings of Rhoades et al., *The Family Law Reform Act 1995*, 34–39. Although some practitioners and judges saw shared residence as an appropriate interim measure, practitioners thought that final shared residence orders were rare, while none of the judges interviewed had made a shared residence order in the interview period.

370. Contact orders were more variable. Such orders were made in 161 cases, but only 40% of these (n=65) took the form that solicitors identified as being “normal”, ie. alternate weekend contact and half school holidays. Standard contact orders were most likely to be made in NSW (particularly Parramatta: 77% of contact cases), and least likely to be made in Adelaide (20% of contact cases).
371. Fourteen percent of contact orders (n=23) allowed for additional contact during the week, either by telephone, or personal contact after school or overnight.⁴⁰⁸ In over a third of these cases (n=8) the other party represented themselves for at least part of the case. It is possible that these parties demanded a greater level of contact than those with legal representation, or were offered a greater level of contact in order to encourage them to settle. A similar pattern was evident in the 10% of contact orders (n=16) which allowed for “reasonable” or “liberal” telephone contact between the non-residence parent and the child. A quarter of these cases involved a wholly or partially unrepresented litigant.
372. In general, orders going beyond standard contact (32%, n=52) were most likely to be made in cases handled by in-house solicitors and least likely to be made in cases run by private solicitors acting for legally-aided clients. Variations ranged from children having contact every weekend to having supervised contact only one day every three months, and reflected a range of factors such as the age of the child, how close the parents lived, working arrangements, allegations of abuse, mental illness, and drug and alcohol problems. The pattern of representation in these cases suggests that private solicitors acting for legal aid clients felt most constrained by funding restrictions from achieving outcomes tailored to the individual

408 Judges interviewed by Rhoades et al. commented that the traditional two days per fortnight contact regime is slowly changing to incorporate mid-week contact as well: *ibid.*, 42–43. The figures from our file sample, however, do not indicate a very widespread change.

case, while in-house solicitors were most likely to be dealing with cases for which standard orders were inappropriate.

373. Thirty-six contact orders (22%) included some form of restraint on the contact parent, including matters such as not smoking, using illicit drugs or consuming alcohol during contact visits, not denigrating the other party, and not allowing the child to come into contact with various other persons. The majority of these orders (n=30) were made by consent.⁴⁰⁹ Such cases were significantly more likely to be run by in-house solicitors.⁴¹⁰ Further, in 14 of the 16 cases run by private solicitors, the solicitor was male.
374. Thirty-three contact orders (21%) required the residence parent to provide copies of school and medical records, or both parties to keep each other informed of any medical treatment, school activities or emergencies relating to the child, or the non-residence parent to be involved in school activities. Again, the majority of these cases (n=18) were run by in-house solicitors. More generally, these cases were significantly more likely to be run by female solicitors,⁴¹¹ and were also more likely to be made in the Brisbane and Newcastle Registries, and in cases that resolved later in the court process (a high proportion reached a pre-hearing conference). Further, cases resulting in such contact were likely to have been initiated after one of the parties became involved with a new partner.⁴¹²
375. Eighteen contact orders (11%) provided for phased-in contact, usually starting from brief, supervised contact, and increasing to

409 Nevertheless, some judges in Rhoades et al.'s study also commented that they were making more conditional contact orders: *ibid.*, 47.

410 $\chi^2=4.065$, $df=1$, $p<0.05$.

411 $\chi^2=4.422$, $df=1$, $p<0.05$.

412 $\chi^2=3.892$, $df=1$, $p<0.05$.

something like the “standard” contact orders. Private solicitors in Queensland were particularly associated with such orders.

376. Only eight contact orders (5%) provided for no personal contact with the non-residence parent; four of these orders allowed the parent to write to the child. All of the no-contact orders were made against the father, and involved extreme circumstances:

- The father was very violent, had problems with drugs and alcohol, and then assaulted the mother during the case.
- The father had problems with alcohol and drugs (for which he had previous convictions), had a psychiatric disorder, was extremely violent, had been convicted of a number of assaults in other states, and had allegedly abused the child. The mother, however, had difficulty convincing the court that the father’s problems warranted a no contact order. He then sexually assaulted the mother in front of the child, and was convicted. Even then, there were another three interim hearings while the father was in jail, until the court made final orders.
- The father filed an application for contact with the children whilst he was in jail after raping the mother’s sister.
- The father was meant to have supervised contact arranged by a Children’s Access Program, but they pulled out due to his drunken, aggressive and suggestive behaviour towards staff.
- The father had a psychological disorder and his behaviour was having an extreme impact on the child, whose own behaviour became increasingly dysfunctional after each contact visit. The expert reports agreed that the father should have no contact. The father’s behaviour was described in the final judgment as “chilling”.
- The father was extremely violent, pursuing and threatening the mother and teenage child after separation. The mother

fled, believing her life was in danger. The child did not want to see the father.

- The father was extremely violent, and had previously been involved in a serious shooting incident. After separation he located the mother, smashed up her home with a sledge hammer, and threatened to kill her and abduct the child. The child expressed a strong wish not to see him at all.

Outcomes Related to Issues in the Case

377. Particular issues raised in a number of cases included domestic violence, relocation, child abduction and Aboriginality. The outcomes in these cases were examined to determine how and to what extent the issue was specifically addressed in the orders made. In general, cases involving domestic violence were more likely than other cases to resolve with an order for no contact with the father.⁴¹³ There was also a significant overlap between domestic violence and relocation cases.⁴¹⁴

378. Twenty-one cases (12%) involved an order concerning relocation. These cases were more likely to resolve at a late stage of the proceedings, with 38% (n=8) being resolved at or after the pre-hearing conference, or at a final hearing. In six cases the residence parent (some of whom were victims of domestic violence) was restrained from leaving the local area.⁴¹⁵

379. In one of these cases, the mother had attempted to flee her former partner and return to her family in another country, but she was then ordered by the court under the Hague Convention to return the child. The other party had abused the mother

413 $\chi^2=14.612$, $df=1$, $p<0.001$.

414 $\chi^2= 7.044$, $df=1$, $p<0.01$.

415 Rhoades et al. found that it was easier to get a relocation order in order to move to or with a new partner, or to take up an employment opportunity, than to escape domestic violence: *The Family Law Reform Act 1995*, 67.

physically, emotionally, psychologically and financially. This was substantiated by a number of reports and records from medical services, psychiatrists and doctors. However, the mother's application for a domestic violence order was dismissed due to the supposed unlikelihood of domestic violence occurring in the future. The other party was very obstructionist, sending menacing, derogatory and defamatory faxes to the mother's solicitor. He refused to return the mother's property unless his demands for contact were met, returned only the child's clothing that was too small or was for a different season, and returned other property, including heirlooms, broken. At Family Court counselling he was verbally abusive, and the mother left in tears.

380. A major concern for the mother throughout the case was that she did not want to be confined to living in the same town as the father. She wanted to be able to move and to extend her own life. She was also concerned about the well-being of the child, who had returned from contact distressed and ill, and so wanted overnight contact phased in. Just before the final hearing, however, she agreed to consent orders that gave contact to the father and restrained her from leaving the local area without the father's written permission. If she was to take the child out of Australia, the father was to have compensatory contact. If this order was breached, a recovery order was to be issued, the mother was to pay costs relating to recovery, and the father was to have residence of the child. The mother abided by these orders, however the father continued with minor breaches of the contact orders and remained very uncooperative. In the client survey, the mother complained that it is "unfair that you can get deported from your homeland and made to live somewhere you don't want to".
381. On the other hand, cases which began after one party snatched or threatened to snatch the child were most likely to be resolved with orders resembling the "standard" — residence to one party,

and alternate weekend contact to the other. None of these cases involved any form of restraining order.

382. There were four cases in which one of the parties was concerned about the child maintaining an Aboriginal identity, but this was reflected in the orders in only one of the cases. In that case, the child's father was Aboriginal, and also extremely violent. The final orders restricted contact between the father and child to photographs and cards, and allowed the mother to relocate with the child overseas. The child representative suggested that the orders include a requirement for the mother to contact the Aboriginal Resources Centre, and to obtain material from the Centre to give to the child, in order to inform her about her Aboriginality.
383. In another case, the Aboriginal mother of the child was successful in gaining residence. One of her concerns in opposing the father's application for residence was that he would not ensure that the child was aware of their Aboriginality.
384. In the third case, the Aboriginal father of the child initially wanted residence and then changed his instructions to seek contact with the child, who resided with the mother in another State. The client survey indicated that cultural awareness was an important issue for the father, but this was not reflected in the case file or the orders made.
385. In the fourth case, the Aboriginal grandparents of the children filed an application for contact, as they were concerned that the children's father would not respect their Aboriginality. Interim orders for contact were made, but problems then arose in contacting the children's mother (the clients' daughter), the clients lost contact, and their legal aid grant was terminated.
386. These cases indicate a failure to deal adequately with domestic violence, child abduction and Aboriginality in the outcomes of family law matters.

Outcomes Compared to Orders Sought

387. One way of measuring a client's "success" in a case is to compare the orders they originally sought with the outcome/s achieved.⁴¹⁶ This is obviously easier in cases that have a limited range of outcomes (eg. personal injury) than in cases where the potential outcomes are unlimited (as in family law). Nevertheless, we attempted to include this kind of measure in the file analysis, in part to determine whether it is likely to have any value in the family law context.

388. The two terms that we decided to compare were the orders sought in the client's original Form 7 (application for final orders) or Form 7A (response to the other party's application), and the final orders actually made in the case, looking separately at children's matters and property matters. The orders sought on the Form 7 or 7A may not have represented the client's original wishes, but nevertheless did indicate their wishes after being advised by their solicitor. For each type of matter we scored the difference between the two terms on a four-point scale, ranging from "the same" to "quite different". The overall results are shown in Table 4.6

416 See eg. Rosemary Hunter and Alice Leonard, *The Outcomes of Conciliation in Sex Discrimination Cases* (Centre for Employment and Labour Relations Law, The University of Melbourne, Working Paper No.8, August 1995).

TABLE 4.6 Outcomes Versus Orders Sought

Score	Children N	Children %	Property N	Property %
Same	51	35.2	3	15.0
Somewhat the same/similar	56	38.6	12	60.0
Somewhat different/dissimilar	14	9.7	3	15.0
Quite different	24	16.6	2	10.0
Total⁴¹⁷	145	100.0	20	100.0

389. It can be seen that outcomes for clients in children's matters were more variable, while in property matters clients were most likely to achieve an outcome similar to what they originally sought. Nevertheless, a higher proportion of children's matters than of property matters resulted in the same orders as originally sought — that is, involving no compromise on the client's part.

390. The number of property outcomes was too small and the distribution of outcomes too concentrated to permit statistical testing, so this was done only for children's matters.

391. Legal aid cases handled in-house were more likely to result in the client achieving orders the same or somewhat the same as they originally sought (81%) than were legal aid cases handled by a private solicitor (58%), although the overall difference between the two groups was not significant. Cases in which the other party was wholly unrepresented were also most likely to result in the client receiving the same orders as originally sought (50%), while cases in which the other party was fully represented were disproportionately likely to result in the client obtaining quite different orders to those originally sought (21%).

417 Children total excludes 16 cases not resolved, 13 cases in which the client was the respondent but did not file a Form 7A, and two cases with information missing. Property total excludes 10 cases in which property was not included in the Form 7/7A, and two cases not resolved.

Again, however, the overall difference by other party's representation was not significant. Qualitative information from the files also revealed that cases initiated after the other party had snatched or threatened to snatch the child tended to result in orders that were somewhat or quite different from what the client originally sought.

392. Cases resolved at the directions hearing stage were most likely to result in an outcome that was the same as the client originally wanted, while cases resolved at or after the pre-hearing conference were disproportionately likely to result in an outcome somewhat different from what the client originally wanted, and cases going to hearing were disproportionately likely to deliver a quite different result to the client. The major difference, in fact, was between resolution at the directions hearing stage (mean success score 1.9, where 1=same, 4=quite different), and at a later stage (mean success scores 2.4 and 2.3 for resolution at pre-hearing conference and hearing respectively).⁴¹⁸ It does not necessarily follow from this that cases resolved early resulted in better outcomes for the client, while the risk of getting an unfavourable outcome increased as the case went further. By the time cases got to pre-hearing conference and hearing, it was possible that intervening events had occurred and/or clients had changed their minds about what they wanted, compared to their original Form 7/7A. Thus the relationship between stage of resolution and the client's degree of success may simply indicate that resolutions close in time to the originating documents are more likely to reflect the orders sought in those documents. One caveat to this argument, however, was the absence of any correlation between success score and the time taken to resolve the case. Thus the actual stage reached, rather than time *per se*, does seem to have had some bearing on the client's chances of success.

418 Kruskal Wallis $\chi^2=6.421$, $df=2$, $p<0.05$.

393. Other factors related to client success were whether the client lived in a metropolitan or country area (metropolitan clients were more likely to achieve the same outcome as they originally sought, while country clients were more likely to make some compromise and achieve a similar outcome),⁴¹⁹ the number of people the solicitor dealt with,⁴²⁰ and the number of issues in dispute.⁴²¹ Cases resulting in the same outcome as sought by the client involved the solicitor dealing with a fewer number of other individuals and entities on average than cases in which the client was less than wholly successful. This may simply reflect the fact that cases resulting in the same outcome tended to resolve at a relatively early stage, with little need for the solicitor to have many outside dealings. Cases resulting in a quite different outcome for the client had a higher than average number of issues in dispute, which may simply reflect the fact that cases going to hearing tended to have a higher number of issues in dispute.

394. It should also be noted that the way we chose to measure client success (other than from the client's perspective, which is discussed in the next section) did not wholly accord with solicitors' notions of a good outcome. Solicitors described good outcomes in terms of the best possible outcome the client could achieve, the best interests of the child, what was just, fair, realistic and effective, or what would best allow the client to get on with their life. Unfortunately, however, these qualities of a case outcome are inherently unmeasurable. The measure of client success that we did adopt proved reasonably sensitive to testing, revealing stage of resolution as an important determinant of client success. Funding status did not emerge as a determining factor, although it appears that in-house solicitors are able to

419 $\chi^2=8.540$, $df=3$, $p<0.05$.

420 Kendall's $\tau_b=0.176$, $p<0.01$.

421 Kendall's $\tau_b=0.148$, $p<0.05$

produce better results for their legally-aided clients than are private solicitors — perhaps again because they tend to resolve their cases at an earlier stage of proceedings.

Client Satisfaction with Outcomes

395. Solicitors' notions of what made clients happy with the outcome of their case also differed somewhat from clients' own assessments of a good outcome. Solicitors acknowledged that clients were happy with the outcome if they achieved the orders they wanted (or better). In two instances, the solicitor felt the client was happy with the result even though the solicitor believed the outcome could have been better. Similarly, cases in which the solicitor felt the client was unhappy with the outcome had a tendency to be resolved with orders that were quite different from those initially sought.
396. In four cases the solicitor was satisfied with the outcome although the client was not. In two of these cases the client ultimately wanted an outcome that could not be delivered by the legal system — wanting the other party “to suffer”, and wanting to restore the relationship. In the other two cases the client's expectations were very unreasonable — wanting the other party to have no contact with the child without any evidence of problems, and wanting residence of the children against all likelihood of this occurring.
397. Clients were asked a range of questions concerning outcomes: whether they felt they won or lost their case, whether they were satisfied with the result and if not, who they thought was most responsible, whether the result accorded with their expectations, whether the result was in their child/ren's best interest, and whether they thought they would have had a better outcome if they had been funded differently. Responses to each of these questions are discussed in turn.

398. One factor that may bear on clients' satisfaction with outcomes is the way in which legal aid clients are constructed as a group — that is, in order to obtain legal aid funding, their cases must be assessed to have merit as defined by the Commonwealth guidelines. The process by which the merits test is applied is discussed further in the next chapter. It is possible, however, that the operation of the legal aid merits test means that legal aid clients are more likely to win their cases, and therefore more likely to be satisfied with the outcome, than self-funding clients not subject to the merits test. In other words, if a legal aid applicant does not have a meritorious case it simply will not run, whereas self-funding clients can run unmeritorious cases and be correspondingly disappointed.

Won or Lost the Case

399. Clients' answers to the question whether they felt they had won or lost their case were broadly distributed, as shown in Table 4.7. (The difference between the "neither" and "both" responses may be identified by reference to the fact that those who answered "both" were more satisfied overall with the result of their case than those who answered "neither".)⁴²²

TABLE 4.7 Do you feel you won or lost your case?

Response	Number	Percent
Won	36	32.1
Lost	32	28.6
Neither	20	17.9
Both	24	21.4
Total	112	100.0

422 Mean satisfaction score for both=3.08 (on a scale of 5), while mean satisfaction score for neither=2.5. By contrast, mean satisfaction scores for won=4.8, and for lost=1.3.

400. As predicted, legally-aided clients were most likely to feel they had won their case (48%), while self-funded clients were most likely to feel they had lost (36%), and clients with both types of funding were most likely to feel they had neither won nor lost (46%). The overall difference between legally-aided and self-funded clients was not significant, however. In-house clients were also more likely to feel they had won their cases (56%),⁴²³ although numbers were too small for statistical testing.
401. Clients whose cases concerned children only were more likely to feel they had won their case, while clients whose cases concerned both children and property were more likely to feel they had lost their case, with the difference being close to statistical significance.⁴²⁴ There was a significant difference by sex of solicitor, with clients of female solicitors being more likely to feel that they had won their case or both won and lost, while clients of male solicitors were more likely to feel they had lost their case.⁴²⁵ Finally, there was a significant relationship between the client success measure discussed in the previous section and clients' responses to this question, with clients who felt they had won their case having a higher mean success score (1.6) than those in the other categories (2.2–2.5).⁴²⁶

Quality of Outcome

402. The overriding consideration specified in the Family Law Act for decision-making in children's matters is the best interests of the child. We therefore asked clients whether they thought the result of their case accorded with this standard (while acknowledging that clients' notions of what is in their children's best interests may not accord with the court's view of that issue).

423 But in-house clients in NSW were less likely to feel they had won their cases than those in the other States.

424 $\chi^2=7.079$, $df=3$, $p=0.069$.

425 $\chi^2=11.014$, $df=3$, $p<0.05$.

426 Kruskal Wallis $\chi^2=10.996$, $df=3$, $p<0.05$.

403. A small majority of clients agreed or strongly agreed that the result of the case was in their child/ren's best interests (53%), although a substantial proportion strongly disagreed (28%). Legally-aided clients were most likely to strongly agree (55%), while clients whose cases were both legally-aided and privately funded were most likely to strongly disagree (7/11=64%).
404. Clients' responses to this question were most strongly correlated with their satisfaction with the result of the case,⁴²⁷ and whether they felt they had won or lost their case.⁴²⁸ Responses were also correlated with the client's degree of satisfaction with the methods used to resolve the case,⁴²⁹ and with their lawyer.⁴³⁰ These correlations suggest that clients' notions of the best interests of the child were strongly associated with their own interests, in turn rendering family law clients' views of their children's best interests an unreliable indicator of where those best interests might in fact lie.

Expectations of the Outcome

405. Clients were asked to rate on a five point scale the degree to which the result of the case matched their expectations before they saw their lawyer, and matched what their lawyer led them to expect. The results of these two questions are set out in Table 4.8.

427 Kendall's tau_b=0.642, p<0.01.

428 Kruskal Wallis $\chi^2=53.972$, df=3, p<0.001.

429 Kendall's tau_b=0.434, p<0.01.

430 Kendall's tau_b=0.276, p<0.01.

TABLE 4.8 The result of the case was what I expected...

Response	Before seeing lawyer	Percent	After seeing lawyer	Percent
Strongly disagree	38	33.6	21	18.8
Somewhat disagree	16	14.2	11	9.8
Neither	20	17.7	18	16.1
Somewhat agree	18	15.9	26	23.2
Strongly agree	21	18.6	36	32.1
Total	113	100.0	112	100.0

406. It can be seen from the contrast between the two sets of figures in the Table that lawyers did change their clients' expectations about the outcome, and that the expectations created by lawyers were closer than clients' initial expectations to the actual result of the case.

407. There was no difference by funding or representation status in responses to the first question, but legal aid clients were most likely to strongly agree that the result of the case was what their lawyer led them to expect (46%), and clients who were both legally-aided and self-funding were more likely to strongly disagree (46%).⁴³¹ Clients whose cases concerned children only were also most likely to agree that the result of the case was what their lawyer led them to expect (39%), while clients whose cases concerned both children and property were most likely to disagree (29%).⁴³² This reinforces the suggestion made earlier that lawyers are better at predicting the outcomes of children's cases than of property cases.

408. Clients were also directly asked whether their initial expectations had changed after discussions with their lawyer. Twenty-seven

431 Kruskal Wallis $\chi^2=7.425$, $df=2$, $p<0.05$.

432 Mann-Whitney test: $Z=-2.057$, $p<0.05$.

clients (24%) answered “yes”, with no differences between funding or representation type. In four cases the client said their expectations had changed for the better, but in 22 cases the client’s expectations had diminished to some extent. Clients’ explanations of how they felt in these cases made it clear that their lawyers had provided explanations of the law and processes involved which the client found disappointing. Nine clients said they discovered that the law was against them, or they were unable to pursue what they had hoped for; six clients said they found the process would take much longer than they expected; and three clients said they could not achieve what they wanted because they did not have enough money (each of these was self-funded).

409. Clients were finally asked whether they felt they had some control over the result of their case. Very few clients gave a neutral response to this question, and the largest group strongly disagreed (37%). Overall, clients were fairly evenly divided between agreeing (45%) and disagreeing (49%).

410. Clients who felt they had some control over the result of their case were also likely to be satisfied with the time the case took to resolve,⁴³³ to feel that they had won or at least partially won their case,⁴³⁴ to have not changed their expectations after consulting with their lawyer,⁴³⁵ and to have reached a result they expected.⁴³⁶ This indicates the extent to which feelings of control are connected to the fulfilment of expectations and subjective perceptions of success.

433 Kendall’s $\tau_b=0.274$, $p<0.01$.

434 Kruskal Wallis $\chi^2=37.971$, $df=3$, $p<0.001$.

435 Mann-Whitney test: $Z=-1.990$, $p<0.05$.

436 Result of the case was what I expected before I saw my lawyer: Kendall’s $\tau_b=0.405$, $p<0.01$; result of the case what what my lawyer led me to expect: Kendall’s $\tau_b=0.435$, $p<0.01$.

411. Again, self-funded clients and clients with both types of funding were more likely to disagree that they had some control over the result of their case, while legally-aided clients were more likely to strongly agree.⁴³⁷ In-house clients gave a higher mean ‘control’ score (3.5) than did the legal aid clients of private solicitors (2.7).⁴³⁸

Overall Satisfaction with Outcome

412. Clients’ responses to the question: “Overall, how satisfied were you with the result in your case?” tended to be polarised, as shown in Table 4.9.

TABLE 4.9 Clients’ Overall Satisfaction with Outcomes

Response	Number	Percent
Very dissatisfied	30	26.5
Somewhat dissatisfied	17	15.0
Neither	18	15.9
Somewhat satisfied	15	13.3
Very satisfied	33	29.2
Total	113	100.0

413. Clients’ degree of satisfaction with the result of their case was correlated with their satisfaction with the time taken to resolve the case⁴³⁹ (although not the actual time taken to finalise the case), their perception that the methods used to resolve their case were fair (see chapter 6),⁴⁴⁰ the degree of control they felt they

437 Kruskal Wallis $\chi^2=6.184$, $df=2$, $p<0.05$.

438 Mann-Whitney test: $Z=-1.907$, $p=0.057$.

439 Kendall’s $\tau_b=0.178$, $p<0.05$.

440 Kendall’s $\tau_b=0.455$, $p<0.01$.

had over the result of the case,⁴⁴¹ if their expectations remained the same after seeing their lawyer,⁴⁴² and whether the result accorded with their expectations (both before and after seeing their lawyer).⁴⁴³ This suggests that clients' satisfaction with outcomes is determined largely by their experience and perceptions of the case rather than by any objectively observable features of the case.⁴⁴⁴

414. In relation to expectations, while there was a clear linear relationship between the result being the same as initial expectations and satisfaction with outcome, the relationship between the result being the same as lawyer-created expectations and satisfaction with outcome was slightly different. Notably, clients could agree that the outcome was what their lawyer led them to expect, but remain somewhat dissatisfied with the outcome.

415. The only items from the analysis of files that were correlated with client satisfaction were the client success index (derived from the difference between the original orders sought by the client and final orders made),⁴⁴⁵ the nature of the matter, and

441 Kendall's $\tau_b=0.457$, $p<0.01$.

442 Mann-Whitney test: $Z=-2.179$, $p<0.05$.

443 Result was what I expected before I saw my lawyer: Kendall's $\tau_b=0.539$, $p<0.01$; result was what my lawyer led me to expect: Kendall's $\tau_b=0.541$, $p<0.01$.

444 There was also no relationship between self-funded clients' satisfaction with the result of their case and the cost of the case, although as noted below, there was a relationship between satisfaction with the result and how successful the client was in achieving their desired outcome. Broadly, these results accord with those of the RAND study of litigant satisfaction in personal injury cases, which showed that procedural justice judgments and outcome satisfaction were not highly influenced by objective outcome, cost or delay, but were more highly determined by perceptions of procedural fairness and expectations of outcomes and costs: E. Allan Lind, Robert J. MacCoun, Patricia A. Ebener, William L.F. Felstiner, Deborah R. Hensler, Judith Resnik, and Tom R. Tyler, 'In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System' (1990) 24 *Law & Society Review* 953.

445 Kendall's $\tau_b=-0.205$, $p<0.05$. Correlation coefficient is negative since the two factors score in different directions: client satisfaction increases from very dissatisfied (1) to very satisfied (5), while the highest success measure (orders the same)=1, and the lowest (orders quite different)=4.

the client's funding status. Clients in children's matters were significantly more satisfied with the outcome than clients whose cases involved both children and property.⁴⁴⁶ And legally-aided clients gave a higher mean outcome satisfaction score (3.5) than self-funded clients (2.8) or clients with both types of funding (2.5).⁴⁴⁷

416. It appears, then, that legal aid clients were generally more satisfied with the results of their cases, which is likely to be due at least in part to the operation of the merits test.

417. If clients were not satisfied with the result of their case, they were asked who they thought was most responsible. As with the responses to the question of who was most responsible if the client was not satisfied with the time taken to resolve the case, the client's former partner, and the Family Court, were nominated as the main culprits in clients' dissatisfaction with the result of their case, as shown in Table 4.10.

TABLE 4.10 If not satisfied with result, who was most responsible?

Response	Number	Percent
The Family Court/Judge	25	35.2
Their former partner	29	40.8
Their lawyer	5	7.0
The child representative	2	2.8
Other	10	14.1
Total	71	100.0

446 Mann-Whitney test: $Z=-2.992$, $p<0.005$.

447 Kruskal Wallis $\chi^2=6.120$, $df=2$, $p<0.05$.

418. ‘Others’ included the Order 30A expert, family court counsellors, legal aid, all the lawyers, the law itself, the entire system, and “all of the above except for myself”. In relation to former partners, clients commented at the end of the survey that the other party had unrealistic expectations, changed solicitor several times, breached orders, and was generally difficult to deal with.

419. The only difference between responses by funding and representation type was that legally-aided clients and in-house clients were more likely to blame someone other than their former partner or the Family Court for their dissatisfaction with the result of their case.⁴⁴⁸

Outcome Related to Funding Status

420. Legally-aided clients were asked whether they thought that the fact that they had legal aid prevented them from taking their case as far as they would have liked, and whether they thought they would have had a better outcome if they had been able to pay for their own lawyer. Self-funded clients were asked the same questions in reverse: whether the cost of their lawyer prevented them from taking their case as far as they would have liked, and whether they thought they would have had a better outcome if they had been eligible for legal aid.

421. Legal aid clients again expressed themselves to be more satisfied on this measure. They were more likely to strongly disagree that the fact that they had legal aid prevented them from taking their case as far as they would have liked (mean score 2.8), while self-funded clients were more likely to strongly agree that the cost of their lawyer prevented them from taking their case as far as they would have liked (mean score 3.2), although the difference

448 Funding: $\chi^2=10.540$, $df=2$, $p<0.01$; representation: 5/7 cases attributed to ‘other’, numbers too small to test statistical significance.

between the two groups was not significant. There was no difference between the mean scores for in-house and referred legal aid clients. Not surprisingly, responses to these questions were correlated with the client's satisfaction both with the outcome of their case,⁴⁴⁹ and with their lawyer.⁴⁵⁰

422. Self-funding clients' dissatisfaction with the outcomes of their cases and regret that they had not had more money to spend on their cases did not translate into 'legal aid envy', however. Only 8% of self-funding clients thought they would have got a better outcome if they had been eligible for legal aid, while a substantial group (35.5%) answered "don't know" to this question. By contrast, 35.9% of legal aid clients thought they would have had a better outcome if they had been able to pay for their own lawyer, with only 12.8% answering "don't know".

Ongoing Issues

423. Nineteen of the cases in the file sample (11%) involved some form of ongoing issues of which the solicitor was aware, after the case had closed. These cases were more likely to be self-funded, although this is likely to be due to the fact that self-funding clients may raise ongoing issues with their solicitors at any time, whereas legally-aided clients would have to seek another grant of aid in order to do so.
424. Seven ongoing cases involved the other party breaching the orders, particularly in denying contact. Two of the solicitors acting for self-funding clients in this situation expected to act for these clients again, in order to deal with enforcement of orders. By contrast, the one in-house solicitor involved in such a case

449 Kendall's $\tau_b = -0.301$, $p < 0.01$.

450 Kendall's $\tau_b = -0.319$, $p < 0.01$.

felt that their client would not get a further grant of aid to enforce or amend the orders.

425. Two cases involved a self-funding client being awarded costs against the other party, who then refused to pay. It was possible that enforcement proceedings would be taken in one of these cases.

426. In other cases:

- the client and the other party reached an agreement out of court to reverse the residence orders made; it was unlikely that the client would obtain a grant of aid to formally reverse the orders
- the matter reactivated, with the other party assaulting the client at a recent counselling appointment
- the client needed to file for divorce to really escape from the other party and his family, but her application would be opposed on religious and cultural grounds
- the orders required the other party to attend a course of counselling. After some difficulty finding a suitable therapist, the other party refused to attend more than once.

427. Seven cases involved final orders that the solicitor felt were not adequate and would possibly lead to future problems. These orders were too ambiguous, unrealistic, inflexible or unrelated to the reality of the clients' lives. For example in one case, the client insisted on a property settlement which involved the client paying the other party a sum of money within a timeframe which the solicitor believed to be unrealistic. In another case, the court refused to make provision for contact arrangements over the school holidays, despite the solicitor's repeated requests. In a third case, the client wanted contact with both his biological child and step-child, but contact for the latter could not be

resolved in the absence of that child's biological father, who failed to appear, thus leaving a "hole" in the contact regime.

428. In the client surveys, too, the most frequent additional comment made by clients concerning the outcome of the case was that despite formal resolution in the court, the issues were still ongoing. Clients complained that they had not had any contact with their children, and/or that the other party continued to breach orders. Clients also explained that part of the problem concerning these ongoing issues was that they could not afford to go back to court in order to enforce orders.

Conclusions

429. The outcome of any family law case is inevitably a product of the interaction between the parties, their solicitors, and the Family Court, and in legal aid cases the filtering effect of the merits test. Solicitors do appear to guide parties towards largely predetermined outcomes based on a notion of what the Court would decide. However while solicitors articulated what they perceived to be the normal range of orders in property and children's matters, their predictions about residence orders accorded most closely with reality. They tended to overestimate the amounts obtained by women in property settlements, and to underestimate the wide variability of contact orders. There were also some interesting marginal differences between the kinds of contact orders negotiated by male and female solicitors.
430. Certain kinds of cases appeared to be handled poorly by the family law system in general. Contact was only denied in the most extreme cases, leaving a range of cases involving violence and alleged abuse with possibly inappropriate contact agreements. Some relocation cases also resulted in women who had been subject to serious violence being restrained from

escaping their batterers. ‘Snatching’ of children appeared to be inadequately penalised or restrained.

431. Clients most often blamed the other party for the fact that the case took too long, or for an unsatisfactory result. While these attributions were clearly born of animosity, it emerged that the other party’s representation status did have an impact on the length of the case, and the closeness of the result to the client’s original wishes. Moreover, unrepresented and partially represented non-residence parents appeared to achieve more extensive contact with their children than did those who were fully represented.
432. Legal aid clients were more likely than self-funding clients to be satisfied overall with the result of their case, to feel they had won their case, and to feel they had had some control over the result of their case. Feelings of control over the result were strongly related to whether initial expectations were met or disappointed, and the likelihood of initial expectations being met was inevitably higher in legal aid cases subject to the merits test. Legal aid clients were more likely to disagree that legal aid had prevented them from taking their case as far as they would have liked, although the apparently positive feeling of legal aid clients was somewhat belied by the fact that more than one third thought they would have got a *better* outcome if they had been able to pay for their own lawyer. Self-funding clients, on the other hand, were more likely to agree that the cost of their lawyer had prevented them from taking their case as far as they would have liked. Yet they did not believe, as a consequence, that they would have done better if funded by legal aid. And despite the resource constraints reported by self-funding clients, the files showed that in fact, self-funding clients were able to pursue their cases and to respond to new issues arising at a late stage, whereas legal aid clients were significantly restricted from doing so by the need to obtain a new grant of aid.

433. In-house solicitors also achieved results closer to what their clients originally sought than did private solicitors handling legal aid cases. This finding is correlated with the fact that in-house solicitors achieved earlier resolutions, and with the fact that the opponents of in-house clients were more likely to be wholly unrepresented. Not surprisingly then, in-house clients were more likely to feel they had won their case and more likely to feel they had had some control over the result of their case than were the legal aid clients of private solicitors.

Funding and Costs

434. This chapter discusses a range of issues related to funding and costs, drawing upon all three data sources: the cases studied in the file sample, solicitor interviews and client surveys. The chapter initially discusses solicitors' views of the most expensive elements of a family law case, and contrasts the views of public and private sector solicitors on these elements. It then considers solicitors' responses to interview questions concerning strategies that might be used to reduce costs, and the kinds of clients for whom those strategies might be deployed. The chapter goes on to discuss the particular experiences of and issues faced by clients and solicitors in cases with different types of funding — legal aid, private funding, or a mixture of both. Finally, the chapter examines the impact of the other party's funding status, and the effect when parties are funded in different ways or have widely differing levels of resources to commit to the case.

Expensive Elements of a Family Law Case

435. According to 45 solicitors (56% of respondents), the final hearing is the most expensive element of a family law case. Just over half of these solicitors explained that engaging counsel is a particularly expensive aspect of running a final hearing. Several in-house solicitors, particularly in NSW, noted that they were virtually precluded from briefing counsel due to the cost, and instead would either try to avoid the need for a hearing (for example by convening a conference to attempt to settle the

case),⁴⁵¹ or make use of an in-house solicitor advocate if one was available,⁴⁵² or have to run the case themselves.

436. Some solicitors provided estimates of the cost of going to a final hearing, and these also differed widely between public and private sector solicitors. One private solicitor estimated preparation fees of \$3,000 to \$4,000, plus the solicitor's fees during the trial, plus the cost of a barrister at \$1,400 per day. Another private solicitor suggested that the cost of engaging a solicitor, a QC and a junior barrister could push fees to \$7,000 to \$8,000 per day. By contrast, one (Victorian) in-house solicitor explained that they are allowed \$1,650 per day for trial, which includes \$852 for counsel. Another in-house solicitor considered that a three day trial would cost up to \$3,000.

437. The other main expense associated with a final hearing was said to be preparation, including getting in experts' reports, preparing final affidavits (the Order 30A affidavit being particularly expensive), issuing subpoenas, preparing evidence and finalising valuations. Again, in-house solicitors stressed that their preparation for final hearings was restricted, as they needed permission to obtain expert reports, and increasingly were unable to order Order 30A reports. One in-house solicitor who had previously worked for a private firm observed that there were very different approaches towards dealing with costs:

We don't spend money on a lot of things at Legal Aid... That is another thing that struck me when I first came into Legal Aid here is that you have to worry about cost. I mean where I was from, nothing cost anything, so you just kept going, you didn't worry about it.

451 At the time of the study, legal aid conferences in NSW were generally held at the late stage of a case, to attempt to achieve a settlement prior to hearing. NSW has subsequently moved to 'early intervention' conferences, prior to the issuing of Family Court proceedings, as has always been the case in Queensland.

452 The NSW LAC employed three full-time, specialist family law solicitor advocates.

438. Twenty-four solicitors (30% of respondents) identified aspects of children's matters that were particularly expensive, notably expert reports, and cases involving allegations of child sexual abuse. Twenty-one solicitors (26% of respondents, including those who tended to deal more with property cases) identified aspects of property matters as the most expensive elements of family law cases, particularly valuation. Costs were said to increase if forensic accountants were used, and if the property case was complex, involving family companies and/or family trusts.
439. Fourteen solicitors (17% of respondents) thought that preparation of documents was the most expensive element of a family law case. Once more, there were some interesting differences between cost estimates for affidavits provided by private and in-house solicitors. One private solicitor considered that the research and drafting involved for a 12-page affidavit meant it would cost up to \$1,000 (approx. \$83 per page). This contrasts with the response of an in-house solicitor, who explained that affidavits were expensive because they cost \$5 per page.
440. Finally, 11 solicitors (14% of respondents) thought that the most expensive element of family law cases were court appearances other than final hearings. Regional solicitors were more likely to hold this perception, reflecting the additional costs associated with court appearances imposed by distance. Two solicitors noted that court appearances were expensive because they involved engaging agents. One solicitor explained that an interim application would involve preparation, engaging a barrister, airfares, an agent for filing and service, additional faxes, and double handling of documentation, resulting in expenses as high as \$8,000–\$10,000.
441. Solicitors' responses thus indicated that in-house solicitors are operating in a far more cost-conscious environment than private solicitors, resulting in avoidance of expensive elements

(eg. barristers, Order 30A reports), and much lower estimated costs for major items. The only issue unlikely to be faced by in-house solicitors is that of distance, which significantly increases costs for clients in regional areas.

Strategies to Reduce Costs

442. One strategy that has been proposed in response to the limited availability of legal aid funds has been the possibility of “unbundling” legal services,⁴⁵³ which involves disaggregating the discrete tasks involved in legal representation (such as fact gathering, giving advice, legal research, drafting correspondence and documents, negotiation, court representation) so that clients handle more of the case themselves.⁴⁵⁴ Another option which has received an increased focus in recent times is the provision of *pro bono* services, that is, free legal services provided by lawyers as a community service “for the public benefit”. In the interviews, solicitors were asked whether they used unbundled services, and when they would choose to act *pro bono*.

Unbundled Services

443. Only four of the private solicitors interviewed had heard of the term “unbundled services” and knew what it meant. Another two had heard the term, but were unsure what it meant. This

453 eg. Australian Law Reform Commission, *Report No.89: Managing Justice — A Review of the Federal Civil Justice System* (Commonwealth of Australia, 2000), 364–73.

454 Forrest S. Mosten, ‘Unbundling of Legal Services in Family Law’, conference paper presented at the Advanced Family Law Conference, Bond University, 17 September 1993. 10. It must be acknowledged that the precise meaning of the term “unbundled services” remains somewhat contested. While the ALRC, for example, refers to unbundling as described above (373–73), it also uses the term to refer to legal information, advice, minor assistance and referral to ADR and ancillary professionals, provided to clients who do not qualify for legal aid (363–72). And one of the referees of this report maintains that unbundling refers to a situation in which the client is in control and delegates tasks to the lawyer, rather than the other way around.

made it difficult to gauge solicitors' views on unbundled services! After interviewers gave a brief description, more solicitors were able to comment.

444. Of the 46 solicitors who ultimately answered this question, 37 (80%) said that they used unbundled services in one form or another. The most popular form of unbundled service appeared to be getting the client to draft their own documents. Solicitors said they asked clients to fill in a Form (particularly a Form 17) to the best of their ability, and would then check over it with them. They said they would also ask clients to collect documents from court, file documents with the court, and/or type up documents themselves after the solicitor had drafted the form by hand. Five solicitors replied that they occasionally got their client to do their own court appearances, especially for duty list appearances or interlocutory matters. One solicitor said he offered clients a choice of doing their own court appearances or documents, though he would prefer them to do the court appearances:

If you have clearly drafted applications that set out the orders precisely what they want, and if you have got the affidavit that supports why those orders should be made, whether or not the person can be articulate or not in my experience doesn't significantly affect the outcome.

445. Various solicitors also said they asked clients to do their own statements of evidence, market appraisals, investigative work, photocopying, preparation work for affidavits (such as writing out the history of the case or providing responses to the other party's affidavit), and negotiating with the other party if they are capable of doing so.
446. Solicitors noted that they would offer unbundled services to legal aid clients as a way of extending the grant to cover the work that had to be done. They also said they might offer unbundled services to clients with limited funds or clients who had been unable to obtain a legal aid grant. More generally,

unbundled services appeared to be offered if the client was “capable”, ie. intelligent, articulate, confident and literate:⁴⁵⁵

Certainly I've had some of the more capable, intelligent clients doing bits of things themselves very often.

A lot of your clients are business people, they are intelligent. I give them sections of the Act... I will give it to them because they are intelligent people and they want to understand and they know, you only have to tell them once what you need and they are well capable of doing it.

447. In each instance, solicitors said they offered unbundled services to decrease costs to the client, and sometimes to save costs at the beginning of a case, to ensure there would be enough funds (private or legal aid) for final hearing. In addition, solicitors saw unbundling services as a way of involving clients in their own case, and allowing them to feel more in control of the case.⁴⁵⁶

448. Several solicitors were strongly supportive of unbundled services, claiming that they were an everyday part of their practice, and unavoidable when dealing with legal aid clients or as a way of delivering affordable legal services: “It’s the way of the future”.

449. Most solicitors who said they used unbundled services, however, were more reserved, acknowledging that unbundled services were not always appropriate. Some clients could not manage tasks themselves. These clients were described as being “less capable”, “helpless”, or even “dense”. In addition, solicitors noted that clients who were emotive, stressed, lacked

455 See also Mosten, *ibid.*, 16, who discusses the use of unbundled services not as a means of providing access for legal aid clients, but as a benefit for middle-income clients.

456 See also John H. Wade, ‘New and Recycled Services by Family Lawyers: Responding to a World of Change’ (1997) 11 *Australian Journal of Family Law* 68, 92, who argues that solicitors have begun to offer unbundled services due to the greater number of self-representing litigants, and clients’ demands for greater control and more affordable services, rather than as a strategy associated specifically with legal aid grants.

confidence or had language problems were less suited to unbundled services. Solicitors generally felt that when using unbundled services they had to “draw the line”. Such services were “risky” and “potentially dangerous”, and should not be used simply as short cuts that reduced the quality of service and damaged solicitors’ reputations. They explained that documents must be checked, that clients are not always willing to tell the truth, and that client mistakes often take longer to correct than having the solicitor do the work in the first place. The solicitor must be careful as they are ultimately responsible for the case.⁴⁵⁷ Several solicitors commented that whilst they may offer unbundled services early in a case, once their name is on the court file they prefer to do all the work themselves, and work *pro bono* if costs are an issue.⁴⁵⁸

450. Finally, a minority of respondents to this question (20%) stated that they did not offer unbundled services, and were strongly opposed to the concept, arguing that unbundled services were inappropriate, dangerous, and too difficult under the current Family Law system, which requires the solicitor to go on the court record as acting for the client.

451. Among the sample of cases studied, only four files (2%) included evidence of unbundled services offered to the client in order to reduce costs. In one of these, the legally-aided client appeared unrepresented in an application for a domestic violence order, but received advice from her solicitor on how to go about it. In another, the client’s legal aid grant was terminated, and she thereafter represented herself at court appearances, while the solicitor continued to handle out-of-court work. In the third case the client became increasingly concerned

457 See also ALRC, *Report No.89*, 372–73.

458 Mosten also argues that family lawyers are resistant to offering unbundled services because they are obsessed with control, and offering unbundled services involves giving up some control: ‘Unbundling of Legal Services in Family Law’, 33. The issue of family lawyers’ control mania is discussed further in chapters 6 and 7.

about mounting costs, and eventually instructed the solicitor to allow her to be self-representing at the final directions hearing. In the fourth case, which involved both property and children's matters, the client ran the contact issues herself, preparing her own affidavits and negotiating with the other party's solicitor for an interim consent order. In relation to the property matter, the client did her own court appearances as an unrepresented litigant, with "coaching" from the solicitor beforehand.

452. It is possible that other forms of unbundled services (eg. preparation of forms and affidavits, gathering of evidence) were also offered in the cases in the file sample without being evident on the face of the file. The file analysis does suggest, however, that unbundled services remain a reasonably rare phenomenon in family law cases, while solicitors' interview responses suggest that self-funded clients may be more likely to be considered 'capable' of benefiting from unbundled services.

Pro Bono Work

453. In response to the question "when do you choose to act *pro bono*?", a number of private solicitors referred to unfunded work on legal aid cases, including work prior to the grant and work not covered by the stage of matter limits, and also free advice on property matters.⁴⁵⁹ They claimed that if they did the amount of work actually paid for by the Legal Aid Commission they would not be doing justice to their client:

You can't charge your client, but you've got to do it for your client because it's required, so you do it and you just do it knowing full well that you'll never get paid for it. The client will thank you for it but that's about as far

459 For a similar argument from the UK, see Alan A. Paterson, 'Financing Legal Services: A Comparative Perspective', in Alan A. Paterson and Tamara Goriely (eds), *A Reader in Resourcing Civil Justice* (Oxford University Press, Oxford, 1996), 237. For comment on this argument, see Senate Standing Committee on Legal and Constitutional Affairs, *Legal Aid: For Richer and for Poorer — Cost of Legal Services and Litigation Discussion Paper* (Commonwealth of Australia, Canberra, 1992), 94–95.

as it goes... I don't want to be professionally negligent, but that's what it comes down to.

From a legal aid point of view, it's certainly firm policy that even if a file is legally-aided you do what work is required.

454. Some solicitors also said they would work *pro bono* after a grant had run out. In one case this involved doing a final hearing *pro bono*. Solicitors explained that they felt obliged to continue with the case rather than offer a second rate service:

[We] just keep doing it until it's over because otherwise we'd just be stuck with no solution for the client, and I know that there are solicitors who refuse to work any further, but I have a lot of difficulty with that.

You just can't ditch the client at the eleventh hour.

455. Sixteen percent of respondents (n=9) said they would act *pro bono* for a client whose case had merit, but who could not receive a grant of aid — the majority of these solicitors were from Brisbane and Parramatta. They explained that if the client did not have the financial means to fund the case themselves, and had been knocked back by the Legal Aid Commission, then they had run out of options. Two solicitors said they would be willing to act *pro bono* in urgent cases where the Legal Aid Commission may provide a grant of aid, but the client cannot afford to wait. In such cases, the delay in obtaining a grant, or the possibility of a grant being given that was inappropriate (such as a grant to go to a Legal Aid Conference when the client needed urgent court orders) would be unfair to the client:

I know that by the time she gets to Legal Aid, three or four weeks will have elapsed. She will be a nervous wreck and she probably would have handed the child over. They are in such distress.

456. More generally, 37% of solicitors said that they would do *pro bono* work on a case if the client was “genuine”, “a worthy

cause”, “particularly deserving”, or “getting a raw deal”. In addition, the client had to have trouble financing the case, the case had to have merit (preferably involving a novel point of law), the client had to be unable to run the case themselves, be completely at a loss and desperate but still sensible and reasonable, and be thankful for the service:

A client who, for example, genuinely can't afford to run a case but who has good reasons for pursuing a certain matter. Somebody who appreciates what you are doing for them and it helps when they've got a problem that is somewhat different. It's easy to motivate yourself and work for nothing when it's a new point or an interesting point or something like that.

Further criteria for taking on deserving clients included if it was unlikely that the case would cost the firm too much, if the other side was appalling, if the case had a good chance of success, or if a child was at risk.

457. The grounds articulated for taking on *pro bono* work underline solicitors' views of the charitable nature of such work, charity being traditionally reserved for the deserving poor. They also demonstrate why increased reliance on formal *pro bono* schemes would be unlikely to provide a solution to the funding shortage in family law — even if solicitors were able to take on all the cases they considered “deserving”, there would be too many unsympathetic, run-of-the-mill clients who would struggle to find representation.⁴⁶⁰ As Alan Paterson has noted in the UK context, it is difficult to see how *pro bono* schemes could play more than a symbolic role in providing access to justice in this area (or many others).⁴⁶¹

460 See also Senate Standing Committee on Legal and Constitutional Affairs, *Cost of Legal Services and Litigation Discussion Paper*, 100–101.

461 Paterson, ‘Financing Legal Services’, 238. See also National Legal Aid Advisory Committee, *Legal Aid for the Australian Community* (Commonwealth of Australia, Canberra, 1990), 92.

458. Moreover, solicitors made it clear that their *pro bono* work for deserving clients did not necessarily involve running the whole case free of charge. They were more likely to discount the bill, undercharge, give free advice, or charge at a Legal Aid scale than to charge nothing at all, and might also draw the line at major work such as final hearings, which would involve paying a barrister. This point was borne out by the file analysis. None of the cases studied were done *pro bono* in their entirety, although 28 cases run by private solicitors (29%) involved some form of discounting or subsidisation. One solicitor did not charge their client for telephoning costs, as the client lived a fair distance from the office and the telephone was the only means of getting instructions. And in two cases, the solicitor did the initial work on the file *pro bono* because the case involved urgent recovery applications.
459. Solicitors explained in the interviews that they would discount bills if: the client had already spent a lot of money; the solicitor had underestimated the costs to the client; the result was unsatisfactory for the client; in order to finish a case if the client had run out of funds; or the client was “deserving”. However, where they could be tested, the files did not bear out these explanations. Discounting where the client had already spent a lot of money was not a general practice. In a number of cases in the file sample the client ran up a sizeable bill but received no discount, and conversely, discounts were offered in some cases in which the client did not spend a lot of money. As discussed below, underestimating costs was a far more frequent occurrence than discounting. Cases that went to pre-hearing conference or hearing were not more likely to receive a discount than cases that settled earlier. There was no relationship between the receipt of a discount and the result of the case, nor between the receipt of a discount and the nature of the matter (children only or children plus property), or the client’s role in the case (applicant or respondent).

460. In general, the only common factor among the cases that received a discount appeared to be the solicitor's attitude towards the client. If the client cared about their children, appeared to be in financial difficulty (although this referred to clients who were self-employed or on low to medium incomes rather than unemployed),⁴⁶² or followed advice, then the solicitor might reduce the bill. In one case, the solicitor gave a discount as the client did not have much money and the other party "had it easy" on legal aid. One solicitor also reduced the bill for a client as they were a "nice person". Certainly in the cases in which the fact of a discount was evident from the file (n=8), there was no clear pattern in relation to either the size of the bill (ranging from \$1,400 to \$38,000), or the size of the client's income (ranging from zero to \$34,000). Objective financial factors appeared to play little part in determining who would be assisted in this way.

461. Finally, solicitors doing *pro bono* work tended not to advertise that fact, and expressed concerns about the floodgates of demand:

I guess if I went to the partners and said, "this person I think has got great merit and they can't get legal aid, and they can't fund their application privately", I think they would probably say, "well look, where do you draw the line? There are going to be hundreds of them..." I think pro bono work for big firms is a bit of a marketing tool, but for a lot of smaller firms you are struggling to just pay costs and make a decent living by charging people, let alone taking on responsibility to take on pro bono work...

462 Similarly, Lochner's interviews with New York lawyers revealed that clients taken on on a no-fee/low-fee basis were typically middle-class, well educated people who may be experiencing a period of temporary disadvantage but whose long-range economic prospects were generally very good. They were often on a steady income but had no savings to pay a lawyer: Philip R. Lochner, Jr., 'When Do and Should Lawyers Render Pro Bono Services?', in Richard L. Abel (ed), *Lawyers: A Critical Reader* (New Press, New York, 1997), 246.

If it got around this town that I was acting pro bono, you'd have to leave town in the dead of night, under the cover of darkness.

462. For most solicitors, then, *pro bono* work in family law is understood to mean charging the client or receiving from Legal Aid an amount less than the solicitor's normal fees. True *pro bono* services — the provision of free legal assistance for the benefit of the public — appear to be extremely rare in this area.

Cases Funded by Legal Aid

463. This section considers the incidents of legal aid funding that are not faced by self-funding clients or their lawyers: difficulties in obtaining and keeping a grant of aid; the amount of legal aid funding provided, in terms of stage of matter limits and the overall funding cap; transaction costs of dealing with the Legal Aid Commission; and lawyers' willingness to undertake legal aid work.

Difficulties with Legal Aid

464. Legal aid was refused altogether in nine of the self-funding cases in the file sample (12.7%).⁴⁶³ In the majority of these cases the client failed the means test, although one was based solely on merits, and another was based on both means and merits. In a further 13 cases (11% of those that eventually received legal aid), legal aid was initially refused and then subsequently granted. Although these statistics indicate what happened in some cases in which aid was refused, the file sample does not, of course, give any indication of the proportion of cases in the family law system as a whole in which refusal of legal aid led to

463 In the client surveys, 20 out of 71 clients said they had applied for but not received a grant of legal aid (28.5%).

the client either deciding to self-represent, or simply walking away.⁴⁶⁴

465. In 14 cases in the file sample (12%), the legal aid grant was limited in some way.⁴⁶⁵ The most common limitation was for aid to be granted for, or later restricted to, contact only rather than residence and contact (6 cases). Other restrictions included: no aid for enforcement proceedings (2 cases), aid granted for negotiations only (2 cases), limits on disbursements and appearances (2 cases), and no aid for trial (2 cases). Conversely, in one case aid was granted only for final hearing. Other limitations mentioned in the client surveys included no aid for property proceedings or for variation of orders.

466. These figures and their rationales conceal what could be a lengthy, frustrating and baffling decision-making process before aid was granted or refused, which was revealed from perusal of the files. In one case, for example, the client (father) initially wanted to apply for a residence order, after the other party took out an intervention order against him. His application for legal aid was refused not on the basis of merits, but because primary dispute resolution had not been attempted. The client then attempted to organise confidential counselling or mediation, but the other party (not surprisingly given the presence of the intervention order) refused and changed her telephone number. The solicitor then contacted the Legal Aid Commission and submitted that the conditions for a grant of aid had been satisfied, however aid was again refused, and the solicitor

464 See John D. McCamus, 'The Reshaping of Legal Aid', in W.A. Bogart (ed), *Access to Affordable and Appropriate Law Related Services in 2020* (Canadian Bar Association, Ontario, 1999); John Dewar, Jeff Giddings and Stephen Parker, *The Impact of Changes to Legal Aid on the Practice of Family and Criminal Law in Queensland* (report to the Queensland Law Society and Family Law Practitioners Association of Queensland, 1998), 85.

465 Again, clients reported a higher rate of limitations in the surveys, with 23.5% of those who obtained legal aid saying they did not receive legal aid for all of their case.

appealed. Aid was eventually granted for contact only, and for negotiations only. The solicitor then sent the Legal Aid Commission a transcript of an interview with the client, describing the incident leading to the intervention order. Aid was then granted, but only for defence of the intervention order in the Magistrates Court. The solicitor persisted, and finally obtained a grant to apply for contact orders, after the intervention order issues had resolved. By this time, the solicitor had done \$900 work *pro bono* on the client's case. In another case, the client's application for aid was rejected, but then granted after an appeal. The case had reached the pre-hearing conference by this stage, so a considerable amount of work had been done, but the solicitor could only charge from the time the grant was finally approved.⁴⁶⁶

467. In relation to restrictions on the grant of aid, in one case a grant was made to apply for a residence order, but then limited to an application for contact only. The client's application for residence was withdrawn. The Legal Aid Commission then advised that it was not willing to extend aid for overnight contact, as the client did not have reasonable prospects of success, despite the fact that there were already interim orders made for overnight contact. The solicitor wrote to the Review Committee, but an extension of the grant was refused. A subsequent appeal also failed. In the same case, the solicitor also applied to the Legal Aid Commission to commence contempt proceedings, but the application was denied on the ground that the benefits gained would not justify the expenditure. After the residence/contact issues 'resolved', the other party continued breaching orders, but the solicitor advised the client that the Legal Aid Commission

466 Note that the LSCSA is the only LAC of the four studied in which grants generally run from the date the application is approved. LAQ and NSWLAC grants generally run from the date the application is received, while VLA grants generally run from the date of the application (unless there is significant delay in forwarding the application to the Commission, in which case the grant will run from the date the application is received).

would not fund for contempt proceedings, and that there was nothing he could do to stop the breaches.

468. In another case, interim orders for contact had been made and an investigation into allegations of child abuse by the other party had been opened by DHS. The solicitor received counsel's advice that to continue the client's application for contact only would contradict the client's concerns for the child's welfare, so the solicitor applied to the Legal Aid Commission for an extension of the existing grant to cover an application for residence. The Commission refused to extend the grant until it had received written confirmation from DHS, which was provided. The other party then assaulted the client and threatened to take the child overseas. Three months after the initial request, aid was extended for an application to restrain the other party from taking the child overseas, but not for a residence application. The client eventually funded the application for residence themselves.

469. In a third case, the client's application for funding to cover enforcement proceedings was refused on merit, and a subsequent appeal was unsuccessful. The solicitor felt that the enforcement application had to proceed, or else the other party could (and did) simply ignore the orders. The solicitor advised the client that enforcement proceedings would be in his best interests and informed him of the costs, but the client could not afford to continue. In relation to the inability to gain a grant of aid for enforcement proceedings, one solicitor commented:

The Legal Aid Commission can say I will help you get the orders but it's up to you about enforcing them. What good is that? I think it's one of my concerns that people take the law into their own hands.

470. In two cases, the grant of aid effectively or explicitly restricted the number of children covered: in one, the application was initially refused on merit, but granted on appeal, however with only enough funding to run an application for residence of three

of the four children involved; in the other, aid was granted to apply for residence in relation to two children, although the client wanted orders for all four children.

471. Four particularly worrying cases concerned clients who had been subjected to severe domestic violence by the other party. In each case the client had either fled from the violence leaving the children, as they had nowhere to take them, or the children had been ‘snatched’ by the other party. In each case the client applied for legal aid for residence or contact, but their applications were either initially refused, or granted to a stage that was clearly inappropriate, such as to negotiate a Parenting Plan. All four cases were dealt with by LAQ — three in-house, and one involving a private solicitor:

- The client (mother) had been subjected to severe domestic violence by the other party (father). She went to a refuge, but was unable to take the children with her. She then approached LAQ to apply for residence orders to recover the children. Initially she was not referred to the Family Law section and her application was rejected. She returned 12 months later and was referred to the Family Law section, but her application was again rejected on the ground that there was no genuine dispute between the parties, and there had been no meaningful denial of contact. After a review of the application, the client was given a grant for a Legal Aid Conference only. At the conference, consent orders were drafted and filed, however the client still wanted to go to court in order to obtain residence. Her application was again denied, on the ground that there was no genuine dispute. After a further review, a grant to commence proceedings for residence was finally given.
- The client (mother) left home after suffering domestic violence, and applied for a grant of aid to apply for contact orders. The grant was initially refused on the ground of merit as residence was not in dispute, contact had not been denied,

and there were insufficient prospects of success. The client wrote to LAQ detailing a long history of domestic violence and child abuse, which she substantiated with witness accounts and photographs. She wrote: “To be honest I feel as though I am being condemned/punished for leaving prior to the abuse becoming severe enough to require hospitalization or a funeral (would that be enough independent evidence?). I hold grave fears for the safety of my children”. The grant was then given.

- There was a long history of domestic violence by the other party (father) against the client (mother), including four previous domestic violence orders and two convictions for breaches of the orders. The client had residence of the children but the father refused to return them after a contact visit. He moved house, making it very difficult for the client to contact the children, and told her he wanted to “go for custody”. The client sought advice from LAQ. She wanted an urgent recovery order and to file an application for residence, but was given a grant to attend a Legal Aid Conference, at which the issue of residence was not resolved. The client reapplied for a grant, which was given for another conference. At the conference she agreed to sign an undertaking not to allow contact between her new partner and the children, as she feared she would otherwise be denied any contact. The solicitor informed her that if no agreement was reached at that point, it may take 2–3 months to obtain a further legal aid grant and get to an interim hearing. The solicitor was also worried that a status quo with the father and children would become established. The client finally gained residence of the children following a Status Conference where the parties agreed to sign a Form 12A.
- The client (mother) suffered serious domestic violence from the other party (father), including having her arm broken three times, broken collar bone, and other injuries requiring

medical attention. She finally fled to a refuge, leaving the children with the father. After two unsuccessful Legal Aid Conferences, at which the other party had been threatening and completely uncooperative, the client finally received a grant of aid to contest the father's application for residence. Then, after interim orders were made for the children to reside with the father, the legal aid grant was suspended for six months, and LAQ informed the client that if issues were still in dispute after that time, pending the view of a child representative or other independent report, a further Legal Aid Conference may be called.

472. The cases outlined above show clients being subjected to tardy, inconsistent and inappropriate decision making by Legal Aid Commissions, adding an extra layer of complexity, uncertainty and stress to their cases. These decisions sometimes contradicted explicit policies. For example, the Commonwealth legal aid guidelines specify ensuring the safety of women and children at risk as a priority, and LAQ's conferencing guidelines stipulate that domestic or family violence cases are not normally appropriate for conferencing if the power imbalance between the victim and the perpetrator of violence is so great that the victim will be unable to negotiate effectively, even with the assistance of a solicitor. The four LAQ cases noted would seem to meet these criteria, yet three of them were sent to conferences, and in the fourth the client encountered difficulty in having the issue of her own and the children's safety acknowledged.

473. The client's grant of legal aid was terminated in 22 of the cases in the file sample (18.6% of those in which aid was granted). Reasons for termination included client lost contact (8 cases), lack of merit (6 cases), failed means test (3 cases), operation of the legal aid cap (1 case), and a variety of other reasons, such as the client acting against their solicitor's advice (1 case), and the client's grant in respect of property matters being terminated as soon as the children's matters settled (1 case). The findings of the

Family Report represented a key determinant of whether a grant of aid would continue or not. Legal aid clients who received an adverse Family Report were likely to lose their grant on the ground of merit. More generally, termination of a legal aid grant was a means of disciplining clients with unrealistic expectations.

474. Several clients commented on the surveys that they had applied for legal aid but had been unfairly refused, and this was seen to account for the poor result in their case. One client said she had applied and been rejected for legal aid three times, although her former partner received a grant of aid. Another client said she felt frustrated because the Legal Aid Commission would not pay for a child representative in a case involving alleged child sexual abuse. From the file, it appeared that funding for a child representative had been refused because neither the client nor her former partner were eligible for legal aid. It must be noted, however, that the issue of legal aid funding was another in which there were considerable discrepancies between clients' reports and files. Clients were sometimes not aware that their legal aid grant had been limited or terminated, and misidentified reasons why grants had been terminated.

475. In the interviews, solicitors were asked whether they perceived any problems with legal aid eligibility guidelines. Only four of the 51 solicitors who answered this question felt there was nothing wrong with the guidelines, or thought they needed to be tightened. When considering solicitors' comments about legal aid, it needs to be borne in mind that interviewees may well have given disproportionate emphasis to problems they had experienced. It is a common phenomenon that people are more likely to recall the one or two occasions when things went badly than the many occasions when everything went smoothly. Nevertheless, what was most telling about our interviewees' responses to questions about legal aid funding was the number and diversity, as well as clear convergences, of their complaints. The cumulative effect of these responses is to create the

impression that legal aid assignments systems, if not in crisis, suffer from significant levels of dysfunction.

476. The largest group of respondents (31%, n=16), which included high proportions of Adelaide and Brisbane solicitors, thought that there were problems with the merits test. The most common complaint was that the test was not applied consistently. Solicitors claimed cases without merit were funded (“Some of the legally-aided stuff we get we wonder why they got legal aid”), while those that did have merit in the solicitor’s view (for instance where a child was being put at risk of abuse) were refused (“if the Legal Aid Commission finds there is no merit that rarely is a true reflection of the merits of the case”). They believed that this inconsistency was leading to injustices, such as funding for violent men to seek recovery orders, but refusal of funding for a woman with a violence-related disability.

What amazes me, I can apply for legal aid for two or three different matters in one week and I’ll get a grant of legal aid in one matter and a rejection in two others. And I look at the merits of them, and to me the one I have got legal aid in has far more dubious merits than the ones knocked back. And I wonder what the criteria is for giving it to one and not giving it to another.

477. Two South Australian and two Queensland solicitors also considered that the merits test allowed the Legal Aid Commission to pre-empt the court’s decision, effectively taking on the role of judge with only an application form and perhaps a covering letter as evidence:

We quite often disagree with their determination about merit and we have got a number of women at the moment who have been denied aid on merit. Two of those matters relate to women who have — a possibility in one case and a definite in another — mental health issues, and the officer has prejudged those women on mental health issues as not eligible to have custody of their children... But there are cases that we say only the

court should decide and we feel that they have prejudged. That goes to a judge's role.

478. The next largest group of respondents (27%, n=14) articulated problems with the means test. Again, a high proportion of these were from Adelaide, and also from Melbourne. Most concerns related to the situation of “ordinary people” on low wages, who were ineligible for legal aid but found it practically impossible to afford legal proceedings. Two solicitors commented that in order to bridge the perceived gap between those who could get aid and those who could afford to fund their own cases, a form of percentage contribution or sliding scale connected to income could be introduced. As we have seen, a number of the cases in our sample involved people on low incomes somehow finding the money to pay for their own cases, although as one solicitor commented, this group of people were forced to find ways of cutting costs, and had to lower their expectations. It is also unknown how many in this situation did not commence proceedings.

479. Twenty-four percent of respondents (n=12) felt that the inability or restrictions placed upon the Legal Aid Commission to fund property matters was problematic, and particularly disadvantageous for women:⁴⁶⁷

I mean I really have a problem with that, because I think that in terms of quality of life for women in particular left with children, that is actually a major issue.

Particularly when you're acting for the wife, the criterion of eligibility are impossible to meet. It's ridiculous and it really annoys me because I end up where there's no house and it's their furniture...they want it back and can't

467 For more extensive discussion of this point, see Nicola Seaman, *Fair Shares? Barriers to Equitable Property Settlements for Women* (Women's Legal Services Network/National Association of Community Legal Centres, Canberra, 1999). See also ALRC, *Report No.89*, 351–53.

afford to replace it, they've got four kids and a pension. The alternative is to go down to St Vinnie's and get scraps from there. And it's their furniture, her mother gave it to her, and you have to say to them, "I can't get you Legal Aid, it's not worth pursuing this", and I think how would I feel? It really annoys me when the house is involved and it doesn't meet their criteria because it's critical in a lot of situations that the children stay in the family home for stability. I think it's outrageous that they can't get Legal Aid for those cases.

480. Respondents felt that the clause requiring applicants for legal aid for family law property proceedings to have no less than \$10,000 but no more than \$20,000 equity in the matrimonial home was problematic, as no cases fit the guidelines, it left low income earners (especially women) in a situation in which they could not afford to fund themselves, and they were unable to borrow. Solicitors might be prepared to defer payment, but only if the case was likely to settle favourably and the property would be sold: "I mean, they just fall between the cracks because there's no way of getting them funded on Legal Aid and they can't afford to pay anyone to do it".⁴⁶⁸
481. Finally, 16% of respondents (n=8) replied that whilst they had nothing against the guidelines *per se*, they thought the administration of the guidelines was problematic. Specifically, they considered that due to lack of funding, the only response available to the Legal Aid Commission was to refuse requests for aid. Commissions do have discretion to refuse to make a grant of aid for budgetary reasons, even if all tests and guidelines are met. However, solicitors perceived that the guidelines — especially the merits test — were used as an excuse to justify the refusal:

⁴⁶⁸ Note that from 1 November 1999, the property guidelines were amended to increase eligibility for legal aid for family law property proceedings, by eliminating the minimum and significantly increasing the maximum equity in the matrimonial home allowed to a legal aid applicant from \$20,000 to \$100,000.

At the moment I don't think the Legal Aid Commission are making decisions purely on the basis of a strict merits test and a strict financial test. The plain facts of the matter are, I understand, they don't have any money and if they don't have any money they can't fund people. And so they are having to look for reasons to refuse.

Well the problem that I perceive at the present time with Legal Aid is that they have no dough, so they write letters that are form letters that say, "Your client is no longer going to get aid or is not going to get aid for this reason". Which in reality is not the reason they are not getting aid, the reality is that there is not enough funding.

482. Twelve of the solicitors who expressed concerns with the merits test put forward the same view — that it was being used to justify not giving grants, when the underlying reason for refusal was that the Legal Aid Commission simply has no funds: “At present nothing seems to have merit in the eyes of the Legal Aid Commission”.⁴⁶⁹

483. Obviously, many legal aid grants continue to be made for family law matters. At the same time, however, solicitors seem to be attempting to explain why cases that would previously have met the guidelines are no longer being funded. What these solicitors suggest, and the files seem to bear out, is that legal aid funding has been cut back to such an extent that rational, consistent decision-making is no longer possible.

484. In 1996, Lord Irvine of Lairg (then a member of the Labour Opposition in Britain) noted the potential disadvantages of legal aid cost capping:

...legal aid would cease to be a benefit to which a qualifying individual is entitled. It would in practice become a discretionary benefit, available at

⁴⁶⁹ Five of these solicitors were from South Australia, three from Queensland, three from Newcastle, and one from Victoria. The quotation is from a solicitor in Queensland.

*bureaucratic disposal, a benefit which would have to be disallowed when the money ran out, or when another category of case was given precedence. Legal aid would cease to be a service available on an equal basis nationally because cases would go forward in one region where identical cases in others, of equal merit, would not.*⁴⁷⁰

The evidence from this study suggests that all of these predictions have been borne out in the Australian context. Whether and to what extent legal aid applicants gain access to the family law system is determined in many cases by inconsistent and unpredictable administrative decision-making by the LACs.

Amount of Legal Aid Funding

485. Each LAC gives fixed grants of aid in stages up to hearing, although at the time of the study, the number and description of stages, and amounts of funding attaching to each, varied by LAC.⁴⁷¹ For example, solicitors' fees were paid at the rate of \$104.50/hour in Victoria (80% of the Family Court scale), \$100/hour in NSW, \$88/hour in Queensland, and \$80/hour in South Australia. Fee schedules for a Form 7 application for residence or contact in the Family Court, and for an application for interim orders, are shown in Table 5.1.⁴⁷²

470 Quoted in Roger Smith, *Legal Aid Contracting: Lessons from North America* (Legal Action Group, London, 1998), 4.

471 Revisions to the Commonwealth Legal Aid Priorities and Guidelines to be implemented from 1 July 2000 incorporate a more consistent approach between LACs to stages of matter and the number of hours allowed per stage. Work is also proceeding towards a uniform national fee scale.

472 As discussed below, in NSW and South Australia these were fixed, lump-sum fees, while in Victoria and Queensland they were maximum fees, with solicitors entitled to claim for the amount of work actually performed up to the maximum. Under the July 2000 guidelines, the variation between Commissions as to whether stage of matter grants are implemented on a lump sum or maximum fee basis will remain.

TABLE 5.1 Legal Aid Rates for Children's Matters, 1999

Description of Work by LAC	Number of stages	Maximum Fee
Form 7 up to Pre-Hearing Conference		
NSW	2	\$1300
Vic	2	\$1600–\$2800 ⁴⁷³
Qld	2 + possible discovery	\$880 + \$616 for discovery
SA	2	\$720 ⁴⁷⁴
Form 8 Application and Interim Hearing		
NSW	2	\$600 + est. hearing time @\$100/hr
Vic	combined with Stage 1 for Form 7	\$500–\$800 ⁴⁷⁵
Qld	2	\$880 + \$528/hearing day
SA	combined with Stage 1 for Form 7	\$160 ⁴⁷⁶
Preparation for final hearing		
NSW	1	est. preparation time @\$100/hr
Vic	1	\$1400 ⁴⁷⁷
Qld	2	\$2112
SA	1	\$1200
Attendance at hearing		
NSW		est. hearing time @\$100/hr
Vic		\$800/day
Qld		\$528/day
SA		\$80/day

473 The sum of \$1600 covered one directions hearing. Additional amounts could be claimed for a second and third directions hearing, up to \$600 per hearing.

474 This figure was reduced to \$640 from 1 October 1999.

475 The sum of \$500 covered an interim hearing up to 3 hours; an additional amount of \$100/hour was payable if the hearing extended beyond 3 hours, up to a maximum of \$300.

476 This figure was increased to \$640 from 1 October 1999.

477 This figure applied to standard track matters; different rates apply to direct and complex track matters.

486. As well as providing differing hourly rates, the LACs allowed different numbers of hours for particular work, hence arriving at very different fees. For example, VLA allowed a higher number of hours than the other LACs for a Form 7 case to pre-hearing conference, while LACNSW and LAQ allowed a higher number of hours for an interim application, and LAQ also appeared to allow the highest number of hours' preparation for final hearing. LSCSA's fees were much lower than those of the other LACs across the board. However, the way in which the fee scales operated in practice also needs to be taken into account. Examination of files indicated that South Australian solicitors were able to obtain extensions of legal aid grants more readily than were solicitors in other States.
487. The issue of the effort involved to obtain an extension of a grant relates to the transaction costs of dealing with the LACs, which are discussed below. The number of stages involved in the grant is another indicator of transaction costs, as at the end of each stage, solicitors are required to account to the LAC and apply for an extension of the grant to the next stage. It can be seen from the Table that VLA and LSCSA provided the most streamlined grant structures in this respect,⁴⁷⁸ while LAQ's system involved the highest potential number of stages per grant.
488. In the file sample, information on in-house files concerning stage of matter grants and commitment values for work done in-house was incomplete and unreliable. In the interviews, several in-house solicitors claimed that the cost of their running a case was fairly minimal, as the main cost was their own time, especially if expensive items were not funded:

478 In addition, under VLA's 'broad banded' stage of matter limits (up to pre-hearing conference), the solicitor could proceed from the first to the second stage without needing to seek approval from the Commission. Broad banding was introduced on 1 November 1998, in conjunction with a substantial increase in the fees payable to solicitors.

If I was to give a grant of aid now and I would think about the costs involved, well I would have to say...aside from my salary there are no costs because we are not going to provide an expert, we are not going to pay for counsel, I will be doing every single appearance in this matter, so where are the costs? I'm it.

489. The mean amount paid by legal aid prior to hearing for cases handled by private solicitors was \$3,372 (median \$2,200). The largest component of this sum went on solicitor fees (mean \$1,980), followed by barrister fees (mean \$872) and disbursements (mean \$272).
490. The mean amount of solicitor fees paid by legal aid was only about half the mean amount paid by self-funding clients for solicitor fees in children only cases (\$3,886),⁴⁷⁹ and the mean amount paid by self-funding clients for disbursements in children only cases (\$489) was also considerably higher than the amount of disbursements paid by legal aid. Overall, the mean amount paid to private solicitors in legal aid cases prior to hearing was almost 50% less than the amount paid to private solicitors by self-funding clients in children-only cases (\$4,823).⁴⁸⁰ It appears, then, that legal aid clients have considerably less funds at their disposal to spend on family law litigation than do ordinarily prudent self-funding clients in comparable cases.

479 This is consistent with the claim of solicitors interviewed by Dewar et al. that they could charge a privately paying client between two and four times more than they would receive for the same matter from legal aid: *The Impact of Changes to Legal Aid on the Practice of Family and Criminal Law in Queensland*, 71.

480 Note that this is not a comparison between two identical items. Data on the amounts paid in legal aid cases was broken down into separate amounts for pre-hearing and hearing costs. Data on the amounts paid in self-funding cases could not be disaggregated in the same way. Hence the comparison is made between pre-hearing costs in legal aid cases, and total costs in self-funded cases that did not proceed to hearing. However the effect of this mismatch is probably to skew the costs in the self-funded cases towards the lower end of the spectrum, which would mean that the contrast between the two sets of figures is understated.

491. The small number of legal aid cases going to final hearing makes it difficult to quote mean figures for solicitor and barrister fees for hearing. Four legal aid cases handled by private solicitors and six in-house cases went to final hearing, as well as seven cases that were both legally-aided and self-funded. Information on fees paid for hearing was unavailable, or no fees were paid by legal aid, in nine of these 17 cases. In the remaining eight cases, legal aid paid an average of \$2,424 in solicitor fees (n=4) and \$1,866 in barrister fees (n=7). Little significance can be placed on these figures, beyond observing that the cost of hearings appears to be greater on average than pre-hearing activities for both solicitors and barristers. By contrast, the estimated average cost of solicitor and barrister fees in self-funded cases that went to hearing was almost \$14,000 (see further discussion of costs in self-funding cases below).
492. Legal aid clients were assessed to pay an average of \$69 contribution, although the client contribution was waived in 24% of cases. In a further 19% of cases the contribution had not been able to be collected and the client's debt had been written off.
493. Private solicitors were asked whether the low rates paid by Legal Aid had any effect on the way they ran their practice or particular cases. South Australian solicitors in particular identified problems with the funding formula, for example complaining that the lump sum amount for each stage of a case was too inflexible: a solicitor may be funded for eight hours of work, which would be received regardless of whether they worked two or 10 hours;⁴⁸¹ and the same amount of money was paid regardless of the number of times the solicitor attended court, the number of adjournments, or the amount of attempted negotiations:

481 As discussed below, this result may occur in South Australia or NSW but would not occur in Victoria or Queensland.

It's a ludicrous arrangement, in that you can get \$640 to deal with the matter very fast to draw up consent orders, just because that's the nature of the matter. Whereas if you have got a really complex matter that requires lots of attendances at court, lots of interim arguments, lots of affidavits, you get paid the same.

494. The main problem was that the amount of work done invariably exceeded the amount allowed in the grant. Solicitors explained:

They give you a lump sum figure for a certain amount of work, and if you want to try and do the job you can't really pay any attention to what they have allowed for their lump sum cost, because you have just got to do the job. Then you look at it and say, according to scale that cost \$3,000 of my time, and Legal Aid have allowed \$800 for the lump sum.

This crap that it's all swings and roundabouts, what you don't make on this file you make on the other file. Well perhaps that's happened once in my entire years of practice. By and large you work your arse off on legal aid matters, because you've got people who are in extremis and they've got all the things that go with being poor.

Another solicitor claimed that at some point "I might as well close the door and go and play golf, I can't lose any more money". Solicitors in Queensland, Victoria and NSW expressed concerns that legal aid rates did not adequately cover disbursements related to working in a firm located outside a metropolitan area, such as the costs of STD phone calls, additional photocopying and faxes, postage, travelling, and especially for agents.

495. Respondents' views were born out by the file data concerning legal aid cases handled by private solicitors. In 15 of the 26 purely legal aid cases handled by private solicitors (58%), there was evidence on the file of the firm having incurred costs, in terms of disbursements and/or agents' or barristers' fees, and the number of hours' work performed by solicitors, in excess of the amount paid by Legal Aid. Quantified amounts unpaid ranged

from \$67 to \$6,890, with an average of \$1,625. This represented solicitor subsidies ranging from 5% to 73% of the total cost of the file, with the majority of cases involving a subsidy of 45% or more.⁴⁸² Particular instances included:

- A country solicitor advised their town agent that they had a grant of \$300 to cover directions hearings. The solicitor required \$100, leaving \$200 for the agent. For the previous court appearance, the agent charged \$600, and the grant was not extended to cover this. Further, most of the \$300 had already been exhausted dealing with negotiations between the parties.
- An agent advised that he would charge the agreed sum (\$100), but that as he had spent well in excess of this (over three hours), he may not be willing to continue on the basis that the grant would not cover his expenses. He agreed to do the next court appearance as arranged, but would do no more after that.
- In preparation for final hearing, the solicitor exceeded the amount allocated for disbursements by \$362, due to the extent of the brief and the large amount of photocopying, but the grant was not extended to cover this.
- A case that was in progress when retrospective caps were imposed had already incurred an additional \$2500 in expenses above the cap, which amount was not recovered.

482 This is consistent with the findings of Dewar et al., that firms able to produce the requisite costing data showed recovery rates for legal aid work below 50%. The authors note that where solicitors' work is costed at the firm's standard charge-out rate, recovery at less than that rate does not necessarily represent a loss, the work "may simply not be as profitable as the firm would like": *The Impact of Changes to Legal Aid on the Practice of Family and Criminal Law in Queensland*, 105. However, this argument does not apply to disbursements and agents' and barristers' fees, and nor does it apply when solicitors' work is costed at the legal aid rate (i.e. the notional amount paid per hour by Legal Aid, where the number of hours worked is above the maximum number of hours allowed for the relevant stage of matter). In this context it is meaningful to describe firms' unpaid contribution as a "subsidy".

496. As a consequence, the majority who answered the question about the effect of legal aid rates (53%, n=26) replied that they impacted adversely on the ways in which they would run a legal aid case. These solicitors tended to be those doing the greatest amount of legal aid work in family law. Generally, solicitors felt that they had to be more careful with the amount of time they dedicated to legal aid cases, and (as discussed earlier) such cases have always tended to be handed to junior solicitors:

It's very good for junior solicitors to cut their teeth on. They're not exactly simple files, but the client is beholden to us in a lot of ways, so we can afford to use junior practitioners and so that again affects the standard of work that a legal aid client might receive.

497. Restricting the amount of time spent on the case might involve getting clients to do more of the work, such as Legal Aid application forms and covering letters, filling in other forms, chasing witnesses and getting their statements, or limiting the solicitor's availability to the client:

I am much more inclined to say to them, "Look, what you are asking me to do, and the level of involvement you are asking me to give, I cannot give, and you are quite free to take your file elsewhere".

I've told her I'll see her once, closer to the hearing. I declined to see her. If she was private and she wanted to see me, fine. That's the difference.

You have to tell the client that they can rarely have access to me. If they want to ring me, if they have a question they can talk to my secretary, but I just can't afford to talk to them all the time.

Evidence from the files indicated that solicitors advised their legal aid clients not to ring them unless absolutely necessary, and to keep their own diaries of incidents rather than contacting the solicitor whenever something happened. One solicitor wrote to his client explaining that he would only contact the client concerning matters raised by the other party, and that the Legal Aid

Commission expected that contact between solicitor and client would be kept to a minimum until the pre-hearing conference.

498. Solicitors also said they would spend less time preparing a legal aid case. Documentation (such as affidavits) may be less thorough, and they are restricted in the number of professional witnesses or expert reports they can draw upon. Several regional (and one suburban) solicitors said they use agents for court appearances for legal aid cases rather than bear the costs of travelling. Some also said they would try to avoid interim applications and try not to adjourn at court. A further limitation expressed by some was that they found it difficult to find barristers to take on legal aid cases if briefs from private clients were available.

499. The files also showed that solicitors tended to advise their clients to settle if they had reached the limits of their grant. They sometimes explained to their clients that they had no other option.

500. In addition to these responses, 31% of solicitors who made further comments at the end of the interview (n=18) expressed the view that the amount of funding provided for legal aid grants was inadequate, and hence the amount of work they could do for the client was diminishing. Some of these added that the recent cutbacks were unfair, as they were creating a legal system based on class division, where legal representation would be a luxury available only to the wealthy:

I think it's basically unfair to the poorer members of the community to operate against them in this manner.

I think the government or the policy makers or whatever are failing in their responsibilities to the Australian people. I as a lawyer, I recognise the strictures that are placed on Legal Aid...and I recognise that there is not a bottomless pit of money. But for me, treating people with dignity is very important, and I find it is a battle sometimes within the constraints, sometimes, that Legal Aid places.

501. The findings relating to solicitors' activities set out in chapter 3 raise some question as to whether the legally-aided clients of private solicitors do in fact receive a lower level of service than self-funding clients, although the measurements employed in chapter 3 would not necessarily detect some of the forms of skimping solicitors mentioned (less time spent working on the case, less time with the client,⁴⁸³ shorter and less thoroughly prepared affidavits). It is plausible to suggest that in such respects, these solicitors' legal aid clients do receive a lower level of service than their self-funding counterparts.
502. A smaller group of respondents (25%), however, replied that although legal aid cases cost their firms money, they nevertheless still run legal aid cases the same as privately funded cases. They felt it was important for their reputation not to offer a lower standard, or that they had a social obligation to offer the same level of service:

We have...accepted [legal aid work] on the basis that I am going to do more or less the complete job and just write it off, rather than do the shoestring thing.

My view is that if it has to be done, and it's worth doing properly and ultimately it reflects on you in the court, and I would rather be well regarded in the court than be considered by the court to be a bit slack on it.

It's sometimes harder when you know you're writing an affidavit on the weekend and you're not getting paid for it. But I don't think there is any dissimilarity in service.

[The rates paid by legal aid] don't affect me at all because obviously my legal duty is exactly the same. I am going to be sued as much by getting it wrong under legal aid as I will by a private party. So there is no difference.

483 Queensland solicitors interviewed by Dewar et al. also said that they were having to set strict limits on the amount of time available for consultation with legal aid clients: *ibid.*, 71.

503. A further 20% replied that rates paid by the Legal Aid Commission had resulted in a decision to reduce the number of legal aid cases the firm was willing to take on. This point is discussed further below.

The Level of the Funding Cap in Individual Cases

504. As noted above, only one case in our file sample involved a legal aid grant being terminated because the case had reached the \$10,000 funding cap. In none of the cases was a discretion exercised to exceed the \$10,000 limit. The low number of cases running up against the cap in the file sample is consistent with LAC statistics showing that few legal aid cases actually reach the cap and are terminated for that reason.⁴⁸⁴ Although earlier research in Victoria indicated fairly widespread experience among solicitors of cases ‘hitting the ceiling’,⁴⁸⁵ this appears to have been a temporary phenomenon, caused by the retrospective imposition of caps on cases that had already been running for some time, rather than an ongoing problem.

505. This may mean that the cap is set at a realistic level, or it may simply reflect the fact that faced with the existence of the cap (and the unlikelihood of being able to invoke the discretion to exceed it),⁴⁸⁶ solicitors take steps to avoid spending money in the early stages of a grant, in case the matter ends up going to hearing. The evidence from the files points to the latter as the most likely explanation.

484 Cited in ALRC, *Report No.69: Managing Justice — A Review of the Federal Civil Justice System* (2000), 338.

485 Springvale Legal Service, *Hitting the Ceiling* (1998).

486 In fact, according to FLLAD figures, LACs have exercised their discretion to exceed the cap in quite a number of cases since July 1997. This might occur, for example, in cases that have gone to trial and run over their estimated hearing time. However, instances of the discretion being exercised do not appear to be widely known, and in any case, use of the discretion could not be relied upon.

506. In order to test the adequacy of the cap, we looked at what \$10,000 would buy if the client was self-funding. Two-thirds of the self-funding cases in the file sample (67%) cost the client less than \$10,000, leaving a full one third of cases (33%) costing more than \$10,000. There was also a range of significant differences between the cases costing less and more than \$10,000.
507. Cases costing less than \$10,000 were significantly less likely to involve interim orders,⁴⁸⁷ less likely to involve a barrister,⁴⁸⁸ and less likely to involve a child representative.⁴⁸⁹ Hence cases involving a child representative, interim orders, and/or a barrister being briefed were more likely to cost over \$10,000. Cases costing less than \$10,000 were also disproportionately likely to settle at the directions hearing stage (80%), or to remain unresolved (8%). Beyond that, costs were more likely exceed \$10,000. All but one of the cases in which a hearing commenced cost the client more than \$10,000.
508. Geographical location also had an impact on whether a case would cost over \$10,000. Clients in country areas were significantly more likely to pay in excess of \$10,000 in legal costs than were clients in metropolitan areas.⁴⁹⁰ Moreover, clients in NSW were disproportionately likely to face a bill of over \$10,000 (44%), while no South Australian clients did so. The main reason for this difference appeared to be that NSW cases were more likely to involve barristers⁴⁹¹ — partly due to the fused profession in South Australia, and partly due to the fact

487 $\chi^2=10.678$, $df=1$, $p<0.005$.

488 $\chi^2=30.928$, $df=1$, $p<0.001$.

489 $\chi^2=8.105$, $df=1$, $p<0.005$.

490 $\chi^2=7.305$, $df=1$, $p<0.01$.

491 A barrister was briefed in 41% of NSW self-funded cases, but only 8% of SA self-funded cases: $\chi^2=4.852$, $df=1$, $p<0.05$.

that South Australian cases tended to resolve at an earlier stage⁴⁹² (hence NSW clients also faced higher solicitor fees).⁴⁹³

509. Cases costing less than \$10,000 also involved fewer children,⁴⁹⁴ fewer issues in dispute,⁴⁹⁵ fewer demands on the solicitor,⁴⁹⁶ fewer aggravating factors,⁴⁹⁷ and the solicitor dealing with fewer people,⁴⁹⁸ than cases costing more than \$10,000.

510. This data indicates that the legal aid cap allows only a limited range of legal aid cases to receive equitable treatment with self-funding cases. The assumption that a \$10,000 ceiling would appropriately reflect the kind of funds available to a self-funded party of limited means⁴⁹⁹ is shown to be a substantial underestimate. This point is reinforced by the fact that whether or not a self-funded case cost more than \$10,000 was wholly unrelated to the client's income — an issue discussed further below.

Transaction Costs of Dealing with the Legal Aid Commission

511. Eighteen cases in the file sample (15% of those that eventually received legal aid) were identified by coders as involving particular difficulties or excessive amounts of correspondence with the Legal Aid Commission. Perhaps not surprisingly, cases that were ultimately both legally-aided and self-funded were prominent in this category.

492 53% of self-funded NSW cases resolved at the directions hearing stage, while 23% went to hearing. By comparison, 85% of self-funded SA cases resolved at the directions hearing stage, while only 8% went to hearing.

493 NSW mean=\$7,340; SA mean=\$3,290.

494 Mann-Whitney test: $Z=-2.922$, $p<0.005$.

495 Mann-Whitney test: $Z=-2.300$, $p<0.05$.

496 Mann-Whitney test: $Z=-2.058$, $p<0.05$.

497 Mann-Whitney test: $Z=-3.295$, $p<0.005$.

498 Mann-Whitney test: $Z=-5.401$, $p<0.001$.

499 See ALRC, *Report No.89*, 337.

512. In four cases — all from the Newcastle Registry — solicitors spent considerable time attempting to get a grant of aid to cover enforcement proceedings, which was eventually unsuccessful. These efforts included correspondence and telephone calls to the Legal Aid Commission, and preparing the application for review.
513. Another case was in progress when the new legal aid guidelines came into effect on 1 July 1997 and the solicitor found it increasingly difficult to deal with the Legal Aid Commission. The solicitor and client were told that the grant might be terminated at any moment, and were constantly uncertain about continuing funding. As soon as the children's matters settled the grant for property was terminated, and the solicitor negotiated the final property issues *pro bono*.
514. In one case there was incorrect payment of an account, and in another the solicitor kept the file open for five months after final orders awaiting payment from the Legal Aid Commission. Both of these cases occurred in NSW.
515. Solicitors were asked in the interviews about the administrative costs of dealing with the Legal Aid Commission, and 75% of those responding said these costs were substantial. Those who did not think costs were substantial tended to work in larger firms where the costs were more easily absorbed. Those who were concerned about transaction costs listed a multitude of ways in which the costs of dealing with the Commission might mount up.
516. One of the most common costs mentioned (n=10) was attempting to get extensions of aid on an existing grant. This was especially a problem in urgent matters, where the solicitor often continued to act even though the extension had yet to be approved, and hoped they would be able to recover costs, which was not always the case. Notably, four of the ten solicitors who mentioned this difficulty were from Melbourne:

And so often if any issue arises, the first thing you have to do before you can do anything else is track down the Legal Aid lawyer who is looking after your file, in order to get the OK to do x, y and z. But of course, getting a verbal isn't any good either; must be in writing. Then you've got to make a phone call plus write a letter. And of course by the time all that happens, whatever it is that you are trying to get coverage for has already happened.

517. Two Victorian cases in the file sample provided evidence of such difficulties. In the first case, the client initially obtained a grant of aid to apply for contact, and interim contact orders were made. Allegations of child abuse were then raised against the other party, which were investigated by DHS. As a consequence, the client was advised to seek an extension of aid in order to apply for residence orders. Before it would provide a grant of aid for residence, VLA required details of the DHS investigation and evidence which would have involved the client in an expensive FOI application. At that stage, the other party threatened to leave the country and assaulted the client. Three months after the initial request, VLA granted aid for an application to restrain the other party from taking the child out of the country, but not for residence.
518. In the second case, the client received an initial grant of aid in order to enforce contact orders, and again sought an extension to apply for residence orders following allegations of abuse against the other party. A small extension (\$595) was granted, but the solicitor advised VLA that the cost of reading the DHS file (which could not be photocopied) and other perusals and preparation came to \$845, and this did not include the costs of briefing counsel or a court appearance. The solicitor wrote:

A major part of our time seems to be spent in seeking extensions of aid and the writer has now been forced to spend approximately an hour dictating this letter which should have been spent on more pressing matters in the circuit.

The written reply from VLA denied that there had been any approval to apply for residence, and threatened to terminate the grant altogether. The solicitor then rang VLA and established that approval had been given for a residence application, and again sought an extension of the grant to cover costs to date and to continue with the residence application. This was rejected one more time, before being finally allowed.

519. Reporting to the Legal Aid Commission at the end of each stage of the grant was another considerable cost. Ten solicitors, including five from Victoria and three from South Australia, felt that the amount of reporting required was excessive. This is curious since, as noted in the previous section, Victoria and South Australia have the most streamlined systems in terms of the number of stages at the end of which the solicitor must report back to the LAC. Indeed, under the broadbanded system applying in Victoria, solicitors are not required to seek a formal extension of a grant until after the pre-hearing conference. It is possible that the level of information and justification sought by LACs before an extension will be approved is greater where there are fewer stages involved, and this is what solicitors find irksome (rather than the number of times they must report back). Some solicitors considered that they should be trusted to make judgements as to whether their case had ongoing merit or not, and that the level of reporting required was insulting.

520. Nine solicitors (including five from Queensland and three from Victoria) considered that itemising, lodging or chasing up accounts was a considerable cost to their practices. The issue of itemising and lodging accounts is more likely to arise in Queensland and Victoria than in NSW or South Australia, since legal aid fee schedules in the latter two States are expressed as fixed, lump sum amounts, allowing solicitors to

submit one-line accounts for the standard fee,⁵⁰⁰ whereas in the former two States, fee schedules are expressed as maxima, requiring practitioners to claim only for the work actually undertaken up to the maximum for the relevant stage.⁵⁰¹ In addition, for some items, VLA requires details of services provided and will not accept a one-line account. And as noted earlier, LAQ breaks up matters into a greater number of stages than the other LACs, requiring solicitors to lodge accounts more frequently.⁵⁰²

521. In relating to chasing up accounts, four of the nine solicitors commented that the Legal Aid Commission was highly likely not to pay the account billed for, and were at a loss to explain why. They felt that the Commission's accounting system was simply arbitrary:

Half the time it seems [our accounts people] have to ring up the person who handled it at Legal Aid's end and find out why, and all I can tell you is that if you looked in our ledger book you would see a lot of red biro where amounts are being deducted, debited, taken off and just not paid, refused payment, and all in all it's a nightmare. (South Australian solicitor)⁵⁰³

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- 500 In NSW, a one line account may be submitted for all stages, unless the solicitor wishes to claim for substantial, unforeseen work above the amount estimated for a defended hearing. In South Australia, a commitment certificate is issued at each stage with the amount of funding allowed for that stage. When the work is completed, the commitment certificate is signed by the practitioner and returned for payment. If a matter settles before the end of a stage, the practitioner can claim for the whole of the stage, unless the matter was finalised so early in the stage that it would be unreasonable to do so.
- 501 In Victoria, practitioners must provide sufficient itemisation of work undertaken within each broadbanded stage (for example in terms of Order 38 of the Family Court Rules) to allow VLA to verify the amount claimed for that stage. In Queensland, a pro forma account is issued for each stage, which is completed at end of the stage and returned for payment. While there is no requirement to itemise costs, practitioners may only claim for the actual professional time spent on the matter, up to the maximum amount specified.
- 502 Queensland solicitors interviewed by Dewar et al. also expressed frustration with LAQ's payment practices: *The Impact of Changes to Legal Aid on the Practice on Family and Criminal Law in Queensland*, 116–17, 126.
- 503 This complaint appears to relate to payment of disbursements rather than professional fees.

It's always \$20 or \$30 less than what we asked for. We've got to the point now that we don't put our accounts on our computer until we get paid. It's just unpredictable. (Queensland solicitor)

Then there is the cost of filling in the accounts, sending them off, waiting for payment which is never paid in less than a month, and usually they will do something strange. My bookkeeper is always having to write letters to them saying you didn't pay these amounts on a particular file, or this account was rendered on such and such a date, it's been two months and you haven't paid it. Why? (Queensland solicitor)

And then there are matters where you, for some unknown reason, you are just not paid small amounts on. They might disallow \$23.60, you have no idea why. So you have got to follow up and find out why. And then there are things that they do to you like, in one matter I had where they just decided that the weren't going to pay my photocopy costs at what they usually pay, they just go and retrospectively reduce them to 9c a copy. So you have to go through the rigmarole... (Queensland solicitor)

522. The next most noted aspect of dealing with the Legal Aid Commission (n=7) involved the initial application for a grant of aid, since the covering letter and associated faxes and telephone calls were all additional expenses that were not covered by the grant. This would not be a problem if funding decisions were made promptly and reasonably, but this was not always the case:

The administrative costs of dealing with the Legal Aid office are the time that we spend negotiating, and I use that term loosely, with the Legal Aid office to get an appropriate grant of aid to enable the client to run the case...and that might be a process of speaking to the assignments officer several times, writing letters, and then going through other review processes to the external review officer. (South Australian solicitor)

One Newcastle area solicitor estimated that they usually spend \$300–\$500 trying to get a legal aid grant, and then the grant is insufficient, but it is the only access to the legal system available to a client without independent funds.

523. Five solicitors (including three from the Newcastle area) referred to the substantial cost of appealing decisions made by the Legal Aid Commission. This cost increased if the case continued during the delay caused by the appeal, or if urgent matters arose that the solicitor could not leave unattended:

Then if aid is knocked back and you appeal then there is really serious cost. Because the appeal takes a lot of effort and time, and in the meantime there are dates going before the court where you've got to work out or not whether you are going to have an agent. So what you sometimes end up doing is sending letters to court saying "sorry, we can't actually send an agent along because we have had a grant of aid terminated and our client doesn't have any money and they can't get there themselves, and so we are applying for an adjournment", and you can only do it by letter.

Four of these solicitors explained that the cost of appealing was particularly frustrating since (as discussed earlier), the original decision often appeared to them to be irrational rather than based on merit. This may have emerged as a particular problem in NSW in the second half of 1999, when a monthly quota was imposed on family law legal aid grants.

524. Other costs mentioned included: providing copies of items such as expert reports, Family Reports, court documents and letters from the other side, given that the Legal Aid Commission paid a minimal amount, or nothing at all, for photocopying; the "paper warfare" involved in arguing over trivial issues, responding to "pointless" requests, telephone calls and paper work near the final hearing; waiting for the Legal Aid Commission to respond; and chasing clients' contributions. Three Queensland solicitors complained about the difficulties of using the new system of electronic lodgment, although another three felt that the system had reduced their administrative costs. One solicitor who practised in a border region claimed that a major cost was dealing with disputes between Legal Aid offices over which should deal with requests for aid.

525. More generally, ten solicitors (half from South Australia and a further three from NSW) referred simply to the cost of “correspondence” with the Legal Aid Commission. One solicitor reflected that the costs of correspondence to the firm meant she might as well run the case *pro bono*, which at least would allow her to run it as she chose.⁵⁰⁴ Several solicitors commented that the amount of time and work involved in correspondence with the Legal Aid Commission was sometimes disproportionate to the amount of time and work put into the case itself:

I have files that may be up to four to five inches thick, and one to two inches of that thickness is my Legal Aid side. Now you don't get paid for any of that and it is time consuming and it is frustrating and it is probably taking the energy away that I could be putting into running the matter.
(Newcastle area solicitor)

526. Although it was difficult to measure the exact proportion of time and paperwork on legal aid files that was taken up with dealing with the Legal Aid Commission, we were able to count the volume of documents and letters sent to the Legal Aid Commission as a proportion of all correspondence sent by the solicitor, and the volume of correspondence from the Legal Commission as a proportion of all documents perused by the solicitor.

527. In four legal aid cases handled by private solicitors the amount of administrative correspondence sent by the solicitor exceeded the amount of correspondence relating to the substance of the case. In the most extreme case, 20 out of 27 pages of correspondence from the solicitor (74%) went to the Legal Aid Commission. The average proportion of the solicitor's correspondence sent to the Legal Aid Commission was 31%. In

504 A similar claim was made in Canadian research: Mary Jane Mossman, 'Gender Equality, Family Law and Access to Justice'(1994) 8 *International Journal of Law and the Family* 357. As noted above, however, the actual incidence of family law cases being taken on *pro bono* is extremely low.

cases involving both legal aid and private funding, which tended to have higher volumes of correspondence from the solicitor (see chapter 3), the average proportion of correspondence with the Legal Aid Commission was 18%.

528. The highest proportion of Legal Aid correspondence received by a private solicitor was 57% of all pages of documents received. The average proportion of documents received from the Legal Aid Commission was 26% in fully legally-aided cases, and 15% in partially legally-aided and partially-self-funded cases. Again, the latter category of cases tended to involve higher numbers of documents overall.
529. This data (which does not factor in the court documents prepared by the solicitor) suggests that it is unlikely that a four to five inch thick file would include one to two inches of documents relating to the legal aid grant. Rather, the thicker the file, the smaller the proportion of Legal Aid documents is likely to be. On the other hand, the data does indicate that legal aid administrative work can occupy a substantial proportion (around 30%) of typical, smaller files, representing a relatively high ratio of unpaid work on these files.
530. The amount of paper received and generated by private solicitors in dealing with the Legal Aid Commission was also compared with the pages of internal administrative documents and letters to and from clients generated and received by in-house solicitors. It emerged that private solicitors handling legal aid cases (whether fully or partially legally-aided) produced or perused more than twice the number of pages relating to the legal aid grant (average 15.9 pages) than did in-house solicitors (average 7.0 pages). The difference between the two groups was significant.⁵⁰⁵ This suggests — perhaps not surprisingly — that

505 Mann Whitney test: $Z=-5.579$, $p<0.001$.

private solicitors experience higher transaction costs of dealing with legal aid cases than do their public sector counterparts. In-house solicitors do not have to send in accounts, and are less likely to challenge LAC decisions on behalf of clients.

531. Some solicitors revealed the ruses they had developed to minimise transaction costs and benefit their clients by bending the rules or exploiting bureaucratic procedures to get what they wanted more quickly — what sociologists would call “strategies of everyday resistance”.⁵⁰⁶ Another solicitor who had previously worked for a Legal Aid Commission was able to rely upon their familiarity with the system to avoid additional costs: “I knew what to say and what to ask for, and...people within the Commission to talk to”. However such strategies lead to further inconsistencies for clients, if the fate of a legal aid application or the speed with which it is granted depends upon which solicitor the client happens to have instructed.

Changes in the Amount of Legal Aid Work

532. Private solicitors were finally asked whether there had been any change in the amount of legal aid work in family law undertaken by themselves or their firm. The majority (71%) replied that their amount of legal aid work has decreased.⁵⁰⁷
533. The most popular explanation for the decline (59%) was that legal aid work did not pay sufficiently to justify continuing:

I don't know who is going to act for the legally-aided person in the future... But now we are finding the cases so difficult and even now becoming less and less remunerative that now we have got to decide will we do them or

506 Michel de Certeau, *Practices of Everyday Life*, trans. Steven Rendall (University of California Press, Berkeley, 1984).

507 See also Springvale Legal Service, *Hitting the Ceiling*, 4–5; Dewar et al, *The Impact of Changes to Legal Aid on the Practice of Family and Criminal Law in Queensland*, 18, 70, 73; and in a global context: Paterson, ‘Financing Legal Services’, 242.

not and so yes, with legal aid it's just simply a case of we will just simply not take on that kind of work in the future.

This was seen to be a particular problem in country areas: “In this town it's very difficult to find someone who will do the legal aid [work] for them”.

534. Four solicitors felt that the inadequate remuneration would mean that they would eventually have to compromise the quality of their services, and under those conditions they would prefer not to accept the work at all:

Well, it got to the stage where I had to make a decision about that — what they were paying and what their expectations were — that I had to either lower my standards or not do it, and I decided not to do it. A hard call to make. (Queensland solicitor)

We are just not taking it on because the firm takes the view that they pay so little that you can't afford to run a practice like that, and the second one is that if you get half way through you can't do a proper job for your client before the carpet is pulled out. (Victorian solicitor)

535. Another reason for decreasing the amount of legal aid work (mentioned by six solicitors; five from NSW) was the feeling that current funding arrangements shifted control in running the case from the solicitor to the Legal Aid Commission:

I really stopped really wanting to do legal aid and effectively stopped dead almost in the early '90s, when they went from billing a certain percentage to giving you certain grants for certain stages. Because then they were playing with the way you ran your case. (NSW solicitor)

The problem with legal aid is that Legal Aid tries to run the case at a time when they don't have knowledge or, I think, the fair ability to make decisions in respect of the conduct of the case... What they do is have, I think, very unreal, distinct stage of matter limits. The work involved in properly and fairly representing your client cannot be done within the stage of matter limits which presently exist. (Victorian solicitor)

536. Five solicitors — all from NSW or Victoria — said they had stopped doing legal aid work because the Legal Aid Commission was too difficult to deal with.⁵⁰⁸ For example:

It's not feasible to conduct family law legal aid. The remuneration was inadequate but that wasn't the reason. The reason was that it became so difficult to actually deal with the Legal Aid Commission that that put us off forever. (Sydney area solicitor)

We made up our minds sort of progressively and informally over the last two years that we have now got to the stage where we decided not to do it full stop...because of two things. Because of the greatly reduced amount of money that you get paid by the Legal Aid Commission, but even more importantly than the money is dealing with the bureaucracy. It's dealing with them as a bureaucracy that's really the straw that has broken the camel's back, and some of the stupidity of their rules and inflexibility, more than the money. (Victorian solicitor)

537. These kinds of reasons were borne out in reading the files, with one solicitor writing to a potential client:

I note that as you are a pensioner, you may be eligible for Legal Aid. Unfortunately, due to ongoing problems with the Legal Aid Commission...this firm does not accept instructions in Legal Aid matters. It may be that you wish to make inquiries of the Legal Aid Commission and let us know if you wish to remain a client of this firm.

The client remained with the firm, after their application for legal aid was refused.

538. While these solicitors actively chose to abandon legal aid work, 20 other solicitors (including nine from NSW, five from South

508 Dewar et al. also concluded that the introduction of LAQ's preferred supplier scheme for family law work had been an occasion for a number of firms to make the decision to abandon legal aid: *ibid.*, 68–69. However, none of the Queensland solicitors we interviewed made this comment.

Australia and four from Queensland) explained that their decrease in legal aid work was a result of their clients being ineligible for legal aid grants, or their applications being rejected. This was attributed to changes in the guidelines (eg. property matters no longer being funded), and the merit and means tests having become tighter. Four also questioned the point of attempting to apply for legal aid grants when funding was so scarce:

What can happen now is that you can send off an application for aid with somebody that really does have a perfectly good position and the Legal Aid Commission sometimes don't respond, or if they respond they say, "look, we've run out of money". They actually do that. And so that makes you more and more reluctant to take on legal aid work. (NSW solicitor)

We are told by people in Legal Aid that basically this is the position: each Legal Aid officer that has the power to make a grant is only allowed to make three grants per month per person. So that by the time anything gets across their desk from out of town they have already used up their three points. They are granting aid for conferencing but that is just a waste of time. (NSW solicitor)

539. As noted earlier, the NSW LAC imposed quotas on family law legal aid grants from the start of the 1999–2000 financial year. These solicitors were interviewed soon afterwards, and their comments undoubtedly reflect the impact of this recent policy change. It should be noted that the quota system does not operate as claimed in the second quotation; however the existence of this perception gives an indication of the solicitor's sense of the futility of applying for legal aid.

540. Of the solicitors who specified how much their legal aid work had decreased, 47% said that they had reduced from a "substantial", "huge" or "considerable" amount to practically nothing. In some cases, solicitors had decreased their legal aid commitment from over 60% to none. Indeed a considerable majority of those who specified how their legal aid work had

decreased were now doing less than 5%, or none at all. If they did take on the occasional case it was most likely for an existing client.

541. The majority of solicitors who had decreased their legal aid work said they had done so in the last three to six years: when legal aid funding cutbacks had reached a critical point, and when changes were made in the way in which grants were made. A number had also decreased their work in legal aid more recently — within the last two years.

542. In-house solicitors also remarked that they had noticed that private solicitors were reducing the amount of legal aid work they were taking on. They expressed concerns that in conjunction with this decrease, in-house practices would no longer be able to provide legal assistance to people who required it. These solicitors also worried that the rights of women and children would be compromised by the lack of funding, or that LACs would be forced to provide community legal education instead of representation services, which could never adequately replace the need for equal access to litigation.

543. Solicitors who said their amount of legal aid work had not changed (16%) either did no legal aid work in any event, or had felt the same pressures as their colleagues, but had decided to continue for philosophical reasons:

Well, I and my partners all have a view that there needs to be equality of opportunity at law as well as in other aspects of society. Legal aid is really the only way to achieve that fairly rather than depending on the individual preparedness of solicitors to effectively give charity...

There are a lot who don't think it pays and I guess they have enough work that they don't need to do that, whereas I've sort of got a philosophical approach to it, which is one of the reasons I practice on my own. I feel that they are the sort of people I like to act for, to help them through that time.

I think probably the other firms are right, that I mean I'm certainly not making heaps of money out of it.

544. Two solicitors who had maintained their legal aid practices had adjusted the way they deal with legal aid cases, streamlining the work and attempting to deal with cases as quickly as possible.⁵⁰⁹ A third considered that legal aid cases could now effectively only run as far as the pre-hearing conference, since the possibility of funding for a final hearing was so slim.
545. Twelve percent of respondents said that their legal aid work in family law had increased, most attributing this to other firms decreasing their legal aid commitments. The increase was invariably said to have occurred within the last 18 months (since early 1998):

The last 18 months is sort of the rot setting in, with some of the firms that did an awful lot of legal aid work and they made the decision that it wasn't worth it any more, and just walked away from it. And since then there has just been a steady marching of other firms who used to do it walking away as well.

546. For these solicitors, the increase appears to be only temporary, as they predicted they would not be able to sustain further legal aid work because of the lack of remuneration, or fewer and fewer grants will actually be made. One explained that they could increase their amount of legal aid work only if they decreased the amount of work done on legal aid cases:

Some legal aid matters are very, very short and to the point, and I think are a good investment. You get things resolved within four or five days.

509 Similarly, some solicitors interviewed by Dewar et al. said that they were making legal aid pay by being “properly organised” and having “legal aid friendly procedures”, although the nature of these procedures was not specified: *The Impact of Changes to Legal Aid on the Practice of Family and Criminal Law in Queensland*, 72.

We do it pretty cheaply...but we do end up with consent orders... And certainly part of that process is we try and short cut the need to prepare affidavits or evidence.

547. These responses show that successive changes to legal aid funding have had an adverse impact on the supply side of the legal aid market in family law.⁵¹⁰ Not all of the effects are attributable to the changes introduced in July 1997. However this does seem to have been some kind of a tipping point, speeding up the rate of exit from legal aid work, and producing a clear trend for fewer firms to do more legal aid work while the majority of firms do none or very little. This raises concerns about client access, particularly in rural and regional areas.⁵¹¹
548. At the end of 1999 the federal Attorney-General announced a forthcoming \$63 million increase in legal aid funding over a four year period, directed in part to addressing the issue of legal aid rates for private solicitors, and to arresting the loss of experienced private practitioners from the legal aid system.⁵¹² Solicitors' comments in the interviews suggest that in order for this increased funding to have the effect of persuading firms to re-enter the system, there will need to be both an increase in the number of grants available, and an increase in remuneration for solicitors (i.e. increased stage of matter limits). Whether the funding increase will be sufficient to achieve these aims is open to question.

510 A similar phenomenon has been observed in other jurisdictions, eg. Ontario Legal Aid Review, *Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services* (Ministry of the Attorney-General, Ontario, June 1998), ch.10.

511 At least one client commented in the survey that he had not been able to choose a private lawyer, since there was an LAC office in his area while none of the private firms did legal aid. See also Dewar et al., *The Impact of Changes to Legal Aid on the Practice of Family and Criminal Law in Queensland*, 68–69.

512 Attorney-General Daryl Williams, press release, 15 December 1999.

Costs in Self-funding Cases

549. This section discusses a set of issues faced exclusively by self-funding clients and their lawyers: predicting the costs of a family law case and the provision of cost estimates; billing practices; the level of costs charged to clients, and cost drivers in self-funding cases; affordability of costs for the “ordinarily prudent self-funding litigant”; and clients’ views on value for money.

Predicting the Cost of the Case and Cost Estimates

550. Solicitors are required by the Family Court and by State legislation to provide clients with an estimate of costs at the outset of the case, and to keep clients updated on costs.⁵¹³ Interviewees invariably stated, however, that they are unable to give an exact amount by way of costs estimate. Indeed, only 6% of solicitors interviewed (n=5) considered that they were able to predict the cost of a case near its start.⁵¹⁴ Even so, these predictions would still have a “margin of error”, would be “good guesses”, or were not possible in some types of cases. A further five solicitors considered that it was possible to predict the costs of “house and garden” property matters near the start of the case, but children’s issues were another matter.

551. The remaining solicitors replied that it is either not possible, or quite difficult, to predict the cost of a case accurately near its start. This difficulty arises due to unknowns such as how far the case will go, whether new elements will arise, how the parties will react, and whether court dates will have to be adjourned:

513 Family Law Rules, Order 38, Division 1A; Legal Profession Act 1987 (NSW), ss.175, 177; Queensland Law Society Act 1952 (Qld), s.48; Legal Practice Act 1996 (Vic), s.86.

514 This is not a problem confined to family law solicitors: see Judy Brookman, ‘Cost Disclosure Found to be Generally Helpful, But Sometimes Impractical’ (1997) 35(7) *Law Society Journal (NSW)* 78–79.

No, I always get caught. I always think that it's going to be cheaper than it is, and I do think that if you're a private payer costs are very high.

552. Eight solicitors felt that it was more difficult to predict the cost of children's matters than property matters, since, as suggested in chapter 4, unexpected elements are more likely to arise in children's cases, they are more likely to involve several interim applications, less likely to settle easily, and the initial issues may have changed completely by the time a case reaches final hearing.

553. The factor that appeared to make the greatest difference to a solicitor's ability to predict costs was gaining information about the other party's case — including the nature of their application and evidence, the other party's personality and willingness to negotiate, and who is representing them:

We get letters and we go, "Oh no, they're on the other side". Ring the client and tell them, "So and so is on the other side. This means that it will be in court, this means that it will take eight months and it will cost you \$3,500–\$4,000". Next day we get another matter in with somebody else on the other side and we'll ring the client and say, "We've got so and so on the other side... We will propose consent orders and we will have it resolved within six weeks". You know within an 80% chance you are right. A huge difference with who's representing the other side.

554. The files examined provided clear evidence of solicitors' hesitations regarding cost estimates. Only 26% of self-funded clients were provided with a quantified cost estimate at the outset of their case.

555. Around half of the cost estimates provided by solicitors were expressed in stages of the case, eg. \$1,500 to directions hearing, so much extra for conciliation conference and pre-hearing conference, and so much extra for final hearing. The most commonly quoted figure for final hearing was \$10–15,000, although some quotes were for considerably less than this. Similarly, 44% of the solicitors interviewed who indicated how

they communicate cost estimates to the client explained that their estimates were based on stages of proceedings. Solicitors also said that they stressed to their clients that most cases settle, in order to explain that they would possibly only incur the costs predicted at the earlier stage(s), and also to encourage their clients to settle.

556. Thirty-seven percent of interviewees said that they communicated the possible costs of a case to a client by giving a range, and this occurred in four cases in the file sample. Some solicitors explained that the range was based on similar matters, although the client was then warned that “you never know what’s going to happen”. There was little consistency in the ranges offered by solicitors in the interviews or in the file sample. For example, one client in the file sample was quoted a range of \$800–\$1,500 plus \$200 disbursements, while another was advised that their case could cost \$10,000–\$15,000.
557. The other substantial group of interviewees (17%) said that they attempt to give some form of ballpark figure, in the way of a “broad estimate”, “general indication” or “rough idea” of how much the case may cost. Only three of the cases in the file sample involved this form of cost estimate, with ballpark figures again varying considerably, from \$1,600 to \$15,000.
558. Of the 15 cases in the file sample in which cost estimates were given, only four ultimately cost around the same amount as the estimate. In over half the cases (n=8), the cost estimate was lower than the ultimate cost to the client, including one case in which the client was advised that the case would cost \$10,000–\$15,000, and the total bill came to over \$15,000. In the remaining three cases, the total bill was lower than the cost estimate, although in one of these cases, the initial cost estimate was revised when it became clear that the case would go to trial. The total bill was thus considerably higher than the initial estimate, but lower than the estimate given for the cost of the trial.

559. Several clients made comments on the client survey concerning costs agreements. One felt that the costs agreement was not honoured, while another noted that the final cost of their case was almost double that stated in the original costs agreement. Another client complained that the costs agreement did not include disbursements. A fourth client said they had been dissuaded from continuing with their case by the high amount quoted as the cost of proceeding to final hearing.
560. The Williams review of cost scales in federal jurisdictions proposed that new scales should be set, according to pre-determined, lump-sum amounts for each stage of proceedings. Fixed amounts were advocated in order to avoid client uncertainty, as well as to create incentives for parties to settle.⁵¹⁵ However greater certainty depends on solicitors charging at the scale rate, and the provision of costs scales does not resolve the problem of determining in advance the stage at which the case will conclude and the level of complexity in the case.

Billing

561. More commonly than giving quantified cost estimates, solicitors provided clients with a costs agreement, which set out the rates at which work would be charged, and how they would be billed.⁵¹⁶ The two methods of charging for professional fees used in all the self-funded cases in the file sample were a specified hourly rate (62% of cases in the file sample), or the Family Court scale (38%). The nature of the case (whether it concerned children and property, or children only) did not impact on the basis of billing.

515 *The Review of Scales of Legal Professional Fees in Federal Jurisdictions* (Attorney-General's Department, 1998), 8.

516 In a survey of 400 NSW firms (not confined to family law), 53% reported that they generally gave clients a cost estimate in the form of a ballpark figure, while 33% only provided information concerning the basis for charging: Brookman, 'Cost Disclosure Found to be Generally Helpful'. This suggests that family lawyers provide less initial costs information to their clients than the average.

The solicitors who charged at scale billed higher professional fees overall (median \$6,044) than those who charged at another hourly rate (median \$3,931), although the difference between the two groups was not significant. Moreover, cases that were billed at scale proved to be more likely to proceed to hearing, which may wholly explain the disparity between the median amounts charged by each method.

562. The main times at which bills were issued were either monthly (31% of cases), after particular events or stages (29% of cases), or a single bill at the end of the matter (19% of cases).⁵¹⁷ Although the difference just failed to reach significance (probably due to small numbers),⁵¹⁸ cases involving property were more likely to have a single bill at the end (31% of such cases) than were cases involving children only (11% of such cases). This is consistent with the notion that solicitors will take property cases “on spec”, on the basis that they will receive payment from the proceeds of the property division, whereas this kind of arrangement is not possible in children-only cases. Indeed, in five cases it was evident from the file that the solicitor had delayed the bill until after the property settlement was finalised.

563. Solicitors were also asked in the interviews how much work they did on a speculative or conditional fee basis.⁵¹⁹ The great majority of those who responded to this question (87%) replied that they may delay collecting their fees from the client until after the division of property at the end of the case makes funds available. Around one quarter said this was a common practice.

517 This again differs from the findings of the NSW survey, *ibid.*, in which 71% of firms billed at the end of a matter, while only 17% billed regularly throughout the case.

518 $\chi^2=3.343$, $df=1$, $p=0.068$, n of single bill cases=11.

519 This is not the same as contingency fees, or ‘no win, no pay’, which are generally considered inappropriate for family law cases: Senate Standing Committee on Legal and Constitutional Affairs, *Cost of Legal Services and Litigation: Contingency Fees* (Canberra, 1991), 5.

This did not necessarily mean that clients would receive a single bill at the end of the case. Most solicitors appeared to continue to send clients interim bills, to keep the client informed and aware of the costs, even though (full) payment at that point was not expected. Payments would be deferred for clients with a limited income, and where their only asset was the matrimonial home. In particular, these clients were likely to be women:

If you act for a woman it will always be at the end, but it's rare that I get money in trust and it's rare that an account is paid along the way.

564. A small group of solicitors (n=4) stated, however, that they would defer the bill only very occasionally, since the firm could rarely afford to carry the cost of the case until settlement, or because they had been “burnt” before:

That's often turned around and bitten us, unfortunately... [Y]ou run a matter and find that there really is nothing at the end of it...or in one case the matrimonial home was burnt down, so we lost out on that one.

More and more I am insisting on being paid as I go along. I have had a couple of clients bankrupt themselves this year because they weren't happy with the way things went... I can't afford to do it any more.

565. Those who were more prepared to defer payment did explain, too, that this is not appropriate in cases where the property pool is only small, and the solicitor's fees are too high in proportion to the settlement. This includes clients who are unable to obtain legal aid because they have too little or just too much equity in the matrimonial home to meet the property guidelines.⁵²⁰ Deferred payments also assume that the matrimonial home will be sold to help pay the legal fees, which does not assist many

520 See also Seaman, *Fair Shares?*, 25–26.

women who wish to remain living with their children in the matrimonial home.⁵²¹

566. It appears, then, that although speculative fees and deferred payments enabled self-funding clients of limited means to meet the cost of legal representation for property division, this option was by no means available to all clients who were ineligible for legal aid due to the means test and/or the property guidelines.

Amount of Costs and Cost Drivers

567. The mean amount paid by self-funding clients in cases that did not proceed to hearing was \$6,066 (median \$3,919). In cases involving both children and property the mean was \$7,546, while in cases involving children only it was \$4,823. As noted earlier, the mean amount for children-only cases was almost 50% more than the amount paid to private solicitors in legal aid cases prior to hearing.

568. Again, solicitor fees comprised the largest component of the total (overall mean \$5,237; children and property mean \$6,845; children only mean \$3,886), followed by disbursements (mean \$489) and barrister fees (mean \$330; children and property mean \$160; children only mean \$472).

569. Twelve self-funding cases proceeded to hearing. The mean total bill paid by self-funded clients in cases that went to hearing was \$21,952 (with minimal difference between cases involving children and property, and children only). This is more than double the legal aid cap, and is in accordance with the level of the ceiling considered realistic by a majority of Victorian family law specialists surveyed by Springvale Legal Service in 1998 (53% nominated a sum in excess of \$20,000).⁵²²

521 Regina Graycar and Jenny Morgan, 'Disabling Citizenship: Civil Death for Women in the 1990s' (1995) 17 *Adelaide Law Review* 49, 58–59.

522 Springvale Legal Service, *Hitting the Ceiling*, 12.

570. A rough estimate of the cost of hearings can be gained by comparing the mean amount paid by clients in cases that did not go to hearing with the mean amount paid by clients in cases that did proceed to hearing. This leaves an estimated mean hearing cost of almost \$16,000. Disaggregated, this represented mean hearing costs of \$9,500 for solicitor fees, \$4,350 for barrister fees, \$470 for disbursements, and \$1,425 for experts. Again, these figures are far in excess of the average amounts paid by legal aid for final hearings.⁵²³ The only consistent element is the fact that hearings apparently cost more than the combined total of all previous stages.

571. Apart from the increase in costs associated with going to hearing, higher costs were correlated with a range of other fairly predictable factors, including: the number of issues in dispute,⁵²⁴ the number of children involved,⁵²⁵ the number of demands placed on the solicitor by the client and/or the other party,⁵²⁶ and the number of aggravating factors in the case,⁵²⁷ if a child representative was appointed,⁵²⁸ the number of solicitor and court-related activities⁵²⁹ (including the number of adjournments⁵³⁰), the number of other people the solicitor dealt with,⁵³¹ if the case was dealt with in the Family Court rather than

523 They are also in excess of the Family Court cost scale for standard track cases proposed by the Williams Review: *The Review of Scales of Legal Professional Fees in Federal Jurisdictions*, 9.

524 Spearman's $R=0.445$, $p<0.01$.

525 Spearman's $R=0.269$, $p<0.05$.

526 Spearman's $R=0.269$, $p<0.05$.

527 Spearman's $R=0.519$, $p<0.01$.

528 Mann-Whitney test: $Z=-3.073$, $p<0.005$.

529 Pages of letters from solicitor: Spearman's $R=0.778$, $p<0.01$; pages of documents perused: Spearman's $R=0.690$, $p<0.01$; number of personal attendances with client: Spearman's $R=0.609$, $p<0.01$; total number of court documents: Spearman's $R=0.744$, $p<0.01$; number of court documents filed on behalf of the client: Spearman's $R=0.601$, $p<0.01$; total number of court appearances: Spearman's $R=0.646$, $p<0.01$.

530 Spearman's $R=0.321$, $p<0.05$.

531 Spearman's $R=0.691$, $p<0.01$.

the Local Court, or if it involved both courts,⁵³² the number of dispute resolution processes attempted,⁵³³ if the case involved interim orders,⁵³⁴ the number of legal personnel involved in the client's case,⁵³⁵ resolution after the directions hearing stage,⁵³⁶ and time to finalisation.⁵³⁷ Solicitor characteristics (such as number of years in practice, position, accreditation status and firm specialisation⁵³⁸) were not generally related to costs, except for the fact that male solicitors billed more on average than female solicitors.⁵³⁹ This is probably related to the fact that, as noted earlier, cases run by male solicitors were more likely to go to hearing. In addition, clients living in country areas paid more on average (mean \$14,000) than clients living in metropolitan areas (mean \$5,000),⁵⁴⁰ and there were also differences between Registries, although numbers were too small for meaningful statistical testing.⁵⁴¹

572. Backwards stepwise regression analysis of the various factors correlated with cost indicated that the main cost drivers were: the amount of correspondence sent by the solicitor,⁵⁴² the overall

532 Kruskal-Wallis $\chi^2=9.731$, $df=2$, $p<0.01$.

533 Spearman's $R=0.312$, $p<0.05$.

534 Mann-Whitney test: $Z=-3.059$, $p<0.005$.

535 Spearman's $R=0.621$, $p<0.01$.

536 Kruskal-Wallis $\chi^2=17.156$, $df=2$, $p<0.001$.

537 Spearman's $R=0.607$, $p<0.01$.

538 cf. Phillip L. Williams and Ross A. Williams, 'The Cost of Civil Litigation: An Empirical Study' (1994) 14 *International Review of Law and Economics* 73, 78–79, who found in their study of personal injury claims that more specialist firms could lower unit costs of cases. However the two studies are not exactly comparable, as our measure of 'specialisation' was percentage of fee income earned in family law, whereas theirs was market share, and our measure of costs was the costs charged to the client, whereas theirs was costs to the firm.

539 Mann-Whitney test: $Z=-2.337$, $p<0.05$.

540 Mann-Whitney test: $Z=-3.065$, $p<0.005$.

541 Brisbane, Dandenong, Melbourne and Townsville had five or fewer self-funding cases apiece. As between the other four Registries, self-funded clients in Newcastle and Sydney paid more on average than those in Parramatta and Adelaide.

542 $t=3.247$, $p<0.005$.

number of court documents in the case,⁵⁴³ the number of legal personnel involved in the client's case,⁵⁴⁴ and the number of issues in dispute.⁵⁴⁵ The model incorporating these four factors was highly predictive, explaining 74% of the variance in the costs data.⁵⁴⁶

Affordability of Costs and the 'Ordinarily Prudent Self-Funding Litigant'

573. As noted in chapter 2, information on the client's income was not always available from the files. Income information was only present in half of the self-funding cases in the file sample, which were usually cases concerning property as well as children. In four of these cases the bill incurred by the client was in excess of the client's annual income — in one case more than

543 $t=3.057$, $p<0.005$.

544 $t=2.565$, $p<0.05$.

545 $t=2.424$, $p<0.05$. Cf. Sarah Maclean, *Legal Aid and the Family Justice System: Report of the Case Profiling Study* (Legal Aid Board Research Unit, London, 1998), 40, who found, in relation to a broader sample of family law cases, that the number of legal issues at the start of the case did not influence the cost. The drivers identified in that study were the personalities of clients and lawyers (not measured in the present study), presence of supervised contact (roughly equivalent to the presence of a child representative), and the case ending up in court. The more detailed information gathered in the present study has enabled "ending up in court" to be disaggregated into several elements, specifically the other three cost drivers identified here. Research conducted for Lord Woolf's inquiry on civil cases in general did identify case complexity as a cost driver, together with duration of the case: Hazel Genn, *Lord Woolf's Inquiry: Access to Justice — Survey of Litigation Costs* (Lord Chancellor's Department, London, 1996), 78.

546 $R^2=0.742$, $F=37.291$, $df=4$, $p<0.001$. In an analysis conducted for the ALRC, Tim Fry found five costs drivers in family court cases: total number of directions hearings, total number of other court events, whether the case went to hearing, whether there was legal aid funding or not, and the number of experts involved: ALRC, *Report No.89*, 258; 'Costs of Litigation in the Family Court of Australia and in the Federal court of Australia' (report to ALRC, November 1999). The data available to Fry, however, was derived mainly from Family Court case files, and did not include the data on solicitors' activities etc. included in our analysis. Moreover, the model produced by Fry explained only 41% of the variation in the costs data, whereas our model is far more robust. Again, too, the element 'whether the case went to hearing' is disaggregated in our model. It should be noted, however, that our model deals only with self-funding cases, whereas Fry's model attempts to explain both self-funding and legally-aided cases. We have no doubt that, as found by Fry, the presence of legal aid funding results in a significant reduction in case costs.

three times the client's annual income, and in another incurred by a client with no income. On average, these clients spent almost half of their annual income (47.6%) on their family law proceedings. Obviously, the majority of these clients had some assets available to cover the bill. Nevertheless, this is not behaviour that is easily assimilated with the notion of the "ordinarily prudent" self-funding family law litigant. Indeed, several clients noted on the client survey that the cost of their case had had an adverse and long-term impact upon their lives and the lives of their children.

574. One solicitor further commented in the interview that compared to commercial law, it is difficult to charge people a lot of money for the solicitor's experience in family law. The money has to come out of the client's pocket rather than being a tax-deductible business expense. Clients are also resistant to paying as they consider the litigation not to be their fault. This was borne out by several comments made by clients on the client survey, who felt that the costs of their case had been too high given that they were the respondent, and therefore the other party should have carried a greater responsibility for costs. None of the cases in the file sample, however, involved any dispute over the solicitor's bill.

575. In terms of actually making payments, in three of the cases in the file sample the client was paying off their bill in installments (interest free). In five cases (all female clients), the client received assistance in paying their legal fees from family or friends. In three cases the client had serious difficulty in paying the bill. In one of these cases, after the client had incurred more than \$10,000 in unpaid legal fees, the firm ceased to act and placed a caveat on her property.

576. Further, the client's bill was discounted by the solicitor in eight of the self-funded cases in the file sample. Quantified discounts ranged from \$45 to \$1,800, and from 0.01% to 58% of the total bill. As noted earlier in this chapter, discounting did not appear

to be related to either the size of the total bill or the client's income, but was dependent on the solicitor's assessment of the client's "deservingness", a wholly subjective criterion.

Effect of the Client's Resources on the Running of the Case

577. Solicitors were asked two specific questions in relation to the resources that self-funding clients were able to bring to their cases. First, solicitors were asked whether the existence of a merits test for legally-aided but not for self-funded cases makes any difference in how they would run a case (in order to compare the position of legally-aided and self-funding clients). Secondly, they were asked whether the amount of money that a self-funding family law client was able to spend influenced the running of the case (in order to compare the position of more and less wealthy self-funding clients).
578. The majority of solicitors (69%) considered that the presence of a merits test for legal aid cases makes no difference to how they would run a case. Most of these said that they apply their own merits test to their self-funded cases, informing their client of their prospects at the beginning of the case and as the case progresses. If the case did not have merit, then the client would usually take the solicitor's advice and not continue. Some solicitors claimed that if the client nonetheless wished to continue, they would advise them to go to another firm. If the client had changed firms several times, this would be an indicator that "there is really something wrong".
579. Moreover, a number of solicitors considered that self-funding clients have their own merits test, in that as they are paying, they will try not to waste money. Several solicitors said that they would not run a case without merit because they had a responsibility to their client not to deceive them or take money from them without being able to offer results.

580. Despite asserting that the merits test makes no difference, several solicitors went on to explain that they would run a self-funded case that they did not consider to have merit, but they would not be happy about it. If the client persisted in their instructions, even after having the potential costs of running a meritless case explained to them, the solicitor would go ahead and act for the client:

I would say to them, "Look, this is what I think about your prospects, this is what I think about this application that you want to bring. If you still want to do it, well put your money where your mouth is". You know, so sometimes you have to make an application...

If the client knows that they don't have a good chance of succeeding and they still instruct me to go ahead, then I am going to do it. But at least they are aware...I send them a letter to tell them what I think as well. So their expectations should not be high, but if they still want to fight it, then I will act for them.

581. The remaining 31% of solicitors frankly admitted that the merits test does make a difference, and that a self-funded client is able to run an unreasonable case so long as they are prepared to fund it. Some of these solicitors expressed the view that it is the client's money, and they can spend it as they please.

582. Three solicitors drew an explicit contrast between the position of legally-aided and self-funded clients in this respect. Two noted that if a client applied for legal aid and was rejected on the basis of merit, their case would never get off the ground, whereas negotiations at least could begin in a self-funded case that was lacking in merit. The third explained that the operation of the merits test puts legal aid clients at a strategic disadvantage. A self-funding client, for example, has the option of making an application for residence, knowing they will not get it, in order to improve the terms of contact orders, whereas this kind of leverage is not available to legal aid clients.

583. On the other hand, as suggested at the end of the last chapter, the fact that self-funded cases can run without merit may help to explain why legal aid clients are more likely to be satisfied with the results of their cases. The expectations of legal aid applicants whose cases are found not to have merit are disappointed by the LAC rather than by the Family Court.
584. Finally, 87% of solicitors who responded to the question considered that the amount that a self-funded family law client can afford to spend on a case will influence the running of the case. The greater the client's funds, the greater access they have to outside resources such as expert reports, subpoenas and additional witnesses. In property cases, limited funds will restrict the amount of investigation and discovery, and hence limit the solicitor's ability to uncover hidden assets. If a client has greater funds, the solicitor can also draw on counsel's advice earlier, and can engage counsel for court appearances. The choice of barrister if the case goes to hearing is also dependent on the extent of the client's funds.
585. To a lesser extent, solicitors explained that the amount of money the client has influences the amount of work they will do on a file, in terms of preparation, perusing documents, clarifying statements. It also impacts on the amount of work that the solicitor will get the client to do themselves.
586. Forty-three percent of solicitors responded that the less money a client has to fund their case, the sooner they would attempt to settle the case — particularly in property matters where a cost-benefit exercise is involved:

If there is \$20,000 in the kitty then obviously I am not going to spend \$10,000 getting an extra \$5,000. I mean the amount that is in the kitty at the end of the day is very, very determinative of how I go about getting it and the advice I give my client to settle or consent or whatever.

587. Solicitors noted that clients with limited funds can be pressured by the other party into accepting a settlement, or if the client runs out of money they have no choice but to settle. This is similar to the effect of the legal aid cap, although it appears that many “ordinary” self-funding clients would be able or prepared to spend considerably more than the current level of the cap on their family law cases.
588. Nineteen percent of solicitors commented that the client’s access to funds determines whether they can instigate a case, and the types of issues they are able to raise. These solicitors felt that the amount of funds available will determine the way in which the client views their case, and will influence what choices they make and whether they can continue or not. Solicitors explained that their role was to offer the client all the available options, advise them on the best path to take given their limited means, and allow the client to choose which way the case would proceed.
589. The small number of cases involved and the paucity of information on income and assets in the files made it difficult to test solicitors’ assertions about the effect of the amount of money a client had to spent against the evidence from the file sample. The kinds of differences claimed by solicitors — eg. amount of solicitor activities, number of other people and organisations the solicitor dealt with, whether or not counsel was briefed, and stage of resolution — could not be discerned from the files, but a larger file sample may well reveal income-related differences in these factors.
590. A couple of solicitors responded that they often find cases where the client has greater access to funds to be easier to run and more rewarding (both financially and intellectually), or that there are different attitudes towards wealthy clients:

You get them occasionally, and it is like a breath of fresh air, although sometimes their problems...I don't know whether I would describe it as

fun! Usually they are probably very, very demanding, but it is an interesting experience, put it that way.

These comments contrast starkly with solicitors' views, noted in chapter 3, of legal aid clients as unreasonable and demanding.

Clients' Views on Value for Money

591. Self-funding clients were asked what they thought of the total bill from their lawyers considering what had to be done in their case, and whether they felt they had received value for money from their lawyers.
592. Clients were fairly evenly divided between those who thought their lawyer's bill was too high (48.4%), and those who thought the bill was about right (45.2%).⁵⁴⁷ There was no difference in the average size of the bills paid by these two groups (around \$10,000). In this respect, too, clients were generally accurate (72%) in their reports on the client survey of the size of their lawyer's bill. Where clients' reports of the size of the bill differed from the actual figure obtained from the file, the usual tendency was for clients either to narrowly underestimate the size of the bill, or narrowly overestimate the amount they had paid. Clients grossly overstated the amount of their lawyer's bill in only five cases.
593. Whether clients thought their lawyer's bill was about right or too high was unrelated to the client's sex or income, the nature of the matter (children only or children and property), the stage of resolution, whether the lawyer charged at scale or a specified hourly rate, or the client's previous experience with lawyers in

547 Livingstone Armytage found that the most common complaint from the clients of accredited specialists was that the cost of their case was too high (or unexpectedly so): 'Client Satisfaction with Specialists' Services: Lessons for Legal Educators', in Australian Professional Legal Education Council, *Skills Development for Tomorrow's Lawyers: Needs and Strategies — Conference Papers* (Sydney, 1996), 361.

general or family lawyers in particular. Clients who thought the total bill from their lawyer was too high were, however, significantly less satisfied with their lawyer (mean satisfaction score 3.5) than were those who thought the bill was about right (mean satisfaction score 4.4).⁵⁴⁸ The direction of this relationship is difficult to determine. It could be that high bills lead to dissatisfaction with lawyers; alternatively, dissatisfaction with the lawyer may lead to a perception that the bill is too high. The importance of costs disclosure was underlined by the fact that all but one of the eight clients who said they had not been advised in writing or via a costs agreement about the fees their lawyer would charge thought their lawyer's bill was too high. At the same time, there was no relationship between clients' views on the size of their lawyer's bill and their satisfaction with the outcome of the case.⁵⁴⁹

594. A higher proportion of clients (57%) felt they had received value for money from their lawyer⁵⁵⁰ — some clients conceded they had received value for money even though they thought the lawyer's bill was too high. Clients' responses to this question were even more highly correlated with their degree of satisfaction with their lawyers. Those who felt they had received value for money gave their lawyers a mean satisfaction score of 4.6, while those who felt they had not received value for money gave their lawyers a mean satisfaction score of 2.7.⁵⁵¹ The

548 Mann-Whitney test: $Z=-2.651$, $p<0.01$.

549 We did not ask clients whether they thought anyone other than the lawyer was responsible for the perceived excessive cost of their case. Cf. New Zealand Law Commission, *Women's Access to Justice: Lawyers' Costs in Family Law Disputes* (Wellington, 1997), 11, which found that women blamed the Family Court for contributing to the high costs of their cases, by failing to recognise or control lawyers' delays and other tactics, and failing to control the unreasonable behaviour of the other side.

550 This is very similar to the Justice Research Centre's earlier finding that 60% of plaintiffs in civil actions thought their lawyer had provided value for money: Marie Delaney and Ted Wright, *Plaintiffs' Satisfaction With Dispute Resolution Processes* (JRC, 1997), 73.

551 Mann-Whitney test: $Z=-4.880$, $p<0.001$.

client's sense of receiving value for money was also related to their satisfaction with the result of their case.⁵⁵²

Cases with Both Types of Funding

595. Thirteen cases in the file sample (7.4%) involved both legal aid funding and private funding by the client. As noted in previous chapters, these cases tended to be more highly contested than others, as indicated by factors such as presence of a child representative (eight cases), proceeding to hearing (seven cases), judgment by the court (four cases), and length of time to finalisation (mean 21.4 months). The reasons why these cases were funded from two different sources varied considerably.

596. In two cases the client's legal aid funding was terminated early in the case because they exceeded the means test threshold.

597. Three of the cases involved property as well as children. In one of these (a Queensland case) the client was funded only for a legal aid conference, and paid their solicitor for the rest of the proceedings. In another, the client's legal aid grant was limited to disbursements and appearances, and the client paid the solicitor's fees, including for resolution of the property matter. In the third children and property case, the client was only granted aid for enforcement proceedings. Conversely, in another case with both types of funding, the client received a grant of aid for the substantive proceedings, but bore the cost of enforcement proceedings themselves.

598. In three cases the client was initially refused legal aid, and was compelled to self-fund the proceedings until they were eventually successful in obtaining a grant of aid. In one of these cases, the grant was made for the final hearing only. In a further

552 Mann-Whitney test: $Z=-3.911$, $p<0.001$.

two cases, aid was granted only for a limited application for contact, but the clients wanted more than this, and instructed their solicitors to take their cases further on a self-funding basis.

599. The last two cases involved multiple applications for final orders, and the clients had only been granted aid for some part of the overall proceedings.
600. The average amount paid by legal aid in these cases was \$2,089, with a minimum of \$414 (the case funded only for a legal aid conference) and a maximum of \$5,121 (for the second children and property case, which went to hearing on the children's matters).
601. The amounts paid by the clients themselves ranged from \$232 (for a case in which legal aid was terminated due to the client's means, but which settled soon after), to \$29,188 (for the case in which aid was granted only for enforcement, but which went to hearing and judgment on the substantive issues). The average amount paid by the clients was \$8,758.
602. In only three of the cases did the amount paid by legal aid exceed the amount paid by the client. On average (and disregarding any solicitor subsidisation of the work funded by legal aid), legal aid paid just under 20% of the cost of these cases, with clients footing the bill for the remaining 80+% of the cost. Given that all but two of these clients were reliant on social security or Austudy, one can only speculate as to where they found the means to pay their legal bills. This category of clients, who were prepared to spend substantial amounts on their family law cases despite having severely limited incomes, further demonstrates the unreality of the notion of the "ordinarily prudent" family law litigant, who deploys his or her finite resources according to rational, cost-benefit calculations.

The Other Party's Funding

603. The other party's funding status was unknown in 37% of the cases in the file sample. In 18% of cases the other party was known to be self-funding, in 14% the other party was legally-aided, in 11% the other party was self-representing, and in 9% the other party was partly self-funding and partly self-representing.

604. Where the other party's funding status was known, self-funding clients were most likely to have self-funding opponents, legally-aided clients were most likely to have legally-aided or self-representing opponents, and clients with both types of funding were most likely to have opponents with a mixed funding status as well. The difference between the funding status of the opponents of self-funded and legally-aided clients was significant.⁵⁵³ This reflects the findings of the earlier profiling study on representation patterns between family law parties.⁵⁵⁴ Within the legal aid group, there was no significant difference between the funding status of the opponents of in-house clients and clients represented by private solicitors.

605. The legal aid merits test requires that cases to be funded must have reasonable prospects of success. Under the 1997 Commonwealth legal aid guidelines, this is defined as having a greater than 50% chance of success. This would seem to make it logically difficult for both sides of a case to receive legal aid funding. However in the file sample, 38% of the cases in which the client was legally-aided also involved the other party being wholly legally-aided. This figure may simply demonstrate the difficulty of predicting the outcome of a family law case at the outset. It may be possible to say, looking at each side separately, that each has a more than 50% chance of success.

553 $\chi^2=28.933$, $df=3$, $p<0.001$.

554 Rosemary Hunter, *Family Law Case Profiles* (Justice Research Centre, Sydney, 1999), 207.

606. Only 12% of legal aid clients had self-funding opponents, while 28% of legal aid clients had self-representing opponents. Likewise, only 7% of self-funding clients had legally-aided opponents, although 37% of self-funding clients had opponents with some mixture of funding arrangements.

Effects of Different Funding Status

607. Solicitors were asked in the interviews whether the fact that one side is legally-aided or self-funded makes any difference to the cost or length of a family law case, and whether it makes any difference to their strategy if one side is legally-aided and the other is not.

608. Sixty-four percent of solicitors who responded (n=48) replied that it makes no difference to their strategy if one side is legally-aided and the other side is not. Of those who elaborated on this point, several explained that it is an important principle that funding status not only does not but should not influence a case. It should be run either in the best interests of the client, or the best interests of the children.

609. Some solicitors claimed that it is possible to use a legal aid grant strategically in order to drag out a case and wear out the other party. In these instances, having a grant of aid was seen to be a distinct advantage, especially over a self-funding client with limited funds. These solicitors also claimed that they had come across other solicitors who did this, or had heard of this being done, but would not run a case this way themselves. Further discussion revealed that such claims may have been prompted by concern for the position of parties who (for means or merit reasons) just missed out on a legal aid grant, when their former partner was more 'fortunate':

I've got someone right on the edge of qualifying for legal aid... I guess they get really frustrated, especially if one side has just got over the threshold and are receiving legal aid and they are not, especially if their financial

circumstances are exactly the same, and it's a discretionary thing down at Legal Aid. If they feel they're robbed and the other side is extending it deliberately to make them pay money... As to whether it's true or not, I think that's another issue.

See, if the other one's not on a high wage, they'll think it's unfair that the taxpayer's funding the wife. Because they're on \$400 a week and somehow or other didn't get it and they can barely keep going.

If you have a client that is not funded and that you know that the person on the other side is funded, quite often they feel a little bit disadvantaged. They think, especially if they are not very wealthy — and many of them aren't — they will say, well you know, if you've got some carte blanche funding until the end of the case, and here am I struggling to pay your hourly rates.

610. Clearly, as the evidence from this and previous chapters demonstrates, legal aid clients do not have carte blanche to run their cases to the bitter end. These responses appear to proceed from a combination of the earlier noted tendency to construct legal aid clients as unreasonable, and misplaced blame for the perceived tightness of legal aid means and merits tests back onto those who manage to satisfy them.⁵⁵⁵ As one in-house solicitor commented:

...we are always open to criticism as Legal Aid lawyers that our clients aren't paying for this and we are open to criticism that we might be dragging out proceedings, because we can actually play this attrition game with people whose funds are running out fast. On the other hand, since legal aid grants have been reduced, we've got the other argument, we've got such limited funding to get where we need to go, we have the problem where people who have the cash are pushing applications...so it's a two sided coin.

555 See also Maclean, *Legal Aid and the Family Justice System*, 42, who notes in the UK context that the evidence that legal aid litigants may try to burn off non-legally-aided litigants is very weak.

611. More often, solicitors who felt that difference in funding status did make a difference to their strategy described disadvantages to legal aid clients, particularly “whistleblowing” and “burning off” the legal aid client.
612. The most common strategic difference, mentioned by 11 solicitors (15%), was the practice of contacting the Legal Aid Commission in attempts to get the other party’s grant of aid terminated on means or merit grounds.

I have had occasion to write to Legal Aid protesting the continuing grant of aid for the other side, on the view that they must be lying to the Commission or they wouldn’t continue to get aid in their circumstances.

There have been several cases where I have been instructed by the client to write to Legal Aid and say that I think you should review the funding in this matter because this is what your client is doing and it seems to be escalating the situation rather than resolving.

613. Most of these solicitors commented that they would write to the LAC in an effort to “sink” the other party’s grant of aid only if they believed that the other party was being unreasonable or difficult, refusing to negotiate, or “doing the wrong thing”. Only one solicitor appeared to be more aggressive in their scrutiny of the other party’s eligibility for legal aid:

If the other side has got legal aid, then you’ve got to find out where they are coming from. Again, I try to look at it from the other side: have they got a fair dinkum case? what’s their concern? is this a put up job? And if it is, then is there somebody you can write to in Legal Aid...?

614. Four cases in the file sample included evidence of (attempted) “whistleblowing” — three of these occurred in Queensland. In one instance the client was self-funding and the solicitor tried to “wipe out” the other party’s legal aid grant by questioning the merit of her case, but LAQ replied that they were quite able to evaluate merit themselves. In two of the cases the other party’s

solicitor informed the Legal Aid Commission that they suspected the client had not fully disclosed all of their income, although in one of these cases the other party was also legally-aided.

615. Nine solicitors in response to this question, and seven solicitors in response to a different question, noted the ability for self-funded clients to “burn off” or outlast their legally-aided opponents. In particular, in-house legal aid solicitors claimed that this was a tactic employed by self-funded parties they oppose. The private solicitors who mentioned this strategy were predominantly from Melbourne, perhaps indicating this as an element of local practice:⁵⁵⁶

I've seen cases where they've been self-funded, who could run a case and hope that they drain the other party of legal aid... I've seen it at court talking to other practitioners etc. on particular cases where that's happened.

Because one has got the imbalance of power, it's enormous. In fact if they know that, and they know the Legal Aid rules, and they'll know that from their own practitioner, you can drive a case as long as you like, knowing the other one will expire on costs. And that's what you do practically, you know that. You have unnecessary duty list appearances...and there'll be unnecessary interlocutory steps, notice to produce even though they've got all the documents, you know... There's delaying tactics which you have to resist as best you can.

The other side was paying big money, they were paying a lot. There was always some development in relation to the matter on a daily basis. At the end of the day she gave up and she settled. She lost her little girl. And I was really concerned about that because I thought we had a really good

556 See also Springvale Legal Service, *Hitting the Ceiling*, 15 (74% of Victorian family law specialists responding to the survey had experienced a matter where a self-funding party prolonged proceedings until the legally-aided party's aid ran out); Jeff Giddings, 'Women and Legal Aid', in Jeff Giddings (ed), *Legal Aid in Victoria: At the Crossroads Again* (Fitzroy Legal Services, 1998), 130, 132.

chance. But unfortunately they put so much pressure that she felt completely intimidated, and I was unable to protect her in that respect. And I think that had they been legally-aided as well they would not have been able to do the amount of paperwork that they did. She certainly felt overwhelmed by it, and that was a real pity because I really thought there was an even chance there.

616. Five solicitors explained that they knew that legal aid clients were expected by both the Legal Aid Commission and their solicitor to attempt to settle as early as possible, and that it was possible to use this expectation strategically. Three said they deliberately put reasonable offers to the other party if they are legally-aided, knowing that they will be under considerable pressure to accept the offer or face the threat of having their grant terminated:

If the other side is legally-aided, I make sure we make reasonable offers and try and make sure the Legal Aid Office is aware of those offers, i.e. I try to “white ant” the other side’s grant to try to bring the matter to an end as soon as possible.

I often advise my clients that they should seriously think about making an offer that the other party almost can’t refuse, and certainly the Legal Aid Commission would see as reasonable in the circumstances, because then, I mean that there’s pressure being placed on the other side, not only by you, but by their funding. And the matter may settle on that basis, and also because you are dealing with a solicitor who is being funded from Legal Aid, who probably has other cases waiting in the wings, pressure by private clients.

617. As the ALRC has noted, one justification for capping individual legal aid grants is to ensure some measure of equity between parties when one has a grant of aid and the other does not, but has limited means. It is thus unfair to the self-funding party to be pitted against someone with unlimited legal aid funding. On the other hand, if a self-funded party knows that their legally-aided opponent has strictly limited funds to spend on their case, then

this position too is open to exploitation.⁵⁵⁷ In response, the ALRC recommended a move to non-uniform caps, which should remain strictly confidential in each case.⁵⁵⁸ Our evidence adds two important pieces of data to this debate. First, cases in which one party is legally-aided and the other is self-funded are relatively uncommon. Thus, to the extent that the capping policy is designed to achieve equity between disparately-funded parties it is overbroad, having an impact well beyond the category of cases for which it was intended. Secondly, in the minority of cases where one party is legally-aided and the other is self-funded, it appears that the legally-aided party is now more likely to be the one disadvantaged, because the strict guidelines and limited amount of aid available leave them vulnerable to tactics such as ‘whistleblowing’ and ‘burning off’.

618. It is true that funding caps are already technically non-uniform, since LACs retain a discretion to exceed the \$10,000 limit in exceptional cases. The latest revision of the Commonwealth legal aid guidelines retains the \$10,000 cap but gives all Commissions a discretion to exceed this by an unlimited amount. In practice, however, there is a clear perception of uniformity. Discretions to exceed have been seen to be exercised rarely, if at all, and no encouragement has been given to clients or solicitors to consider this an option. It is arguable that the situation where a self-funded opponent is able to outspend or ‘burn off’ a legally-aided client might be one in which discretions should properly be exercised. As noted, this would be likely to occur in only a minority of cases. Thus it would not seriously jeopardise the other major aim of capping, which is to facilitate overall management of costs by LACs. (Though it is also arguable that stage of matter limits make a

557 ALRC, *Report No.89*, 337.

558 *ibid.*, 351.

greater and more effective contribution to overall cost management than do caps in individual cases.)

Effects of Resource Disparity

619. Clients were asked in the survey whether their former partner had more money to spend on the case than they did, and if so, whether they felt this had an effect on their case. Fifty-two clients (46%) responded that the other party had more money than they did to spend on their case. Responses did not vary significantly by reference to either the client's or the other party's funding status, although clients who said the other party was self-representing were least likely to claim that that party had more money to spend on the case.⁵⁵⁹ Given the general income disparity between male and female family law clients, it is not surprising that women were significantly more likely than men to answer that the other party had more money to spend on the case.⁵⁶⁰ Those who said that their former partner had more money to spend on the case were also significantly less satisfied with their lawyers,⁵⁶¹ and more likely to feel that they had lost their case.⁵⁶²

620. Thirty-two of the clients (61.5%) who said their former partners had more money to spend on the case felt that this had affected their case. Only two of these clients felt that the effect had been positive — in one case because they had been assigned an “exceptional and caring” legal aid lawyer. The remainder asserted that the other party's greater wealth had had a detrimental effect on their case. Disadvantages specified included: the other party was able to drag the case out and refuse

559 $\chi^2=4.626$, $df=1$, $p<0.05$.

560 $\chi^2=4.594$, $df=1$, $p<0.05$.

561 Mann-Whitney test: $Z=-2.088$, $p<0.05$.

562 $\chi^2=8.546$, $df=3$, $p<0.05$.

to settle; the other party had worn down the client by various tactics, including making false allegations or obtaining legal aid under false pretences; the client had been unable to take the case as far as they wanted, or had been forced to compromise or capitulate; the client had received a poorer level of service from their solicitor or barrister; the proceedings had had long-term, adverse financial consequences for the client; and the client felt the other party had more credibility, more rights, and was more likely to be listened to because they had more money.

621. There was no gender difference in responses to this question, although there was a funding difference, with self-funded clients significantly more likely than legally-aided clients to say that the fact that the other party had more money had an effect on their case.⁵⁶³ The group of clients who answered ‘yes’ to this question appeared to be disgruntled with every aspect of their family law proceedings: they were significantly less likely to be satisfied with their lawyers,⁵⁶⁴ to think that the methods used to resolve their case were fair,⁵⁶⁵ to think that the legal system treated them fairly⁵⁶⁶ and to be satisfied with the result of their case,⁵⁶⁷ and were significantly more likely to feel that they had lost their case.⁵⁶⁸
622. These responses suggest a basic source of feelings of injustice among family law litigants — the perceived lack of a level playing field of resources to commit to the resolution of a dispute. It is arguable that legal aid should play some role in equalising the position of the parties in individual cases. This

563 $\chi^2=4.388$, $df=1$, $p<0.05$.

564 Mann-Whitney test: $Z=-2.883$, $p<0.005$.

565 Mann-Whitney test: $Z=-2.202$, $p<0.05$.

566 Mann-Whitney test: $Z=-2.189$, $p<0.05$.

567 Mann-Whitney test: $Z=-3.098$, $p<0.005$.

568 $\chi^2=6.839$, $df=1$, $p<0.01$.

would require, for example, that parties with limited means both be legally-aided, regardless of the respective merits of their cases, and, more controversially, that legal aid funding be used to provide additional resources to clients facing wealthy opponents. It would represent a departure from the current legal aid philosophy of providing some minimal level of access to justice to those who are deemed to be deserving of public assistance. However, it would improve client satisfaction with the justice system, and by removing the possibility of attrition tactics, may be conducive to earlier settlement, or judicial resolution where no settlement is likely. The cost-benefits of such an approach should be given serious consideration.

Conclusions

623. This chapter shows that both legally-aided and self-funded clients experience difficulties with the cost of family law proceedings, however legally-aided clients appear to be systematically disadvantaged in comparison with their self-funding counterparts, through the vagaries of the assignments process, the limited amount of funding available in a grant of aid, and their vulnerability to attrition tactics or termination of aid.
624. Legal aid clients may experience frustration, delay and confusing decision-making in applying for a grant of aid. In particular, despite the fact that the Commonwealth guidelines give first priority to ensuring the safety of women and children at risk, the evidence from the files shows that cases involving severe domestic violence, and/or in which children have been 'snatched' by one of the parties, are not necessarily guaranteed a full grant of aid. Neither are cases that ostensibly meet all the guidelines necessarily guaranteed a grant of aid at all. The potential benefits of national guidelines include consistent application of eligibility criteria and the achievement of equity for clients with minimal personal resources. This chapter

demonstrates, however, that neither of these benefits are currently being delivered. There is considerable inconsistency between LACs, and even between cases brought to the same LAC at different times.

625. Moreover, the stage of matter limits and overall funding cap provide sums of money to legal aid clients that are a long way below the amounts that “ordinary” self-funding litigants can and do spend on their cases. The low rates paid by legal aid do appear to be resulting in a lower level of service for legal aid clients in some respects, such as in the amount of time spent with the client, and the amount of time spent preparing documents and doing other work on the case. Low legal aid rates also clearly generate solicitor resentment, which tends to be displaced onto legal aid clients.
626. Finally, legal aid clients are liable to termination of their grant before completion of their case, and some are subject to aggressive tactics by self-funding opponents, designed to exhaust or truncate their grant of aid. A small proportion of legal aid clients choose or are forced to supplement their legal aid grant with their own severely limited funds.
627. Analysis of the litigation behaviour of self-funding clients casts doubt on the notion of the “ordinarily prudent self-funding litigant” who makes careful, rational decisions about the use of his or her limited resources in legal proceedings. One interpretation of the observed spending patterns of self-funding clients is that there is no such thing as an “ordinarily prudent” family law litigant; rather, the issues at stake lead clients to make decisions about how much they will spend on litigation on an emotional rather than economic basis. That is, unlike other types of litigation, family law proceedings are not approached in cost-benefit terms. If this is so, then restricting the availability or amount of legal aid funding in order to achieve parity with a hypothetical “ordinarily prudent self-funding litigant” is an unrealistic and inequitable exercise. An alternative interpretation

is that the self-funding litigants in our file sample were indeed acting prudently, on the basis of proper consideration of the long-term implications of their cases. On this basis, they valued the things at stake in family law litigation extremely highly. If this is the case, then in order to treat legal aid clients equitably, they too should be permitted to place the same high value on the outcome of family law proceedings.

628. The limits on legal aid funding and the cost of private legal services create real hardship and feelings of injustice in particular in small property cases and cases where there is a significant resource disparity between self-funding parties. The legal aid guidelines have recently been amended to alleviate the former situation to some extent. Whether it should also be a goal of legal aid to alleviate the latter situation could usefully be the subject of further debate among funders, community groups and LACs.

Client Satisfaction

629. This chapter deals with clients' satisfaction with the process used to resolve their case, and with their lawyer. It discusses clients' perceptions of the 'family law system', and of the legal services they received, and the relationship between them.
630. As noted in chapter 1, the utility of client satisfaction surveys is thought to be limited in these areas, on the basis that clients do not have the objectivity to evaluate the performance of the legal system,⁵⁶⁹ or the expertise to comment on the technical skills of their lawyers.⁵⁷⁰ On the other hand, there are some important aspects of client service, such as communication skills, empathy and giving choices, that only clients can assess. The conclusion of the chapter reflects upon these methodological issues as well as the substance of clients' responses to our survey questions.

Dispute Resolution Processes

631. The first point to note when discussing clients' satisfaction with the process/es used to resolve their case is the level of apparent confusion or ignorance among clients regarding those processes. As mentioned in chapter 2, there was considerable discrepancy between information obtainable from the solicitors'

569 E. Allan Lind and Tom R. Tyler, *The Social Psychology of Procedural Justice* (Plenum Press, New York, 1988).

570 Richard Moorhead, Avrom Sherr and Alan Paterson, 'Judging on Results? Outcome Measures: Quality, Strategy and the Search for Objectivity' (1994) 1 *International Journal of the Legal Profession*, 194.

files regarding dispute resolution processes, and the methods clients said had been used in their case.

632. Clients were asked to indicate whether they or their lawyer had tried any of the following methods to resolve their case: Family Court counselling, mediation, legal aid conference, discussions between the lawyer and the client's former partner and/or their lawyer, conciliation conference, a judge's decision. In each instance, some clients claimed the particular process had been used when there was no record of it on the file, and some failed to indicate that the process had been used when it was recorded on the file.

633. Overall, clients over-represented the role of mediation to a very large degree (12 cases in the files, 48 cases in the surveys).⁵⁷¹ It is possible that the term 'mediation' is understood by clients to be all-encompassing, and that they therefore defined any formal attempt to reach a resolution as 'mediation'. This suggests that some caution is required in conducting and interpreting surveys of community attitudes to mediation.

634. To lesser degrees clients over-represented the role of Family Court counselling, conciliation conferences, and judicial decisions. Conversely, they under-represented the role of lawyer negotiations, and their own discussions with the other party. In other words, clients overemphasised third party interventions in their case, and underemphasised their solicitors' and their own efforts to resolve the case. Telephone interviewers commented that clients had found it difficult to answer the question concerning lawyer negotiations, because this was an activity they did not see. They also tended to count consent orders as a judge's decision. In general, they tended to think in terms of 'the

571 Clients responding by telephone overstated the use of mediation to a greater degree than clients responding by mail, suggesting that telephone interviewers may have tended to resolve doubts by answering 'yes'.

system' as a whole, rather than different parts serving different functions. This needs to be borne in mind when considering clients' reported satisfaction with the dispute resolution methods used in their case. That is, clients are responding according to their perceptions of the system, which do not necessarily reflect their actual contact with various aspects of it.

635. There were no significant differences between self-funding and legally-aided clients' reports of dispute resolution methods used (apart from the obvious difference that legal aid clients were more likely to say they had attended a legal aid conference), suggesting that legal aid and self-funding clients are equally prone to the kinds of misunderstandings about process identified above. There was a significant difference between in-house and referred legal aid clients in reporting the use of mediation, with the latter being more likely to say that mediation was used in their case.⁵⁷² There were no significant differences between higher and lower income self-funding clients in relation to reported dispute resolution methods, indicating that higher income clients were not necessarily more aware of what had happened in their cases.
636. Clients were asked to rate their overall impression of the methods used to resolve their case on a five point scale ranging from "very unfair" to "very fair". Clients were fairly evenly divided in their answers, with the mean score being 3 (the mid point).

572 $\chi^2=4.174$, $df=1$, $p<0.05$.

TABLE 6.1 Client Satisfaction with Dispute Resolution Processes

Rating Percent		Number
Very unfair	25	22.1
Somewhat unfair	16	14.2
Neither	21	18.6
Somewhat fair	24	21.2
Very fair	21	18.6
Did not answer	6	5.3
Total	113	100.0

637. There was no significant difference between clients' responses according to funding status, type of representation, or income. There was a significant difference on the basis of clients' sex, with female clients (mean score 3.4) more likely than male clients (mean score 2.4) to think that the methods used to resolve the case were fair.⁵⁷³ There was also a strong correlation between clients' rating of the fairness of the methods used to resolve their case and their satisfaction with the outcome of their case.⁵⁷⁴

638. Clients were further asked how far they agreed with the proposition: "overall, I felt that the legal system treated me fairly". The mean score in response to this question was 2.7, below the mid-point of the scale, indicating majority dissatisfaction with the fairness of the legal system. The distribution of responses was as follows.

573 Mann-Whitney test: $Z=-3.208$, $p<0.005$.

574 Spearman's $R=0.546$, $p<0.01$.

TABLE 6.2 Clients' Views of the Fairness of the Legal System

Rating	Number	Percent
Strongly disagree	45	39.8
Somewhat disagree	18	15.9
Neither agree nor disagree	6	5.3
Somewhat agree	15	13.3
Strongly agree	29	25.7
Total	113	100.0

639. It can be seen that few clients remained neutral in response to this question. While the numbers of those somewhat agreeing and somewhat disagreeing that the legal system treated them fairly were comparable, the number strongly disagreeing far outweighed the number strongly agreeing, and constituted the largest single response category.⁵⁷⁵ This might give some cause for concern.

640. Views on the fairness of the legal system were not related to funding status or income, however clients represented by an in-house practice were significantly more likely to agree that the legal system treated them fairly (mean 3.4) than were clients represented by a private solicitor (mean 2.6).⁵⁷⁶ Responses were also correlated with a range of other issues. Clients were less likely to think that the legal system treated them fairly if they thought the other party having more money to spend affected their case,⁵⁷⁷ if their expectations had changed after seeing their

575 This finding presents a strong contrast to that of Marie Delaney and Ted Wright, *Plaintiffs' Satisfaction With Dispute Resolution Processes* (Justice Research Centre, 1997), 23. Fully 61% of the plaintiffs they surveyed were satisfied with the legal system, with only 39% dissatisfied. Our results were almost exactly the opposite.

576 Mann-Whitney test: $Z=-1.987$, $p<0.05$.

577 Mean yes=2.2, no=3.2; Mann-Whitney test: $Z=-2.189$, $p<0.05$.

lawyer,⁵⁷⁸ if they were less satisfied with the time taken to resolve their case,⁵⁷⁹ if the result of their case was not what their lawyer had led them to expect,⁵⁸⁰ if they felt they had little control over the result of their case,⁵⁸¹ if they were not satisfied with the result of their case,⁵⁸² and most notably if they felt they had lost their case.⁵⁸³ Clearly, then, perceptions of the overall fairness of the legal system are affected both by specific procedural factors (time, a level playing field, degree of control), and the extent to which expectations are met and outcomes are approved.

641. In terms of other 'objective' factors, once more, female clients were more likely to say that the legal system treated them fairly (mean 3.0) than were male clients (mean 2.3).⁵⁸⁴ There was an associated, but stronger tendency for clients engaged in home duties or working part-time to be more satisfied with the fairness of the legal system than clients working full-time.⁵⁸⁵ This may be because the legal process impinges more on full-time employment than on other employment statuses.

642. Additional comments at the end of the surveys shed further light on the gender divide in clients' views. Twelve clients (11 male,

578 Mean yes=2.2, no=2.9; Mann-Whitney test: $Z=-1.975$, $p<0.05$.

579 Spearman's $R=0.348$, $p<0.01$.

580 Spearman's $R=0.479$, $p<0.01$.

581 Spearman's $R=0.594$, $p<0.01$.

582 Spearman's $R=0.683$, $p<0.01$.

583 Mean lost=1.4, won=4.1, neither=2.2, both=2.6; Kruskal-Wallis $\chi^2=47.432$, $df=3$, $p<0.001$. Lind and Tyler warn, however, that winning clients have a tendency to cluster around the top end of rating scales, and it is difficult to know whether this is a real phenomenon or a "ceiling effect" caused by subjects' frequent use of the high extreme of rating scales: *The Social Psychology of Procedural Justice*, 66.

584 Mann-Whitney test: $Z=-2.301$, $p<0.05$. The New Zealand Law Commission's paper on *Women's Access to Justice: Lawyers' Costs in Family Law Disputes* (Miscellaneous Paper 10, Wellington, 1997) recorded some women's sense of frustration with their experience of the family law process, but it did not specifically compare women's views with those of men.

585 Mean home duties=3.4, part-time/casual work=3.0, full-time work=2.1. Kruskal-Wallis $\chi^2=9.846$, $df=2$, $p<0.01$.

1 female) said they thought the family law system was biased towards women or towards mothers.⁵⁸⁶ In particular, the Family Court was considered biased, although clients also felt that Family Court counselling, the Family Report, the child representative and the Department of Social Security were biased. The files showed that three of these clients may have had objective grounds to feel they had been treated unfairly, other than on the basis of their sex. In the remaining nine cases there did not appear to be any overt cause for grievance.

643. On examination of the files, it appears that clients who felt there was bias experienced outcomes that were different from what they wanted, their cases were more likely to be resolved late in the process (after pre-hearing conference), and the client had ultimately consented to terms with which they were not satisfied. Moreover, these cases tended to be particularly 'difficult', with a high number of 'aggravating' factors, such as allegations of abuse, mental illness or very difficult opponents, or had notable problems with legal aid.

644. Whilst the outcomes may not have satisfied these clients, there was little indication that the other party had gained any particular advantage. There were only three cases in which the other party had clearly 'won' — in one the wife appeared to have won the property dispute, in another the mother regained residence of the children after leaving them temporarily in the client's care, and in the third the client's expectations of gaining residence were stated by the solicitor to be unrealistic. In the remaining cases the mother gained residence but was restrained from relocating, the children were split between the parents, or the parents were granted shared residence. In one case, the mother lost residence altogether.

586 Similar views were reported in Tom Fisher, Tony Love, Lawrie Moloney, Kaileen Pearson and Damien Walsh, *Traditional Divorce: Consumer Perceptions of Legal Aid Clients Choosing Traditional Legal Processes* (National Centre for Socio-Legal Studies, LaTrobe University, 1993), 53.

645. In several of the cases, the solicitor explained that despite the client's perceptions of the outcome, the case had resolved as well as could be hoped, or was in the best interests of the children or the client. The clients' animosity towards the Family Court/system appears have derived from this disjunction between what the solicitor explained was the best possible or most desirable outcome, and what the client wanted.
646. More generally, one quarter of the clients who made additional comments (23/94) felt that the Family Court made them feel disempowered and isolated.⁵⁸⁷ Clients commented that they felt the Family Court was unsupportive, lacked empathy, did not listen to them, and did not take the time to understand their particular case. Several clients explained that they had a different judge at each court appearance, and this meant the case lacked continuity.⁵⁸⁸ Some also were concerned that the actions of the other party had not been sufficiently carefully scrutinised.
647. Again, the cases of the clients who made these comments tended to include a relatively high number of aggravating factors, and to be resolved late in the process, with a relatively high proportion going to final hearing and involving a judicial determination (most usually in the client's favour). In fact, these clients often obtained the outcomes they sought, but they nevertheless found the process unsatisfactory.
648. These cases lend some support to the North American research which suggests that clients place greater emphasis on procedural

587 See also Livingstone Armytage, 'Clients Satisfaction with Specialists' Services: Lessons for Legal Educators', in Australian Professional Legal Education Council, *Skills Development for Tomorrow's Lawyers: Needs and Strategies — Conference Papers* (Sydney, 1996), 361.

588 cf. the ALRC's suggestion that the Family Court should adopt an individual docket system of case management, with one judge assigned to each case: Australian Law Reform Commission, *Report No.89: Managing Justice — A Review of the Federal Civil Justice System* (Commonwealth of Australia, 2000), 596–98, 613–15.

justice than on outcomes.⁵⁸⁹ However, as noted above, our study did not replicate the North American findings that clients are more satisfied if they feel that their case was treated with procedural justice than they are with the outcome, or that clients are more likely to accept a negative outcome if they feel that their case was treated fairly. Rather, clients in our sample tended to project their dissatisfaction with outcomes back onto the process (eg. in allegations that the Family Court is biased). Thus, our study tends to confirm the previous Australian and English studies which stress the importance of outcome satisfaction to overall client satisfaction.⁵⁹⁰

Legal Services

649. As noted in chapter 2, 95 clients who participated in the survey had a private solicitor, while 18 had a Legal Aid Commission lawyer. Sixty-two clients (55%) said they had consulted a lawyer prior to their recent family law matter, and of these, 37 (61%) said their previous experience with lawyers was to do with a family law matter. Clients with different funding statuses, different representation or different incomes were not more or less likely to have previous experience with a lawyer.

589 See E. Allan Lind, Robert J. MacCoun, Patricia A. Ebener, William L.F. Felstiner, Deborah R. Hensler, Judith Resnick and Tom Tyler, 'In the Eye of the Beholder: Tort Litigants' Evaluations of their Experiences in the Civil Justice System' (1990) 24 *Law and Society Review*, 953; Lind and Tyler, *The Social Psychology of Procedural Justice*; Tom R. Tyler, 'Client Perceptions of Litigation' (1988) 24 *Trial*, 40; J.M. Landis and L. Goodstein, 'When Is Justice Fair?' (1986) *American Bar Foundation Research Journal*, 675; E. Allan Lind and R.I. Lissak, 'Apparent Impropriety and Procedural Fairness Judgments' (1985) 21 *Journal of Experimental Social Psychology*, 19; Tom R. Tyler, 'The Role of Perceived Injustice in Defendants' Evaluation of Their Courtroom Experience' (1984) 18 *Law and Society Review*, 74.

590 eg. Delaney and Wright, *Plaintiffs' Satisfaction With Dispute Resolution Processes*, 21; Tim Prenzler, Andrew McLean Williams and Hennessey Hayes, 'Quality Control and Contracting Out of legal Aid' (1997) 56 *Australian Journal of Public Administration*, 40; Fisher et al., *Traditional Divorce*, 49; Brian Abel-Smith, Michael Zander and Rosalind Brooke, *Legal Problems and the Citizen* (Heinemann, London, 1973), 203.

650. When clients were asked how they had chosen their lawyer, the largest groups responded that they had been referred by a relative or friend (29%), or they had been referred by another lawyer (18%) or by Legal Aid (18%).⁵⁹¹ Other responses included “found him/her in the telephone book” (12%), “a person I had dealt with before” (6%), and referred by a Community Legal Centre (5%). Different groups of clients had chosen their lawyers in different ways. Not surprisingly, legal aid clients, and LAC clients in particular, were most likely to have been referred by legal aid, while self-funding clients found their lawyer by a range of other means, with clients in the higher income group most likely to have been referred to their lawyer by a relative or friend.
651. Several clients (13 in the file sample) had changed solicitors in the course of the current matter. The majority were women, and a relatively high proportion occurred in the Newcastle cluster. In the Newcastle cases, the eventual solicitor had usually started out as an agent in the case, and then the client had transferred to that firm. While clients may have been dissatisfied with the service provided by their original solicitors,⁵⁹² they were asked in the survey to respond only in relation to their current solicitor, that is, the one who was also participating in the study.
652. At the beginning of the survey, clients were asked to rate their satisfaction with their lawyer on a five point scale, ranging from “very dissatisfied” to “very satisfied”. Later in the survey, clients

591 This is consistent with other studies, in quite diverse settings, which have found that friends, other lawyers and official bodies are major sources of referrals of clients to lawyers: Avrom Sherr, Richard Moorhead and Alan Paterson, *Lawyers — The Quality Agenda, Vol.1* (HMSO, 1994), 51; Carroll Seron, ‘The Business of Practising Law: The Work Lives of Solo and Small-Firm Attorneys’, in Richard L. Abel (ed), *Lawyers: A Critical Reader* (The New Press, New York, 1997), 36.

592 eg. in one case in the file sample, the previous solicitor had failed to file any responding documentation, and in another the eventual solicitor assisted the client with a complaint to the Legal Services Commission concerning excessive billing by the former solicitor.

were asked a series of questions about the way the lawyer took instructions and dealt with their expectations, the quality of service provided by the lawyer, the lawyer's knowledge of the law and court process, and whether they would use the same lawyer again if they had another family law matter.

Overall Satisfaction

653. The majority of clients (68%) were satisfied with their lawyer, with the largest group (45%) saying they were very satisfied. The mean satisfaction score was 3.85. Overall satisfaction with the lawyer was strongly correlated with positive answers to the quality questions,⁵⁹³ belief in the lawyer's technical competency,⁵⁹⁴ and willingness to use the same lawyer again.⁵⁹⁵ Satisfaction with the lawyer was also correlated with the client's view of the fairness of the legal system,⁵⁹⁶ and with the client's satisfaction with the result of the case,⁵⁹⁷ although the level of satisfaction with the lawyer was higher than the level of satisfaction with the process or the result. On the other hand, clients' satisfaction with their lawyers was negatively correlated with the lawyer's need to break 'bad news' to the client. Clients whose initial expectations in the case had been diminished gave their lawyers a significantly lower mean satisfaction rating (2.8)

593 Kendall's tau_b=0.567, p<0.01 (correlation with sum of all answers to quality questions).

594 Kendall's tau_b=0.534, p<0.01.

595 Man-Whitney test: Z=-7.509, p<0.001.

596 Spearman's R=0.236, p<0.05. Similarly, Roger James and Associates found that clients could but tended not to separate the services provided by their solicitor from "the system" overall: *Understanding the Needs of Legal Clients: Sources of Satisfaction and Dissatisfaction: Research Report* (Templestowe, Victoria, 1998), 6; and research cited by the NSW Law Society indicates that clients' assessments of solicitors are interlinked with the client's experience of the whole legal system, as well as the ways in which solicitors communicate and interact with the client: *Access to Justice: Final Report* (1998), 47.

597 Kendall's tau_b=0.383, p<0.01.

than those whose expectations had increased or remained the same (4.1).⁵⁹⁸

654. There was no difference in satisfaction levels between self-funded and legal aid clients, clients of private or in-house solicitors, or clients with higher or lower incomes.

Taking Instructions

655. Clients were asked whether there was anything that they felt was important to their case that their lawyer never asked about. Twenty-three clients (20%) answered “yes”. Self-funded clients were significantly less likely to say this had occurred, while clients with both legal aid and private funding were more likely to report this occurrence.⁵⁹⁹ Within the legal aid group, LAC clients were somewhat more likely to say that there was something important that their lawyer had not asked them about, but the difference was not statistically significant. There was no difference between the responses of higher and lower income self-funding clients.

656. When asked to specify what it was that their lawyer had failed to ask about, clients gave a wide range of answers. These included: particular behaviour of the other party (5 cases); the client’s own circumstances in relation to income and property ownership (2 cases), or emotional issues such as why the client was distressed and agitated, or the impact of delays in the case on the child concerned (2 cases); and “the interests and concerns of my child” more generally (1 case).

657. In the highest number of cases (n=7) the client took issue with the way the lawyer had decided to run the case, for example failing to pursue evidence or witnesses that the client thought

598 Mann-Whitney test: $Z=-3.581$, $p<0.001$.

599 $\chi^2=6.618$, $df=2$, $p<0.05$.

were relevant, or failing to raise matters that the client thought were important to the case. One client said that the initial barrister chosen to represent them was “hopeless”, while another said that they felt the lawyer never had a passion for protecting them or their children. In a further three cases, the client noted that the lawyer hadn’t wanted to deal with maintenance issues, leaving the client to work with the Child Support Agency, or simply not pursuing the matter. Each of these three cases was legally-aided, with two handled by in-house lawyers in Adelaide. Lawyers’ reluctance to deal with the maintenance issue is clearly related to legal aid guidelines. Otherwise, there was no particular pattern of omission, with some perceived failures evidently a matter of the client disagreeing with the lawyer’s judgment about how to run the case (see chapter 7).

658. In a few instances, clients remained happy with their lawyers despite the failure to deal with a particular issue. One client felt that their lawyer treated them “as if he was a family member or personal friend. He really took an interest in the case”; he “did his job well”, even though he had never asked about the way the other party treated the other children who were not the subject of the application. Another client whose lawyer had left her to deal with the child support issues herself felt nevertheless that she had been “completely in the dark” before seeing the lawyer, who had “guided” her through the process, and she was generally happy with the service received. More commonly, however, lawyers’ omissions appeared to have a significant impact on client satisfaction. Clients who answered “no” to this question gave their lawyers a much higher mean satisfaction score (4.1) than those who answered “yes” (2.7).⁶⁰⁰

600 Mann-Whitney test: $Z=-4.115$, $p<0.001$.

Lawyers' Knowledge of Law and Court Processes

659. The lawyer's technical skills and knowledge are the aspect of legal services that clients are perhaps least qualified to comment upon. Clients responding to our survey did not hesitate to answer the question concerning their lawyer's knowledge about the law and court processes, but gave uniformly high scores. On a five point scale ranging from "very poor" to "very good", 65% rated their lawyer's knowledge as "very good", with the mean score overall being 4.4.⁶⁰¹ There were no differences between clients' responses on the basis of funding status, representation type, income level, Registry cluster, solicitor's years in practice, or any other relevant variable.

Client Service

660. Clients were asked to respond to a series of propositions concerning the service provided by their lawyer, on a five point scale ranging from "strongly disagree" to "strongly agree". These questions were designed to test for issues identified by clients as important (eg. communication, pursuing the client's interests, giving the client ownership of the case),⁶⁰² and potential problems identified by critics as elements of poor legal services (failing to listen to the client, insensitivity and lack of empathy, lack of honesty, failing to return phone calls promptly, failing to talk to the client in a language they can understand, failing to inform clients of all their options, failing to involve clients in their own cases, failing to provide ongoing

601 Similarly, clients surveyed by Livingstone Armytage expressed satisfaction with the legal knowledgeability and skill of accredited specialists: 'Client Satisfaction with Specialists' Services', 357.

602 Hilary Sommerlad, 'English Perspectives on Quality: The Client-led Model of Quality — A Third Way?', in *Legal Aid in the New Millennium* (Papers presented to the International Legal Aid Conference, University of British Columbia, Vancouver, 16–19 June 1999), 6–7.

information).⁶⁰³ The questions asked and mean scores are shown in Table 6.3.

TABLE 6.3 Client Service Response

Proposition	Mean Score
S/he listened to me	4.1
S/he understood my situation	4.0
S/he responded to my telephone calls within 24 hours	4.0
S/he explained what would most likely happen to me	4.1
S/he made me feel like I had some control over my case	3.4
S/he spoke to me in a way that I could understand	4.3
S/he gave me advice in writing that I could understand	4.1
S/he was honest	4.4
S/he showed concern for the well-being of my child(ren)	4.0
S/he explained all of my options	4.0
S/he kept me informed of what was happening in the case	4.1
S/he handled the other side well	3.7
S/he acted in my best interests	4.1

661. These are fairly uniformly high scores. The mean in all but two cases fell around “agree”, moving towards “strongly agree”. Indeed, given general attitudes towards lawyers in the community, it is heartening to see that the highest mean score was given in answer to the proposition: “my lawyer was honest”.

603 eg. Law Society of NSW, *Access to Justice: Final Report* (Sydney, 1998), 47; William Felstiner, ‘Professional Inattention: Origins and Consequences’, in Keith Hawkins (ed), *The Human Face of Law: Essays in Honour of Donald Harris* (Clarendon Press, Oxford, 1997), 122; Robin Handley, ‘Lawyer/Client Communication’, in Kay Lauchland, Robin Handley, Allan Chay and Judy Smith (eds), *Interviewing: Who Cares About the Client?* (APLEC, 1996), 957–58; William L.F. Felstiner and Austin Sarat, ‘Enactments of Power’ (1992) 77 *Cornell Law Review* 1447, 1454–58.

662. The two propositions eliciting lower mean scores related to the lawyer's handling of the other side, and the client's feeling of having some control over the case. Telephone interviewers commented that clients were always slowed down by the question about handling the other side, presumably because this is an activity that the client doesn't necessarily see. As noted earlier, clients often did not know the extent to which their solicitor had negotiated with the other party or their solicitor. This may help to explain the relatively low score.
663. The response to the question about client control is more significant. This was the only question to which "agree" responses (29%) outnumbered "strongly agree" responses (28%), and there was also a notably high proportion of "strongly disagree" responses (20%). As discussed in the next chapter, solicitors in the family law jurisdiction see it as an important part of their role to 'manage' the client's expectations and bring them to an understanding and acceptance of what the Act and the Court require. This must necessarily diminish clients' feelings of control, and may help to explain their responses to this question. Certainly clients who said their expectations had changed after discussions with their lawyer were significantly less likely to agree that their lawyer made them feel they had some control over their case (mean=2.6), than clients who said their expectations did not change (mean=3.7).⁶⁰⁴
664. Nevertheless, managing the client is not necessarily incompatible with giving the client control over the case. The client can be given a range of options within the parameters of expected processes and outcomes, which means it is the client who makes

604 Mann-Whitney test: $Z=-3.194$, $p<0.005$. Richard Ingleby has also noted that clients' feelings of alienation and loss of control may be explained by the conflict between what the client wants and what the client is entitled to: *Solicitors and Divorce* (Clarendon Press, Oxford, 1992), 137.

the ultimate choice how to proceed.⁶⁰⁵ As noted above, clients generally agreed that their lawyer explained all of their options, but some did comment that they weren't sure what "all" of their options might have been. It appears that some family law solicitors may take their perceived client management responsibilities too seriously, leaving their clients feeling somewhat disempowered.

665. Client responses to the client service questions did not differ according to funding status or client income. There was a significant difference by type of representation in relation to only one of the client service questions — my lawyer kept me informed of what was happening in the case.⁶⁰⁶ LAC clients gave a lower score in response to this question (mean 3.3) than did legally-aided clients of private solicitors (mean 4.3) or all clients of private solicitors (mean 4.2). This may, then, be the one area of client service that suffers from the fact that LAC solicitors do less work on their cases than private solicitors.

666. The sex of the client made a significant difference in two questions, and came close to significance in two others. Male clients were more likely to strongly agree that their lawyer listened to them, and that their lawyer kept them informed of what was happening in their case (mean 4.4), while responses from female clients were more varied (mean 3.9).⁶⁰⁷ A similar pattern was evident in relation to the proposition: "my lawyer understood my situation".⁶⁰⁸ On the question of returning

605 See Alex J. Hurder, 'Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration' (1996) 44 *Buffalo Law Review* 71, 77–80 (although Hurder argues that in practice, lawyers and clients should make decisions jointly rather than autonomously).

606 All cases: Mann-Whitney $Z=-2.104$, $p<0.05$; legal aid cases: Mann-Whitney $Z=-2.048$, $p<0.05$.

607 Listened: Mann-Whitney $Z=-2.007$, $p<0.05$; kept informed: Mann-Whitney $Z=-2.070$, $p<0.05$.

608 Mann-Whitney test: $Z=-1.803$, $p=0.071$.

telephone calls within 24 hours, a larger proportion of female clients than of male clients strongly disagreed.⁶⁰⁹ These questions all relate to the lawyer's attentiveness to the client. When combined with the observation made in chapter 3 that cases with female clients involved more demands per case, it may be that lawyers are not increasing their attention levels to respond to those demands. Alternatively, it may simply be that women clients are more attuned to these aspects of client service. Previous research on client gender difference sheds little light on these findings,⁶¹⁰ so any explanation can only be speculative.

667. When responses to all the client service questions were aggregated, there was no overall significant difference between male and female clients. The aggregated score also made it easier to discern any difference between solicitors in different Registry clusters. In this respect, Dandenong solicitors scored the lowest mean and Sydney and Brisbane solicitors the highest means, but the difference was far from statistically significant. At the same time, Sydney solicitors received a relatively high proportion of additional positive comments from clients, while Dandenong solicitors received a relatively high proportion of additional negative comments.
668. Additional positive comments from clients tended to focus on personal characteristics such as understanding, empathy, honesty, sympathy, care, helpfulness, emotional supportiveness,

609 Mann-Whitney test: $Z=-1.741$, $p=0.082$.

610 Livingstone Armytage found that female clients had higher expectations of their lawyers than male clients, *except* in relation to quality of service: 'Client Satisfaction With Specialists' Services', 359; Bryna Bogoch found that female clients express cooperation and solidarity with all lawyers, while male clients are less deferential, especially to female lawyers: 'Gendered Lawyering: Difference and Dominance in Lawyer-Client Interaction' (1997) 31 *Law & Society Review* 677. The clients in our sample did not distinguish between male and female lawyers in their answers to the client service questions.

sensitivity, reassurance, approachability, fairness, promoting confidence, having a personal touch, and looking after the client. Clients then commented positively on their solicitor's technical competence (efficient, professional, never kept me waiting, paid attention to detail, knew their stuff, realistic), approach (put things in perspective, acted in the client's or children's best interests, dealt with all the facts — personal and emotional, gave options), and communication skills (listening, explaining the procedures, keeping the client informed). The value placed by clients on personal characteristics (which received comparatively little attention in the structured part of the survey) was reflected by their solicitors, as discussed in the next chapter.

669. The majority of additional negative comments from clients concerned lack of communication skills (particularly not keeping informed, not asking the right questions, not acknowledging issues the client thought were important, and not explaining all options).⁶¹¹ These were followed by criticisms of technical competence (the solicitor was overcommitted, lacked experience, did not understand family law, gave the wrong or inappropriate advice, misinformed the client, mismanaged their expectations), and personal characteristics (the solicitor lacked understanding, was dishonest or untrustworthy, was unreasonable, aggressive or rude).

670. The aggregate client service score was not related to the solicitor's years in practice, percentage of work in family law or accreditation status, indicating that clients did not perceive a difference in the service provided by more or less experienced or specialised solicitors, or by those who were or were not accredited specialists.

⁶¹¹ For the prominence of poor communication in complaints against lawyers, see ALRC, *Discussion Paper 62: Review of the Federal Civil Justice System* (August 1999), 48.

Would Clients Use the Same Lawyer Again?

671. Clients were finally asked whether they would use the same lawyer again if they had another family law matter. Sixty-six percent answered “yes”, while 8% did not know whether they would use the same lawyer again. As would be expected, responses to this question were significantly related to the client’s satisfaction with the lawyer,⁶¹² and with the outcome of the case,⁶¹³ but were not affected by funding status, representation type, income, client sex, and so forth. One client, for example, commented that the solicitor was “nice and very sympathetic”, but had not been aggressive enough in the most recent matter. Although the client had used the same solicitor four times previously in family law matters, he felt he would not use her again. In the same case, the solicitor commented that she had encouraged the client to settle, due to an adverse family report and a negative judge, but felt in retrospect that it may have been worth taking the case to trial, just to give the client a sense of closure.

672. Further light was shed on the question of when clients would or would not use the same lawyer again in additional comments from clients concerning previous solicitors they had dealt with. Four out of the five clients who made such comments had changed solicitors because they felt the previous solicitor was dishonest, rude, aggressive or unreasonable, had provided a poor quality service, had not filed documents on the client’s behalf when they should have, or had been too expensive. Clearly, personal and service issues dominate this list.

673. Nevertheless, the high degree of correlation with other questions suggests that asking clients whether they would use the same

612 Mann-Whitney test: $Z=-7.509$, $p<0.001$.

613 Mann-Whitney test: $Z=-5.144$, $p<0.001$.

lawyer again is probably redundant. Client satisfaction surveys could either ask about satisfaction with the lawyer, or about whether the client would use the same lawyer again, but need not ask both questions.

Legally-Aided and Self-Funding Clients

674. Although clients' funding status did not affect their answers to almost all of the lawyer satisfaction questions discussed above, there was a difference when satisfaction with the lawyer was directly linked to the client's funding status. Only two (out of 62) self-funding clients thought they would have had a better lawyer if they had been eligible for legal aid, although 15 (24%) answered "don't know". By contrast, 10 out of 40 (25%) legal aid clients thought they would have had a better lawyer if they had been able to pay for one themselves, while a lower proportion answered "don't know".
675. The two self-funding clients who thought they could have had a better lawyer both said that they were "somewhat dissatisfied" with their lawyer, but "very dissatisfied" with the result of their case. The 10 legally-aided clients who thought they could have had a better lawyer gave the full range of responses to the lawyer satisfaction question, although the largest group (4) were "very dissatisfied". However there was a clear trend for these clients to be "very dissatisfied" with the result of their case (7 out of 10).
676. This suggests that case outcome rather than the performance of the lawyer him- or herself was most instrumental in the clients' assessment of whether they could have had a better lawyer if their financial situation had been different. Nevertheless, the skew towards legal aid clients remains marked, indicating (not surprisingly in light of the discussion in chapter 5) that it is legal aid clients who feel most adversely affected by their financial situation.

Conclusions

677. The findings from the client surveys provide information on clients' views of the family law litigation process and of their lawyers, and also shed light on the broader question of the utility of client surveys as a measure of how well the system, or individual lawyers, are performing.

678. The results suggest, first, that client survey responses on questions of process are likely to be unreliable, since clients have great difficulty distinguishing between different elements of process and types of dispute resolution. However it does seem clear that there is a high level of client dissatisfaction with "the system" as a whole, which is often linked with inability to achieve expected or desired outcomes. It also appears that clients rate outcomes as more important than process, as suggested by previous Australian and UK research, and contrary to the propensities of US clients identified by Allan Lind, Tom Tyler and others. Contrary to concerns about the general quality of legal services, too, clients were highly satisfied with their lawyers — more so than with the process or outcomes of their cases.

679. Nevertheless, the close correlation between clients' satisfaction with the outcome of their cases and with their lawyer suggests that if information is to be sought from clients about lawyers' performance, then information must also be sought on clients' views of the outcome of the case, so this factor can be controlled for. The fact that the lawyer may have been compelled to give the client bad news about their prospects of success is also likely to impact on the client's rating of the lawyer's performance. As shown in chapter 4, while lawyers may have succeeded in convincing some clients that their expectations about the likely result of their case were unrealistic, they clearly did not succeed in convincing those

clients that their initial expectations were unreasonable, or that the outcome ultimately achieved was 'better'.

680. It is interesting to speculate on the reasons for this failure, although little evidence is available to do more than that. It may be that lawyers explain the family law system and the range of possible outcomes to their clients in rigid and inflexible terms, which leaves clients feeling that their individual circumstances have not been taken into account. The lawyer's identification with the system then leads the client to transfer some of the blame for this unsatisfactory state of affairs to their lawyer. The description in chapter 4 of lawyers' techniques for 'managing' clients towards a particular outcome gives some support to this hypothesis. On the other hand, it is possible that some clients hold such fixed beliefs about their entitlements in the case or what they want to achieve, that anyone who gets in the way of those beliefs will bear the brunt of their disappointment.⁶¹⁴ This raises the further question of where such beliefs originate. It is arguable that the Family Law Reform Act has created a set of community expectations about family law proceedings that are inaccurate or overly simplistic and hence, in some instances, cannot be realised.⁶¹⁵ If this is so, then responsible management of client expectations should be a matter of community education, rather than being left solely to solicitors in individual cases.

681. Legally-aided and self-funded clients did not give significantly different responses to the questions concerning quality of service, despite solicitors' claims in the interviews that funding cutbacks had produced a noticeable reduction in the quality of

614 See eg. Ingleby, *Solicitors and Divorce*, 137.

615 See Helen Rhoades, Reg Graycar and Margaret Harrison, *The Family Law Reform Act 1995: Can Changing Legislation Change Legal Culture, Legal Practice and Community Expectation? Interim Report*, (The University of Sydney and The Family Court of Australia, April 1999). For a similar effect in the UK following the introduction of similar reforms, see Ingleby, *ibid.*, 35, 52.

legal services provided to legally-aided clients.⁶¹⁶ The phenomenon of solicitors predicting or asserting a reduction in services when in fact clients discern no difference has been observed in other studies as well.⁶¹⁷

682. Neither did clients distinguish overall between the quality of services provided by in-house solicitors and private solicitors doing legal aid work. Again this was consistent with previous Australian and UK studies, and contrary to US findings.⁶¹⁸ It was particularly noteworthy given the clear differences in the quantity of these services evident from the files. It may follow that the quantitative difference between in-house and private legal aid services does not generally translate into any difference in quality.

683. On the other hand, it may be that the sceptics concerning client satisfaction surveys are right: clients are unable to differentiate between different levels of service, being uniformly happy with the service provided, despite clear objective differences in the way cases are run. However the client service questions on our survey did show themselves to be fairly sensitive in picking up matters the client might not know about (the lawyer's handling of the other side), points on which lawyers rated less highly than the norm (making clients feel they had some control over their case), and points on which LAC lawyers rated less highly than their private sector colleagues (keeping clients informed of what

616 See also Springvale Legal Service, *Hitting the Ceiling* (1998), 4–5.

617 John Hodgins, 'Surviving Fiscal Cuts: The Purchaser-Provider Paradigm and Beyond', in *Legal Aid in the New Millenium* (Papers presented to the International Legal Aid Conference, University of British Columbia, Vancouver, 16–19 June 1999).

618 Prenzler et al., 'Quality Control and Contracting Out of Legal Aid', 40, 48; cf. Samuel J. Brakel, 'Free Legal Services for the Poor — Staffed Office versus Judicare: The Client's Evaluation' (1973) 2 *Wisconsin Law Review* 532. While Avrom Sherr and Simon Domberger discerned a small 'edge' for private lawyers over law centre lawyers, their results did not produce any significant difference between the two: 'Measuring Legal Work: The Shy Profession', *New Law Journal*, 28 January 1982, 80–82.

was happening in their case). This suggests that a small number of well targeted client survey questions may provide useful data for law firms or legal aid funders.

Quality of Legal Services

684. As noted in chapter 1, before we could begin to compare the quality of the legal services provided to self-funding and legally-aided clients, we had to give careful consideration to the measures we could use to do so, in a context in which there is no universally mandated quality assurance scheme for the delivery of legal aid and/or family law services. Although there have been a number of calls for monitoring of the quality of representation provided to legal aid clients,⁶¹⁹ the Australian legal aid system has tended to rely on the professionalism of solicitors doing legal aid work, rather than to impose bureaucratic quality standards. LAQ is the only Legal Aid Commission to have introduced quality requirements, as part of its preferred supplier scheme.

685. Other possible sources for understanding what quality may mean in the context of Australian family law include the specialist accreditation schemes operating in three of the four states covered by our study (South Australia excluded), quality accreditation standards under the QIL Code or ISO 9001, or the codes of practice for family lawyers promulgated by professional associations.⁶²⁰ The Family Law Act and Family Law Rules also impose a series of obligations upon family

619 eg. Senate Legal and Constitutional References Committee, *Inquiry into the Australian Legal Aid System: Third Report* (1998), 52–53; Jeff Giddings, 'Legal Aid Services, Quality and Competence: Is Near Enough Good Enough and How Can We Tell What's What?' (1996) 1(3) *Newcastle Law Review* 67.

620 See eg. The Law Society of New South Wales, *Family Law Advisory Code of Practice*, (Sydney, 1992); The Law Institute of Victoria, *Family Law Code of Practice* (Melbourne, April 1992 revision). The ALRC has recently recommended the development and implementation of national model professional practice rules, including specific rules for family law practitioners: *Report No.89: Managing Justice — A Review of the Federal Civil Justice System* (2000), 225–43.

lawyers in relation to fair and conciliatory behaviour, cost disclosure, and an emphasis on the rights and interests of children. For example, section 14D places an obligation on solicitors to advise parties about primary dispute resolution methods in accordance with Part III of the Act, section 65E requires the ‘best interests of the children’ to be the paramount consideration in children’s matters, Division 10 of Part VII delineates precisely how the ‘best interests of the children’ are to be determined, and Order 38 r 7 sets out a solicitor’s duties to enter into fair and reasonable cost agreements with their clients.

686. As sources for developing quality criteria there are, however, problems with all of the foregoing. The potential problem with both quality assurance (QA) schemes and specialist accreditation as sources of quality criteria is that they are not uniformly subscribed to across the practice community.⁶²¹ They are discretionary processes, and as such the standards to which they may encourage their participants to aspire may not be valuable or reliable measures when attempting to compare the quality of legal services across registries, firms, and funding sectors. As far as the codes of practice and more general statutory duties are concerned, there is no real way of monitoring solicitor behaviour in relation to them. Although there are mechanisms by which solicitors who do not meet some of these requirements can be penalised, disciplinary action is uncommon, as it depends on a process of detection and complaint by clients or other practitioners to formal legal disciplinary bodies.⁶²² Further, the

621 See eg. Kris Will, ‘Formal Quality Systems: An Introduction’, *Victorian Law Institute Journal*, vol.70, no.2, 1996, 31.

622 Each State has their own legal complaints board, for example, in NSW the Office of the Legal Services Commissioner, in South Australia the Legal Practitioners Conduct Board, in Queensland and Victoria the Office of the Legal Ombudsman. Complaints can in general be made to these boards by clients, and negotiation between the client and the solicitor involved will then be handled by the Board’s complaints officers, leading, if possible, to a remedy or restitution for the client. An important power of most of these boards is the ability to review decisions of the Law Society, Bar Association (and in NSW the Department of Fair Trading) if any of these other bodies have dismissed complaints that they may have handled at first instance (in Queensland, access to the

mere existence of all of these professional standards can not be taken to imply their acceptance as sources of or standards for quality practice and client service.

687. We found it necessary, then, to undertake a qualitative investigation of solicitors' current understandings of quality and the derivation of those understandings. In other words, we set out to investigate the 'culture' of family law and how it operates as a source of quality standards, rather than attempting to measure the quality of legal aid services against any absolute threshold or standard that may have no meaning or significance for those who practice in the area.

Exploratory Research on Quality

688. The English authors of The Quality Agenda rejected peer review of solicitors' files as a means of determining the quality of legal work, based on lack of consensus among peer reviewers on particular aspects of quality. This occurred, however, in the absence of any opportunity for peer reviewers to discuss their respective conceptions of quality, or to agree and define the quality standards to be applied.⁶²³ We were interested to see what quality standards practitioners would articulate if given the opportunity.⁶²⁴ We did this initially by means of an exploratory study, in order to derive measures that could be used for the purposes of the comparison study. We did so by inviting a larger

622 Legal Ombudsman is available only after a complaint has first been dealt with by the (cont.) Law Society). In family law, the majority of complaints handled by these boards relate to costs, and most commonly the disclosure of disbursements. See eg. The Office of the Legal Services Commissioner, *Annual Report 1997-98*, Sydney, 53-60.

623 Cost disputes can also be sanctioned to a certain extent by the Family Court. *The Family Law Rules*, O 38, r 27 (5) provide that the court or a judicial registrar may set aside a costs agreement if the obligations upon solicitors set down by that Order are not complied with.

624 Avrom Sherr, Richard Moorhead and Alan Paterson, *Lawyers — The Quality Agenda*, Vol.1 (HMSO, 1994), 57.

group of ‘peers’ to discuss quality in the abstract rather than with a focus on files. We consulted with 25 family law practitioners,⁶²⁵ about quality in family law services by means of a small number of open-ended questions, with prompts if a particular issue was not mentioned in the course of the conversation. The questions were distilled from a reading of the quality literature, and designed to cover the four major aspects of quality identified in The Quality Agenda, being: structure, process, inputs, and outputs.⁶²⁶

689. This exploratory research into the cultural understandings of quality indicated that the skills most valued by family lawyers were client focused, but also emphasized technical competence. In relation to skills which focused primarily on the client, the most important were empathy, insight, patience, sensitivity to the client’s needs, and the ability to ask the client the appropriate questions in order to understand their circumstances. Distinguishing between ‘adequate’ and ‘good’ service in order to determine some comparative elements was something our respondents found difficult, with the results being criteria set at a fairly high standard.⁶²⁷

625 For an argument about the value of identifying lawyers’ understandings of their work, see Lynn Mather, Richard J. Maiman and Craig McEwen, “‘The Passenger Decides on the Destination and I Decide on the Route’: Are Divorce Lawyers “Expensive Cab Drivers”?” (1995) 9 *International Journal of Law and the Family* 286, 287.

626 We recruited by the ‘snowball’ method via members of the project’s steering committee. Twelve of our participants were in private practice, 11 were from Legal Aid Commission in-house family law practices, and two were from a women’s legal service, included because of their role in referring clients to private practitioners. We were able to consult via focus groups with the Sydney practitioners. The remainder of the consultations were done by telephone.

627 Sherr et al., *Lawyers — The Quality Agenda*, vol.1, 19. The questions were: 1. How do you assess a good lawyer in family law? (prompts: in terms of your own work performance, lawyers you work with and/or oppose); 2. What is an adequate level of legal service? What more is required for a good level of legal service? Are there different levels of service given to different (eg. legal aid) clients? (prompts: time, cost, communication, outcomes); 3. As a lawyer, what do you think is expected of you, and by whom? (prompts: profession generally, opponents, clients, firm/LAC, court, any other); 4. What steps are necessary in order to ensure that a case runs smoothly? How would you describe good case management?; 5. Do you rely on/refer to any articulated standards in relation to quality? (prompts: practicing certificate, Law Society, legal complaints body, firm-based quality standards, any others). The participants were not shown the question sheet before, during or after the discussion, and the order of questions was adapted in each case to follow the flow of the conversation.

690. It was also seen as essential to be able to manage the client's expectations. This was understood to mean educating clients about what was achievable in their case, so that their expectations came within the range of outcomes the practitioner realistically expected that the Court would deliver.
691. Further, legal qualifications and knowledge were mentioned as a foundational prerequisite, not a guarantor, of skill, but having well prepared documents (which were viewed as being monitored by the Court's requirements) was seen as extremely important. Document preparation was thus interpreted by practitioners as a technical competency that existed outside of, but in addition to, the knowledge that could be gained through formal (university) qualifications.
692. Our exploratory study showed that practitioners placed a strong emphasis on experience as a source or means by which all of these 'good' service skills were developed. By contrast, they did not ascribe any value to imposed quality standards such as total quality management (TQM), accreditation, or Law Society codes of practice as a source for developing or improving skills.
693. Output aspects of quality such as time and case outcomes were not top of mind issues for our exploratory group of family lawyers, as they were not mentioned without prompting, and they produced no consensus results. This may be because of the nature of the practice area, in which the time it takes to resolve a case is often out of the solicitor's control, being dependent on the nature of the matter, the client's position and personality, the other party's behaviour, and possible court delays, and the notion of a 'good' outcome is tied to the facts of the case rather than being objectively determinable (see chapter 4). There was a consensus result however in relation to the issue of approach to practice, our exploratory study suggesting that Australian family lawyers adhere to a culture of resolution, and are prepared to resolve matters through negotiation.

Findings from the Solicitor Interviews

694. As noted in chapter 2, we interviewed a total of 83 solicitors (60 from the private sector and 23 from Legal Aid Commissions) who participated fully in the research by assisting us to gain access to their clients and files. We also interviewed a further 20 private solicitors who did not participate in this way, in order to determine whether there was anything ‘unusual’ about the private solicitors who agreed to participate in the study, particularly in relation to their views on questions of quality in legal services. As discussed at the end of chapter 2, we found almost no significant difference between the two groups in this respect, other than in the contribution they thought other lawyers had made to their skill development. Participating lawyers were significantly more likely to say that other lawyers had been important in their skill development (through mentoring, peer exchange or seeking advice from counsel), while non-participating lawyers were significantly more likely to say that no other lawyers had been important in their skill development.⁶²⁸ However in relation to the kinds of skills thought to be necessary for family lawyers, the behavioural norms applied in running a case, and sources of quality standards, the two groups expressed very similar views.

695. The following discussion, then, is based on the interviews with participating lawyers, but the conformity of their responses with both the findings from the exploratory phase and the responses given by the sample of non-participating lawyers indicates that they are representative of the wider community of family lawyers.

628 More in line with ‘competence plus’ and ‘excellence’ on Sherr et al.’s quality continuum: *ibid*, 7–9.

Skills

696. In relation to the nature and description of skills thought essential by practitioners to deliver a quality service in family law, our final findings overwhelmingly reproduced the findings from the exploratory study. The skills ranked as the most important by solicitors clearly divided into those which focussed upon the client, and client relations, and those which were technically directed (that is, seen as crucial to being a good lawyer and running cases with technical skill). Importantly, the majority thought a combination of both were crucial (63.4%), although it could be argued that client focussed skills were more significant, as there were more practitioners who thought that purely client focussed skills were important (30.5%) as opposed to those who emphasised a purely technical focus (6%).
697. The participants' description of what these client and technical skills actually were mirrored the descriptions given in the exploratory stage of the research. The client skills of greatest common importance to practitioners were: empathy and understanding; the ability to listen to what the client is trying to express; patience and tolerance (with clients' backgrounds and personal problems, as well as their anger/frustration related directly to their family law matter); 'people skills' (a range of skills including a sense of humour, client rapport, ability to like people and have insight into how they work); and 'communication'. Comments made about 'communication' (too often a hollow catchall phrase borrowed from customer relations) could be dissected to understand what family lawyers actually meant when they placed importance on 'communication skills'. Overwhelmingly, communication was interpreted to mean a responsibility to listen to what the client was trying to say, but to inform them clearly about the process they were about to go through, and what was most likely to happen to them at all stages of the process of resolving their case. (For example, how much the case was likely to cost, how long it would take,

what the court process entailed, what the client's legal options were, what the Court was designed to do).⁶²⁹

698. The emphasis that solicitors placed upon communication skills as an important element of a quality service was supported by the results of the client surveys. As noted in the previous chapter, the mean score from the client surveys in response to the question relating to understanding was 4. The mean score in response to the questions relating to solicitors listening to the client and explaining what would most likely happen to them was 4.1. This tends to indicate that the client-based skills solicitors believed to be important in delivering a quality service correlated with the client's assessment of the service they received.

699. In terms of technical skills, the most frequently mentioned were legal/procedural knowledge, and judgement (described as the ability to focus on what was relevant to the case, to "credibility test" the client, to ask the right questions in order to give good advice,⁶³⁰ and to evaluate the legal relevance of issues raised versus the needs of the client with 'common sense').⁶³¹ Again,

629 $\chi^2=17.631$, $df=1$, $p<0.001$.

630 To test if solicitors emphasized communicating with clients in practice, we included a number of questions in our file coding sheet. These questions required coders to make an assessments on a 4 point scale of the solicitor's communication with the client (eg: frequency of returning phone calls, forwarding correspondence, notifying of results of court appearances, etc.). All of these required some judgment by coders, and as a consequence, the results were significantly affected by coder bias. Splitting the data to control for coder bias yielded some trends. Solicitors with self-funding clients were more likely than those with legally-aided clients to send their clients copies of letters to the other side, and accredited specialists were more likely than non-accredited specialists to respond promptly to correspondence. Overall, none of these trends was significant, indicating a fairly consistent standard of communication with clients about the progress of their case amongst our sample.

631 As noted in the previous chapter, 12% ($n = 13$) of clients indicated that their solicitor had failed to ask them something they felt was important, indicating a small number of solicitors may not have met the standard expected for the exercise of good judgment. However, the fact that this number is small does indicate that most solicitors were able to deliver a good standard of technical skills by asking the relevant questions to extract the appropriate information to give advice.

the evidence from other aspects of the research indicates that family law solicitors do in fact possess good technical skills. Not only were these rated highly by clients on the client survey, but the files showed only two of the solicitors involved in the study and four opposing solicitors had technical shortcomings, and in only one instance was an opposing solicitor clearly technically incompetent.

700. Solicitors' interpretations of 'communication' and of 'judgement' demonstrate why the majority think a combination of client and technical skills are important when attempting to deliver a quality service.⁶³² That is, in order to communicate effectively with the client, it is crucial to be able to interpret the technical procedures, and to predict for them the operation of the Act, the conventions underpinning the Court's discretion, and Court procedure. The client-based/technical-based skill divide is, in some respects, arbitrary, as both types of skills contribute to how a solicitor manages or handles their client.

Managing Expectations

701. An emphasis on the need to manage the client's expectations reproduced our findings from the exploratory research. The importance of a solicitor's ability to manage expectations was supported by the finding that 84% of our respondents believed that it was necessary to draw boundaries with their clients.⁶³³

632 cf. David M. Engel, 'The Standardization of Lawyers' Services' (1997) 77 *American Bar Foundation Journal* 817, 820, who argues that "judgment" consists of 'legal experience' (the capacity of the lawyer to apply prior experiences in legal practice to the needs of the client), 'legal reasoning' (the ability to perform logical operations involving legal concepts) and 'the legal mind' (the ability to understand and apply in specific cases fundamental principles and values of law and the legal system). So defined, judgment is not an absolute quantity, but "may range along a continuum from the routine and the standardized to the creative and the unique". In the family law context, our respondents were rather more absolutist in their understanding of judgment.

633 English solicitors interviewed by Hilary Sommerlad made similar points: 'Access to Justice and Quality: A Bespoke Service or the Procedural Approach?', paper presented to the Legal Aid in a Changing World Conference, University College London and Legal Aid Board Research Unit, London, 4-5 November 1999, 140-42.

Many commented that they “played devil’s advocate” with their clients, taking the part of the Court or the LAC in an attempt to focus their client on the legal/funding context in which their matter was to be run. Respondents also identified that this was an important means of reducing the emotional identification that can occur between solicitor and client in the running of a family law matter, which they identified as being disadvantageous to the case.⁶³⁴

702. Practitioners’ reliance on extrinsic mechanisms like the Act and the Legal Aid guidelines, as a means of managing the client, was emphasized by all our interviewed solicitors when we enquired how important the client’s expectations were to determining strategies to run their matters. The overwhelming majority of solicitors felt that the client’s expectations were very important (only one disagreed). They differed, however, in how they dealt with those expectations. There was a divide between a small minority who allowed the client to drive the case, and those, comprising 93% of respondents, who preferred to manage the client’s expectations in such a way as to meet the merit criteria imposed by the Legal Aid guidelines, or to meet the outcome the practitioner expected from the Court.⁶³⁵ Those who let the client ‘drive’ the matter (7%) believed that if the client did not receive what they wanted as a result, they had not been properly represented (an assumption more in line with ‘traditional’ legal practice in commercial litigation or personal injury). Our analysis of files indicated that this seemed to be regardless of the merits of the claim (for example, refusing to acknowledge the other party’s contributions in property

634 See also Mather et al., “‘The Passenger Decides on the Destination and I Decide the Route’”, 289; Austin Sarat and William L.F. Felstiner, *Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process* (OUP, New York, 1995), 58.

635 By contrast, the clients interviewed by Hilary Sommerlad wanted their lawyer to identify with them and their cause: ‘English Perspectives on Quality: The Client-Led Model of Quality — A Third Way?’, paper presented to the International Legal Aid Conference, Vancouver, 16–19 June 1999, 7.

matters), or the impossibility of a settlement being negotiated (for example, in sexual abuse or child protection cases).

703. The file analysis similarly indicated only a minority of cases (5%) in which the solicitor acting for the other party was criticised for failing to manage their client more firmly. Most of these solicitors were male. These solicitors, for example, failed to ensure that their client complied with the final orders in the case, refused to make concessions and stuck to their instructions of trying to make the opposing party look as bad as possible, pursued their client's strategy of trading a property settlement for contact, or took their client "too seriously". In three of these cases the solicitor interviewed felt that the solicitor on the other side was "not providing appropriate advice" on issues relating to domestic violence or child abuse, allowing their clients to persist with violence towards their former partners or minimising incidents of abuse rather than attempting to control their client's behaviour.
704. It is interesting to note that no public sector lawyers belonged to the category of solicitors who said they let the client drive the matter, and the private solicitors who did so undertook less legal aid work than other private solicitors.⁶³⁶ It could be argued then that the merits test as prescribed by the Legal Aid guidelines plays an important role in determining how solicitors manage client expectations. Some solicitors who acted for legally-aided clients felt strongly that the merits test forced them to comply with very directive client management standards.⁶³⁷ (For example, informing a client that regardless of their wishes, an

636 We included questions in the file coding sheet which asked the coder to identify the solicitor's approach to the client — had they followed all the client's instructions/ identified with the client, or directed the client on what was a reasonable process or a reasonable outcome or both? This would have provided a check against solicitors' reports in the interviews, however the responses gained were significantly affected by coder bias, and were ultimately uninterpretable.

637 Of the 7.4 % that allowed clients to drive matters, n = 5. The mean percentage of legal aid work done by this group was 25%, compared with 48% for those who relied on the system.

application for residence would be impossible on a merit basis if they had voluntarily forfeited contact with their child for a number of years, and the solicitor would thus be unable to act, a scenario that would not necessarily arise if the client was self-funded.) This was offered as a justification for ‘whistleblowing’ (see chapter 5) by at least one private practitioner, who said he would feel compelled to report either a legally-aided client, or an other party, to the LAC if he felt their case had no merit, and that they were wasting legal aid money.⁶³⁸

705. As should be expected from any solicitor in any area of practice, our respondents articulated their obligation to work within the framework demarcated by the Act, its interpretation by the Court, and the operation of the Rules. Our results indicated that our respondents generally agreed that these conventions were the most important determinants of how they managed client expectations. Most solicitors indicated that the client’s expectations needed to be heard, but the next step was to test those expectations against the likely outcome, from the court’s perspective, and to communicate this very clearly to the client at the earliest possible opportunity.⁶³⁹ In this way, the court acted as an “abstract” if not an actual audience for the client’s case.⁶⁴⁰
706. Solicitors overwhelmingly described using the law to manage clients as a way of ensuring that clients’ expectations were

638 See also Bryna Bogoch, ‘Power, Distance and Solidarity: Models of Professional-Client Interaction in an Israeli Legal Aid Setting’ (1994) 5 *Discourse and Society* 65, 83; Christine Parker, ‘The Logic of Professionalism: Stages of Domination in Legal Service Delivery to the Disadvantaged’ (1994) 22 *International Journal of the Sociology of Law* 145. Both Bogoch and Parker see lawyers using legal aid eligibility guidelines as a means to control and disempower the client; however they do not also consider the ways lawyers control self-funding clients.

639 Given the findings reported in chapter 5, this would seem to involve solicitors’ own understandings of merit rather than current LAC interpretations.

640 See also Sarat and Felstiner, *Divorce Lawyers and Their Clients*, 57, 69. Sarat and Felstiner argue that “defining the legally possible is one of the divorce lawyer’s basic devices in efforts to exercise power in lawyer-client relations”. This may well be true, even if one does not accept that law is sufficiently open-textured to allow any outcome.

realistic, or “hosed down”.⁶⁴¹ (One solicitor said she tells her clients very clearly that the law is not justice, so they realise that what they hope to achieve is very different from what the law will allow.) They felt that this was essential, as if the client was led to expect something beyond what was achievable or able to be delivered legally, they would be dissatisfied with their service, which had negative repercussions for the lawyer and the client.⁶⁴²

707. This meant that solicitors had to be careful not to let the client ‘drive’ the case, although they had to balance this with the fact that the final decision does rest with the client. As a strategy, this meant giving clients options,⁶⁴³ and showing clearly where each one would end up, and what the results would be if followed, within the parameters of the system.

708. As noted in the previous chapter, we tested the value of the community-held opinion about client management as an element of good service by asking clients specifically if their expectations changed after discussions with their lawyer, and if they did, how they felt about those changes. The fact that 24% of clients indicated that their expectations changed as a result of discussions with their lawyer (the majority for the worse), tends to indicate that solicitors are in fact ‘hosing down’ client expectations if they float either above what the solicitor expects the court may award or above what the legal aid guidelines may allow to be pursued.

641 Robert H. Mnookin and Lewis Kornhauser, ‘Bargaining in the Shadow of the Law: The Case of Divorce’ (1979) 88 *Yale Law Journal* 950, 994.

642 See also John Griffiths, ‘What Do Dutch Lawyers Actually Do in Divorce Cases?’ (1986) 20 *Law & Society Review* 135, 160; Mather et al., “‘The Passenger Decides on the Destination and I Decide on the Route’”, 295.

643 See also Peter Carne, ‘Management of Your Family Law Practice’, Family Law Residential, Kooralbyn, Queensland, 1992: “Right from the start the solicitor has to control the client. This control will hopefully ensure that the client will come through the matrimonial dispute less scathed emotionally and financially than he or she would have otherwise, and, for the solicitor, avoids dealing with a client who at the end of the process is dissatisfied both with the result and the legal costs”.

709. It was also seen in the previous chapter that clients whose expectations had either not changed or been raised indicated a high level of overall satisfaction with their solicitor. By contrast, clients whose expectations were lowered by their solicitors gave their solicitors a much lower mean satisfaction score. Accordingly, although the overwhelming majority of practitioners appear to be providing a good service to their clients by managing client expectations in relation to the benchmarks provided by the system, many clients clearly do not appreciate being informed that the prospects of their claims are not as they hoped. To some extent, this disrupts our respondents' opinion that not to manage expectations leads to client dissatisfaction.
710. Our respondents therefore relied overwhelmingly on the formal conventions of the family law system as the touchstone for managing their clients. This is hardly a remarkable finding. The more complex issue, however, is whether there are other conventions beyond the Act or the legal aid guidelines that were significant to practitioners' conceptions of a good legal service in family law. This issue is explored later in the chapter.

Importance of the Client's Background to Service Delivery Standards

711. Interestingly, the skills mentioned by the exploratory group that made a service 'good' as opposed to 'adequate', such as speaking to the client in plain English, and an awareness of and commitment to dealing with issues like domestic violence, were mentioned by our respondents, but not in proportion to the discussion of the other skills such as patience, empathy and communication.⁶⁴⁴ Again, this mirrored our exploratory research. Of the five solicitors who did mention these skills as being of primary importance, two worked for LACs, and two did

644 See the discussion of giving the client options in chapter 6.

a high proportion of legal aid work in private practice. Arguably, these particular practitioners were more attuned to dealing with these issues, as the funding status of their primary client base ensured they were far more likely to assist people of different cultural backgrounds, or people with greater conceptual difficulty caused by lack of education/poverty or mental illness.

712. As a general observation, despite the lack of unprompted comment by solicitors on sensitivity to race, gender, violence or abuse as primary service delivery issues, there was consensus on the skills thought necessary to provide a good service in family law. These skills (empathy, an ability to listen, an ability to communicate process and expected outcome with the client, an ability to manage the client's expectations and use good technical understanding or judgment when doing so), are not, as we might have thought from our original research, merely aspirational standards expressed by an elite group of professionals.⁶⁴⁵ Rather, these skills were accepted by practitioners across the board as measures of good practice and, as a consequence, good service.

Accreditation versus Acculturation

713. To understand the source of this broad consensus regarding the skills necessary to deliver a good legal service in family law, we specifically asked solicitors if 'other lawyers had been important in the development of [your] skills?' In particular, we were interested to examine the relative importance of formal practice standards (such as those provided by accreditation programs) and informal acculturation. Most interviewed solicitors (62.4%)

645 As noted in the previous chapter, when clients were asked if there was anything their solicitor never asked about, only 2 (from 113) mentioned domestic violence, indicating that the majority of solicitors do in fact have a high level of awareness (more than 2 of our sampled cases involved domestic violence). Further, in response to Question 31(f) of the client survey which asked if the solicitor 'spoke in a way [you] could understand', the mean result was 4.3, indicating that solicitors may be undervaluing a 'good' skill that clients indicate is well practiced.

believed that peer exchange was the most important way by which they developed their skills, either by observation in court, seeking advice from counsel, or through other solicitors they worked against or for, especially in close-contact structured negotiations where clients were present, such as Legal Aid or conciliation conferences.⁶⁴⁶ As one junior solicitor observed, watching others provided a culturally delineated standard for good lawyering skills which younger solicitors were quick to follow:

You spend so much time dealing with other members of the profession, in conferences, or in huddles outside of court rooms, and everything like that. Your standing within the profession is really important because it reflects on your ability to negotiate with other sides, including knowing when negotiation is futile and knowing when to put a stop to it.

714. The most important aspect of peer exchange was the ability to gain feedback or advice from colleagues. This was a key aspect of practice for many solicitors working within LACs, which seemed to foster and promote a very ‘open-door’ policy on staff supervision, training, and advice giving at all levels.
715. Peer exchange was a far more significant means of learning skills than any other method or possible source of standard setting, such as accreditation. Accreditation was not mentioned at all in relation to the ‘skill development’ question, and when accredited specialists were specifically asked why they had chosen to become so, only 11.3% of those eligible for accreditation⁶⁴⁷ commented that it was in order to build skills. The most common reason given for becoming accredited was to

646 The 25 solicitors interviewed in our exploratory research had an average of 15 years’ experience in family law. This raised the possibility of skewed results arising from an atypical group, but the larger group of interviewed practitioners indicated no difference of opinion on these points.

647 cf. Bruce L. Arnold and Fiona M. Kay, ‘Social Capital, Violations of Trust and the Vulnerability of Isolates: The Social Organization of Law Practice and Professional Self-Regulation’ (1995) 23 *International Journal of the Sociology of Law* 321.

gain a market advantage (31.8%). One solicitor explained this very clearly:

I let it go the first year [it was offered]. At the time I thought I will use this as a shield or a sword in the sense that you use your accreditation to make an impact on the market, and say “I am the accredited specialist, come to me”. But after one year the 5 people in [my town] who became accredited so widely advertised they were specialists, I thought I’d use my accreditation as a sword...if I am going to maintain my position in the market I have to become an accredited specialist.

716. Accreditation within the Australian context is therefore not automatically viewed by practitioners as a signifier of quality service,⁶⁴⁸ an opinion that is transmitted through peer exchange. As one solicitor commented, she had no intention of becoming accredited “because people who have done it have said that it’s not worth it”. In fact many practitioners commented on their distrust of accreditation as a signifier of anything but a desire to gain market share (24.2%). One practitioner stated baldly that “you don’t need a certificate to be a specialist”. In fact, for many who had no intention to become accredited, it was felt that a solicitor’s years of experience in family law was a preferable indicator to a client that they would be provided with a good service. (Although how the client would actually be expected to know this was not addressed.) As one (non-accredited) solicitor commented:

I think that an experienced family law practitioner will still get the work that an accredited family law practitioner will get and I’ve seen some accredited family law practitioners produce some pretty dodgy work.

It was notable, too, that clients were no more satisfied with the services provided, or the results achieved, by accredited

648 Respondents from South Australia were unable to answer this question as that State has no specialist accreditation program.

specialists than they were with the performance of non-accredited family lawyers.

717. Public sector solicitors were more likely to view accreditation favourably, as an opportunity to build skills. This was particularly so in NSW, where solicitors accepted as policy the need to become accredited as soon as they were eligible. The NSWLAC obviously saw accreditation as an investment, providing structured support for those doing the course, including paying fees and organizing study groups. Solicitors indicated that they thought the policy rationale was so that “the Commission could market themselves” on the basis of having accredited specialists. This suggests that for the NSWLAC, accreditation is in fact a signifier of good service because of the skill enhancement obtained by those doing the course. Considering that the ‘market’ for the Commission’s services is given, it would be fair to assume that the NSWLAC views accreditation as an important means of using any existing industry processes in order to badge their solicitors as ‘quality service providers’ for Government and the practice community. This perhaps can be viewed as a pre-emptive public relations strike against the historical suspicion that public legal aid services are somehow not as good as those provided by the private sector. In contrast to the NSWLAC, LAQ saw no immediate value in promoting or paying for accreditation courses, preferring to spend money to send their staff to specialist mediation courses. This arguably reflects the emphasis in LAQ on primary dispute resolution methods, especially conferencing, as a mandatory requirement for all potential grant recipients to gauge the suitability of their matter for further funding.

718. The more traditional method of skill learning, mentoring as defined by the master/articled clerk relationship, was experienced by only 22% of our interviewees. These relationships were more likely to be mentioned by senior male practitioners as methods by which they learned good family law skills. This group of

practitioners, all in private practice, were also far more likely to think that aside from their initial mentoring, no other lawyers had been helpful in their skill development.⁶⁴⁹

719. To some extent, this could be explained by the changing nature of legal practice generally, and family law practice in particular. In many Australian states, traditional ‘apprenticeships’ no longer exist as a formal method of gaining practice qualifications in any area of law, having been replaced by six months of focussed skill study at Colleges of Law. The practitioners who had experienced mentoring and placed no importance on peer exchange were slightly more likely to be male. These were the same practitioners who had in fact begun their practices in family law in 1975 when the Family Law Act was enacted, and some had even had experience under the precursor to the current Act (the Matrimonial Causes Act 1959). Hence they had not been exposed to this pedagogical shift. Similarly, the percentage of women within the profession generally has grown since 1975,⁶⁵⁰ and there was perhaps a greater readiness by many of our female respondents to discuss the exchange/interchange of ideas about practice and to give or receive advice about skill development. Of our respondents, it was women who were more likely to comment on assisting or mentoring younger solicitors, even though they may not have been mentored themselves. However, this was not carried out through the traditional ‘master/apprentice’ relationship, but as part of the general practice of peer exchange that occurs amongst family lawyers as a community. As one female senior solicitor, who herself had not been mentored but “thrown in the

649 See also John H. Wade, ‘New and Recycled Services by Family Lawyers: Responding to a World of Change’ (1997) 11 *Australian Journal of Family Law* 68, 89–90.

650 Mean years in practice for those that were mentored was 15.22, and for those that felt no other lawyers were important in their skill development was 16.13. By comparison, the mean years in practice for those more likely to mention peer exchange as the most important factor in their skill development was 11.87. Of the 18 mentored solicitors, only 2 public sector solicitors and only 7 female solicitors had been mentored.

deep end”, commented: “We are lucky in Adelaide, we’re a small profession and people are supportive...and [if you] see a new person struggling you try and give a few clues and be available to talk.”

720. These comments also raise the issue of the relevance of location to any discussion of quality in family law. Our statistical analysis yielded no significant results when comparing groups of practitioners in different registries, supporting the homogeneity of views about the content or nature of good service skills in family law. However, from a qualitative perspective, location was viewed as quite important in terms of how these skills were acquired. As a general observation, solicitors practising in smaller cities (like Adelaide and Townsville) were very quick to comment about the conciliatory and helpful nature of their colleagues within the practice community. Similarly, in rural, isolated practice communities, such as Armidale and Bundaberg, solicitors mentioned local organised network/discussion groups as a formal mechanism for providing peer exchange about practice problems and issues. In other locations, there was a less active culture of peer exchange. This was most notable in Dandenong, where our sample was dominated by male practitioners of the ‘old school’, and our results indicated that they were more likely to think that no other solicitors had been of assistance in the development of their skills. However, this perception may be because of the small numbers from this registry included in our sample.⁶⁵¹

651 In the mid 1970s, only 20% of law graduates were women. This rose to 35% in the mid 1980s, and by the late 1990s, 50% of law graduates are women. Keys Young, *Research on Gender Bias and Women Working in the Legal System* (NSW Department for Women, 1995).

Experience

721. When asked what else has assisted their development as a family lawyer, most of our interviewees mentioned experience (64.6%). In many respects, this reinforced the importance placed by solicitors on peer exchange, as the most significant aspect of ‘experience’ was experience in practice. Other perspectives on experience were also mentioned, such as life/age, or personal experience (ie: family breakdown or just the fact of having a family, which was seen to provide a foundation for better empathy with the clients). Other important factors were broad knowledge/experience of other areas of law (for example, criminal law was seen to assist with evidence, commercial litigation with file management), and previous occupations (especially social work/teaching, which some practitioners felt assisted them to have a broader understanding of the social problems people face).

722. Sherr has been dismissive of input measures such as qualifications and experience, arguing that while they are easily quantifiable, there is no evidence of any correlation between either measure and legal competence.⁶⁵² The fact that crude ‘years in practice’ or ‘degree of specialisation’ are not useful measures of a good service was in fact reinforced in our research by the fact that there was no correlation between the aggregate score for client satisfaction and the lawyer’s number of years in practice, the percentage of work they did in family law, or the fact that they were accredited (see chapter 6).

723. However in both our exploratory and follow up interviews, respondents showed that in the Australian context there are several sustainable reasons why ‘experience’ may contribute to

652 The sample of Dandenong solicitors was small (n = 7). It is interesting to recall that Dandenong solicitors received the lowest aggregate service rating from the client surveys, while also having relatively high levels of inputs into their cases.

the development of skills for good family law service delivery. Firstly, it could be argued to provide opportunities to interact with/observe other family lawyers, and learn initial skills from them (although this development trajectory arguably plateaus rather than continues to rise at some stage). It provides opportunities to understand clients better by their own life experience, age, family experience, or extended experience with clients, including exposure to and understanding of domestic violence issues.⁶⁵³ It provides an opportunity to develop judgment (knowing when to settle, making an assessment of how to proceed according to the features of a particular case). Finally, it can be argued to provide an opportunity to gain exposure to the system,⁶⁵⁴ which dictates and monitors approach to practice through forms, rules, and the stages of the court process (a point to which we will return).

724. Nevertheless, experience in this sense clearly does not simply equate with numbers of years in practice. This leads researchers of quality somewhere through the looking-glass when it comes to considering ‘experience’ as a measure of good legal service delivery. It seems that the measurable aspects of experience are essentially meaningless, while its meaningful aspects are essentially unmeasurable!

A Conciliatory Culture (?)

725. Our exploratory research also indicated that a conciliatory approach to practice in the jurisdiction was a commonly held view, and our follow up research reinforced this consensus to a point. For example, in the open-ended interviews, when asked to

653 Avrom Sherr, ‘The Value of Experience in Legal Competence’, in Australasian Professional Legal Education Council, *Skills Development for Tomorrow’s Lawyers: Needs and Strategies — Conference Papers* (Sydney, 1996), 133, 153.

654 By contrast, two of the case files involved inexperienced opposing solicitors dealing ignorantly/inappropriately with their client’s violence and failing to understand its effect on the victims.

describe the most important skills of a family lawyer, several practitioners described skills in terms of an approach to practice, and the most important of these was to be conciliatory (that is, to negotiate, be reasonable, or flexible). To test the exploratory findings, and the preliminary comments offered by some practitioners in relation to the skill question, we sought comments from our interviewees on the counter-view, that is we asked them: 'what is your attitude to practitioners who behave aggressively', and 'what proportion do you think are in that category?'

726. A majority (69%)⁶⁵⁵ thought that other solicitors with aggressive tendencies were bad solicitors, and did not understand the nature of the area of practice or its commonly held standards. For example, one suggested that aggressive family lawyers "don't know the nature of the law", and another offered that "[the] court doesn't like it and [it] doesn't win you any friends". Despite this, a third of respondents (31%) felt that aggression is "sometimes in the client's interests", or "is the only response to a situation", or is "part of the client's instructions". Significantly more men than women believed aggression to be an acceptable part of practice.⁶⁵⁶

727. Only three of the files analysed included evidence of the solicitor taking an aggressive approach, apparently without direct instructions from the client to do so. Two of these cases involved the solicitor putting unfair pressure on an unrepresented opponent. The view that there were many

655 Including local legal and judicial culture, as noted by Sarat and Felstiner, *Divorce Lawyers and Their Clients*, 106–107.

656 Note that not all solicitors provided an answer to this part of the question. The question actually asked solicitors: 'What is your attitude to other family practitioners who behave dishonestly or aggressively?', and 'How many do you think are in that category?' Many 'split' the question, choosing to comment on either aggression or dishonesty, but not both. The percentages given reflect those that responded to the issue of aggression (n = 45). From the overall sample (n = 83), 27.4% commented that they thought dishonesty was 'really bad', and was described as 'beating up matters for fees', and a 'breach of duty to the [Family] Court', and viewed as 'damaging to the profession's image.'

occasions on which it was perceived appropriate to act aggressively was, however, emphasised by the litany of aggressive behaviours listed by solicitors about their opposition, when coders asked for comments on the behaviour of the other solicitor in relation to the file analysis. These aggressive tactics included: tendering affidavit evidence on the dates of court appearances, causing adjournments and added cost for the other party; refusing to negotiate with a legally-aided client; making unreasonable settlement offers and wasting time; “revving up” their clients and obstructing settlement; filing applications at Registries a long distance from the other party’s home making it difficult for that party to attend court; advising their client not to pay penalty costs; dealing directly with the other party rather than through their legal representative; and “aiding and abetting” their client to intimidate and manipulate the other party. Aggressive solicitors tended to represent self-funding clients, whereas the targets of the aggression tended to be legally-aided. Even so, such behaviour was evident in only a minority (7%) of cases.

728. In order to elicit from our interviewees the extent to which they, and other players in the system, believed in settlement (ie: fostering a conciliatory approach), we asked them a series of questions: ‘When is it best to settle and when is it best to go to court in family law cases?, and ‘Is there an expectation that family law cases should settle and from whom?’

729. All of our respondents believed that it was best to settle cases, as it was felt to be to the client’s economic benefit, to the benefit of the children, and to the long term benefit of the macro family relationship, as it gives control over the result rather than leaving it to the “lottery” of a judge’s decision.⁶⁵⁷ This last point, that to allow a family law matter to be decided by a judge was a

657 $\chi^2 = 6.501$, $df = 2$, $p < 0.05$.

“gamble”, was in some respects a surprising sentiment to be expressed by practitioners. It would seem to contradict the strong emphasis our respondents placed upon the technical skills and knowledge needed to predict the range of outcomes a court would order when advising clients and managing their expectations. However, practitioners tended to articulate the view that a judge’s decision may in fact be a ‘lottery’ as a means of encouraging clients to settle. As Sarat and Felstiner have also noted, the ‘lottery’ element may relate to the question of which judge will be assigned to hear the case, and how that judge will or will not deal with the individual features of the case.⁶⁵⁸

730. This point aside, there was a consensus regarding expectations of settlement amongst our respondents. As one solicitor mentioned, “Well, as a general proposition, it is always better to settle. Family lawyers will tell you that, trot it out as sort of a motherhood statement but it’s probably true.” However, this did not necessarily mean settlement procured just through solicitor negotiation or out of court conciliation. For the majority, settlement was viewed as occurring within the structure of the Family Court, which meant that settlement and issuing of proceedings were not mutually exclusive positions to take. What is of interest were the different reasons that our interview subjects gave as motivations for going to court.

731. For only a minority of our respondents, the decision to go to court (or issue proceedings) “depended on the client”, that is, was client determined or driven (14.6%). For some clients, even after they had been “educated” about what to expect from the system and the potential range of outcomes, and had been advised accordingly, they still felt the need to go through the court process, for “catharsis”, “to be heard”, or “to have their day in court”. These clients seemed to fall into two categories,

658 See also Sarat and Felstiner, *Divorce Lawyers and Their Clients*, 117–122.

clients who were vexatious (“the lunatic fringe”, as one solicitor described them, who could never see reason), and those who would be destroyed through a negotiation process (female survivors of domestic violence, or those whose relationship was based on other forms of power imbalance). Some solicitors indicated that clients sometimes needed a person in authority (a judge or registrar) to make orders to ensure that they would be abided by, if the client and the other party were incapable of compromise.

732. Twelve percent of our interviewed solicitors indicated that they went to court only when the other party or the other solicitor was so intractable, vexatious or aggressive that negotiation outside the system became impossible. This group spent significantly less time in practice doing family law,⁶⁵⁹ indicating that effective management of the opposition is a skill that is improved through practice experience in the jurisdiction.

733. The overwhelming majority (73%) responded that they went to court to “facilitate settlement”. They were not so precise as to delineate the cause as either their client or the other party, but believed it was the key moment in the handling of a case when a family lawyer’s judgment (the skill described previously, and seen as important by so many lawyers) would be put to good use. For many others also, the question of cost was a key reason in their decision to issue proceedings. That is, if negotiations had been going on fruitlessly for months soaking up legal fees, it was felt that it was “better to go to court and get it over and done with”.

734. For the majority of our interview subjects, to issue proceedings on the other party was seen as a way to force them into the system, providing formalised procedures for negotiation.⁶⁶⁰ This

659 *ibid.*, 117.

660 Kruskal-Wallis $\chi^2 = 7.722$, $df = 2$, $p < 0.05$.

reliance on the system as a tool for settlement was also reinforced in our research by comments some solicitors made to coders when asked to comment on their files. Many solicitors with this perspective felt that settlement would occur in property matters at the Order 24 conference. In children's matters, if expert evidence was required, solicitors felt settlement would occur once the expert's (usually a psychiatrist or psychologist) report had been tendered.⁶⁶¹ It was felt that Order 30A reports formed the foundation upon which a judge's decision was made, allowing solicitors to predict accurately in advance what the orders were likely to be, and to advise their client about settlement accordingly. Otherwise, many solicitors felt that once it was known which party the child representative preferred, settlement became possible, as the court was likely to follow the "sep. rep's" opinion, automatically reducing one of the party's hopes for a favourable result from the court. This was felt to occur either at or before the pre-hearing conference,⁶⁶² or at the door of the court at final hearing.

735. Hence for the community of family lawyers, the Court (as the interpreter and arbiter of the Act) is perceived as an essential part of the settlement continuum, in the process Galanter has termed "litigotiation".⁶⁶³ The opportunities that the court provides for clients to settle were described by one respondent in this way (and the formula was repeated many, many times):

661 See also Richard Ingleby, *Solicitors and Divorce* (OUP, Oxford, 1992), 31, 34; Tom Fisher, Tony Love, Lawrie Moloney, Kathleen Pearson and Damien Walsh, *Traditional Divorce: Consumer Perceptions of Legal Aid Clients Choosing Traditional Legal Processes* (National Centre for Socio-Legal Studies, LaTrobe University, 1993), 16–17.

662 The ALRC has suggested that the Family Court's case management guidelines should in fact be amended to allow for earlier ordering of O30A reports in cases of need, defined as those involving unrepresented litigants, and allegations of family violence or child abuse, although it did not recommend ordering family reports specifically for the purposes of settlement. ALRC, *Discussion Paper No.62: Review of the Federal Civil Justice System* (August 1999), 336.

663 The ALRC has noted that although the pre-hearing conference is not designed as a dispute resolution event, both the Court's and its own data indicated a high settlement rate at this stage: ALRC, *ibid.*

I must say I think it is a good idea to initiate proceedings...because there are so many checks and balances in place in the Family Court [U]sually I would start off a matter either by giving the client an option to talk to their partner after I have given them advice or I will write a gentle letter [to the other party] saying, "well look, you know, I think this is what you should do, go and see a solicitor and we will start from there." So, I always start from the try and negotiate point of view... [T]hen you find out fairly quickly as to whether you think the parties, or ...their respective solicitors, are moving any closer together. And if they are not..., I think, ...it's often better to apply to the court than go through that. Because what you're getting if you let parties drag on too much is Custer's Last Stand, they're both firmly entrenched, they know what divides them, and it then becomes a win/lose situation. Whereas if you put them through a mediation-type process, through the court, it's a Registrar telling them what he or she thinks might happen, it's a counsellor telling them to be child focussed, and it tends to bring them together.

736. The perceived centrality of the Family Court to the settlement process may also help to explain why solicitors generally preferred to refer their clients to Family Court counselling than to community-based mediation. As noted in chapter 2, 63% of the cases in the file sample involved Family Court counselling, but only 8% involved community-based mediation. Solicitors considered that Family Court counselling was better equipped to handle children's issues, was free, had a good success rate, the counsellors had greater expertise and knowledge of family law, and settlements reached through counselling were more reasonable, workable and just, had greater authority, and were more easily recognised by the Court. Notably, the solicitors who particularly commended Family Court counselling were either in-house solicitors or private solicitors dealing with legally-aided clients, indicating that Family Court counselling is considered to be better equipped to deal with legal aid cases.
737. There are a variety of reasons why community-based mediation might be seen as more appropriate for self-funding clients and

less appropriate for legal aid clients. For example, some solicitors thought community-based mediation was suitable for cases involving small amounts of property, where it could provide a cheaper solution than lawyer negotiations. Twelve solicitors (16%) said they would encourage clients to attend mediation if they were well-educated, articulate, reasonable, able to communicate with the other party, and aware of their rights and entitlements — characteristics that tend to be related to funding status:⁶⁶⁴

I think the people that are able to go to mediation and reach agreement usually have more education, usually are articulate and usually the separation has been more amicable. So in those circumstances they're able to reach an agreement... And they are generally pretty open-minded people, they're not passionate, they haven't had abuse, there haven't been a range of other factors. As soon as there are extraneous factors and allegations, mediation just doesn't work and it's not appropriate. The Centacare people work with a different socio-economic group of people and they assist clients to reach agreement and often, because there is not as much fight about it, they're able to do so.

...it's usually the ones that are privately funded that go to mediation.

738. Thirty percent of solicitors said they do not encourage their clients to go to community-based mediation if there is a power imbalance between the parties, although the existence of unequal bargaining power was more likely to be related to gender in general than to funding status in particular:

If there are power differences, and there usually is, then mediation tends to make it worse. The person, usually the husband, who has control speaks the most, and is able to browbeat the other party. The mediator, unfortunately, may then also take his side, so the woman is ganged up from

664 Marc Galanter, 'Worlds of Deals: Negotiation to Teach About Legal Process' (1984) 34 *Journal of Legal Education* 268; see also Rosemary Hunter, *Family Law Case Profiles* (JRC, 1999), 85.

all sides. Sometimes they are a mess afterwards, they need counselling to get over the counselling. Mediation is a great idea, but not in the context of power inequality, which is usually the situation in family law, in which case you need a lawyer present.

More often than not there is one party in a position of power, whether it's psychological, money, or so on and so forth, and mediation does nothing. All it does in fact, it's been my experience, is exacerbates the power position, the power controls. So the person who is passive or dominated, they continue to be dominated and the mediation agreements are quite unjust and inequitable.

739. Other reasons for not encouraging community-based mediation included: its unavailability in the local area; lack of knowledge about the services provided; lack of confidence in the competence of mediators or their knowledge of the Family Law Act; and resistance from particular groups of clients: "I've got a really, really high NESB population here, like incredibly high, and they just won't use those services in a million years on their own volition". Six solicitors felt that mediation was unnecessary. As long as both clients have legal representation, then the solicitors should negotiate. One pointed out that unnecessary mediation causes further delays, and as the clients would have to come back to their solicitors for advice on the agreement anyway, it also increases costs. Several others thought that if clients were able to communicate, they should be encouraged to negotiate themselves.

740. Overall, 53% of solicitors stated that they did not encourage their clients to attend community-based mediation, 37% said they would encourage their clients to attend subject to some form of proviso from the list above, and only 10% gave unqualified support. Twenty-eight percent thought that community-based mediation did not help at all, while 70% thought that it helped in some cases and hindered in others. The main form of hindrance noted was agreements that were "bizarre", unenforceable,

impractical, unworkable, “wishy-washy”, or unfair. One solicitor explained that some property agreements simply gave a 50/50 split, without considering factors such as the number and ages of children, who was the primary care giver, contributions, etc., which would be considered by the Court. Another complained that “we are supposed to be acting in the best interests of the children, but if people come to an agreement by consent they can agree to the most abominable outcomes for children and nobody seems to give a darn”.

741. Another possible reason for solicitors’ cool response to community-based mediation lies in their answers to the question ‘is there an expectation of settlement in Family Court cases, and by whom?’ These answers indicated that solicitors wish to be seen to be actively engaged in settlement activities by their peers and by the Family Court.⁶⁶⁵ Seventy-six percent of those who responded to this question, for example, believed that other solicitors expected settlement. Interestingly, however, solicitors doing a large proportion of legal aid work seemed slightly more inclined to think that other solicitors did not expect to settle.⁶⁶⁶ This perhaps indicates some of the current difficulties experienced when attempting to provide services to legally-aided clients, which were illuminated by our questions to solicitors regarding their files. These difficulties included opposing solicitors acting in an aggressive strategic fashion and refusing to negotiate, as they knew a client was legally-aided, and would not be able to obtain funds for protracted negotiation.

665 Evaluations of community-based mediation services have confirmed that the clients of those services tend to be middle-class and self-funding: Anthony Love, Lawrie Moloney and Tom Fisher, *Federally-Funded Family Mediation in Melbourne: Outcomes, Costs and Client Satisfaction* (Attorney-General’s Department, January 1995), 33–34; Lawrie Moloney, Tom Fisher, Anthony Love and Sandra Ferguson, *Managing Differences: Federally-Funded Mediation in Sydney: Outcomes, Costs and Client Satisfaction — Synopsis, Key Findings and Recommendations* (Attorney-General’s Department, July 1996), 10–12.

666 See also Ingleby, *Solicitors and Divorce*, 158; Mather et al., “The Passenger Decides on the Destination and I Decide the Route”, 307.

It also perhaps reinforces the fact that some (male) solicitors acting for privately funded clients are more likely to allow the client to ‘drive’ their case, regardless of merit, whereas legally-aided clients, by virtue of the guidelines controlling their funding, must abide by their solicitor’s assessment of merit and how strenuously a matter can be pursued, or face the consequences of having their funding terminated.

742. Overall, however, the most important factor in creating an expectation to settle was the policy and procedure of the Family Court. All of our participants who commented on the court’s expectation believed that the Family Court expected settlement. The primary reason for holding this belief, as already indicated, was that primary dispute resolution was written into the Act itself, and that the intention behind the legislation was then translated to practitioners, and ultimately clients, by the different stages and directions for settlement provided by the Court.⁶⁶⁷ These included: the provision of initial Family Court counselling for clients; the provision for settlement conferences before final hearings; comments delivered to participants in litigation by judicial officers at these stages in the process before final hearing; and even the delay to reach final hearing itself.⁶⁶⁸ It was felt that the Court only expected “the very worst” cases to go to final hearing, and always expected child sexual abuse cases to reach final hearing, where assiduous assessment of evidence was essential for the protection of children, in order to comply with the philosophy of section 65E.

743. A substantial proportion of practitioners (27.3%) gave as their reason for the Court’s expectation of settlement the Court’s own

667 The mean percentage of legal aid work done by those solicitors who did not expect other solicitors to settle was 53.4%. The mean percentage of those who thought other solicitors did expect to settle was 45.4%.

668 The ALRC has also noted that while the Federal Court’s mission statement refers to “deciding disputes according to law”, that of the Family Court refers to helping families resolve disputes by agreement, with a final judicial decision as a “last resort”: *Discussion Paper* No.62, 316.

statistics concerning rate of settlement. These statistics are disseminated in Court documents,⁶⁶⁹ at conferences, and in continuing legal education forums. Interestingly, there was no consensus amongst our interviewees about what these figures actually were (a range was given from 85–97%), but this in itself did not seem to be relevant. The very existence of an observable resolution rate provided not simply a record but a personal benchmark, so that individual solicitors knew how many of their cases they should in fact be attempting to settle before final hearing, to be considered an appropriate and participatory player within the system.

744. One solicitor summarised the power statistics have on the profession, creating a self-fulfilling prophesy:

The [Family Court] expect a high number of settlements to get their statistics up. They have to tell Government I suspect. They...have a strong view that everything should settle...and at the end of the day, statistically, that in fact will happen.

745. The LACs were also viewed as playing a role in enforcing the rate of settlement through their funding guidelines. For example, many Queensland solicitors mentioned the fact that LAQ requires clients to attend mandatory conferencing before grants of aid are made as improving their settlement rates. Practitioners, however, viewed LACs in all states as playing a role in reinforcing the desired settlement rates they believed were expected by the Family Court. As one public sector solicitor commented:

I think I have had a percentage of 92% settling since I have been at Legal Aid, and I know that is higher than the average but yeah, that's my ratio. I have only run four full hearings in the Family Court...since I have been at Legal Aid in three and a half years.

669 See also Carole Brown, 'Integration of Dispute Resolution Services Within the Family Court', paper presented to the Second World Conference on Family Law and the Rights of Children and Youth, San Francisco, 1999, 2.

746. These statistics are then conveyed by solicitors in both the private and public sector to their clients as part of the process of managing client expectations, “hosing them down” and educating them about the importance of settlement. As one private practitioner commented:

There [is] an expectation amongst the profession who know the statistics, but the clients don't, they really think it's going to be gloves off in every situation and they are amazed that the procedures that are there that make settlement so easy. [The Court] is expecting the majority to settle, [it's] pouring resources into achieving that. Ninety-five percent do.

747. As some of the client survey responses may suggest, however, the desire to conform to expected (high) rates of settlement may lead solicitors to over-manage their clients, rather than taking a more critical view of the relevance of statistical patterns to individual cases.

A Unique Practice Area

748. The indication that the Family Law Act stands at the normative apex of the community of Australian family lawyers also explains why our respondents are of the view that family law is different to other areas of practice, which reproduces another finding from our exploratory research. For them, the Act, although obviously prescriptive in terms of their behaviour, is nevertheless viewed positively.⁶⁷⁰ As one solicitor commented: “family lawyers should have the commitment and philosophy of the Act and act on it; other areas of law are inflexible and uncreative”. The key rationale for this opinion returns to the consensus belief that family lawyers need to have good client-

⁶⁷⁰ See eg. Family Court of Australia, *Report to the Chief Justice of the Evaluation of Simplified Procedures Committee* (August 1997), 64–66, showing 7% of cases proceeding to judgment in 1995 and 1996. The equivalent figure for 1997–98 was 5%.

based in combination with good technical-based skills, with the requisite judgment ability to turn an emotional problem into a legal problem, with legal solutions that must be negotiated in a conciliatory fashion.

749. Lawyers from other practice areas, according to our participants, were not capable of understanding these elements of family law practice in combination. As one family lawyer noted:

You often get common lawyers who dabble in family law having a very different approach to people who mainly do family law work. They try to run it like a common law file...it's...a conceptual thing.

750. Another of our participants, a legal aid lawyer who works primarily in criminal law, echoed this sentiment when he reflected on why he doesn't feel he can do more family law work:

I would find it too hard. Not too hard, too frustrating because of just human beings, the fact that they seem to get readily involved in these conflicts which don't resolve, they are just ongoing festering wounds...the [clients] are in perpetual dispute beyond the law.

751. This perspective is interesting, because most family lawyers believe that to be a good family lawyer, certain characteristics must be innate in order to give a practitioner the capacity and willingness to remain in the area in order to build skills. When asked if the characteristics necessary to be a good family lawyer could be learned through experience, 33.8% of our respondents believed it was through experience alone, reinforcing our findings on peer exchange and practice experience as crucial to skill building. However, 45% were of the belief that experience practising family law is crucial, but as a means to improve innate characteristics, such as empathy, patience, and tolerance for the human condition. As one private practitioner explained:

[It's] nature and nurture. You have to have [communication and personal skills]...that's what enables [you] to remain in family law, as opposed to

commercial litigation or straight commercial, where you don't need those personal characteristics. You've got so much client contact that you've got to have it to start with and then you refine and develop it, otherwise we'd be social workers.

752. It was statistically significant that those that did a greater percentage of work in family law were of the belief that 'good' family lawyers needed to have innate characteristics (like patience and other client-based skills), that could be improved through experience.⁶⁷¹ Experience measured as 'percentage of work in family law' rather than 'years in practice' might then have some value as a quality measure, as it would capture the consensus belief of practitioners that individuals with the right qualities remain practising in the area, therefore acting as an indicator of their suitability to be 'good' family lawyers. It is difficult to specify, however, what proportion of family law work would qualify for this purpose (more than 10%? more than 50%?). There was no relation established in the client surveys between the percentage of work in family law and client satisfaction with the service they received, but at the same time, none of the solicitors whose clients participated in the survey did less than 20% of their work in family law.
753. The shared perception of the uniqueness of family law as an area of practice also emphasises the advisability of quality standards being tailored for particular practice areas. For family lawyers, because of the strong shared consensus of what constitutes 'quality', it would appear to be unstrategic and perhaps quixotic to attempt to impose upon them bureaucratically developed, general purpose quality standards for the legal profession as a whole. As an indicator of what the acceptance rate of such regulatory quality service standards might be amongst family

⁶⁷¹ Sarat and Felstiner claim that lawyers generally act as apologists for existing legal arrangements: *Divorce Lawyers and Their Clients*, 86, although the situation conveyed to clients may not necessarily accord with the lawyer's own views.

lawyers, only 16.9% of the legal practices involved in our research currently have quality accreditation or TQM procedures in place. Many solicitors in these firms did not appear to take imposed and named quality mechanisms seriously, commenting that they were “not really sure what they are”. Further, comments about industry imposed schemes (such as advisory codes of practice designed by Law Societies) as sources for standard setting were conspicuous by their absence when our respondents were asked to comment on how they learned the skills necessary to deliver good service and to function within the community of practitioners. This included the absence of reference by Queensland solicitors to the quality assurance elements incorporated into LAQ’s preferred supplier scheme guidelines.

Conclusions

754. The emphasis on the Family Court as an arbiter of professional behavior as well as an arbiter of clients’ disputes was a common and recurring theme throughout all of the responses we received from solicitors in relation to their approach to practice. It therefore appears that the Australian jurisdiction does in fact have normative quality standards, as prescribed by the Act (and to the extent of directing client management, the legal aid guidelines), that the practice community accepts, and to which they adhere.

755. In addition, to give effect to the philosophy of the Act and to ensure matters are “within range” of how the Court interprets that Act, solicitors deal with their clients in particular ways. These methods of client interaction then become accepted as normative standards of a good service, and include, as our research demonstrates: an ability to be able to communicate process to the client, an ability to exercise judgement when considering the client’s individual needs and expectations and to

consider their relevance to legal principles, an ability to manage the client's expectations in accordance with the expectation delineated by the Act. Our respondents acknowledged that maintaining these standards is not always easy or possible. They suggested that there will always be cases driven by "the lunatic fringe", or those that can not help but go to court because of child abuse factors. However, even these cases, which solicitors view as those in which it may be appropriate to act aggressively, are controlled to a certain extent by Act, and by the 'best interest of the child' provisions.

756. This said, there are certain innate qualities that the majority of our practitioners believed to be important in order to be a good family lawyer (such as empathy, the ability to listen, and patience or tolerance), that could not be determined by the Act. Yet these qualities were considered to predispose solicitors to practice in the area, and it was a commonly held belief that they too could be enhanced by exposure to the precepts of the law in practice.
757. These findings from our research indicate that Australian family lawyers are very directive of their clients because of their adherence to the Act, which demands that they manage client needs very tightly. This raises the question of whether this practice overrides clients' interests, which may call family lawyer community standards as they currently exist into question as reliable indicators of good service. The client surveys, however, did not indicate widespread dissatisfaction, although clients were resistant to being managed away from their initial goals. In terms of satisfaction with their lawyers, the lack of significant differences between the responses of legal aid and self-funding clients, and between the clients of private and salaried legal aid solicitors suggest fairly consistent service delivery between different groups of lawyers, and supports the conclusion that Australian family lawyers belong to a cohesive practice community culture, bounded by consistent professional norms.

758. In this respect, our findings differ substantially from the assertions of the ALRC that there is a variable standard of proficiency amongst family law practitioners, and that “based on the comments of the Family Court, some litigants and practitioners, there is a real need for the profession to seek to improve practice standards in this jurisdiction”.⁶⁷² The ALRC appears to be generalising from complaints about a small minority of lawyers, whereas all of the evidence available to us indicates that such generalisations are not justified. This also casts doubt on the ALRC’s proposed remedies for the ‘problem’, although its suggestion that a mentoring system be introduced, under which experienced specialists would provide advice and assistance to less experienced practitioners, is in fact quite close to the informal method of family lawyer socialisation currently in place.
759. Solicitors’ reliance on the Family Law Act as the source of understandings of good practice raises further questions about any perceived need by government in the near future to expend funds on the design and implementation of bureaucratic criteria to measure and guarantee quality in legal aid service delivery. Such criteria may prove to be appropriate in other practice areas,⁶⁷³ but within the current state of Australian family law, it would appear more efficient to direct available funds into the system that monitors and directs current practice, in order to improve existing services. Even if the accepted standards of behaviour and service delivery were felt by government to be in need of change, it would appear that the most effective way to achieve this would be to harness the existing avenues by which standards are transmitted within the practice community — through amendment to the Family Law Act or Rules, reinforced by the Family Court.

672 $\chi^2 = 8.265$, $df = 3$, $p < 0.05$.

673 ALRC, *Report No.89*, 242–43.

760. Finally, legal aid lawyers in both the public and private sectors currently appear to provide an equivalent quality service to their clients. The Senate Legal and Constitutional References Committee⁶⁷⁴ speculated that the “exceptionally high” quality of the work of in-house solicitors, despite lower wages, may be due to higher job satisfaction, commitment, and other intangible factors.⁶⁷⁵ In-house solicitors in NSW in particular said that despite cutbacks to legal aid they still enjoyed working for the LAC. They described the in-house practice as supportive, encouraging, and staffed by people who are genuinely interested in their work, and explained that their positions as in-house solicitors gave them access to interesting cases. Some felt that the LAC is not given enough recognition for the quality of service that it does offer:

I've got nothing but praise for the support and supervision that I get... I don't feel just like a work horse, and there's a lot of lawyers who came out with me who don't feel valued at all.

...they are a bunch of very dedicated individuals who are working through some difficult times.

761. As this chapter suggests, in addition to these utility-based explanations for the high quality work of public sector family lawyers, the quality of their services is regulated by the fact that in-house solicitors share the same professional norms and hold themselves to (at least) the same standards of service as their private sector colleagues. Our interviews gave some indications of future potential problems, however.

674 They may also be appropriate in other aspects of family law work, such as child representation. Our findings relate only to the representation of adult legal aid clients. LAQ, for example, proposes to introduce child representative accreditation through the use of standards.

675 Senate Legal and Constitutional References Committee, *Inquiry into the Australian Legal Aid System: Third Report*, 47.

762. When we asked our respondents if they were satisfied with the service they could provide to their clients, no public sector lawyer actually felt unsatisfied with the service they delivered. But unlike private sector lawyers who were slightly more inclined to give a definite response to the question (ie: yes or no), public sector lawyers were more likely to feel satisfaction with service was dependent on the amount of money or time available.⁶⁷⁶ One in-house solicitor said they were “satisfied with the people I work with, satisfied with the organisation, not satisfied with the resources that we are allocated, because we don’t have financial resources”. Another considered that cuts to legal aid had not drastically impacted on their practice so far, but if cuts continued, the quality of service would inevitably decrease. A third explained:

I believe Legal Aid offers an excellent service. I believe that service is significantly hampered by the financial constraints upon it and I think that is getting worse...you just can't have parity of legal services... I don't think [the funding restraints are] affecting the quality at all, I just think it's the quantity and extent that is the problem.

The reality behind this view was evident in chapter 3.

763. Interview and file data cited in this chapter and in chapter five also suggests that the 1997 legal aid guidelines (particularly the overall funding cap) appear to have encouraged some private sector lawyers to abandon the conciliatory approach and run aggressively strategic campaigns against legally-aided clients, in order to truncate or exhaust their grant of aid. This is an issue that goes not to the quality of legal aid services per se, but to the ethics of dealing with legally-aided opponents, although different legal aid policies could also obviate such tactics.

⁶⁷⁶ Twenty-two percent of public sector lawyers felt this way compared to 11% in the private sector, although the numbers were very small in this category (n = 11).

764. The family law quality 'eco-system' itself currently appears to remain intact. However the concerns of legal aid lawyers as to quantity of service, and the realisation that the legal aid guidelines form part of the formal structures that prescribe solicitor behaviour, suggest that the terms of these guidelines are capable of affecting the quality of service delivered to legal aid clients. Because of the tendency towards commonality of approach, shifts in one sector are likely ultimately to impact on all family law clients regardless of funding status. Moreover, any attempt to introduce extrinsic quality assurance measures into a legal aid system that in other respects makes quality service more difficult to sustain, would be likely to have little actual impact on how solicitors deal with their legal aid clients, and may have the effect of hastening the exit of private solicitors from the provision of legal aid services in family law.

Conclusion

765. As discussed in chapter 1, the objectives of this study were to determine:

- (a) whether Legal Aid recipients are advantaged in being able to pursue their cases free of concerns about cost (do they receive a greater level of service with legal aid funding than the ‘ordinarily prudent self-funding litigant’ is able to afford?);
- (b) whether, conversely, Legal Aid recipients are disadvantaged relative to private clients because legal aid rates purchase a lower level of service than the ‘ordinarily prudent self-funding litigant’ is able to afford;
- (c) the relative efficiency and effectiveness of current models of Legal Aid service delivery;
- (d) the impact of different fee arrangements on lawyer behaviour and effort; and
- (e) the effectiveness and utility of various possible quality standards and quality measures for legal services.

The answers to these questions provided by the study, and their policy implications, are as follows:

766. First, legal aid recipients gain no advantage by virtue of the fact that public funds rather than their own resources are expended on their cases. To the contrary, the stage of matter limits and overall funding cap result in considerably lower expenditure on legal aid cases than self-funding clients on average spend on

their cases. The \$10,000 cap applying to individual cases has been a significant source of inequity between legally-aided and self-funded clients represented by private solicitors. The fact that most Commissions have had an unlimited discretion to exceed the cap has not alleviated the inequity, and the fact that all Commissions will have this discretion in future does little to rectify the situation while the perception remains that such discretions are rarely, if ever, exercised.

767. The goal of equity would be better achieved by the introduction of guidelines governing the circumstances in which the discretion to exceed the cap may be exercised (for example if a self-funded opponent engages in attrition tactics, or if a trial overruns its estimated length through no fault of the legally-aided party or parties); by means of genuine variation in the cap on a case by case basis, as recommended by the ALRC; or by a doubling of the cap to more accurately reflect the amount that self-funded clients are able to spend on their cases. Such measures need not compromise the other goal of capping — cost containment. The retention of stage of matter limits would still ensure that the pre-trial stages of a family law case — when the great majority of cases are finalised — are handled as economically as possible.

768. In relation to stages of matter, the achievement of a national funding model from 1 July 2000 is a significant step towards the streamlining and uniformity of legal aid grants. There is also a case for making all stage of matter grants a fixed rather than maximum amount in order to minimise transaction costs for both LACs and private solicitors. And stage of matter limits could be increased for early stages, to provide incentives to gain full information about the client's and the other side's case, and to attempt to settle, as early as possible.

769. In addition to restrictions on the amount of funding available, legal aid clients are also restricted in the types of matters they are able to pursue, and are subject to stringent and occasionally

arbitrary processes of decision-making and surveillance in connection with the grant of aid. The latter is a function of a system funded below the level at which it can keep its most minimal promises. Funding levels ought to be sufficient to eliminate arbitrary decision-making and rejections of legal aid applications despite the fulfillment of all criteria and guidelines, and to remove incentives to send unsuitable cases to PDR, such as in urgent matters or where the safety of a spouse or child would be compromised.

770. One consequence of the severely restricted availability of legal aid grants is that clients who are sufficiently fortunate to obtain and hold onto a grant of aid for Family Court proceedings have an increased likelihood of succeeding in their case and of being satisfied with the outcome. The conditions observed in this study are not, however, a necessary precondition of this result. The granting of aid in a larger number of cases pursuant to a consistent application of the merits test should produce the same level of satisfaction for legal aid clients.
771. Legal aid recipients are further disadvantaged to some extent relative to private clients in the quantity of services they receive (particularly from in-house solicitors), as well as in some private solicitors' perceptions of legal aid clients as demanding and unreasonable, and in their vulnerability to attrition tactics from the other side. However, legal aid clients do not appear to be disadvantaged in relation to the quality of legal services they receive.
772. Secondly, in terms of legal aid service delivery, in-house lawyers appear to operate more efficiently and effectively than do private sector legal aid lawyers. They deal with more client problems, and engage on average in fewer activities per case, but achieve quicker outcomes, which are closer to what the client originally wanted, and with no discernible difference in service quality. This conclusion applies both to in-house practices undertaking considerable amounts of party

representation (LAC NSW and LSCSA), and to those that do only limited adult representation work in family law cases (LAQ and VLA). In light of this finding, and in the context of limited funding and the exit of private family law practitioners from legal aid work, available legal aid funds may be more efficiently deployed in boosting in-house practices.

773. Since there are no alternative delivery systems in operation in Australia it was not possible to observe the relative efficiency and effectiveness of such systems. Australian pilot studies and the overseas literature, however, indicate that there is little cost advantage to be gained from tendering or block contracting of legal aid services, since the transaction costs of administering contracts — particularly incorporating robust quality assurance measures — outweigh any modest savings that may be made in the unit cost of cases.
774. Thirdly, different fee arrangements in family law appear to have little impact on lawyer behaviour or effort for those lawyers who accept the fee arrangements. Thus, private solicitors will offer similar services to legally-aided and self-funded clients, even though the latter generate twice the amount of revenue for the firm, and salaried solicitors share the same quality commitments as private solicitors (although may not be able to deliver the same services due to policy constraints for example on briefing barristers and ordering expert reports). The major impact of low legal aid rates is not a decline in quality but exit from the field. While the findings of this study cast doubt on whether there has been any recent ‘juniorisation’ of legal aid work, the research clearly shows that firms and individual solicitors are abandoning legal aid work.
775. As suggested above, if it is sought to increase the number of solicitors offering legal aid services, it may be more cost effective to do so via in-house practices than by attempting to attract private practitioners back into legal aid work. Nevertheless, the mixed model of legal aid service delivery

remains important in Australia, particularly in ensuring adequate services in rural and regional areas, and also to avoid conflicts when (as often occurs) both parties are funded by legal aid. In order to make legal aid work worthwhile for private firms once more, solicitors' interview responses suggested there must be an increase in legal aid rates (with sufficient allowance for out-of-town practices), a reduction in transaction costs for private practitioners (including the costs of challenging legal aid funding refusals), and an increase in the number of legal aid grants available.

776. Finally, in relation to quality standards and quality measures, the study shows that specialist accreditation, quality management, codes of practice and legal aid quality standards command little adherence as sources of guidance for family law practitioners. Neither does experience measured in terms of years in practice provide a reliable quality indicator, while the 'transaction criteria' developed in the UK are also deficient, as they ignore the qualitative, communicative and judgment aspects of good legal services. The research establishes that the major source of family law practitioners' views of quality is family law practitioner culture, with the content of cultural norms influenced by the Family Court, the Family Law Act and Rules, Legal Aid guidelines, and peer exchange. This culture accounts for the lack of discernible differences in quality of services provided to self-funded and legally-aided clients, and to the legally-aided clients of private and public sector solicitors. At the same time, the standards of good service articulated by family lawyers, and the client survey data indicating that lawyers generally adhere to these standards, suggest that there is not currently a quality 'problem' with the services delivered to legally-aided family law clients.
777. These findings in turn suggest that the imposition and monitoring of extrinsic quality standards would be an inefficient use of limited legal aid budgets. There is certainly a case for

ongoing monitoring of the quality of legal aid services, which may be achieved by means of carefully constructed client surveys. Any problems thereby identified, or other proposed cultural changes, would then need to be addressed via the mechanisms identified for the transmission of understandings of quality within the community of family lawyers.

Appendix 1

Commonwealth Legal Aid Guidelines,
July 1997

SCHEDULE 2

COMMONWEALTH PRIORITIES

(AS AT 1 JULY 1997)

Commonwealth priorities are set out below and Commonwealth funds must be used to provide assistance within these priority areas.

If the Commission wishes to expend Commonwealth funds on a grant of legal assistance in any individual case which does not fall within the stated priorities, it may not do so unless:

- a) there are Commonwealth funds available; and
- b) the Commission's proposal to spend Commonwealth funds on that category has been approved by the Commonwealth in writing before the grant of legal assistance is made.

FAMILY LAW

Matters arising under the *Family Law Act*, the *Child Support (Assessment) Act* and the *Child Support (Registration and Collection) Act* limited to:

- a) separate representation of children;
- b) parenting plans and orders;
- c) location and recovery orders;
- d) other orders relating to children;
- e) injunctions relating to family violence;
- f) child support;
- g) child and spousal maintenance;
- h) property orders, where assistance is to be granted in relation to one or more of the above matters; and
- i) dissolution, in exceptional circumstances.

FAMILY LAW PROCESS

Urgent Matters

Protecting the safety of a child or a spouse who is at risk is to be accorded the highest priority in making grants of aid in Family Law.

As a matter of urgency, aid would be granted for an interim order or injunction where:

- (i) a child's safety or welfare is at risk;
- (ii) the applicant's safety is at risk;
- (iii) there is an immediate risk of removal of a child from Australia or to a remoter geographic region with Australia; or
- (iv) other exceptional circumstances exist.

Non-urgent matters

Under normal circumstances aid would not be granted until the parties have been separated for a sufficient period of time to enable them to be sure that there are real issues in dispute. This is referred to by some commissions as the six week rule.

Primary Dispute Resolution

As far as practicable priority should be given to resolving family law matters through non-litigation processes. This would include the use of counselling services to enable the parties to resolve issues in dispute between themselves and other primary dispute resolution services such as the conferencing models currently in use in legal aid commissions. Assistance for litigation should be pursued only as a last resort.

Aid should be granted for primary dispute resolution where:

- (i) the issues for resolution are substantial and there has not been a court order, registered parenting plan, mediation or family law conference in relation to the issues in

dispute in the last two years, unless there has been a material change in circumstances; and

- (ii) the matter does not meet the urgency priority.

Aid should not be granted for primary dispute resolution if:

- (i) there are current investigations or proceedings in relation to child abuse; or
- (ii) there is a current behaviour, including violence, intimidation, control or coercion that jeopardises a party's safety or ability to effectively negotiate; or
- (iii) there is documentary or other clear evidence establishing the refusal or unwillingness of the other party to attend; or
- (iv) there are practical difficulties which cannot be overcome, such as the geographical distance between the parties or the unavailability of a dispute resolution service in the applicant's region.

Agreements and Consent Orders

Where parties agree about arrangements, assistance may be granted to register an agreement, parenting plan or consent orders if:

- (i) formal court orders are necessary; and
- (ii) a registrar of the magistrates court or the Family Court or a community legal centre or advice service cannot help the applicant to prepare and register a parenting plan and consent orders.

SCHEDULE 3
COMMONWEALTH GUIDELINES
Legal Assistance in Respect of Matters Arising Under
Commonwealth Laws

INTRODUCTION

Legal assistance may be granted in respect of applications which meet:

- the means test; and
- the guidelines; and
- the merits test;

and which arise under Commonwealth law and which are specified as priority matters.

In the ordinary course of events, the tests will be applied in the above order.

THE MEANS TEST

Except as specified in the guidelines, the means test shall apply in all matters where a grant of aid is sought.

Unless specifically varied by the Commonwealth, the means test to be applied shall be the means test used by the Commission at the date of the application for assistance.

THE MERITS TEST

The merits test is to be applied to all initial applications, extensions and appeals.

The merits test has three facets:

- legal and factual merits — the “reasonable prospects of success” test;
- the “ordinarily prudent self-funding litigant” test; and
- the “appropriateness of spending limited public legal aid funds” test

The “Reasonable Prospects of Success” Test

Where it appears on the information, evidence and material provided to the Commission that the proposed actions, applications, or defences for which legal aid funding is sought have no reasonable prospects of success, then legal aid is rejected.

In respect of some matters, the guidelines provide for a merit threshold greater than “reasonable prospects of success”. In all areas of the law, those prospects of success described or estimated at “50%/50%”, “about even”, or “as good a chance of winning as losing” do not satisfy the reasonable prospects of success test, except where other exceptional circumstances can additionally be demonstrated.

The “Ordinarily Prudent Self Funding Litigant” Test

It must be recognised that legal aid is a benefit funded by Australian taxpayers. Many taxpayers who are above the means test threshold for the granting of legal assistance have their own access to justice constrained in whole or in part because of limited financial resources. To reduce the inequity between those who have access to assistance and those who are marginally excluded, the Commonwealth seeks to have strategies adopted which will provide solutions to assisted clients’ problems at a minimum cost. The approach to litigation of an “ordinarily prudent self-funding litigant”, one without “deep pockets”, would be to seek to resolve the matter within a specified, limited dollar allocation.

Where it is considered that the “ordinarily prudent self-funding litigant” would not risk his or her funds in proceedings, then neither will limited legal aid funds be risked in proceedings.

The clear aim is to put assisted litigants into an equal but not better position than private litigants without “deep pockets” who risk their own funds.

The “Appropriateness of Spending Limited Public Legal Aid Funds” Test

The Commonwealth has numerous competing interests for its legal aid resources, and therefore as part of its Merits Test, it also needs to be satisfied that the matter for which an initial grant of legal assistance or an extension is sought, is an appropriate expenditure of public legal aid funds. Examples are:

- (a) A clear example of inappropriate expenditure (and accordingly assistance is refused) is where it is sought to make an application to the Court to dispense with a spouse’s consent to a passport, so that the applicant and child can travel or proceed overseas. It is considered by the Commonwealth that the contingent documentary costs of overseas travel should properly form part of the overall expense of the trip, and is not an appropriate matter in which to grant legal assistance.
- (b) Some aspects of contact and property disputes – where the issue appears to be of such minor significance in relationship to the legal costs which will be incurred, e.g. who will pay for the bus fare/taxi fare etc on the visit, who washes the clothes, provides the morning or afternoon tea etc, then again the Commission will decline to use its funds for such purposes.

GRANTS OF LEGAL ASSISTANCE INVOLVING BOTH COMMONWEALTH AND STATE LAW

Aid may be provided to persons requiring a grant of legal assistance involving both Commonwealth and State laws if in the nature of the legal problem and the course of its resolution, the matter is essentially Commonwealth. If it is essentially State, the Commonwealth would expect the matter to be funded using State funds. If the matter is neither essentially Commonwealth nor State, but a substantial mix of both, the Commonwealth will pay for the proportion of the total costs based upon an estimate by the LAC of the percentage of the work done under the grant which is attributable to Commonwealth law.

FAMILY LAW

Guideline 1 – Child Representation

In no circumstances should this Guideline be interpreted to indicate that there is an obligation on the Commission to make a grant of assistance because a court has ordered that a child representative be appointed.

- 1.1 The Commission may grant assistance for child representation if the Family Court requests the Commission to arrange the child representation of a child.
- 1.2 In this Guideline the matter includes any parenting dispute but especially involving the residence of, and contact with the same child or children.

[Note: See also the guideline on cost ceilings in family law]

- 1.3 Where the Commission meets the total costs of the child representation and there are one or more parties who are not in receipt of legal assistance, the child representative, at the request of the Commission, may seek orders from the Family Court in respect of the amount or relevant portion of the costs of the child representation.

1.4 In this Guideline the relevant portion of the costs is calculated by dividing the anticipated costs of the child representative by the total number of parties to the proceedings.

For example, if there are three parties to proceedings where the costs of the child Representative are \$12,000, the relevant portion for each party is \$4,000. If the two Parties are legally assisted the portion of costs attributable to legally assisted parties is \$8,000.

Guideline 2 – Parenting Orders

2.1 Parenting Orders

The Commission may grant assistance for applications for parenting orders if:

- (i) there is a dispute about a substantial issue; and
- (ii) (a) recent primary dispute resolution has not resolved the dispute;
- (b) the other party has recently refused or failed to attend primary dispute resolution; or
- (c) primary dispute resolution is inappropriate or impractical.

2.2 Discharge or Amendment of Parenting Orders

If a court has made parenting orders or a parenting plan has been registered, the Commission will not usually grant assistance to discharge or amend the plan or orders unless:

- (i) there has been a material change in circumstances and there is a dispute about a substantial issue; and
- (a) recent primary dispute resolution processes have not resolved the dispute;
- (b) the other party has recently refused or failed to attend primary dispute resolution; or

- (c) primary dispute resolution is inappropriate or impractical; and
- (ii) there are special circumstances which suggest that the application is likely to be successful, for example,
 - (a) evidence of violence or physical or mental harm to the applicant and/or a child;
 - (b) the likelihood of future violence or physical or mental harm, to the applicant or a child;
 - (c) the removal or risk of removal of a child from the applicant where the applicant has primary residence responsibilities;
 - (d) the removal or risk of removal of a child from the jurisdiction of the court; or
 - (e) the party with primary residence responsibilities needs to move permanently overseas, interstate or elsewhere with a child and another person unreasonably refuses his/her consent.

2.3 Third Parties

Aid may be made available to third parties (non parents) in proceedings for parenting orders only where:

- (i) the party has had a history of substantial caring for and beneficial contact with the child, or
- (ii) exceptional circumstances exist, for example where the child's safety or welfare is at risk.

Guideline 3 – Child Maintenance/Child Support

3.1 The Commission offers two services to stage 1 parents:

- (i) Child Support Service for parents in receipt of Commonwealth benefits Seeking maintenance or increased maintenance; and

- (ii) Liable Parents Information Service for liable parents making applications for variation, discharge or suspension of maintenance.

3.2 Stage 1 Parents

Stage 1 parents are the parents of a child born before 1 October 1989, who never lived together or who separated before 1 October 1989.

The Commission will not usually grant assistance to Stage 1 parents but will refer them to one of its services or to a community legal centre service.

The Commission may grant assistance to Stage 1 parents if use of one of the Commission's services or a community legal centre service is not appropriate because;

- (i) the case is very complex;
- (ii) the applicant needs urgent orders;
- (iii) it is impractical for the applicant to use a Commission or community legal centre service or a similar service
- (iv) the applicant will not benefit from attending a Commission service because of a language or literacy problem, or an intellectual, psychiatric or physical disability;
- (v) the Commission has granted assistance for other proceedings and maintenance is ancillary to, but cannot be separated from, those proceedings;
- (vi) the child is over the age of 18;
- (vii) the applicant is defending an application for a child maintenance order or increased maintenance; or
- (viii) in the case of apparent liability for maintenance, paternity is in dispute.

3.3 Stage 2 Parents

Stage 2 parents are parents of children born after 1 October 1989 or parents of children born before 1 October 1989 who separated after that date. The Child Support Agency assesses and collects their child support payments.

The Commission may grant assistance for an application for a departure order in the following

Circumstances:

- (i) if the applicant seeks departure from an administrative assessment made before 1 July 1992 or wishes to oppose an application for a departure order; or
- (ii) if a Child Support Review officer has made an administrative assessment and the applicant is not satisfied with the decision.

The Commission will usually limit the grant of assistance to Magistrates' Court proceedings.

3.4 Applicant children

The Commission may grant assistance to a child seeking maintenance, child support or variation of maintenance or child support order under stage 1.

Guideline 4 — Arrears of Maintenance or Child Support

4.1 The Commission may grant assistance to recover arrears of maintenance or child support if:

- (i) neither a Magistrates' Court nor Family Court registrar nor the Child Support Agency will assist the applicant to enforce the order and the services of a solicitor are necessary; or
- (ii) another family law problem, apart from the non-payment of maintenance is involved, for example, property proceedings.

Guideline 5 – Spouse Maintenance

5.1 Applicants

The Commission may grant assistance to applicants seeking orders for spouse maintenance or variation of spouse maintenance if the applicant:

- (i) cannot obtain maintenance or a variation of maintenance by consent; and
- (ii) the respondent can be located and can afford to pay maintenance or increased maintenance.

5.2 Respondents

The Commission may grant assistance to applicants to defend applications for spouse maintenance or applications to increase spouse maintenance if:

- (i) it is unlikely that the court will make an order for the amount which the applicant's spouse seeks; and
- (ii) the services of a solicitor are necessary.

Guideline 6 – Paternity

6.1 Applicant Mother

If the Commission's Child Support Service cannot assist, the Commission may grant assistance to an applicant seeking a finding of paternity, including an order for parentage testing, if:

- (i) the father denies he is the father of the child; and
- (ii) the father can be located and can afford to pay maintenance for the child.

If the Commission grants assistance for parentage testing the applicant must also seek an order for the father to pay the costs of the testing.

6.2 Respondent Father

The Commission may grant assistance to an applicant who wishes to defend an application for a finding of paternity if:

- (i) the applicant denies that he is the father of the child, and
- (ii) the applicant has sufficient evidence to support his denial of paternity and agrees to submit to parentage testing.

Guideline 7 – Dissolution (Divorce) Proceedings

7.1 The Commission may grant assistance for applications for dissolution of marriage if:

- (i) dissolution of the marriage is imperative, for example, if dissolution of the marriage may end continued harassment or ill-treatment of the applicant by the spouse; or
- (ii) the applicant suffers special hardship, for example the applicant would not benefit from going to a divorce class because of a language or literacy problem or an intellectual, psychiatric or physical disability.

Guideline 8 – Property Proceedings

8.1 The Commission may grant assistance for property proceedings if there is evidence that the separation is final, for example, the parties have been separated for 6 months or more, and

- (i) in the case of real estate,
 - (a) the applicant is likely to retain the family home; and
 - (b) the applicant cannot borrow sufficient funds both to buy the other party's interest in the family home and pay the anticipated legal costs of the proceedings.

The applicant should obtain a letter from his/her lending authority confirming that he/she has asked for a loan to pay for legal costs and, if possible, advising the amount which he/she can borrow.

- (ii) in the case of personal property, the application relates to funds from which the applicant can only receive a deferred benefit, for example, superannuation benefits.

8.2 The Commission will usually limit the grant of assistance to proceedings in court if the equity of the matrimonial property in dispute is valued at less than \$20,000.

8.3 The Commission will not usually grant assistance for property proceedings if the value of the equity of the property in dispute is less than \$10,000, but may grant assistance for negotiations.

Guideline 9 – Travel Applications

9.1 The Commission will not usually grant assistance for travel applications.

Guideline 10 – Adoption

10.1 The Commission will not usually grant assistance for parties:

- (i) seeking an order for adoption; or
- (ii) seeking to oppose the making of an order for adoption.

10.2 The Commission may grant assistance for a child representative if:

- (i) the adoption proceedings are contested;
- (ii) an application has been made to dispense with the consent of a natural parent; or
- (iii) an application has been made to discharge an order for adoption.

Guideline 11 – Change of Name

11.1 The Commission will not usually grant assistance for change of name applications.

COSTS CEILING (CAPS) FAMILY LAW

Aid in family law grants in matters commenced after 1st July 1997 will be limited to:

- (i) a ceiling on party professional costs (including counsel, expert reports and other disbursements) of \$10,000;
- (ii) a ceiling on the child's representative's costs (including counsel, expert reports and other disbursements) of \$15,000.

A matter includes any dispute involving the same parties about the same or substantially the same issue.

If it appears likely that the costs ceiling will be exceeded, the case should be handled in-house wherever possible.

In exceptional circumstances, if it is not possible to limit costs within the ceiling, at the discretion of the Chief Executive Officer a fee package may be negotiated by the Commission to enable the matter to be handled by the private profession.

The package must in all cases be subject to a strict limit on costs which has been negotiated with the service provider. The Chief executive Officer is responsible for ensuring that costs are managed within the limit set.

The Commission must inform the Commonwealth of any case in which the estimated cost exceeds \$10,000.

Appendix 2

File Coding Sheet

FIRM ID _____

CASE ID _____

JUSTICE RESEARCH CENTRE
COMPARISON OF LEGAL SERVICES IN FAMILY LAW
FILE ANALYSIS

1. Date of first instructions

--	--	--

2(a) Date of last item on file

--	--	--

2(b) Date file closed

--	--	--

NOTES

PART I – ACTIVITIES ON THE CASE

3. Court Documents

Type	No. pages (except forms)	Source	Date filed	Court (Family or Local)

TYPE = Forms, affidavits, Orders, subpoenas, financial statements, chronology, etc. For affidavits, note text and annexures separately, and whether witnessed by solicitor or someone else (eg JP).

PAGE: For affidavits, give no. of pages for text, and total pages for annexures.

SOURCE = client, other party, child representative, court, other: specify.

4. Court and ADR Attendances on Behalf of Client

Nature of attendance	Court & presiding officer	Who attended (initials)	Date	Duration	Outcome

NATURE OF ATTENDANCE = mention, directions, conciliation conference, pre-hearing conference, compliance conference, interim hearing, final hearing, Legal Aid conference, etc.

COURT = Family/Local/Magistrates Court

PRESIDING OFFICER = Registrar, Judicial Registrar, Judge, Magistrate.

WHO ATTENDED = who attended on behalf of client

OUTCOME = eg. adjournment, consent orders, order to attend counselling, order to appoint child representative, order to file documents, interim orders, final orders, partial agreement, etc

5. Office Activities ONLY COUNT ITEMS RELATING TO THE CLIENT'S FAMILY LAW MATTER

Fill in the number of folios, calls or attendances for each category for each stage of the case. Adjust as necessary if no interim orders. 1 folio = 100 words; calculate 3 folios per page. Give or estimate total duration of personal attendances for each stage.

LETTERS: include memos to process servers, filing services, etc.

TELEPHONE CALLS: don't include messages, unless lengthy information left or received

	First instructions to Form 7/7A	Form 7 to interim orders	Interim orders to hearing or settlement	After hearing or settlement
<i>(a) Letters from solicitor</i>				
<i>(b) Phone calls 5 minutes or less</i>				
<i>(c) Phone calls more than 5 mins</i>				
<i>(d) Perusal of documents</i>				
<i>(e) Internal Legal Aid documents</i> (specify standard docs)				
<i>(f) Docs/letters to Legal Aid</i>				
<i>(g) Docs/letters from Legal Aid</i>				

	First instructions to Form 7/7A	Form 7 to interim orders	Interim orders to hearing or settlement	After hearing or settlement
<i>(h) Personal attendances w. client</i>				
DURATION				
<i>(i) Personal attendances w. others (specify)</i>				
DURATION				

6. File Summary

(j) Briefs Counsel (purpose) _____

Solicitor advocate (purpose) _____

(k) Faxes How much of solicitor's correspondence was sent by fax? 0.....50.....100

How much correspondence to solicitor was sent by fax? 0.....50.....100

(l) Case involved sale of house? Yes No N/A

(m) Any documents prepared by solicitor inadequate, incomplete or rejected by court?

No Yes (specify) _____

(n) Solicitor dealings with: (circle all that apply)

client other party other solicitor child representative intervenor/s

Family Court Local Court Legal Aid Commission government agency/ies

valuer O30A expert health/medical practitioner/s social/community worker/s

family member/s of party/ies other witness/es (specify) _____

interpreter service filing service process server estate agent/conveyancer

barrister/s other (specify) _____

(o) Solicitor's case management practices

	Never	Sometimes	Usually	Always
Confirmed instructions in writing?				
Gave advice in writing?				
Sent client copies of letters to other side?				
Sought client's response to material from other side?				
Returned calls within 24 hours?				
Notified client of court attendances in writing?				
Responded promptly to correspondence?				

(p) Demands placed on solicitor: Frequent phone calls/letters from client

Frequent phone calls/letters from other party Other (specify) _____

(q) Solicitor's approach: followed all client's instructions/identified with client

directed client on appropriate process directed client on reasonable outcome

other _____

PART II – SUMMARY INFORMATION

7. Client Demographics

(a) Sex (circle) Male Female

(b) Year of birth 19_____

(c) Postcode at beginning of case

(d) Language background (circle) English-speaking Non-English speaking ↓

- required interpreter? N / Y → provided by solicitor? N / Y provided in court? N / Y

(e) Was client in paid employment at beginning of case? (circle and enter details as necessary)

Yes → occupation _____

No → unemployed home duties student other (specify) _____

(f) Gross income at beginning of case \$ _____ per week OR \$ _____ per annum

- major source of income (circle) self partner social security other (specify) _____

(g) Factors affecting handling of case (tick all that apply)

	Client	Other Party
Alcohol problems		
Drug problems		
Psychiatric problems		
Violence (allegedly perpetrated by: Indicate if dv order obtained)		
Child abuse (allegedly perpetrated by: Indicate if officially substantiated)		
English language problems		
English literacy problems		
Cultural/religious issues		
Non-compliance with agreements/ breaches of orders		
Acting independently of solicitor		
Other (specify)		

8. Representation

(a) *Client's funding status* (circle) self-funded legal aid both
- if legal aid or both, was grant terminated or limited in any way?

No Yes (specify) _____

(b) *Other party's funding status* (circle)

legal aid self-funded self-representing unknown other (specify) _____
↓
private solicitor OR Legal Aid office

9. The Case

(a) *Nature of matter* (circle) children property both

- number of children (enter "n/a" if no children involved)

- type of property (circle all relevant) matrimonial home household possessions

personal property car/s cash/bank account other real estate business
superannuation debts other (specify) _____

(b) *Client was* (circle) applicant respondent

(c) *Was a child representative appointed?* (circle) No Yes

(d) *Total number of parties, apart from a child representative*

(e) *Issues in dispute* (circle all that apply)

residence contact parental responsibility specific issues property division
sole use & occupation spouse maintenance child support/maintenance dissolution
injunctions/restraining orders (specify) _____
other (specify) _____

10. Dispute Resolution**(a) Courts involved**

(specify Family Court Registry/ies) _____

(specify location of Local/Magistrates Court/s) _____

(b) Family Court case management track (circle) direct standard complex none**(c) Out of Court dispute resolution processes used** (circle all that apply)

negotiation between parties negotiation between solicitors solicitor negotiation with o.p.

Legal Aid conference Family Court counselling Family Court mediation

private/community-based mediation other (specify) _____

(d) Did the case involve enforcement proceedings? (circle all that apply, and enter number of enforcement applications as necessary)No Yes, re. property → number Yes, re. children → number **(e) At what stage was the case finally resolved?** _____**- if not resolved, give reason** _____**(f) Finally resolved by** (circle all that apply, number in order of occurrence, and specify which matters were resolved)

___ agreement between parties: not formalised _____

___ agreement between parties: Form 12A _____

___ agreement between parties: other consent orders _____

___ judgment following contest – in favour of client / other party _____

___ default judgment / struck out / dismissed – in favour of client / other party _____

___ withdrawn – by client / other party _____

___ other (specify) _____

11. Outcome

(a) PARENTING orders sought in the original Form 7/7A

(b) PARENTING outcome

(c) FINANCIAL orders sought in the original Form 7/7A

(d) FINANCIAL outcome

PART III – COSTS

12. If the case was (wholly or partially) LEGALLY-AIDED:

(If case was partially legally-aided and partially self-funded, also answer Q.13)

(a) Stage funded to _____

(b) Amount of funding received/expended

stage of matter grants/commitment value prior to hearing \$ _____

disbursements prior to hearing \$ _____ interpreter fees \$ _____

for interim hearing: solicitor \$ _____ ; barrister \$ _____

for final hearing: solicitor \$ _____ ; barrister \$ _____

(c) Client contribution assessed \$ _____

(d) Client contribution collected? yes partly not yet no: written off

13. If case was (wholly or partially) SELF-FUNDED:**(a) Was client provided with a costs estimate at the outset of the case?**

No Yes → amount: \$ _____

(b) Basis of billing for professional fees (circle)

scale hourly rate flat fee per stage flat fee overall

other (specify) _____

(c) Billing frequency (circle) monthly quarterly single bill at end

other (specify) _____

- *accounts itemised?* No Yes**(d) Total amounts billed for**

solicitors' fees \$ _____ counsel fees \$ _____

experts \$ _____ interpreter fees \$ _____

disbursements \$ _____

other (specify) \$ _____

(e) Was there any form of dispute over the bill? (circle) No → go to 14. Yes- *was there a taxation of costs in the Family Court?* (circle) No Yes

- initiated by (circle) client solicitor ↓ other party

- did the dispute result in the alteration of any of the above figures?

(circle and enter details as necessary)

No Yes (specify) _____

14. Costs orders: (circle and specify amounts as relevant)

None In client's favour: \$ _____ Against client: \$ _____

PART IV – LEGAL PERSONNEL INVOLVED IN THE CASE ON CLIENT'S BEHALF

Initials	Position	Role in case	Years in practice	Accredited Specialist?	% work in family law	% legal aid work in FL

POSITIONS =
 (in law firm): partner, senior associate, associate, employee solicitor, clerk;
 (in LAC): practice manager, senior solicitor, solicitor-advocate, solicitor;
 (barristers): QC/Senior Counsel, junior barrister.

END OF CODING SHEET

Appendix 3

Lawyer Interview Questions

**LEGAL SERVICES IN FAMILY LAW:
PART TWO**

Practice Information

FIRM NAME: _____

FIRM NO. (our ref.): _____

a) No. of partners in practice: _____

b) No. of family law partners: _____

c) No. of family law employees: _____

d) Est. % of (adult) family law work legally-aided: _____

e) Est. % of family law work on child representation matters: _____

f) Est. % of fee income earned in family law: _____

g) How is work distributed between partners/employees in family law matters involving:

i) property (partners)_____ (employees)_____

ii) children (partners)_____ (employees)_____

iii) child representation (partners)_____ (employees)_____

iv) other [specify:_____]

(partners)_____ (employees)_____

FIRM ID _____

CASE ID _____

Lawyer Interview Schedule

Prompts emerging from perusal of the file:

1. **Time:** Any comments regarding how long this matter took to resolve?

2. **Difficulty level:** Check impressions from Q 6(p) and Q. 7 (g) on file. Do you think this was a difficult case? What made it difficult?

3. **Court/other solicitors:** Any comments regarding the other solicitor or the Family Court in this case?

4. **Experience:** NB: Part IV on File Analysis sheet

5. **Outcome:** [ref. Q 10 and 11]: Did your client win or lose?

6. **Costs:** [ref. Pt 3] How much work done on the file was done pro bono? (both outside the grant of aid, or free re self-funding clients)

7. **Any other things on form not clear from file?**

Open-Ended Questions

[NB: these questions relate to ALL interviewed solicitors]

[quality of service/lawyering]

- 1) What are the 3 most important skills of a family lawyer? How important have other lawyers been in helping you develop your skills? (prompt: re supervision when first in practice) What other factors have influenced your development as a family lawyer?
- 2) What is your attitude to other family practitioners who behave dishonestly or aggressively? What proportion are in that category?
- 3) What personal characteristics do you think are essential in order to be a good family lawyer? Can they be learnt through experience?
- 4) Do you feel a need to draw boundaries with your clients? How do you balance this with the need to 'be on their side'?
- 5) How important are the client's expectations in determining how you run a matter?
- 6) How much emphasis do you place on a client's personal difficulties and history when determining strategies for the case? [prompts: dv, language, culture, sexual abuse etc etc]

[time]

- 7) What aspect of family law work is the most time consuming?
- 8) What are the principal causes of delay in family law cases?
- 9) How often do new elements arise during a case? How do you deal with them?
- 10) Is your work evenly distributed throughout a case or clustered? If clustered, when do you put in your time and why? [ie: practice management processes, periodic file review etc]
- 11) **[QLD SOLICITORS ONLY]** We understand that LAQ requires you to use pro forma affidavits. Is this the case? If so, does this make you more efficient?
- 12) Can you predict how long a case will take near the start? How? [prompt: is this easier in certain types of cases?]

[cost]

- 13) What are the most expensive elements of family law cases?
- 14) Is it possible to predict the cost of a case near its start? How? If not right at the start, when?
- 15) Does the fact that the other side is legally-aided or self-funded make a difference to case cost or length? If yes, how?

[Legal Aid vs Self-funded]

[NB: the next 4 questions are related specifically to the particular client base of the practice. 'Mixed' refers to a family law practice that delivers service to both legally-aided and self-funded clients]

16) All Private Law Firms

- a) Has there been any change in the amount of legal aid work that you or the firm do in family law? Over what time period have any changes taken place? Why have any changes occurred?
- b) When do you choose to act pro bono on a file (what factors)?
- c) Are you familiar with the term 'unbundled services'? Is it a practice used by your firm as a way of reducing costs, and/or preserving grants in your family law work? Do you have an opinion of unbundled services?

17) Private Law firms (mixed ONLY)

- a) Are there any differences in the kinds of demands you receive from your legally-aided and your self-funded family law clients?
- b) Do you think your, or other solicitors', legally-aided family law clients get better or worse service than self-funded clients? Have there been any changes? When? Why?
- c) Legally-aided clients are subject to a merits test, self-funded clients are not. Does this make any difference to how you run a case?

18) Private Law Firms (mixed, and only LA)

- a) What are the administrative costs to your practice of dealing with the LAC? [ref. Each state's title]
- b) Do you perceive any problems with Legal Aid eligibility guidelines?
- c) Do the low rates paid by Legal Aid affect the way you run your practice and/or cases?

19) Private Law Firms (mixed, and only self-funded)

a) Does the amount that a self-funded family law client can spend on a case influence the running of the case? [prompts: amount of resources, effort, time etc] How? Why?

b) How much work do you do on a speculative or conditional fee basis in family law? When and why?

[NB: these questions relate to ALL interviewed solicitors]

[process]

20) What difference does it make to your strategy if one side is legally-aided and one side is not?

21) When is it best to settle, and when is it best to go to court in family law cases?
[prompt: what factors, or actors in the system, influence your decision?]

22) Is there an expectation that family law cases should settle? From whom?

23) Do you encourage clients to go to community-based mediation? How many of your clients have already been to community-based mediation before they come to you? Does it help? Do you offer mediation services?

[outcome]

24) How often does a case conclude in a way that you foresaw earlier on in the case? If not right at the start of the case, when can you predict the outcome?

25) How often do you brief counsel? When and why? [prompt: any difference between legally-aided and self-funded cases?]

26) In your practice experience, what is the normal range of outcomes in: a) property, and b) children's matters?

[quality of service/lawyering]

27) What motivates you in your family law work?
[Prompts: Is your motivation level affected by i) the type of client; ii) the type of case; iii) the form of payment?]

28) Do you feel satisfied with the service you are able to provide to your family law clients?
[prompts: LA/non-LA; clients with different financial means, clients with special needs?]

29) [NB: not SA] Are you an accredited specialist in family law? If yes, why did you choose to become accredited? If no, why not, and do you intend to ever become accredited?

30) Does your firm have a procedure for dealing with client complaints?

31) Does your firm have any formal policies on staff supervision and/or training

32) What kinds of resources do you have to carry out legal research?

33) Does your practice have in-house Quality standards? [if so, request ONE copy per practice]

34) Is there anything we haven't asked about your practice, or the state of family law generally, that you feel that we should know?

Appendix 4

Client Survey

Justice Research Centre

Legal Services in Family Law Client Survey

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Recently you gave permission for us to send you this survey to help us with our research. We are looking at legal services provided to different kinds of clients with family law disputes. We hope that the research will identify any inequalities in legal services, and lead to a better understanding of good legal services in the family law field.

As a condition of your participation we **guarantee to protect your individual privacy and confidentiality**. Information you provide will not be revealed in any way to your lawyer or anyone else. Results will be reported only as numbers and percentages. You will not be personally identifiable or able to be identified in any reports of the research.

We would appreciate it very much if you would take the time to answer the following questions. It should take only about 15 minutes to complete the survey. We are interested in your personal opinion of the service you received from your lawyer and believe that your opinions, and those of other clients participating in the survey, matter. Please do not worry if your responses seem subjective.

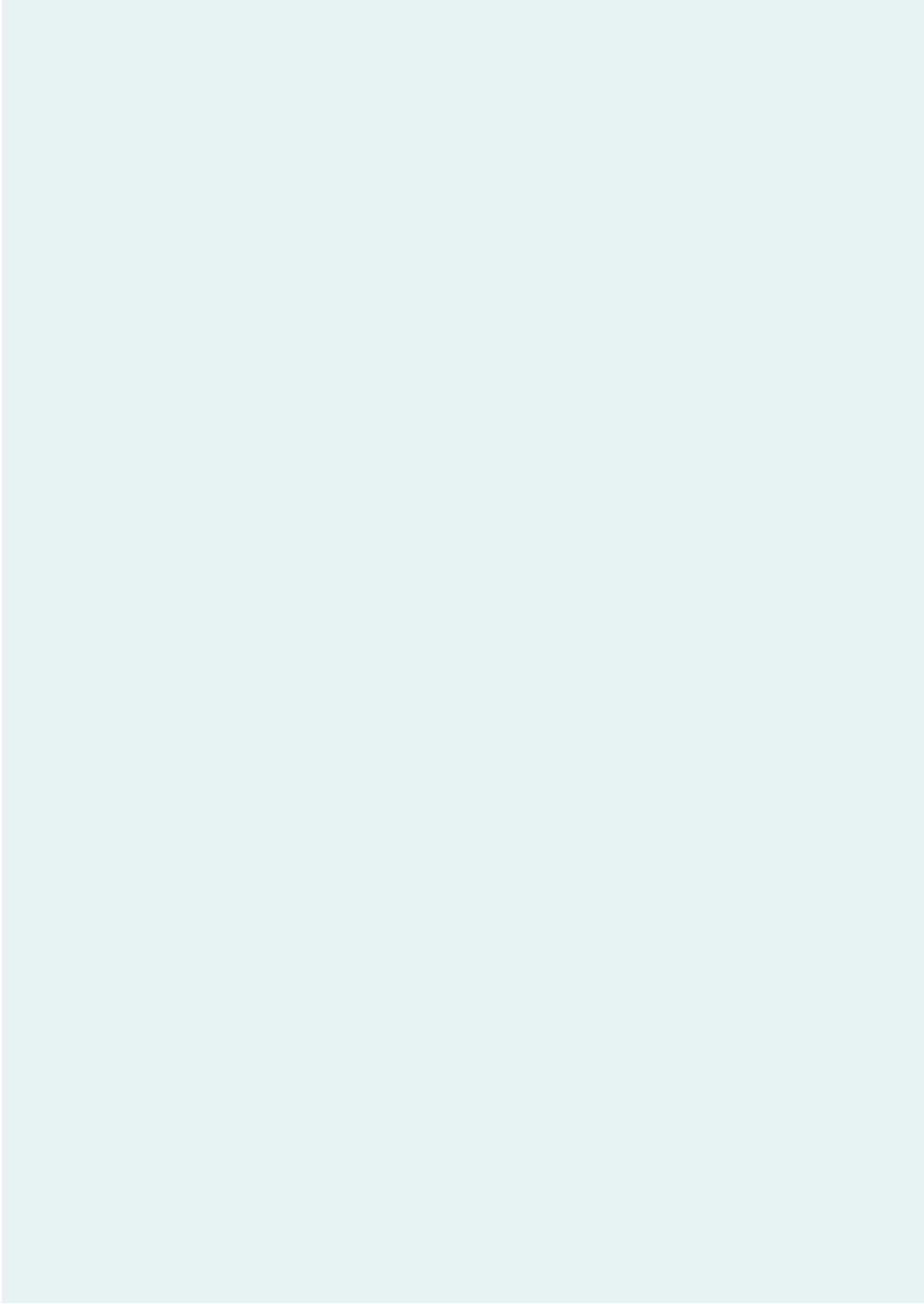
This is an **anonymous questionnaire**, so please do not write your name or the name of your lawyer on the questionnaire.

- If you have any questions
 - If you would prefer to do the survey by telephone
 - If you need an interpreter to help you to answer the survey
- please call Rosemary Hunter, Ann Genovese or Natalina Nheu on our toll free number 1 800 062 543.

When you have finished, please return the questionnaire in the enclosed postage paid envelope. If you lose your envelope, please mail the survey to GPO Box 232, Sydney NSW 2001.

Please return the survey before **Friday, 28 May 1999**.

Thank you very much for your assistance.



Justice Research Centre Legal Services in Family Law Study

These questions relate to your recent family law matter.

A Your Case and Costs

- 1** Was your case about: (please tick **ALL** that apply)
- Your child(ren)
 Your property or financial issues
 Can't remember/don't know
- 2** Did your child(ren) have their own lawyer?
- yes
 no
- 3** Did your former partner: (please tick **ALL** that apply)
- Pay for their lawyer
 Receive Legal Aid
 Represent themselves
 Other (please specify) ▼

 Don't know
- 4** Did your former partner have more money to spend on the case than you?
- No ► **Go to Question 5**
 Yes ▼
 Do you feel that this had an effect on your case?
- No
 Yes (please describe) ▼
- 5** Were you satisfied with your lawyer?
- very dissatisfied ← → very satisfied
- 6** Did you apply for legal aid?
- Yes ► **Go to Question 7**
 No ► **Go to Question 16**
 Don't know ► **Go to Question 7**
- 7** Did you receive a grant of legal aid?
- Yes ► **Go to Question 8**
 No ► **Go to Question 16**

(a) Legal Aid Clients

- 8** Was your lawyer:
- in a Legal Aid office
 in a private law firm
 don't know
- 9** Were you required to make a contribution to legal aid for your case?
- Yes ► **Go to Question 10**
 No ► **Go to Question 11**
 Don't know ► **Go to Question 11**
- 10** How much were you required to contribute?
- \$
 Other (please specify) ▼

 Don't know
- 11** Did you receive legal aid for all of your case?
- Yes
 No (please specify what was **NOT** covered by legal aid) ▼

 Don't know
- 12** Was your legal aid grant terminated?
- Yes ▷ Legal Aid decided your case wasn't worth pursuing
 ▷ You had used all the money that Legal Aid gave to your case
 ▷ Legal Aid decided you could afford to pay for yourself
 ▷ Your lawyer never explained why
 ▷ You don't know/can't remember
 No
 Don't know
- 13** How strongly do you agree with the following statement: 'The fact that I had Legal Aid prevented me from taking my case as far as I would have liked'.
- strongly disagree ← → strongly agree
- 14** Do you think you would have had a better **outcome** if you had been able to pay for your own lawyer?
- Yes
 No
 Don't know

- 15** Do you think you would have had a better **lawyer** if you had been able to pay for one yourself? (**after completing this question, go to Question 23**)
- Yes
 No
 Don't know

(b) Self-funded Clients

- 16** Approximately how much did you pay your lawyer in total?
- Less than \$1000
 \$1001–\$5000
 \$5001–\$10 000
 \$10 001–\$20 000
 \$20 001–\$50 000
 \$50 001–\$100 000
 \$100 000+

- 17** Considering what had to be done in your case, do you think that the total bill from your lawyer was:
- Too high
 About right
 A low price
 No opinion

- 18** Did your lawyer advise you in writing or enter into a costs agreement with you about the fees that he or she would charge?
- Yes
 No
 Don't know

- 19** How strongly do you agree with the following statement: 'The cost of my lawyer prevented me from taking my case as far as I would have liked'
- strongly disagree ← → strongly agree

- 20** Did you feel as if you received value for money from your lawyer?
- Yes
 No
 Don't know

- 21** Do you think you would have had a better **lawyer** if you had been eligible for legal aid?
- Yes
 No
 Don't know

- 22** Do you think you would have got a better **outcome** if you had been eligible for legal aid?
- Yes
 No
 Don't know

B The Process Used to Resolve Your Case

- 23** Did you or your lawyer try any of the following to resolve your case? (please tick **ALL** boxes that apply)
- Family Court counselling
 Mediation
 Legal Aid Conference
 Discussions between your lawyer and your former partner and/or their lawyer
 A conciliation conference
 A judge decided it
 Other (please specify) ▼

 Can't remember/don't know

- 24** Overall, did you think that these methods were:
- very unfair ← → very fair

- 25** Considering what had to be done in your case, were you satisfied with the total time that it took to resolve?
- very dissatisfied ← → very satisfied

- 26** If you thought your case took too long to resolve, please indicate who you thought was **most** responsible for the delay (please tick **ONE** box)
- The Family Court
 Your former partner
 You
 Your lawyer
 The child(ren)'s lawyer
 Other (please specify) ▼

 Don't know
 Not applicable

C Your Lawyer

When you first decided to see a lawyer, you probably had some ideas about what you hoped to achieve, or how your case would be resolved.

27 Did your lawyer advise you that these expectations were

- Very reasonable
- Somewhat reasonable
- Somewhat unreasonable
- Very unreasonable
- Can't remember
- We did not discuss my expectations

28 Did your expectations change after discussions with your lawyer?

- Yes ► **Go to Question 29**
- No ► **Go to Question 30**
- Don't know ► **Go to Question 30**

29 If your expectations did change, how did you feel about that? (please describe)

.....

.....

.....

30 Was there anything that you felt was important to your case that your lawyer never asked about?

- Yes (please specify) ▼

.....

.....

- No

31 IMPORTANT: This question asks a number of things relating to the quality of the service your lawyer gave you. One of our aims in this section is to identify the elements of a good service in family law. Although the questions appear similar, they are different. Please take your time to consider each on its merits.

How strongly do you agree with the following statements about your lawyer?

- She/he listened to me

strongly disagree ← → strongly agree
- She/he understood my situation

strongly disagree ← → strongly agree

- She/he responded to my telephone calls within 24 hours

strongly disagree ← → strongly agree

- She/he explained what would most likely happen to me

strongly disagree ← → strongly agree

- She/he made me feel like I had some control over my case

strongly disagree ← → strongly agree

- She/he spoke to me in a way that I could understand

strongly disagree ← → strongly agree

- She/he gave me advice in writing that I could understand

strongly disagree ← → strongly agree

- She/he was honest

strongly disagree ← → strongly agree

- She/he showed concern for the well-being of my child(ren)

strongly disagree ← → strongly agree

- She/he explained all of my options

strongly disagree ← → strongly agree

- She/he kept me informed of what was happening in the case

strongly disagree ← → strongly agree

- She/he handled the other side well

strongly disagree ← → strongly agree

- She/he acted in my best interests

strongly disagree ← → strongly agree

32 Did you believe that your lawyer's knowledge about the law and court process was:

- very poor ← → very good

33 Would you use the same lawyer again if you had another family law matter?

- Yes
- No
- Don't Know

D Outcomes

34 How strongly do you agree with the following statements?

■ The result in my case was what I expected before I saw my lawyer

strongly disagree ← → strongly agree

■ The result in my case was the same as what my lawyer led me to expect

strongly disagree ← → strongly agree

■ Overall, I felt that the legal system treated me fairly

strongly disagree ← → strongly agree

■ I felt that I had some control over the result of my case

strongly disagree ← → strongly agree

■ The result in my case was in my child(ren)'s best interests

strongly disagree ← → strongly agree

35 Do you feel that you won or lost your case?

- won
- lost
- neither
- both
- other (please specify) ▼

.....

36 Overall, how satisfied were you with the result in your case?

very dissatisfied ← → very satisfied

37 If you were **not** satisfied with the result of your case, who do you consider was **most** responsible? (please tick **ONE** box)

- The Family Court/Judge
- Your former partner
- You
- Your lawyer
- The child(ren)'s lawyer
- Other (please specify) ▼

.....

- Don't know
- Not applicable

E General Questions

38 Are you:

- Female
- Male

39 What is your year of birth?

19.....

40 What was your employment status at the start of your case?

- Working full-time
- Working part-time or casually
- Unemployed
- Not in the workforce ▷
 - home duties
 - full-time student
 - pensioner
 - retired

Other (please specify) ▼

.....

41 What was your main occupation at the start of your case? ▼

.....

42 What was your yearly income before tax at the start of your case?

- \$0–\$10 000
- \$10 001–\$20 000
- \$20 001–\$30 000
- \$30 001–\$40 000
- \$40 001–\$50 000
- \$50 001–\$60 000
- \$60 001–\$80 000
- \$80 001–\$100 000
- \$100 000+

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The Justice Research Centre supports the development of legal policy and effective justice system reform with high quality research. The impetus for establishing the Centre was that in the past much law reform debate was based on impressions and anecdotes rather than systematic and objective research data and analysis.

The Centre is recognised nationally and internationally for influential research which is characterised by a sophisticated policy perspective combined with an empirical approach to issues and rigorous standards of quality, objectivity and independence.

The research program

Our research examines all aspects of the justice system including the policies that shape it, the behaviour of the people who participate in it, the operation of its institutions and processes, and its social and economic effects on the community.

The Justice Research Centre's research program is broadly focussed, across four major areas —

- the judicial process, courts and dispute resolution
- the legal profession and legal services
- human rights and access to justice
- compensation and insurance regimes

The Centre's research projects are addressed to significant — often controversial — justice issues, where our results make a substantial contribution to policy development and law reform.

How we operate

The Justice Research Centre is an independent public interest research organisation. Its research is influential because of its quality and objectivity.

Core funding is received from the Law Foundation of New South Wales, but the Centre is increasingly dependent on support from other sources. The Centre actively seeks financial support from justice system ‘stakeholders’ to whom our work has value because it improves policy development and law reform outcomes. The Centre has received grants and donations from federal and state governments and from private sector organisations

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