QUEENSLAND PUBLIC INTEREST LAW CLEARING HOUSE INCORPORATED

SUBMISSION TO LEGAL AID QUEENSLAND'S REVIEW OF THE CIVIL LAW LEGAL AID SCHEME (CLLAS)

INTRODUCTION

What is QPILCH?

The Queensland Public Interest Law Clearing House Incorporated (QPILCH) is a non-profit community based legal service that coordinates the provision of pro bono legal services in public interest matters. QPILCH also provides direct services through targeted projects, including the Homeless Persons' Legal Clinic, the Administrative Law Clinic, and the Consumer Law Advice Clinic.

Why did QPILCH prepare this submission?

Despite the availability of some free and low cost legal services, many people are denied access to legal services, the courts and justice, particularly in civil law.

It is a well known fact that insufficient funding impedes the effectiveness of legal aid. However, civil legal aid faces an additional obstacle, because in the last decade, throughout Australia, there has been a marked redirection of legal aid funding away from civil matters, towards criminal and (to a lesser extent) family law matters. Combined with the narrowing of the means test, the result of this redirection is the number of people who have access to justice in civil law matters is seriously limited.

This view is supported by several significant studies, including the Senate Legal and Constitutional References Committee's 'Legal Aid and Access to Justice' report (June 2004); J Dewar, J Giddings and S Parker (1998) *Griffith Legal Aid Report: The Impact of Changes in Legal Aid on Criminal and Family Law Practice in Queensland*, Griffith University Socio-Legal Research Centre; and the Scottish Legal Aid Board (SLAB) "Legal Aid in a Changing World". This latter study found: less people were eligible for legal aid, those who were eligible were put off by the size of contributions payable, people find it difficult to access civil legal aid because fewer solicitors offer the service, and policy changes have a significant impact.

CLLAS and schemes like it are integral to expanding access to the legal system, but it is underutilised and presents an opportunity for greater use through structural change. We believe that CLLAS should be re-examined in the context of free and low cost civil law services generally and the provision of speculative law services in particular if it is to fully play a role in facilitating legal services for those in need. We support all attempts to increase access to the legal system.

Structure of this submission

This paper:

- examines the operation of conditional legal assistance funds in general and CLLAS in particular;
- comments on the changes proposed by the Legal Aid Queensland (LAQ) discussion paper;
- discusses a number of issues arising from this information and makes further recommendations to improve the CLLAS system; and finally
- assembles information on other similar Conditional Legal Assistance Funds (CLAFs) in other states and territories, as well as a brief international perspective provided by examination of a CLAF in Hong Kong – attached as Appendix A.

WHAT IS CLLAS?

The increasing strictures on legal aid funding at Commonwealth and state level have resulted in an increase in the number of people who are ineligible for legal aid in relation to a growing list of civil law matters that fall outside the mandate and resources of the system. In some instances, these legal issues may have a serious impact on an individual who has substantial legal merit, but the individual involved is unable to pursue legal redress due to the financial constraints of running a civil action in the courts. This isolates a sector of the community who enjoy very limited access to justice due to a priority funding system that places civil litigation low on the scale of competing legal needs.

The sector of the community which cannot afford private legal assistance or obtain legal aid is getting bigger (see Chapter 3 of Law Council of Australia (2001) 2010: A Discussion Paper – Challenges for the Legal Profession). The Law Council of Australia has stated:

> The cost of justice is rising and unlikely to be reduced. At the same time, the user pays philosophy has had a significant effect on legal aid. In real terms, Commonwealth funding has been significantly cut over the last 5 years. The Commonwealth Attorney-General has noted that "legal aid has never been, and will never be, available to everyone. It is a means of providing legal representation for the most needy members of the community, not of generally funding people's private disputes. (LCA Report, pp 58-59)

A number of possible options outside the traditional legal aid system are available to expand access to justice in civil law areas currently not covered by legal aid. One option that has been implemented in several Australian states and territories, and in some international jurisdictions, is the establishment of a conditional legal assistance fund (CLAF). This refers to a scheme whereby the financial assistance is provided only for civil litigation, and usually only in cases in which the assisted person may recover a monetary award. These schemes are restricted to financial assistance for disbursements and can also include other legal costs, and are limited to circumstances prescribed by the parameters of the scheme. CLLAS is one such scheme.

The term 'conditional legal assistance (or aid) fund' (CLAF) is not precisely defined, and definitions will vary. Schemes are variously referred to as CLAFs, litigation

lending, contingency lending schemes, disbursement assistance schemes and litigation support funds. However described, there are two basic approaches:[1]

- schemes that cover partial, or total, legal fees and disbursements for litigation
- schemes that only cover disbursements for litigation.

A key characteristic of a CLAF is that it can support only litigation which results in a money outcome (award and costs) and therefore only cases that go before a court or tribunal with power to award costs: a litigant is provided with assistance on the basis that if they are successful they will repay the CLAF at least the amount borrowed and, in some cases, a fee as a premium for the risk of the matter not being successful. For unsuccessful matters the litigant is not under any obligation to repay the amount borrowed. Depending on the conditions of the scheme, an unsuccessful plaintiff may still have to pay the other side's costs. In short, CLAFs provide small short-term loans, sometimes interest free, that are not repayable in the event litigation is unsuccessful.

The requirement for repayment of the moneys outlaid and in some cases a small levy on the award is necessary as a source of income, because most CLAFs are established to be financially viable, thereby continuing as self-sustaining schemes and not dependent on public subsidy. Financial viability can be defined as:

- requiring only moderate injection capital for its maintenance
- maintaining sufficient recurrent capital for its activities
- achieving a return at least equal to the opportunity cost of the organisation investing those funds.[2]

CLAFs vary in the way that the fee is calculated. These can include:

- charging an interest rate on the amount borrowed
- charging a percentage of the damages awarded, in jurisdictions where this is legal (contingency fee)
- charging a maximum or fixed fee
- imposing no fee, or only a small administrative charge.[3]

OVERVIEW OF CLLAS

In July 1992 Legal Aid Queensland (LAQ) decided to cease funding civil law matters where there is a power in a court or tribunal to award costs. LAQ continues to assist some specific civil law areas as determined by Commonwealth and State guidelines (see QPILCH Submission to Legal Aid Queensland's Review of Civil Law Services at www.qpilch.org.au/publications). In May 1993 the Civil Law Legal Aid Scheme (CLLAS) was introduced to make up for the associated shortfall in legal services to impecunious plaintiffs who had civil law matters with valid legal merit in cases not specifically covered by LAQ guidelines or other low cost services.

The scheme was an initiative of the Minister for Justice and the Attorney-General, and was intended to bridge the gap caused as a result of the changes in legal aid policy. Unlike some other CLAFs, CLLAS is not a managed fund. Rather, the Public Trustee

[1] Much of this discussion draws from chapter 10 of Access to Justice Advisory Committee (1994) *Access to Justice: an Action Plan,* Commonwealth of Australia.
[2] Law & Justice Foundation of New South Wales (1999), para 4.
[3] Factors taken from Law & Justice Foundation of New South Wales (1999), para 6.

of Queensland provides funds for cases approved under the scheme, and Legal Aid Queensland carries out administration of CLLAS.[4] As far as we are aware, the Public Trustee has approved all requests recommended by LAQ. Within the Legal Aid Queensland structure, the Civil Law Legal Aid Scheme is coordinated by the Grants sector.[5]

CLLAS in a nutshell

Available to: individuals residing in Queensland
Application Fee: None
Types of Cases: The Scheme considers all civil litigation cases, including business and commercial disputes but personal injury cases receive the greatest share (24%) as shown in the 2004-2005 annual report. In recent years the Scheme has expanded its guidelines to include aid for public interest and test cases.[6]
Excludes: Criminal and Family matters.
Merits Test: In deciding whether to grant aid, the Committee members consider the following aspects of the applicant's claim:
(a) The legal merits of the case, i.e. reasonable prospects of success;
(b) The nature and extent of any benefit the applicant will gain if aid is granted;
(c) The detriment the applicant may suffer if aid is refused;
(d) If the matter is of public interest or is a test case.
Means Test: All applications for aid submitted to CLLAS are subject to the Legal Aid Queensland means test.[7] Applicant must provide proof of their financial means (income and assets), including recent pay slips, copies of pension card or health care card, current account statements from bank or financial institutions. Where the applicant is financially eligible, the application is referred to the Scheme's Advisory Committee. Should the applicant be financially ineligible, the application is refused.
Contribution: If the applicant is just above the means test for Legal Aid, they may be asked to contribute a small amount to their solicitor, which will help to pay some of the costs of their claim.[8]
Financial Assistance: CLLAS will fund outlays identified in a budget forecast by the legal firm representing the applicant. For matters where aid is approved to progress to trial, the solicitor will be paid $2,000 in cases in the District and Supreme Courts and $500 in the Magistrates Court, on account of professional fees for work completed and to be completed up to and including the trial and disbursements.[9] Disbursements include filing fees, medical reports, but excludes barristers' fees. At the conclusion of the matter, the applicant is required to repay to the Scheme the total amount of the funding provided if there is a successful outcome. However, if the matter is unsuccessful, there is no repayment required.[10]

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[4] Legal Aid Queensland, 'Civil Law Legal Aid Scheme', http://www.legalaid.qld.gov.au/legalhelp/services/cllas/cllas.htm.
[5] Legal Aid Queensland (2004) *Annual Report 2003-2004*, p 49.
[6] See n 4.
[7] Legal Aid Queensland, 'Factsheet 02 – the Legal Aid Queensland Means Test', http://www.legalaid.qld.gov.au/publications/factsheets/PDFs/meanstest2005.pdf
[8] See n 7.
[9] See n 7.
[10] Legal Aid Queensland, 'Civil Law Legal Aid Scheme,' http://www.legalaid.qld.gov.au/legalhelp/services/cllas/cllas.htm.

Management and administration

All applications for assistance under CLLAS are referred to the Advisory Committee for determination.

The Committee may refuse the application if not enough information is provided for them to be able to carry out a proper assessment.

The decision as to funding is made on a consensus basis; usually applications are decided by individual Committee members and recorded.[11] The composition of the advisory committee has not been made public.

Firm panel

Legal firms on the Scheme's Special List have agreed to speculate their professional fees for CLLAS clients until the successful conclusion of the claim.

The guidelines provide that the applicant must approach a practitioner who is on the Civil Law Legal Aid Scheme's list of practitioners.[12] The applicant must submit a standard Legal Aid Queensland application which must be accompanied by a covering letter from the practitioner providing information about: the claim, nature and extent of injuries, details of likely cost of disbursements to be incurred in litigation, assessment of prospects, and quantum and basis of that opinion.[13]

Additionally, it is a requirement that the individual is represented by a solicitor before applying to CLLAS,[14] and that they have already obtained legal advice as to the potential success of their claim.[15] However, we understand that these guidelines have been informally relaxed and applications for legal aid that are unsuccessful but may qualify for CLLAS are referred to the scheme for assessment.

CLLAS maintains a list of 218 firms of which only 70 are currently active users of the scheme.

The Operations of CLLAS

Data on the operation of CLLAS is difficult to access. We have only recently obtained a range of statistical data on the operation of CLLAS for the 2004-05 year from the CLLAS annual report. This document has not been previously published, and the information on CLLAS operations in the LAQ annual report is brief. However, the Public Trustee of Queensland's Annual Report for the 2003-2004 financial year reports that at the end of that financial year the outstanding outlays provided by the Public Trustee to the fund were $753,514 of which the amount of $42,974.00 'was abandoned as unrecoverable when cases were completed unsuccessfully', that is, where the litigation did not result in a monetary award for the client of the scheme.[16]

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[11] See n 7.
[12] Legal Aid Queensland, 'Civil Law Legal Aid Scheme – Solicitors Guide', http://www.legalaid.qld.gov.au/legalhelp/services/cllas/docs/solicitors_guide.pdf, p 1.
[13] Legal Aid Queensland, 'Civil Law Legal Aid Scheme – Solicitors Guide', http://www.legalaid.qld.gov.au/legalhelp/services/cllas/docs/solicitors_guide.pdf, p 2.
[14] Legal Aid Queensland, 'Civil Law Legal Aid Scheme – Solicitors Guide', http://www.legalaid.qld.gov.au/legalhelp/services/cllas/docs/solicitors_guide.pdf, p 1.
[15] Legal Aid Queensland, 'Civil Law Legal Aid Scheme', http://www.legalaid.qld.gov.au/legalhelp/services/cllas/cllas.htm
[16] The Public Trustee of Queensland (2004), p 9.

In 2002-2003 the cost to the Public Trustee of running the civil law legal aid scheme (presumably before repayments as this amount is reported as lower in other sections of the report) was: $238,000 in 2003 and $276,000 in 2002.[17]

Attached in Appendix A is an outline of other Australian CLAFs a Hong Kong CLAF.

RESPONSE TO DISCUSSION PAPER

Scope of the Review

The consultation paper states that the scope of the review entails:

1. The current processes of the Civil Law Legal Aid Scheme, including operational performance, intake processes for CLLAS applications, approval processes for granting aid on CLLAS matters, the scheme's funding model and cost recovery process, the file review process, and the panel of approved firms.
2. The impact of the changing legislative environment.
3. The future direction of CLLAS.

However, the consultation paper itself limits discussion to five issues for comment:

1. Should CLLAS guidelines be updated to allow funding for personal injury claims where estimated quantum falls below the threshold where costs can be awarded under related legislation?
2. Should CLLAS guidelines be amended to allow aid to be considered for any civil action where a firm is willing to act on a speculative basis, the applicant cannot obtain assistance from any other source, and there are reasonable prospects of success for the action?
3. Should CLLAS guidelines be amended to allow aid to be considered for an opinion from Counsel at any time in settlement proceedings where it is deemed appropriate?
4. Should CLLAS expand its guidelines to allow consideration for reasonable outlays associated with public interest and test case matters where a member firm of QPILCH has agreed to act on a pro bono basis?
5. Given the current civil law market place and legislative environment, where should the Civil Law Legal Aid Scheme position itself and what should its key priorities be?

Issues and Proposed Solutions – for Comment

Issue 1 for Comment

Should CLLAS guidelines be updated to allow funding for personal injury claims where estimated quantum falls below the threshold where costs can be awarded under related legislation?

The consultation paper has the following discussion in relation to issue 1:

> The scheme's guidelines allow aid to be considered for any civil litigation matter that is to be dealt with in the state jurisdiction where there is no grant of aid available from Legal Aid Queensland and where costs can be awarded.
>
> In recent times, the scheme has been providing assistance for personal injuries claims where costs are no longer awarded due to legislative changes. Firms are willing to

[17] The Public Trustee of Queensland (2004), p 63.

> continue to speculate their professional fees for these smaller claims; however they are reluctant to fund outlays.
>
> If the scheme were to cease assisting with these claims, people with limited means would be less likely to gain compensation for their injuries.

This question should be answered in the affirmative.

Issue 2 for Comment

Should CLLAS guidelines be amended to allow aid to be considered for any civil action where a firm is willing to act on a speculative basis, the applicant cannot obtain assistance from any other source, and there are reasonable prospects of success for the action?

The consultation paper has the following discussion:

> When considering applications, the Advisory Committee takes into account the legal merit of the claim, the nature and extent of potential benefit to the applicant if aid is approved, and any detriment to the applicant, if aid is not approved. In formulating its recommendation, the Advisory Committee has regard to the financial viability of the scheme and may give priority to:
>
> (a) cases involving children;
> (b) personal injury cases;
> (c) cases where, if not litigated, the applicant may lose their home or livelihood.
>
> The scheme's guidelines allow aid to be provided for public interest matters, test case matters and business or commercial disputes.
>
> In recent times, the scheme has considered assisting with any civil action where a firm is willing to act on a speculative basis, the applicant cannot obtain assistance from any other source and there are reasonable prospects of success for the action. This degree of flexibility allows the scheme to provide relevant and appropriate assistance where it would not otherwise be available.
>
> The basic principle that priority may be given to actions involving children, personal injuries cases, and cases where the applicant may lose their home or livelihood would remain.
>
> The scheme's Advisory Committee can approve aid either for specified outlays or for stages of preparation, eg. on a medical negligence claim, the committee may approve aid for a medico-legal report to investigate liability (negligence and/or breach of duty). In this case no further aid will be provided until that report is obtained and the committee has reviewed the report. For claims where liability has been admitted and quantum is significant, the Advisory Committee may approve aid for reasonable outlays required to prepare the matter for settlement (a staged grant of aid).

Assuming this means that it will apply where costs cannot be awarded but damages can result, this question should also be answered in the affirmative.

Issue 3 for Comment

Should CLLAS guidelines be amended to allow aid to be considered for an opinion from Counsel at any time in settlement proceedings where it is deemed appropriate?

The consultation paper has the following discussion:

> Counsel involved in matters funded by the scheme are briefed on a speculative basis.
>
> Currently the scheme's guidelines only allow for an opinion from Counsel after close of pleadings and a matter is ready for trial. In a number of circumstances it is beneficial for a firm, and the scheme, to obtain an opinion from Counsel on prospects of success and/or liability at an earlier stage in proceedings. It would be desirable if the scheme's guidelines could allow aid to be considered for an opinion from Counsel at any time in settlement proceedings where it is deemed appropriate for an opinion to be obtained.

It was contemplated in LAQ's broader civil law review that the Commonwealth guidelines should be amended so that legal aid would be available for:
"(a) an investigation into and report on the merits of a case, or
(b) the mediation of a dispute."

We submit that this should similarly apply under CLLAS, that is, the proposal should be extended to permit briefing of counsel at any stage when necessary and used to encourage resolution of the dispute at an early stage (see also later).

Issue 4 for Comment
Should CLLAS expand its guidelines to allow consideration for reasonable outlays associated with public interest and test case matters where a member firm of QPILCH has agreed to act on a pro bono basis?

The consultation paper has the following discussion:

> Queensland Public Interest Law Clearing House (QPILCH) draws on the resources of the legal profession to provide pro bono legal services, advice and assistance in targeted areas of law and assessment, research and referral services.
>
> CLLAS guidelines allow funding for public interest and test case matters, but the scheme does not fund a large number of these cases.
>
> Currently CLLAS guidelines require firms to speculate their fees and for the firm to be on the scheme's list of approved firms. It is proposed that CLLAS expand its guidelines to allow consideration for reasonable outlays associated with public interest and test case matters where a member firm of QPILCH has agreed to act on a pro bono basis.

This question should be answered in the affirmative, but so long as it includes cases where costs awards and damages are unavailable, such as before the Guardianship and Administration Tribunal, so where the costs paid are not expected to be returned to the scheme.

For example, QPILCH referred an important and meritorious Guardianship and Administration Tribunal case to a member firm willing to act on a pro bono basis. However, to properly act for the client, the firm would have incurred significant costs to obtain medical reports etc which it was not prepared to carry. There are no disbursement funds which can assist in these circumstances.

Issue 5 for Comment
Given the current civil law market place and legislative environment, where should the Civil Law Legal Aid Scheme position itself and what should its key priorities be?

The consultation paper has the following discussion:

> **Changing Environment and Future Direction**
>
> In response to increasing community concerns, the Queensland Government has introduced several legislative changes that have affected the way that compensation claims are dealt with prior to them entering the court system.
>
> Recent tort law reforms have the combined effect of restricting the circumstances where costs can be awarded in personal injury claims. The flow-on affect is that solicitors are no longer as willing to speculate their fees on smaller personal injury claims where costs are either not awarded or are capped. As the scheme relies upon solicitors taking matters on a speculative basis, a negative impact on the scheme is inevitable.
>
> It is now timely that Legal Aid Queensland and the Public Trust Office review where the scheme sits within the current environment, and develop a plan for future direction and development.

In short, we submit that more work needs to be done before this question can be answered. For example, priorities can only be considered on the basis of determined and emerging need and with the benefit of input from stakeholders outside Legal Aid Queensland and Public Trust Office. See further discussion below.

ISSUES FOR FURTHER DISCUSSION

We submit that we need a disbursement fund that meets all the needs of Queenslanders who cannot obtain legal aid or afford private representation in civil law matters. The current operation of CLLAS permits a number of types of worthy cases to 'fall between the cracks'. The fund should be responsive to need and flexible in approach, and prepared to make a greater contribution to funding just outcomes within the broad civil justice system.

In the following discussion, we are not necessarily submitting that these ideas should be implemented. Rather, we are raising them as issues for discussion that should be tested through further research.

Review of CLLAS

In our submission to LAQ's civil law review we stated:

> LAQ is currently developing a consultation paper to review the Civil Law Legal Aid Scheme (CLLAS).
>
> References to CLLAS in the consultation paper are only passing. Yet CLLAS offers an opportunity to enhance civil law casework if it is managed to best effect.

> The paper recognises that CLLAS is underutilised and speculative work generally is decreasing, which suggests that it is an issue worthy of closer and more detailed examination if the aim is to enhance civil law services.
>
> In our view, however, CLLAS is so integral to consideration of civil law services, it should be considered with the other issues raised in the paper. This reinforces our view that the paper is premature.
>
> We make specific reference in our comments to how CLLAS could operate more broadly.

We stand by the view that CLLAS should be examined more broadly in the context of free and low cost civil law services generally and the provision of speculative law services in particular.

The consultation paper states:

> It is therefore timely that there should be a review of the scheme's performance and operations, and its place in the wider civil law market place, to ensure that it continues to provide a relevant and appropriate service to the community.

The consultation paper includes a summary of the recommendations of a review of CLLAS that was conducted by LAQ but which has not been made public:

1. The scheme frequently receives referrals from Legal Aid Queensland where applicants have applied for aid for a civil law problem, but the matter is not one that Legal Aid Queensland will fund. These applications are referred to CLLAS if it is apparent that the claim is one that would fit within the scheme's guidelines. Currently there is no documented process to follow when transferring an application to CLLAS. A referral protocol will be developed.
2. An electronic copy of the Legal Aid application form was developed in response to firms' requests, but feedback indicates it is not user-friendly. Legal Aid Queensland will investigate developing a more user-friendly and efficient electronic form.
3. All applicants are required to sign a Client's Acknowledgement when aid is first approved for their claim. The Acknowledgement stipulates that if a matter settles successfully the applicant must repay the scheme any funding provided by the scheme before the representing firm disburses the funds to the applicant. Although firms currently sign the Acknowledgement, the form is worded in such a manner that it can be interpreted that it is only the client who is agreeing to the terms of the Acknowledgement. The Client's Acknowledgement will be updated to include an acknowledgement from solicitors confirming that they agree to represent the client in accordance with the scheme's guidelines.
4. The Scheme has specific approval and refusal clauses that are utilised. These clauses enable all information that is specific to CLLAS to be readily identifiable and accessible when required for the accurate management of the scheme. The wording for the refusal clause that is utilised is somewhat confusing. The refusal clause utilised by CLLAS for matters suitable for referral to the scheme will be updated.
5. Currently the scheme does not have a formal guide for a cost benefit test. A cost benefit matrix will be developed and utilised by the scheme to ensure that there is uniformity of decision making and that the benefit applicants receive is not absorbed when refunding the scheme and paying solicitors' fees.
6. Legal Aid Queensland will carry out promotional activities to raise awareness of the scheme with referral agencies, the legal profession and the community.

These recommendations relate primarily to technical and procedural issues.

The consultation paper also states that it is proposed to review the CLLAS panel system, but in our submission such a review should be part of this process not a later one.

Participants in this review are hampered by:

- not having access to the full internal review of CLLAS already conducted;
- not knowing the outcomes of the broader civil law review;
- not having a more detailed assessment of comparative approaches; and
- not having sufficient information to consider the impact of recent legislation on speculative law services.

Participants therefore do not have the ability to assist in fulfilling the review's goal of ensuring that CLLAS 'continues to provide a relevant and appropriate service to the community'.

For example, in relation to the last dot point above, while the consultation paper states there has been an impact of recent tort reform and states it "has resulted in a reduction in the number of applications processed under the scheme", the statistics show that the number of applications has increased since the low point in 2003-04. These circumstances need to be more thoroughly examined.

In our view, this review of CLLAS should be considered in a wider context, as part of a broader review of speculative work. This would enable consideration of the role of CLLAS in supporting 'no win, no fee' casework, encouraging early settlement, supporting alternative funding arrangements such as litigation insurance and other forms of litigation lending and resolving costs issues.

Speculative fee arrangements

CLAFs provide an important means for cases with legal merit to proceed to court where ordinarily, due to financial constraints on both the lawyer and the litigant, legal redress was simply unachievable. It is also a means by which smaller firms or independent legal practitioners, who may not be able to bear the associated disbursement costs of running a civil action even on a no-win no-fee arrangement, can offer a legal service to individual cases of legal merit.

However, there are significant attendant risks and problems associated with speculative arrangements, including:

- recent changes to the law (through the *Personal Injuries Proceedings Act 2002* (Qld) (PIPA) and the *Civil Liability Act 2003* (Qld) and other legislation and reforms) have allegedly lead to a decrease in their use by restricting the costs that lawyers can charge
- complaints about abuses by some members of the legal profession, and
- confusion about how speculative arrangements operate.

These circumstances give rise to a number of issues that warrant deeper consideration not afforded by this review because they operate to reduce the attractiveness of speculative fee arrangements.

Costs

Solicitor and own client costs

The risk distribution advantage of CLLAS entails the litigant not having the risk of paying legal fees to their lawyer if their matter is unsuccessful. Therefore, it is only if they gain a monetary award or settlement that they will have to repay any money; they are no more out of pocket if the matter is unsuccessful than they would be if they had never commenced litigation (unless there is an adverse costs order – see later).

In Queensland, before 2003, under some conditional fee arrangements, "successful" matters had resulted in a client paying a total amount of fees that exceeded the court award or settlement amount. Therefore, the *Queensland Law Society Act 1952* (Qld) was amended so that where a client is "successful" in a personal injuries claim, the lawyer cannot charge professional fees of more than half of the net award or settlement received by their client.

While it is understandable that a client would be concerned at a significant reduction of their award through costs, the position of the firm must also be considered. Litigation is costly and time-consuming and the quantum of damages difficult to estimate. NSW legislation, to be adopted in Queensland in 2006, further limits the costs lawyers can charge in damages and other speculative cases. This will potentially place further pressure on speculative casework.

Despite civil law reform over the years, little has been done in terms of effectively reducing the expense of litigation and finding ways to make it more acceptable. Rather, reforms have made it less attractive.

In addition, costs regimes in various areas of law are ad hoc. PIPA made major changes in relation to personal injuries claims (removing costs in claims under $30,000). Costs have also been removed in other jurisdictions, such as in the Queensland Industrial Relations Court (QIRC). In this jurisdiction, larger awards are rarely made and the matter usually focuses on a different sort of outcome, but the cost of the litigation can still be high.

The problem for the litigant is that, if there is a no costs or a limited costs regime, what clients get taken out of any award or settlement by way of costs may leave them with little or nothing. Reforms to personal injuries costs rules do not apply in other areas of law.

For example, this occurs frequently in unfair dismissal cases. A case may be worth only $10,000 or less but it costs from $5,000 (very cheap simple trial) to $20,000 or $30,000 to litigate a case. Most do not proceed to trial. The Commission has also capped damages and awards are notoriously low - very few over about $7,000/$8,000. If there were costs in the Commission, there would be more encouragement to litigate. The problem with contract of employment cases is that they can be very expensive to run in the courts (at least $30,000 to $40,000) and the returns can be very risky. If you have a potentially impecunious employer or are employed by a service company with no assets or you face an employer prepared to throw everything at it, there is little incentive for clients to litigate.

Adverse costs orders

Legal Aid Queensland advises that 'applicants should be aware that if their claim is unsuccessful then there is a possibility that costs could be awarded against them. In these circumstances no funding will be provided by the Scheme towards these costs.'[18] This is an important factor to consider as persons who utilise CLLAS have already demonstrated they are unable to cover the costs of litigation through the means test. Costs associated with litigation may be quite substantial and thus unsuccessful litigants who already have limited resources may find themselves in further financial trouble. A person who has a meritorious claim may baulk at proceeding with litigation if they risk losing their house through an adverse costs order, irrespective of where the costs for their own lawyer comes from. The wealthy and impecunious are not so deterred.

While improved speculative fee arrangements would permit clients to fund their own representation, it would not protect them against an adverse costs order.

Under the *Legal Aid Act 1977* (Qld), a legally aided person or other party may apply to LAQ for the costs ordered by a court against a legally aided person. Under the *Legal Aid Commission Act 1979* (NSW), where costs are awarded against a legally aided person, the Commission will pay the costs and the legally aided person will not be liable for them up to an amount of $5,000. In WA, the Litigation Assistance Fund 'underwrites the risk of an adverse-costs award'. However, that fund has been suspended.

In the UK, where parties are legally aided, they are immune from costs orders.

This can be augmented by costs protection orders, where the court makes an order early in the proceedings limiting a party's liability if they lose. However, these are only ordered in exceptional circumstances (in public interest cases and not in favour of individuals).

It has been proposed in the UK that individuals who are outside the legal aid means test but unable to afford private representation be protected through a costs 'protection certificate'. This is similar to the immunity from costs afforded a fully legally aided person, although staggered according to the person's ability to contribute something should an adverse order be made. The application would be subject to the usual merit assessment and would only be offered where the other party was significantly funded.

Costs protection is not unknown in Australia. Under ss6 and 7 of the *Federal Proceedings (Costs) Act 1981* (Cth), the Federal Court can grant a certificate stating that it would be appropriate for the Attorney-General to authorise payment to the respondent of its costs and any costs incurred by the appellant that the respondent is required to pay where the appeal is successful. This would occur where the respondent has no means and an adverse costs order would cause the respondent undue hardship. Under s8 of the Act, the Court can also issue a costs certificate on the application of a party if it orders a new trial in a civil cause. However, these occur after the event, whereas the UK proposal is for the certificate to be provided early in the proceedings.

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[18] Legal Aid Queensland, 'Civil Law Legal Aid Scheme', http://www.legalaid.qld.gov.au/legalhelp/services/cllas/cllas.htm.

Other problems with speculative arrangements

Recent events have shown that there is significant confusion amongst clients as to what the term "no win, no fee" actually means and difficulties for lawyers in that it requires of the practitioner skills in assessing, managing, spreading and financing risk (Dal Pont 2001, p 402). While this is perhaps easier in personal injuries cases, greater difficulties can arise in other areas of law.

A persistent source of complaint with these arrangements is over differing views of the meaning of 'successful'. Trouble also arises when either the firm changes its view on the client's chances of success or realises the likely award will be too small to cover their costs. There is therefore need for greater awareness of these arrangements.

There are also problems with the way speculative arrangements operate. Even when a matter is unsuccessful, or is not continued, under some conditional fee agreements the client may have to pay the firm. For example, the firm may claim the outlays (expenses incurred by the firm while acting on the client's matter) if not required 'up front' by the firm. In addition, the client is not always aware from the start of the relationship that they may be ordered to pay the costs incurred by the other, winning party. Lack of understanding on the part of some clients or poor returns have lead to dissatisfaction and dispute.

In addition, if the client withdraws their instructions before the case is concluded (or the firm ceases to act for some other reason), the client may be required to pay the firm's professional fees and costs up to that point. This causes problems for the ordinary person who usually does not have the funds to pay, and in any event cannot see logically why they should pay, the firm having promised that you only pay if you win.

It is important for the law governing these agreements to balance the interests of justice and fairness to all parties. Unfortunately, clients seeking these arrangements are often forced to take whatever terms the lawyer offers on a 'take it or leave it' basis, sometimes for good reason, such as where the risk is high. CLLAS could potentially make speculative arrangements more attractive to the profession if it was able to offer benefits to both client and lawyer.

Legislative reform

In 1995, conditional fees for solicitors were introduced in the United Kingdom.[19] This was an alternative to a CLAF in that clients could take out insurance in a specially introduced insurance scheme for all personal injury matters, which in return for a premium paid protected them against paying costs if awarded against them.[20] However, in 1998, the Blair Government proposed in its paper *Access to Justice with Conditional Fees*, that personal injury and most civil matters no longer be covered by legal aid and instead restrictions to conditional fee arrangements be relaxed to cover those matters.[21]

[19] Law & Justice Foundation of New South Wales (1999), para 2.
[20] Law & Justice Foundation of New South Wales (1999), para 2.
[21] Law & Justice Foundation of New South Wales (1999), para 3.

This resulted in the *Access to Justice Act 1999*. This Act establishes the Legal Services Commission, which funds the Community Legal Service. Under this statute there is an obligation on the Commission to prepare a funding code, and the draft code sets out a number of funding priorities and there is a focus on encouraging conditional fee agreements.

Under the *Access to Justice Act 1999* (UK) ('the Act'), lawyers and clients may make conditional fee agreements ('CFAs') for non criminal and non family law proceedings.[22] This includes any sort of proceedings for resolving disputes (not just court proceedings), whether commenced or contemplated. Under a CFA, a lawyer's fees and expenses (or any part of them) will only be payable in specified circumstances. CFAs may also provide for a 'success fee' - an increase in fees in specific circumstances.

The Act also establishes litigation funding agreements ('LFAs'), whereby a third party agrees to fund (in whole or in part) the provision of advocacy or litigation services to another person, and the litigant only agrees to pay a sum to the benefactor in certain circumstances.[23] As with CFAs, LFAs cannot be used for criminal and family law matters and are available for disputes other than court proceedings.

CFAs and LFAs are designed to work in tandem with legal costs insurance. Another major feature of the UK reforms was the ability to recover insurance premiums as part of the costs where a costs order is made in favour of any party who has taken out an insurance policy against the risk of incurring a liability in those proceedings.[24]

The purpose of these reforms was to make justice more affordable and accessible, to discourage weak claims and encourage early settlement. Underlying this was the desire to ease the administrative burden on those providing and purchasing legal services.[25] The reforms coincided with the abolition of legal aid funding for personal injury claims (excluding medical negligence) and a severe cut to legal aid funding for civil matters. The reforms led to some concerns that marginalised people would be pressured into signing unfair 'no win no fee' agreements that provide for a substantial success fee.[26] However, there are safeguards built in to the *Conditional Fee Agreements Regulations 2000* (UK), which require the lawyer to at least orally inform the client of:

(a) the circumstances in which the client may be liable to pay the costs of the legal representative in accordance with the agreement,
(b) the circumstances in which the client may seek assessment of the fees and expenses of the legal representative and the procedure for doing so,
(c) whether the legal representative considers that the client's risk of incurring liability for costs where the client has legal costs insurance for that matter, and

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[22] *Access to Justice Act 1999* (UK), s 27(1).
[23] *Access to Justice Act 1999* (UK), s 28.
[24] *Access to Justice Act 1999* (UK), s 29.
[25] Department for Constitutional Affairs (2003) *Simplifying CFAs*, http://www.dca.gov.uk/consult/confees/cfa.htm.
[26] Citizens Advice Bureau (2004) *No win, no fee, no chance*. http://www.citizensadvice.org.uk/macnn/no_win_no_fee_no_chance-2

(d) whether other methods of financing the costs are available, and, if so, how they apply to the client.[27]

Furthermore, the legal representative must fully inform the client both orally and in writing of the CFA's effect, and if the legal representative considers that any particular method of financing is appropriate (such as obtaining insurance), they must provide reasons for doing so.[28]

Rather than increasing the number of claims (and the number of people accessing the justice system), since the introduction of the UK CFA system, there have been less personal injury claims made each year. Another concern is that CFAs are inappropriate for small claims in the UK, due to rules of 'irrecoverability' of costs in small claims cases – this makes the small claims unattractive for private sector lawyers.

Other approaches

In our submission to the civil law review, we recommended the establishment of two new funds – a full cost fund and an environmental law fund.

The first fund would provide full funding for civil law actions (and other uses such as research), similar to South Australia's *Litigation Assistance Fund*. The purpose of this fund is to assist in cases where a firm cannot be attracted on a speculative or pro bono basis, but the case has prospects of success and an injustice will be done if the applicant is not represented.

The latter fund would fund public interest environmental claims, which are currently unfunded, and where costs and damages awards do not automatically follow the event, although applications for security for costs and damages are frequently made. This fund should be topped up by government annually.

Litigation lending and legal expenses insurance

Litigation lending schemes increase the community's access to justice only when a litigant can make arrangements to cover the professional fees of his or her lawyer, for example, when a lawyer is willing to take the case on a speculative fee basis.[29] This places the individual in a position of being reliant on the willingness of a lawyer to weigh the risks and assess the merits of their claim before even being allowed to approach a forum where their grievances may be heard.

The position of legal expense insurance, giving a worldwide picture, has recently been canvassed in a report prepared for the Queensland Law Society by Dr Julie-Anne Tarr[30].

Currently in Australia, legal expenses insurance ('LEI') is rare, and where it is available, there is little consistency, and what is covered varies greatly between providers. Various forms of LEI have been proposed over time, but in Australia and

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[27] *Conditional Fee Agreements Regulations 2000* (UK), R4.
[28] *Conditional Fee Agreements Regulations 2000* (UK), R4.
[29] Australian Law Reform Commission (1999), para 7.10.
[30] Tarr (2002) *Report on Legal Expenses Insurance for: Access to Justice Committee Queensland Law Society*.

New Zealand, these types of schemes have encountered strong resistance, while a number of civil law jurisdictions have had overwhelming success.

In the UK, however, LEI is prolific and is divided into commercial and personal insurance, with the latter being subdivided into stand alone policies, and policies which add on to an existing policy, such as motor or home and contents insurance. The stand alone policies are less popular, primarily because individuals believe the risk of incurring legal costs (and consequently, their need for LEI) is low, or they believe that they will be covered by legal aid if the need arises. Since the UK *Access to Justice* reforms, the strain on legal aid has been alleviated, and the effectiveness of 'costs risks litigation insurance' (also known as 'after the event insurance') has been enhanced. The *Access to Justice Act 1999* (UK) ('the Act') encourages people contemplating litigation to take out insurance to cover themselves against the risk of having to meet both the costs of the other party and his or her own legal costs if the case is unsuccessful. As noted in our earlier discussion of the Act, LEI premiums are recoverable in costs under the Act.[31]

In Europe, LEI is usually sold to individuals as an add on policy, and generally covers unforeseeable legal expenses, rather than all legal costs a person may incur. There is also a heavy reliance on unions to provide legal advice and services to employees. The provision of LEI is also regulated by the European Union. LEI has had the most success in Europe in countries where the lawyers' fees are modest, the public perception is that they need LEI, and where there are substantial gaps in the legal aid scheme. Empirical research in Europe indicates that the existence of LEI policies has not increased the number of litigious claims. The interaction between LEI and legal aid is different in each country. For example, under Swedish reforms, an application for legal aid will only be successful if it was reasonable in the circumstances for the applicant not to have an LEI policy. Similarly, in Germany, a person will generally not be eligible for legal aid if they are covered by LEI in a particular area.

In Europe, LEI policies generally cover reimbursement of lawyer's fees and the expenses of the opposing parties, subject to overall limits set by the insurer. LEI is most often sought for motor vehicle related legal expenses, but is also commonly provided for claims in tort, criminal defence, property, employment, social security, and, to a lesser extent, contractual matters. The insurance companies will usually stipulate a minimum amount below which will not be litigated, and this helps to discourage frivolous claims.

Common exclusions for European LEI are actions for damages caused by war, riots, civil commotions, nuclear energy, actions based on intellectual property rights, family law, succession, bankruptcy, constitutional or international matters, tax and fiscal matters, and disputes relating to the LEI contract itself. LEI is also unavailable for intentional acts or for incidents prior to obtaining LEI.

In the United States, 'prepaid legal expense plans' are more prevalent than LEI. The US environment is quite different to that of Europe and Australia; the legal aid system is weak and under-funded, and contingency fee arrangements are common, particularly in personal injury matters. Most of the prepaid legal expense plans are

[31] *Access to Justice Act 1999* (UK), s 29.

promoted by unions, funded by employers, and are specifically aimed at providing affordable access to legal assistance for low to middle income earners by way of automatic payroll deduction. Plans usually vary between providers, and contents, quality and scope of the plans are diverse.

South Africa has a sophisticated LEI system covering both civil and criminal matters. The most common form of LEI in South Africa is 'after the event insurance' which is taken out after the litigation has commenced to cover the risk of an adverse award of costs, and is available for court or arbitration proceedings.

The main barrier to LEI in Australia is that consumers generally underestimate or doubt their need to insure for this type of expense.

These issues need to be examined in detail, including consideration by government of consolidated costs legislation to overcome the problems currently operating which deter litigants with meritorious cases. In addition, consideration should be given to CLLAS playing a role in facilitating after the event insurance for matters funded under the scheme to protect against adverse costs orders.

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RECOMMENDATION 2:
WE RECOMMEND THAT OTHER INITIATIVES SUCH AS NEW COSTS FUNDS AND LEGAL EXPENSE INSURANCE BE CONSIDERED IN TANDEM WITH A FULL REVIEW OF SPECULATIVE FEE ARRANGEMENTS TO ENHANCE USE OF SPECULATIVE FEE ARRANGEMENTS AND ACCESS TO THE JUSTICE SYSTEM.

Management and administration

A Separate fund

As stated earlier, the Public Trustee pays for administration of the scheme and the disbursement of funds to firms representing successful applicants.

CLLAS is not a separately managed fund as occurs in other jurisdictions.

We suggest that this is a shortcoming of our scheme because it militates against active management that would facilitate growth of the available funds and therefore expansion of the scheme.

While we understand that no recommendations for funding have been rejected, there is likely a limit to the scheme’s use. It is difficult to see how other initiatives, such as requiring increasing application fees and % contributions (see later), could be implemented under current arrangements.

While CLLAS is cheaper to the applicant compared with most other schemes, any restrictions on expenditure, if there are any, limit its greater utility.

Assessment process

Often, it is difficult, if not impossible to calculate the actual damages and investment that will be required to obtain a recovery until well into a case[32]. Knowing which case will be successful and which case will fail is difficult to determine, especially early on. Therefore, one of the most significant disadvantages of CLAFs is that they are unable to recover all monies lost in litigation.

CLAFs can recover a substantial portion of their outlays. However, this can be due to a scheme picking only clear winners, with other more risky, but nonetheless meritorious cases not being approved. While it is important for them to be self-sustaining, managers should not be so cautious that access to justice is denied in deserving cases.

A more rigorous assessment process balanced with an interest in protecting rights and promoting justice is needed. It is difficult to assess from the case list provided in CLLAS's 2004-05 annual report how this balance is currently achieved.

Application fee

In Queensland when seeking assistant from CLLAS, applicants do not have to pay any application fee.[33] In other jurisdictions applicants are required to pay an application fee, often non-refundable, before they even know whether they will be offered assistance. This application fee can range from $100[34] and even reach $250 in some instances.[35]

While we are conscious of the need not to impose a further hurdle before impecunious applicants, elsewhere in this submission we suggest that CLLAS should be more widely available to people who are outside the LAQ means test. We would submit that should a person qualify within the means test, there be no application fee. However, people of greater means could be required to pay an application fee to make a contribution towards administration costs if this aspect of the scheme is changed.

Contribution

Under CLLAS, grantees can be required to make a contribution to the costs of the lawyer to reduce the amount required from the fund. In some other schemes, if successful, grantees are also required to pay a return to the fund greater than the costs outlaid, usually a percentage of the award.

For the CLLAS applicant, it is a considerable advantage that they do not have to repay any financial assistance provided to them unless their matter is successful; that is, it results in a monetary award for them. Furthermore, if their matter is successful they only have to repay the flat amount of financial assistance that was provided, although they may still have to pay their solicitor's full fees including an uplift (from the costs order and/or award).

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[32] Kritzer (2002), p 1977.
[33] See pages 3-5 above.
[34] See pages 28-36 below.
[35] See pages 28-30 below.

The fact that successful cases are only required to repay the initial outlay provided by the fund will mean that CLLAS is unable to 'top up' the fund in order for it to continue running. The South Australian Litigation Assistance Fund (LAF) which has been running since July 1992[36] provides a good example of how the fund can be 'topped up'. Firstly, the LAF requires a $100 application fee or $250 where it is an urgent matter[37]. Secondly, where litigants under the scheme are successful they are required to reimburse the fund the legal costs and disbursements already paid and an additional 15 per cent of any damages awarded by the court upon settlement. South Australia also has a Disbursement Only Fund (DOF) in place which requires the 'repayment of the disbursements paid by the Fund together with an uplift of 25 per cent to 100 per cent thereof (of costs not damages)[38]'.

Similarly, in Victoria, a litigant provided financial assistance by the Victorian Law Aid Scheme will have to repay, if their matter is successful, all disbursements incurred on their behalf in addition to 5.5 per cent of the award or settlement they obtain in the matter.[39] This element of the Victorian scheme does not maintain a consistency between assisted litigants – those who obtain a larger settlement are required to repay more to the fund. For example, a litigant who is awarded $10,000 is required to repay $550 to the fund on top of the flat repayment. Another litigant who receives a $100,000 award will have to repay $5,500 on top of the flat repayment.

Thus it can be seen that such a regime can result in the applicant litigant having to repay large amounts of money back to the fund, perhaps sometimes in instances where they have suffered a permanent personal injury. This also can be on top of solicitor and own client costs, including an uplift. It can also be seen to be disproportionate to the costs of actually bringing the claim. For instance, the legal costs of bringing a claim may be $40,000 for any one case, but the amount of the sum awarded may vary greatly. Therefore the percentage payable is not proportionate to the actual cost of running the case.

By providing for an additional percentage top up in the recovery of successful claims, CLLAS would be able to ensure the greater funding of future cases.

According to the 2004 Annual Report of Legal Aid Queensland, in 2003–2004, there were 138 successful claims finalised in the year with settlement figures totalling over $11.3 million.[40] Just 5% of this would amount to over $.5M.

Contingency fee agreements, where an agreement provides for all or part of fees or costs to be calculated as a percentage of the award or settlement or the value of property that may be recovered, are prohibited in Queensland. The schemes that permit payment of a percentage of an award are in effect contingency arrangements. There would be a need to exempt CLLAS from the prohibition if this course was adopted.

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[36] Law Society of South Australia, 'Litigation Assistance Fund', http://www.lssa.asn.au/community/services_for_the_community.htm.
[37] See n 49.
[38] See n 46.
[39] See pages 33-34 below.
[40] Legal Aid Queensland (2004), p 54.

This suggestion though should not exclude the funding of cases where monetary awards are not made.

Advisory committee
In our view there is need to review the composition of the advisory committee. We submit that the committee needs to be more representative of the wider profession, including representatives from the QLS, Bar Association and community legal centres.

In addition, the supervising body needs to be more transparent in its activities and decision-making processes. This will ensure greater accountability and assist in understanding the assessment process.

Administration costs
The Public Trustee pays LAQ an amount for administration of the scheme, presumably salary and rent.

The Annual Report of the PTO for 2003-2004 merely reports that during 2002-2003 there was a cost to the Public Trustee of $88,591.00 for both administering and financing CLLAS as well as providing rent relief to the Legal Aid Commission during that period.[41] It is not known what this amount actually refers to.

On the basis of this information, it is difficult to estimate administration costs to date.

RECOMMENDATION 3:
WE RECOMMEND THAT A COMPARATIVE STUDY BE CONDUCTED TO GAUGE THE VARIOUS MERITS OF THE DIFFERENT SCHEMES IN TERMS OF ASSESSMENT, RECOVERY OF GRANTS, AND INCREASE IN THE FUND.

RECOMMENDATION 4:
FOLLOWING THAT STUDY, CONSIDERATION SHOULD BE GIVEN TO WHETHER CLLAS COULD AND SHOULD BE ESTABLISHED AS A SEPARATE FUND AND WHETHER APPLICANTS SHOULD BE REQUIRED TO PAY AN APPLICATION FEE AND GREATER RETURNS TO THE SCHEME.

RECOMMENDATION 5:
WE RECOMMEND THAT THE ADVISORY COMMITTEE'S DECISIONS, PROCESSES AND THE ADMINISTRATIVE COSTS OF THE SCHEME SHOULD BE MADE TRANSPARENT.

RECOMMENDATION 6:
WE RECOMMEND THAT THE ADVISORY COMMITTEE SHOULD INCLUDE REPRESENTATION FROM THE QUEENSLAND LAW SOCIETY, BAR ASSOCIATION AND COMMUNITY LEGAL CENTRES.

[41] See n 18.

A focus on litigation

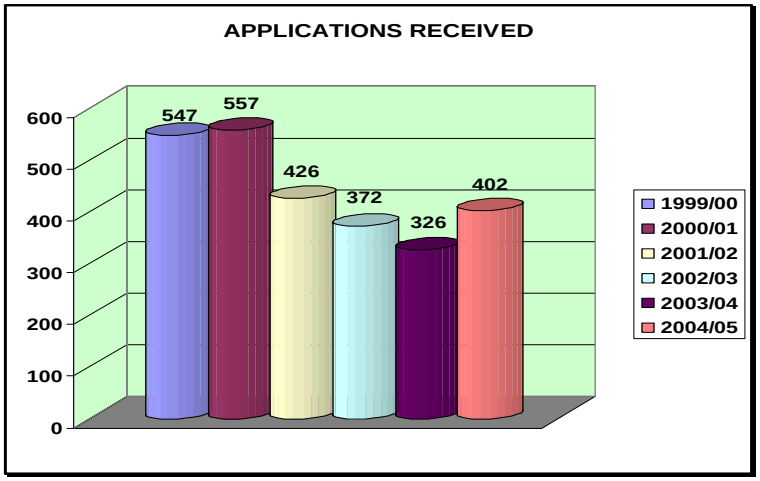
As CLLAS is currently structured, it appears to focus on reaching a final determination of costs and award by the courts. CLLAS could potentially play a role in encouraging litigants to reach an early settlement of proceedings. While all good lawyers will encourage their client to settle when possible and appropriate, and as they are acting on a speculative basis and thus have a strong role to play in negotiations, a common point of disputation between solicitor and client is when the clients feels the settlement is inadequate and forced upon them. Clients may feel let down by their lawyer if they support a "less than adequate" settlement. Another possible inducement to settlement that may be open to a lawyer is, where the lawyer is of the view that the offer is appropriate, to advise their client that they will have to pay less back to CLLAS in the event of settlement. This could be monitored by CLLAS to ensure that the lawyer has not encouraged settlement unnecessarily.

Utilisation

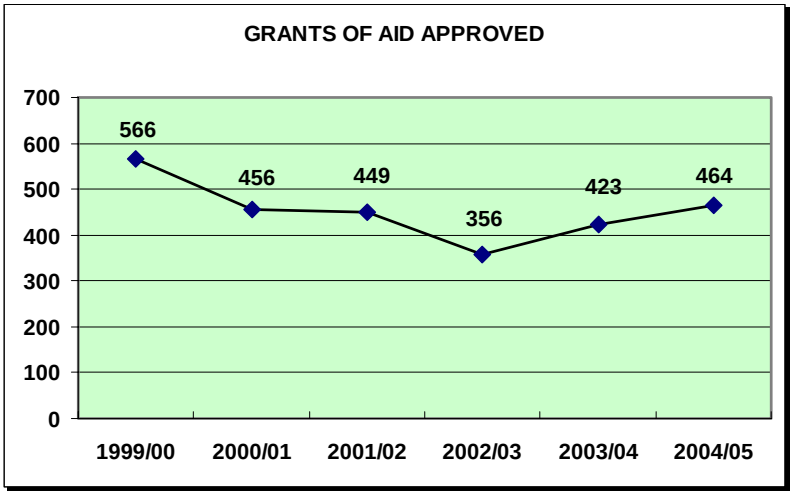
There is minimal information published on the operations of CLLAS. The information provided in the last annual report would indicate that the scheme in Queensland is in fact underutilised, and usage has actually declined in recent years.[42]

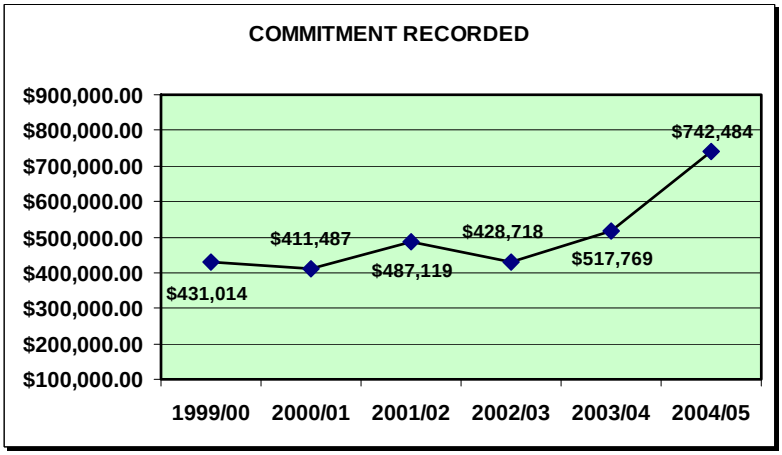
In the period since 1999, there has been an overall fall in the number CLLAS grants; however, over the same period expenditure has risen, due to the fact that costs have increased significantly over the period. In addition, as indicated earlier, both the number of applications and expenditure have risen from a low in 2003-04, although only one year of figures since are available.

The following tables are taken from the CLLAS 2004-05 annual report.



[42] The Public Trustee of Queensland (2003-2004), p. 9. CLLAS Annual Report 2004-2005

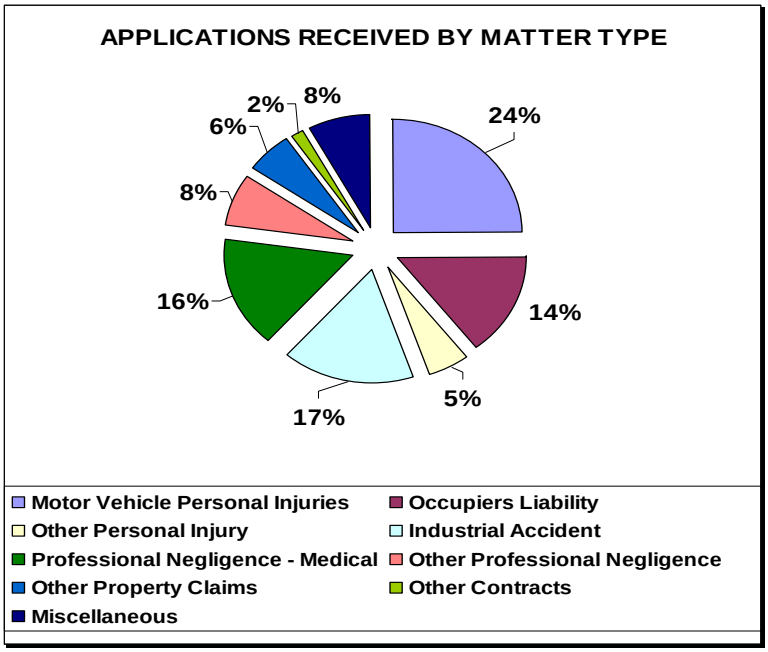




What is more important to note, in our view, is that the total expenditure for CLLAS over its entire almost 13 years of operation is just over $3.3M, of which to date, over $2.2M has been recovered. Therefore, the total cost of the scheme to date (excluding administration costs) has been approximately $1.1M (with some potentially still to be recovered).

Types of matters

According to the consultation paper, the "original intention of the scheme was to give priority to funding cases involving children, personal injury claims and cases where, if not litigated, the applicant would lose their home or livelihood. In recent years the scheme has expanded its guidelines to include aid for public interest and test cases."



The miscellaneous matters referred to in the above chart consist of the following matter types:

Debt	Wills
Discrimination	Other Administrative Law
Defamation	Insurance
Survivorship	Employment
Property - Mortgage	Public Interest Cases

We submit that there should be no limit on the type of case that CLLAS can consider at least in the short term. All civil law cases should be considered, with the option to fund those cases that have the greatest benefit to the community and address the greatest need if the fund's limits are reached.

For example, we cannot see why CLLAS should not also be available in immigration law cases with legal merit, where costs orders are possible or even environmental law cases where costs are not usually awarded but can be in limited circumstances, and be promoted in other areas of law not commonly serviced, such as judicial review.

RECOMMENDATION 7:
WE RECOMMEND THAT THE TYPES OF CASES OPEN TO A CLLAS APPLICATION SHOULD BE UNLIMITED, SUBJECT TO A BROAD DISCRETION IN THE ADVISORY COMMITTEE.

Means test

Persons who wish to utilise CLLAS need to comply with the Legal Aid Queensland means test.[43] The means test determines the eligibility of applicants based on a formula of the applicant's assets and income[44]. The purpose of the means test is to

[43] Legal Aid Queensland, 'Civil Law Legal Aid Scheme', http://www.legalaid.qld.gov.au/legalhelp/services/cllas/cllas.htm.
[44] Legal Aid Queensland, 'Factsheet 02 – the Legal Aid Queensland Means Test', http://www.legalaid.qld.gov.au/publications/factsheets/PDFs/meanstest2005.pdf.

target those who are most in need.[45] There will be circumstances in which persons who are unable to realistically afford the cost of litigation will fall outside the Legal Aid means test. For example, Legal Aid Queensland stipulates that assets will not include 'the house you live in, land purchased on which you are building a home, or cash saved for a home purchase (as long as the contracts for building or purchase have been entered into) unless your equity in the property is more than $146,000.' Therefore, if the applicant has saved money for the purchase of a home but has not yet entered into the relevant contracts, he/she will be ineligible for assistance. Further, if the persons' equity in their place of residence exceeds the $146,000 (which is most likely in the current market) they will also be ineligible for assistance. However, these potential applicants may not have the sufficient income to cover the costs of litigation, and as indicated earlier, this is a growing proportion of the community. Thus, CLLAS in effect may be turning away persons who could still benefit from the scheme but fall outside the scope of the means test.

There are proposals by LAQ to tighten the means test. We have argued against this move (see Submission to Legal Aid Queensland's Review of Financial Eligibility for Legal Assistance at www.qpilch.org.au/publications). We submit that there is a growing chasm between those eligible for legal aid and those who can afford private legal services. We submit that CLLAS, similar to other schemes, should be available to more people who cannot obtain aid and cannot afford private representation.

RECOMMENDATION 8:
WE RECOMMEND THAT CLLAS SHOULD NOT BE LIMITED BY THE LAQ MEANS TEST BUT BY AN EXPANDED TEST THAT TAKES ACCOUNT OF AN APPLICANT'S ABILITY TO PAY FOR PRIVATE REPRESENTATION AND BY A MERIT TEST.

Firm panel

As discussed earlier, the requirement that only firms on the CLLAS panel can submit applications to CLLAS has been relaxed. Nevertheless, we assume that the preferred process is for firms to carry the burden of the assessment process.

We submit that it is in the interest of CLLAS to accept referrals from any source, so long as the proper application form is used and sufficient information is provided to fully assess the request. QPILCH operates a similar assessment scheme and follows a rigorous assessment process with accountability mechanisms to ensure that applications for assistance are assessed to the required standard. From time to time, we refer to counsel to obtain an independent assessment when we do not have the expertise. Hence our earlier recommendation that CLLAS have access to counsel for advice.

Also, LAQ staff should be alert to the possibility of referral to CLLAS of applications submitted by applicants.

We are also of the view that community legal centres be able to undertake CLLAS funded work in test cases within their areas of interest and expertise.

[45] Buck and Stark (2003), p 428.

RECOMMENDATION 9:
WE RECOMMEND THAT CLLAS SHOULD BE ACCESSIBLE BY ANY LAW FIRM AND COMMUNITY LEGAL CENTRE WILLING TO ACT IN THE MATTER ON A SPECULATIVE BASIS AND THAT APPLICATIONS SHOULD BE CONSIDERED FROM ANY SOURCE.

Promotion

CLLAS is based upon the same fundamental principles as other CLAFs operating in other Australian jurisdictions, but fails to be utilised on the scale of the South Australian or Victorian schemes, for example. This can in part be attributed to the amount of publicity that CLLAS receives in comparison with the wide acknowledgement and recognition that the Victorian Law Aid Scheme enjoys. Without adequate publicity and knowledge of the scheme, within the legal profession as well as the public, low use rates will continue.

We note that one outcome of the internal review of CLLAS is that "Legal Aid Queensland will carry out promotional activities to raise awareness of the scheme with referral agencies, the legal profession and the community". We support that initiative. However, we question whether there will be a considerable change in the professions' acceptance and use of CLLAS if other changes are not made to speculative fee arrangements as mentioned above.

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WE RECOMMEND THAT CLLAS SHOULD NOT BE LIMITED BY THE LAQ MEANS TEST, BUT BY AN EXPANDED TEST THAT TAKES ACCOUNT OF AN APPLICANT'S ABILITY TO PAY FOR PRIVATE REPRESENTATION AND BY A MERIT TEST.

RECOMMENDATION 9:
WE RECOMMEND THAT CLLAS SHOULD BE ACCESSIBLE BY ANY LAW FIRM AND COMMUNITY LEGAL CENTRE WILLING TO ACT IN THE MATTER ON A SPECULATIVE BASIS AND THAT APPLICATIONS SHOULD BE CONSIDERED FROM ANY SOURCE.

APPENDIX A

COMPARISIONS WITH OTHER SIMILAR SCHEMES

SOUTH AUSTRALIA

South Australia operates two CLAF schemes, each with different criteria and operations.

The Litigation Assistance Fund

Background: The litigation assistance fund has been running since July 1992[46].
Available to: Individuals and companies[47]. Assistance is limited to the public of South Australia[48].
Application Fee: $100 or $250 where urgency is an issue. This fee is non-refundable[49].
Types of Cases: Commercial disputes, inheritance claims, insurance contract disputes, professional negligence claims, public liability and personal injury claims.[50]
Excludes: Criminal, family and de facto matters.
Merits Test: Considerations include:
(a) prospects of success
(b) likelihood of recovery
(c) matters of public importance[51]
Means Test: Assistance will only be given to applicants who are unable to meet the expected costs of proposed or actual litigation from their own income and assets.[52] Applicant can have an income of up to $70,000 gross, and assets such as house and car, which are of "reasonable" value[53].
Contribution: Having regard to the applicant's financial circumstances the Panel may require the applicant to contribute to the cost of the litigation.[54]
Financial Assistance: The Fund will cover the reasonable legal costs and disbursements of an approved matter[55].
Operation of the Litigation Assistance Fund:
(1) Application to be completed by client and solicitor. The applicant's lawyer must provide details of how the claim will be proved, how any defences will be answered, the amount of damages sought and how it will be proved and an estimate of legal costs[56].

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[46] Law Society of South Australia, 'Litigation Assistance Fund', www.lssa.asn.au/community/laf.htm.
[47] See n 46..
[48] Law Society of South Australia, 'Litigation Assistance Fund – Rules of Application', http://www.lssa.asn.au/community/laf.pdf, Rule 6.
[49] The form to apply for assistance can be found at the Law Society of South Australia webpage, 'Litigation Assistance Fund – Rules of Application', http://www.lssa.asn.au/community/laf.pdf.
[50] See n 46.
[51] See n 46.
[52] Law Society of South Australia, 'Litigation Assistance Fund – Rules of Application', http://www.lssa.asn.au/community/laf.pdf, Rule 11.
[53] See n 46.
[54] Law Society of South Australia, 'Litigation Assistance Fund – Rules of Application', http://www.lssa.asn.au/community/laf.pdf, Rule 14.
[55] National Pro Bono Research Centre, 'The Australian Pro Bono Manual', para 4.5 www.nationalprobono.org.au/probonomanual/ProBono_Manual_04.htm#5.
[56] See n 59.

(2) 'The Manager shall consider each application for assistance in accordance with the Funds Rules and Guidelines and shall make a report to the Assessment Panel with the recommendation for the disposition of the application'.[57]
(3) Must satisfy means and merit test
(4) 'The Assessment Panel shall consider the Manager's report before formulating its advice to the Trustee on the disposition of each application for assistance'.[58]
(5) If the application is successful, the fund will cover "solicitor/client" costs on the scale appropriate to the jurisdiction
(6) The Trustee may at any time after the approval of an application vary, extend, suspend or cancel such assistance in accordance with the grounds outlined in the 'Rules of Litigation Assistance Fund'[59].
(7) If case is successful
- 15 per cent of any award by the Court or upon settlement of each case will go back into the fund; and
- the fund will be reimbursed for the legal costs and disbursements already paid. [60]

Disbursement Only Fund (DOF)

Background: The DOF is an adjunct to the Legal Assistance Fund[61].
Available to: Individuals and companies[62].
Application Fee: $100 or $250 where urgency is an issue. This fee is non-refundable[63].
Types of Cases: Civil and Commercial matters[64].
Excludes: Criminal, family and de facto matters.
Merits Test: Considerations include:
(a) prospects of success
(b) likelihood of recovery
(c) matters of public importance[65]
(d) If it is an application to defend a claim, the counterclaim must exceed the value of the plaintiff's claim.
Means Test: where assets and income available to applicant are insufficient to meet the expected costs of litigation. Application may be rejected if eligible for legal aid.[66]
Contribution: Having regard to the applicant's financial circumstances the Panel may require the applicant to contribute to the cost of the litigation.[67]
Financial Assistance: The Fund provides disbursement assistance such as court filing fees, expert's reports, witness fees, transcript and trial fees[68]. Barristers and Solicitors

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[57] Law Society of South Australia, 'Litigation Assistance Fund – Rules of Application', http://www.lssa.asn.au/community/laf.pdf, Rule 2.
[58] Law Society of South Australia, 'Litigation Assistance Fund – Rules of Application', http://www.lssa.asn.au/community/laf.pdf, Rule 3.
[59] Law Society of South Australia, 'Litigation Assistance Fund – Rules of Application', http://www.lssa.asn.au/community/laf.pdf, Rule 17.
[60] See n 46.
[61] National Pro Bono Research Centre, 'The Australian Pro Bono Manual', para 4.5 www.nationalprobono.org.au/probonomanual/ProBono_Manual_04.htm#5.
[62] The Law Society of South Australia, 'Trustee for the Litigation Assistance Fund Application form – Disbursements Only Funding Application for Assistance', http://www.lssa.asn.au/community/dof.pdf.
[63] See n 62.
[64] See n 46.
[65] See n 46.
[66] See n 61.
[67] Law Society of South Australia, 'Litigation Assistance Fund – Rules of Application', http://www.lssa.asn.au/community/laf.pdf, Rule 14.

fees are excluded[69]. The fund manager's approval must be obtained before disbursements of $1000 or more are incurred[70].

Operation of Disbursement Only Fund:

(1) 'The Manager shall consider each application for assistance in accordance with the Funds Rules and Guidelines and shall make a report to the Assessment Panel with the recommendation for the disposition of the application'.[71]

(2) Must satisfy means and merit test

(3) 'The Assessment Panel shall consider the Manager's report before formulating its advice to the Trustee on the disposition of each application for assistance'.[72]

(4) If application is successful:
- trustee pays the disbursements of the solicitor
- Solicitor agrees to complete the work on a speculative basis.

(5) If the litigation is successful:
- the client repays the total disbursement PLUS 25 per cent-100 per cent of the total value of the disbursements funded
- the solicitor may charge a solicitor/client fee up to double the fees that the solicitor would be entitled to according to the scale contained in the fourth schedule of the Rules of the Supreme Court.[73]

(6) If the litigation is unsuccessful:
- the client remains liable for the party/party costs of the other party.[74]

TASMANIA

Civil Disbursement Fund (CDF):

Background: Run by the Legal Aid Commission Tasmania. The fund was set up by the Tasmanian Government and $250,000 was allocated to it in the 2003-2004 budget.[75]

Available to: Tasmanians requiring financial assistance for their civil cases, not just those who would be eligible for legal aid.[76] Assistance under the scheme is only available to individuals being represented by a solicitor.[77]

Application Fee: None.[78]

Types of Cases: preference will be given to serious personal injury claims, workers compensation claims and professional negligence claims and other cases, set against competing resources and priorities.[79]

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[68] See n 62.
[69] Law Society of South Australia, 'Litigation Assistance Fund', www.lssa.asn.au/community/laf.htm.
[70] National Pro Bono Research Centre, 'The Australian Pro Bono Manual', para 4.5 www.nationalprobono.org.au/probonomanual/ProBono_Manual_04.htm#5.
[71] Law Society of South Australia, 'Litigation Assistance Fund – Rules of Application', http://www.lssa.asn.au/community/laf.pdf, Rule 2.
[72] Law Society of South Australia, 'Litigation Assistance Fund – Rules of Application', http://www.lssa.asn.au/community/laf.pdf, Rule 3.
[73] See n 46.
[74] See n 46.
[75] Legal Aid Commission of Tasmania, 'Civil Disbursement Fund', www.legalaid.tas.gov.au/CDF.
[76] Legal Aid Commission of Tasmania, 'Civil Disbursement Fund Guidelines' http://www.legalaid.tas.gov.au/CDF/CIVIL%20DISBURSEMENTS%20FUND%20GUIDELINES.pdf, Guideline 3.4.
[77] Civil Disbursements Fund Guidelines – Guideline 4.2.
[78] Civil Disbursements Fund Guidelines – Guideline 2.5.
[79] Civil Disbursements Fund Guidelines – Guideline 4.7 and 4.8.

Excludes: Criminal matters, family and de facto matters, MACT/MAB claims, proceedings before the Resource Management and Planning Appeals Tribunal and any other category of claim that the Commission decides.[80]

Merits Test: The committee will determine the merits of the case, taking into account:

(a) the prospects of the case
(b) the quantum of damages
(c) the likelihood of recovery. [81]

Means Test: No general means test applies.[82] However, the applicant must show at the time the application is made, that the applicant is not in a position to cover the disbursement costs involved in the matter.[83]

Contribution: The Commission may require the applicant to contribute to the cost of disbursement having regard to the applicant's financial circumstances[84].

Financial Assistance: may include court filing fees, medical reports, expert reports, interpreter's fees, conduct money, witnesses' expenses, transcript fees, trial fees, solicitor's travelling and accommodation fees. However, the fund will not cover Solicitor's and Barrister's fees, sundry items including telephone, fax, postage, photocopying and courier fees.[85]

Operation of the Civil Disbursement Fund:

(1) Applications will first be assessed by the committee (an advisory committee of the Legal Aid Commission of Tasmania) and then the Commission.[86]
(2) The committee has set 'committee meeting dates' and applications need to be received at least one week prior to the meeting date[87].
(3) If the application is successful the solicitors must be acting on either a:
    - no win/no fee basis; or
    - reduced or delayed fee (will need to show that the applicant will not be able to fully pay the solicitor's fees for a delayed period of time); or
    - pro bono basis (will only apply where the applicant will ordinarily have no other access to the court system and/or whether the matter raises a wider issue of public concern[88]).[89]
(4) The Commission may at any time after the approval of an application for the assistance, vary, extend, suspend, or cancel such assistance on any of the grounds outlined in the 'Civil Disbursements Fund Guidelines'.[90]
(5) If the litigation is successful:
    - Disbursements are to be repaid in full plus a premium between 20 per cent - 100 per cent (as set by the commission) of the amount of disbursements paid out.[91]

[80] Civil Disbursements Fund Guidelines – Guideline 4.5.
[81] Civil Disbursements Fund Guidelines – Guideline 4.1.
[82] Civil Disbursements Fund Guidelines – Guideline 3.1.
[83] Civil Disbursements Fund Guidelines – Guideline 3.2
[84] Civil Disbursements Fund Guidelines – Guideline 5.1
[85] Legal Aid Commission of Tasmania, 'Civil Disbursement Fund', www.legalaid.tas.gov.au/CDF.
[86] See n 47.
[87] See n 47.
[88] Civil Disbursements Fund Guidelines – Guideline 4.3
[89] Civil Disbursements Fund Guidelines – Guideline 4.2
[90] Civil Disbursements Fund Guidelines – Guideline 6.1
[91] Civil Disbursements Fund Guidelines – Guideline 1.3

NEW SOUTH WALES

Pro Bono Disbursement Trust Fund

Background: It is a key criterion of the Pro Bono Disbursement Trust Fund that Legal Aid has been refused and there is no likelihood that the individual will be able to gain any legal representation otherwise.

Types of Cases: Only for matters conducted pro bono or at a significantly reduced cost and the matter must have been referred through the Law Society's Pro Bono Scheme or the Bar Association's Legal Assistance Scheme or the Public Interest Advocacy Centre (including PILCH). [92] A solicitor can apply to have a matter formally referred to them under the scheme in order to conduct a matter pro bono and have access to the disbursement fund.[93]

Merits Test: The referral will contain a case summary outlining the merits of the matter (time permitting) including where appropriate, an analysis of the law in relation to the matter[94].

Contribution: An assessment will have been made of the client's means and whether they are able (and willing) to contribute to the cost of running their matter. The current trend is to require applicants to contribute at least something to the cost of their matter.[95]

Financial Assistance: provides assistance by reimbursing solicitors for disbursements in approved matters. The fund will reimburse most disbursements, such as court filing fees (so long as no postponement or waiver has been obtained), medical reports, searches, registration fees and translator fees.[96] The disbursement must be considered necessary by the administrators of the fund and a receipt be provided before any reimbursement will be paid.[97] Costs do not have to be awardable to receive assistance from the fund. However, if the client is successful in their action and recovers costs, the money must be repaid to the fund. Total reimbursement will not exceed:

- for supreme court actions, $7500.
- for district court actions, $7500
- for local court actions, $3750
- other jurisdictions/areas - $5500.[98]

Operation:

- Legal Aid must have been refused.[99]
- Solicitors are asked to accept a referral. No pressure is placed on solicitors should they be unable to accept for any reason.[100]
- A request may be made to the NSW Bar Association Legal Assistance Scheme for assistance in the location of a barrister willing to accept the matter on a pro bono basis if necessary.[101]

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[92] National Pro Bono Research Centre, 'The Australian Pro Bono Manual', para 4.5 www.nationalprobono.org.au/probonomanual/ProBono_Manual_04.htm#5.
[93] See n 92.
[94] Law Society of New South Wales, 'How the Pro Bono Scheme Referral Protocol Benefits Practitioners', www.lawsociety.com.au/page.asp?partid=16408.
[95] See n 92.
[96] See n 98.
[97] See n 98.
[98] National Pro Bono Research Centre, 'The Australian Pro Bono Manual', para 4.5 www.nationalprobono.org.au/probonomanual/ProBono_Manual_04.htm#5.
[99] Law Society of New South Wales, 'How the Pro Bono Scheme Referral Protocol Benefits Practitioners', www.lawsociety.com.au/page.asp?partid=16408.
[100] See n 94.
[101] See n 94.

- Further attempts may be made to re refer matters under certain circumstances (for instance, where there is a conflict of interest being discovered OR the matter is being transferred to another jurisdiction etc).[102]

WESTERN AUSTRALIA

Litigation Assistance Fund

Background: The Western Australia Litigation Assistance Fund was established in 1991[103] with $1 million seed funding received from the Law Society Public Purposes Trust and the Lotteries Commission.[104] The fund, which was an initiative of the Law Society of Western Australia[105], was closed to applications prior to August 2003,[106] and is still not currently receiving applications for assistance.[107]
Available to: Individuals who cannot afford to litigate in civil matters.[108]
Application Fee: As the fund is currently at a standstill, there is no information available publicly as to the application procedure and the associated costs.
Financial Assistance: The Litigation Assistance Fund provides financial assistance to successful applicants covering both lawyers' fees and disbursements in return for a fee of 15 per cent should they succeed in their litigation. However, it has been held in the Federal Court of Australia that in an appeal there will be no allowances made for this as the court took the stance that this amount would likely be negotiable – that is despite recognition that the fund agreement with the client is that repayment of assistance be the first charge of any monetary outcome.[109]
Operation of the Litigation Assistance Fund: The client must approach a lawyer who then is responsible for applying to the fund. The fund then 'underwrites the risk of an adverse-costs award'. The plaintiff, if successful in litigation, must repay 15 per cent of the damages award back to the fund. The lawyer, if successful, works for a pre-negotiated flat fee – this is negotiated with the Legal Aid Board and is usually below market rates.[110]

VICTORIA

Law Aid

Background: The Victorian Law Aid Scheme emerged from Part VIA of the *Legal Aid Act 1978* (Vic), introduced in 1995.[111] It was initiated as a joint exercise between the Victorian government, the Law Institute and the Victorian Bar Council.[112] Initially

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[102] See n 94.
[103] Law Society of Western Australia, 'Litigation Assistance', www.lawsocietywa.asn.au/litigation.html.
[104] Smith (2001), p 17.
[105] See n 103.
[106] National Pro Bono Research Centre, 'The Australian Pro Bono Manual', para 4.5 www.nationalprobono.org.au/probonomanual/ProBono_Manual_04.htm#5.
[107] See n103.
[108] Law Reform Commission of Western Australia (1997), p 7; National Pro Bono Research Centre, 'The Australian Pro Bono Manual', para 4.5 www.nationalprobono.org.au/probonomanual/ProBono_Manual_04.htm#5.
[109] *Re: Sevenhill Holdings Pty Ltd; Michael Shane Blades and Lesley Gail Blades And: Danica Musovic; Mick Musovic; Logie Brae Pty Ltd and Ramon English No. Wag 102 of 1990 Fed No. 372*, in the Federal Court of Australia, Western Australia District Registry, per French J (1992).
[110] Ministry of the Attorney General [Canada] website, Publications, *Ontario Legal Aid Review; Chapter 13 '"Other" Civil Law Legal Aid Services*, www.attorneygeneral.jus.gov.on.ca/english/about/pubs/olar/ch13.asp
[111] Opas (1998), p 28.
[112] Galbally (2003), p 95.

funded with a $1.6 million seeding grant from the Victorian State Government in 1998, the scheme has progressed in its disbursement funding activities, and has made substantial progress towards achieving 'its aims of provision of service and operational viability.'[113]

Available to: Individuals and companies.

Application Fee: A non-refundable fee of $100 must be lodged with the application.

Types of Cases: All forms of civil litigation cases are supported including personal injury claims, claims against institutions involving discrimination or oppressive behaviour, professional negligence claims and wills and estates claims.[114] Law Aid has granted assistance in matters such as violence and abuse in logging demonstrations, High Court appeals, product liability claims, and sexual harassment claims.[115]

Excludes: Law Aid does not cover criminal and family matters, these areas are dealt with under standard Legal Aid Victoria assistance schemes.[116]

Merits Test: Considerations include:

(d) prospects of success
(e) likelihood of recovery
(f) matters of public importance.[117]

Means Test: Applications for Law Aid are assessed on a case-by-case basis, taking into account the individual client's financial means.

Contribution: If the case is successful, the applicant is required to pay 5.5 per cent of the award or settlement to Law Aid (originally, this was set at 10 per cent of the award or settlement)[118], as well as repay all the disbursements incurred on their behalf if those costs are recovered. If unsuccessful, no payment is required.[119]

Financial Assistance: The Fund will cover the reasonable legal costs and disbursements of an approved matter. Disbursements that may be covered by the scheme include expert fees, travelling and accommodation expenses, witness fees and court fees.

Operation of Law Aid: Application for Law Aid must be made on the approved application form. It must be completed by the solicitor, who assists their client to complete Sections 1-3 and fills out sections 4-6 themselves. It does require that the solicitor applying for Law Aid on behalf of their client substantially assess the merits of a case, as part 4 of the application requires that a solicitor not apply for Law Aid until all preliminary investigations have been completed and full details of the applicant's case can be provided. This presumably is to assist the trustees in considering whether the application is of sufficient legal merit and the likely financial merit as well.[120]

NORTHERN TERRITORY

Northern Territory Contingency Legal Aid Fund

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[113] Galbally (2003), p 95.
[114] Law Aid Victoria, 'Scheme Outlines', http://www.lawaid.com.au/outline.htm.
[115] Galbally (2003), p 95.
[116] Law Aid Victoria, 'Scheme Outlines', http://www.lawaid.com.au/outline.htm.
[117] Law Institute of Victoria, 'Lawyers Offer More Help', http://www.liv.asn.au/media/releases/20001117_lomh.html, 17 November 2000.
[118] Opas (1998), p 30.
[119] Galbally (2003), p 95.
[120] Law Aid Victoria, 'Application Form for Civil Litigation Support', http://www.lawaid.com.au/LawAid_application_form.pdf.

Background: In September 1993, the Northern Territory Legal Aid Commission noted that there were particular groups in the community who received inadequate or no legal assistance, and this included those plaintiffs with civil law matters where a speculative fee arrangement is not available.[121] In the same year, the Northern Territory established CLAF, a joint initiative of the Attorney General's Department, the Legal Aid Commission and the Northern Territory Law Society. It is administered by the Legal Aid Commission, and funded with a seeding grant of $200,000 from the Law Society Public Purpose Trust. The CLAF provides assistance in civil matters where private practitioners are prepared to speculate their professional fees until the conclusion of the matter and disbursement costs of running the matter are paid out of the Fund.[122] It is designed to cover disbursements only, and therefore does not cover other associated legal costs.[123]
Available to: Northern Territorians requiring financial assistance for their civil cases, not just those who would be eligible for legal aid. In this respect, the criteria is slightly wider than most, in that failure of the legal aid means test does not exclude an applicant from receiving funding for disbursements in civil cases.
Application Fee: There is no application fee associated with making an application for assistance.
Financial Assistance: Expenses relating to the cost of medical experts, witnesses, air-fares, et cetera. The fund does not pay for solicitor or barrister costs, cases are taken on a purely speculative basis.[124]
Operation of the Civil Disbursement Fund: There is relatively little information available on the operation of the CLAF in the Northern Territory. Therefore, data such as the amount required on settlement or win, or the exclusionary criteria, are not known.

HONG KONG

Supplementary Legal Aid Scheme (SLAS)

Background: Hong Kong was the first common law jurisdiction in which a contingency litigation assistance fund was established.[125] The SLAS was a commercial operation established in 1984 and began with a capital base of $HK1 million (AUD $150,000 at the time; $290,000 in March 2000). Due to the small capital base it operated under tight restrictions; finances allowed it only to support personal injury claims and some low risk civil law claims.[126] Within 3 years the fund was financially viable and had supported 442 applications by September 1992 – 440 of which were successful.[127] At that state 'the surplus cash of the Fund…had increased to $HK2 million.[128]

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[121] Northern Territory Legal Aid Commission (1993), *Submission to the Senate Enquiry into Legal Aid and Access to Justice*, http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/legalaidjustice/submissions/sub82.doc.
[122] See n 121.
[123] Law & Justice Foundation of New South Wales (1999), para 127.
[124] ABC Radio National - The Law Report, 'Behind the scenes of legal funding', http://www.abc.net.au/rn/talks/8.30/lawrpt/lstories/lr230796.htm, 23 July 1996.
[125] Law & Justice Foundation of New South Wales (1999), para 4.
[126] See n 125.
[127] See n 125.
[128] See n 125.

Types of Cases: Those where there is a claim for monetary compensation and a reasonable chance of success.[129] "It extends to personal injury cases; employee compensation claims; and medical, dental, and professional negligence claims."[130]
Merits Test: The merits test revolves around the reasonableness of the claim.[131]
Means Test: The applicant's financial situation must meet eligibility criteria.[132]
Contribution: In terms of outcome, a settlement is considered as a win at trial in terms of requiring a contribution back into the fund. If a claim is settled before trial, the successful plaintiff must pay 7.5 percent into the fund, and if the plaintiff wins at trial, 15 percent is paid back into the fund.[133]

[129] Ontario Ministry of the Attorney-General (1996), chapter 13.
[130] See n 129.
[131] See n 129.
[132] See n 129.
[133] See n 129.

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