

## Submission to the Productivity Commission Inquiry into Access to Justice Arrangements

JusticeNet SA is an independent not-for-profit organisation that provides pro bono legal services for low-income and disadvantaged South Australians.

JusticeNet coordinates two pro bono legal services that use the pro bono capacity of the public and private legal profession to address distinct areas of unmet legal need:

- Pro Bono Referral Service (inc the Refugee and Asylum Seeker Service); and,
- Self-Representation Service (currently Supreme Court, Federal Courts starts May 2014).

JusticeNet is a member of the South Australian Council of Community Legal Services and Pro Bono Access Australia, a network of pro bono legal services.

For more information about JusticeNet visit [www.justicenet.org.au](http://www.justicenet.org.au)

JusticeNet welcomes the opportunity to respond to the Draft Report produced by the Commission. The focus of this submission is to respond to information requests in Chapter 14 (Self Represented Litigants) and Chapter 23 (Pro Bono services).

### Chapter 14 – Self-Represented litigants

#### Information request 14.1

*What is the most effective and efficient way of assisting self-represented litigants to understand their rights and obligations at law? How can the growing complexity in the law best be addressed?*

It is the experience of JusticeNet that a Self-Representation Service is both an effective and cost-effective way of assisting Self-Represented Litigants (SRLs).

JusticeNet has operated a Self-Representation Service (SRS) in the Supreme Court of South Australia since September 2013. The service was a joint initiative of JusticeNet SA and Flinders University.

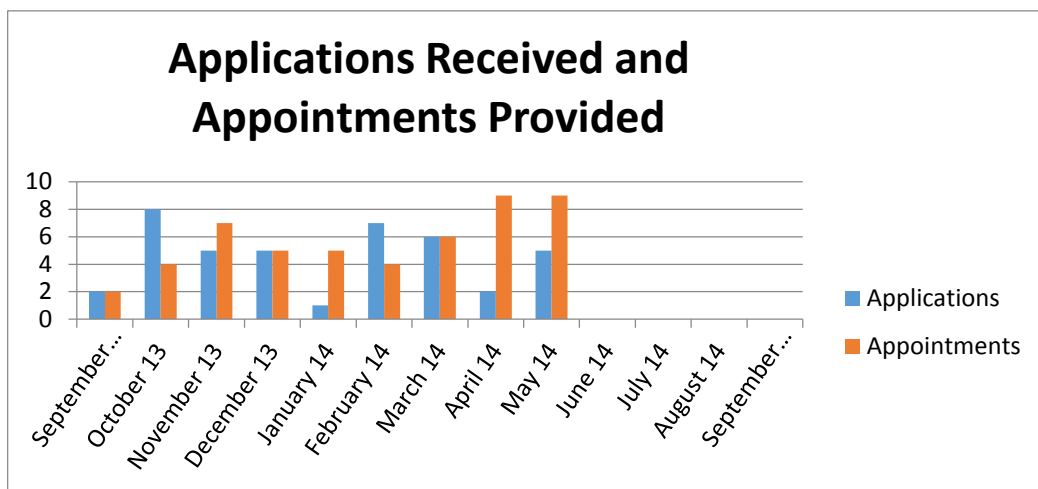
The SRS provides legal advice and legal task assistance to low-income and disadvantaged clients representing themselves in the civil jurisdiction of the Supreme Court under a limited retainer. The service does not represent clients or take responsibility for the conduct of their matter.

The SRS is closely modelled on the Self-Representation Services operated by the Queensland Public Interest Law Clearinghouse (QPILCH) since 2007.

The SRS operates only one day per week as a 12-month pilot. Volunteer lawyers from six participating law firms staff one hour appointments with client SRLs. The SRS employs a Managing Solicitor to assess applications for assistance, brief volunteer lawyers and provide follow up advice and assistance to clients. The Managing Solicitor is supported by volunteer law students from Flinders University.

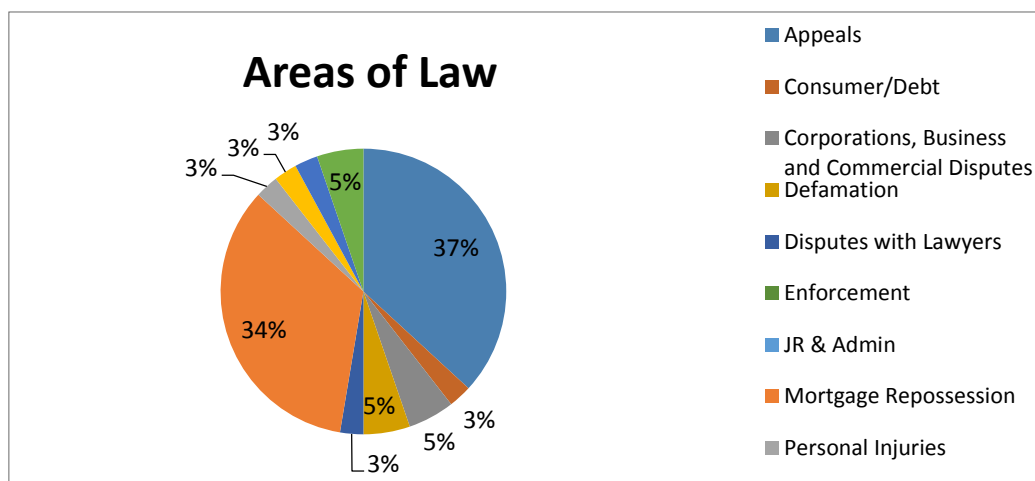
The SRS has received 45 applications in eight months and provided 52 appointments to clients: see Figure 1.

**Figure 1**



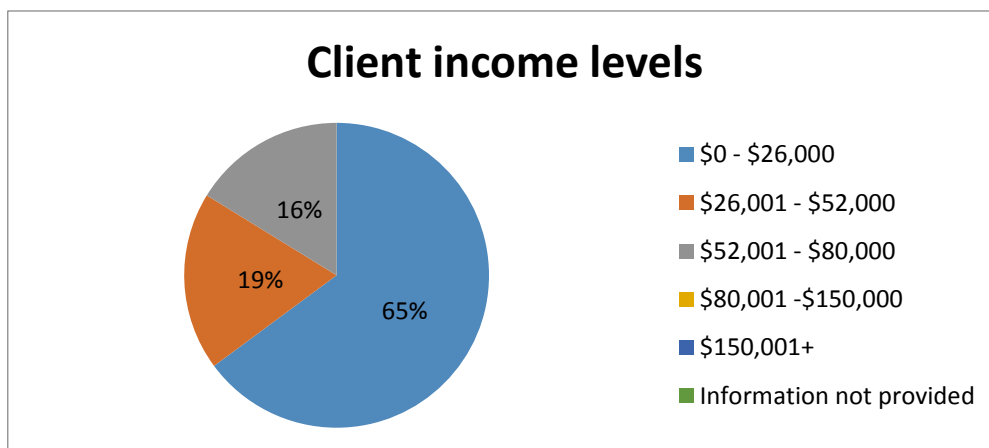
The majority of clients have sought assistance with appellate proceedings or are defendants in mortgage repossession proceedings: see Figure 2.

**Figure 2**



The service only provides ongoing assistance to clients who are unable to afford private legal representation or assistance. 65% of clients reported incomes of less than \$26,000 per annum. 100% of clients who have been provided appointments have reported incomes of \$80,000 or less.

**Figure 3**



3 clients have been, or are in the process of being, referred for pro bono legal representation. The service pursues referral where the client has a case with substantial merit and / or they are unable to effectively represent themselves, due to language, literacy or other issues.

The SRS will be independently evaluated after 12 months of operation.<sup>1</sup> For the purposes of the evaluation, the key objectives of the service have been identified as being to:

- Increase access to legal advice and assistance, including alternative dispute resolution, for disadvantaged litigants in person;
- Promote the orderly and timely resolution of court proceedings;
- Divert unmeritorious matters from court;
- Decrease demands on the court system and registry staff; and
- Increase access to representation for clients with meritorious cases.

For the purpose of this submission, a breakdown and preliminary analysis of the activities of the SRS in the two primary areas of assistance (Appeals and Mortgagee Repossessions) is set out below.

### **Appeals**

Of the 14 clients who sought assistance from the SRS with appellate proceedings:

- 9 were provided with legal advice and / or drafting assistance
- 1 was referred for pro bono legal representation
- 4 were referred to other legal service providers.

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<sup>1</sup> The review will be conducted by the South Australian Government's Office for Crime Statistics and Research.

Of the 9 clients who were provided advice and assistance, all were either advised against commencing an appeal, or to stop an appeal already underway. Those matters have resolved as follows:

- 1 settled with the assistance of the service
- 1 continued with some assistance from the service
- 7 appear to have accepted the advice of the service to either cease or withhold from commencing proceedings.<sup>2</sup>

The following cases studies illustrate the way the service has assisted clients with appeals.

- A client sought the help from the SRS to appeal a Magistrate's decision. Over the course of several appointments, the SRS advised the client that while the Magistrate may have in one respect erred in dismissing the client's case, the decision was based on other valid grounds and therefore an appeal would likely be fruitless. The client was provided assistance to negotiate a discontinuance and settlement with the opposing side.
- A client sought assistance from the service to pursue an appeal to the Full Court of the Supreme Court. The service provided her with advice that her chances of success were very low. The client initially presented as determined to proceed at any cost and so the service offered her procedural advice and limited drafting assistance to prepare the necessary documentation to advance her appeal. The service has not been in contact with the client for some time and court records show that the client has not taken any steps to progress her matter for 3 months.
- A client sought assistance to appeal a traffic matter. The client was very determined, seeking only assistance to 'complete the court forms'. The client was encouraged to make an appointment. At that and subsequent appointments the service advised him that the merits of his appeal were very low. Concurrently, the service provided limited assistance with preparing the relevant appeal documents and gave the client detailed advice about merits and risks. The client has subsequently advised the service that he has decided not proceed with the appeal.

### **Repossession matters**

11 clients were provided with legal advice and or drafting assistance with repossession related matters. Of the 11:

- 5 were provided with legal advice, drafting assistance and help presenting their case.
- 3 were provided with legal advice only
- 3 were referred to other legal services.

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<sup>2</sup> Based on information from the client or from a review of court records showing that no further steps have been taken to advance the matters since the last appointment.

Case studies:

- The SRS helped a client take urgent steps to prevent a warrant of possession being issued over his house. The SRS advised the client that the lender had obtained a possession order inappropriately and helped the client obtain the lender's agreement to consent to the order being set-aside.
- The service helped a client of non-English speaking background to negotiate with her lender. She had fallen into arrears as a result of unexpected expenses arising from deaths in her family. She was assisted to negotiate a hardship application with her lender.
- A client sought assistance to prevent the repossession of the marital home pending the outcome of Family Court proceedings. The service helped her to make an application to vary the possession orders to extend the time to deliver possession of the property to the lender.

Although the data is limited, these results demonstrate that the SRS provides beneficial legal services to disadvantaged SRLs and is also effective at diverting clients whose cases have matters lacking merit away from the courts.

Of particular interest is our experience that a client is as likely to accept the advice of the service to settle, discontinue or not commence an action when that advice is coupled with legal task assistance (as compared with advice only). This is so even when assistance has been provided to advance their case and the service offers further assistance to the client.<sup>3</sup> It is the view of JusticeNet that this may be explained as follows:

- practical assistance allows for a stronger relationship to develop between service and client that allows for the service to deliver more persuasive advice;
- the process of providing legal task assistance, and the tangible result, demonstrates to the client the complexity of the legal matter that he or she faces and reinforces the difficult and time consuming road ahead in prosecuting their case.

This finding emphasises the importance of two key features of the SRS model, namely:

1. early intervention in the litigation process; and,
2. providing ongoing assistance throughout the course of a client's matter.

Overall our experience delivering the service corroborates QPILCH's observation cited in the draft report at p448:

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<sup>3</sup> Clients with 'weak' cases are still provided with legal assistance. It is only where cases are identified as wholly without merit that the service limits assistance to procedural advice only.

*It [the SRS] enables a deeper relationship with the client, thus developing trust and a greater capacity for influencing the client to take appropriate steps. It permits more time for ensuring that the litigant is fully prepared and understands the litigation process. The benefits of this type of scheme are therefore two-fold: the client is assisted to better communicate their case to the court and other party; and the court receives the benefit of a better prepared participant in the proceedings.*

## **Information Request 14.2**

*There are a number of providers already offering partially or fully subsidised unbundled services for self-represented litigants. The Commission seeks feedback on whether there are grounds for extending these services, and if so, what are the priority areas? How might existing, and any additional services, better form part of a cohesive legal assistance landscape? What would be the costs and benefits associated with any extension of services? Where self-representing parties have sufficient means, what co-contribution arrangements should apply?*

## **Self-Representation Service**

Based on our experience to date, JusticeNet submits that the Self-Representation Service is an effective and efficient way of helping SRLs, particularly in higher courts. While systemic changes (such as simplified rules and procedures and limiting the right to representation), have been implemented in lower courts over the years, there is clearly a limit to which those types of reforms can be pursued in superior courts of record.

The SRS was developed to provide pro bono legal services to clients whose matters may be unsuitable for pro bono representation. It works well in Supreme Court for several reasons:

- the substantial power imbalance between represented parties and SRLs;
- limited availability of alternative legal services;
- the significant adverse consequences for the losing side; and
- the complexity of the law, court rules and procedures.<sup>4</sup>

JusticeNet's SRS is limited to helping clients with matters in the Supreme Court civil jurisdiction due to funding limitations. JusticeNet believes that extending the SRS to the District Court would be desirable as there is greater unmet legal need in the District Court.<sup>5</sup> We are actively exploring ways to expand the service.

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<sup>4</sup> A good example encountered by the SRS are the rules concerning permission to appeal. Depending on the nature and jurisdiction of the trial proceedings, there are three distinct procedures which Appellant's must follow simply in order to seek permission to commence an appeal.

<sup>5</sup> In addition to the greater overall numbers of actions heard by the District Court, JusticeNet's research shows that there is a greater incidence of self-represented litigants in the civil jurisdiction of the District Court.

JusticeNet has recently been funded by the Federal Attorney-General's Department to operate a Self-Representation Service in the Adelaide and Darwin registries of the Federal and Federal Circuit Courts. The SRS will assist clients with matters in the general federal jurisdiction.

### **Filling a gap in existing legal services**

The availability of publicly funded representation for those facing civil law problems and lacking the means to afford a lawyer is very limited. Certainly it is inadequate to meet legal need now and for the foreseeable future.

Absent widely accessible civil legal aid, there a range of restricted legal services for people facing civil law disputes, such as legal information services, advisory services and minor assistance schemes. While they all have a valuable role to play in helping those in need, they can be insufficient for those facing the prospect of formal court proceedings.

The SRS fills a gap in legal service delivery. It offers ongoing advice and legal task assistance for SRLs who are facing legal proceedings. Help is provided through face-to-face (or, when necessary, telephone) appointments. The SRS can also intervene early in the litigation process. Referrals to the service are overwhelmingly from registry staff and the JusticeNet service is easily accessible in the court building.

By contrast, traditional 'door-of-the-court' duty lawyer schemes do not generally provide ongoing help and assist clients late in proceedings. The interlocutory stages of civil law proceedings are of vital importance. The comments of QPILCH cited in the draft report (p447) noting the benefits of early intervention in the civil litigation process are worth repeating:

*While duty lawyers can give valuable assistance to SRLs on their trial or hearing day, there are serious limits to the amount of value that duty lawyers can really add to a case. In civil litigation, the pre-trial steps, the pleadings, discovery, are absolutely critical. The day of trial is often too late to amend a document.*

Because the SRS is a pro bono service, it also brings some additional benefits:

- it can access to specialist help from volunteer lawyers across the profession;
- as a pro bono service leveraging the assistance of volunteer lawyers, the SRS can efficiently assist clients with matters the complexity and time consuming nature of which might otherwise be regarded as outweighing the benefits to the clients;
- anecdotally, the fact that solicitors are known by clients to be volunteers often seems to give them a credibility or standing in the eyes of the client that makes them more effective 'critical friends' able to reality test clients perceptions and deliver persuasive advice.

The SRS does have limitations arising from the discrete nature of the assistance provided and the restriction on providing representation. There will always be people who cannot represent

themselves no matter what support they are provided. JusticeNet addresses this issue currently by endeavouring to refer such clients for pro bono representation where appropriate.

### **Unbundled Legal Services**

JusticeNet welcomes measures to facilitate the increased provision of unbundled legal services by private legal providers as a potentially important way of improving civil justice access and affordability.

### **Chapter 23 – Pro Bono services**

#### **Draft recommendation 23.1 - Volunteer practicing certificates**

JusticeNet supports the draft recommendation that those jurisdictions that have not done so already should introduce free practising certificates for retired or career break lawyers providing pro bono legal services.

Amendments to the *Legal Practitioners Act 1981 (SA)* that allow for volunteer practicing certificates in South Australia will come into effect on 1 July 2014. Apparently, the changes do not allow for the Law Society (the issuing authority in South Australia) to issue free practicing certificates, but allow for the fee and levy to be minimal.

JusticeNet submits that the costs should be kept as low as possible. Free volunteer practicing certificates increase the provision of pro bono legal services. There has been a steady increase in the number of free volunteer practising certificates being issued in those states where they have become available.<sup>6</sup>

The availability of free or very low cost volunteer practicing certificates in South Australia is likely to a significantly boost the pro bono capacity in South Australia over time. JusticeNet has difficulty attracting lawyers on secondment due to the small number of larger law firms in South Australia compared with some other jurisdictions. This reform would facilitate an alternative avenue for recruiting lawyers to participate in our pro bono services.

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May 2014

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<sup>6</sup> [http://www.nationalprobono.org.au/news\\_detail.asp?id=103](http://www.nationalprobono.org.au/news_detail.asp?id=103)