Law Council
OF AUSTRALIA

Inquiry into Access to Justice

Senate Legal and Constitutional Affairs Committee

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Introduction

The Law Council of Australia is grateful for the opportunity to provide a submission to the Senate Standing Committee on Legal and Constitutional Affairs inquiry into Access to Justice.

The Law Council believes that all Australians have a fundamental right to access to legal advice and services, regardless of their means. This is an essential tenet of the doctrine of the rule of law. Our justice system becomes meaningless if there are barriers that prevent people from enforcing their rights. True equality requires that all these barriers – financial, social and cultural – be removed for all Australians. The legal assistance system is critical in overcoming these barriers.

Ensuring access to justice for the economically and socially disadvantaged members of our community is the responsibility of all governments. The Law Council believes that this is a critical time for all those concerned with access to justice and if the legal assistance sector is not to be plunged further into crisis then governments must act now.

Ten years of ineffective access to justice policies have produced, amongst other things, cutbacks in funding, an unproductive concentration on the Commonwealth-State divide, and a reduction in the number and seniority of practitioners prepared to undertake legal aid work.

The system is facing an impending crisis over the coming 6 to 12 months as a result of the increased strain on legal aid services arising from the global financial crisis in addition to the parallel decrease in revenue for the legal assistance sector from the Public Purpose Funds. These twin forces have resulted in a situation where an injection of additional funding is required to simply continue to provide the services that are currently available and not 'go backwards'.

The terms of reference for the Inquiry into Access to Justice require the Committee to have particular reference to:

- the ability of people to access legal representation;
- the adequacy of legal aid;
- the cost of delivering justice;
- measures to reduce the length and complexity of litigation and improve efficiency;
- alternative means of delivering justice;
- the adequacy of funding and resource arrangements for community legal centres; and
- the ability of Indigenous people to access justice.

In addressing these terms of reference, the Law Council recommends that governments should:

- develop and adopt a mechanism to break down the Commonwealth/State funding divide*;*
- create and adopt a truly national legal aid means test;
- increase fees for private practitioners undertaking legal aid work;
- create incentives for lawyers to practice in rural, regional and remote areas;
- increase funding for community legal centres;
- increase funding for dedicated Indigenous legal services; and
- restore a national civil legal aid program.

The ability of people to access legal representation

Preliminary issue – recommendations of previous inquiries

The above terms of reference require consideration of similar issues raised by previous inquiries into access to justice and legal aid, and by other inquiries where the question of access to legal services has been a relevant matter. The Law Council has previously made submissions to the following Senate Inquiries:

- the Senate Legal And Constitutional References Committee inquiry into Legal Aid and Access to Justice, referred to the Senate on the 17th June 2003 and completed in June 2004;[1] and
- the Senate Legal And Constitutional Affairs Committee inquiry into the Australian Legal Aid System, referred to the Senate in 1996 and completed in June 1998.[2]

The main messages to the more recent 2003 Inquiry were that legal aid service providers were then unable to meet the demand that was presenting at the door, and that it was thought that there was a level of legal need which was not known and not met and likely to go well beyond that which was then presenting to the main legal aid providers who were already working co-operatively to maximise service delivery.

The report of that Inquiry made 63 recommendations. Many of the recommendations were aimed at determining and meeting legal needs in Australia, including the legal needs of indigenous people, and people living in rural, regional and remote areas. A number of these recommendations remain unfulfilled and all indicators suggest that the problems identified in the 2003 report have become progressively worse.

There is already a raft of existing material which should inform Governments and policy makers about access to justice issues. Legal aid service providers have made multiple submissions repeating the same concerns over the past decade to various inquiries, the main one being inadequate funding. The Law Council suggests that these recommendations which already exist and which continue to be relevant be implemented immediately.

Impending crisis in the legal assistance sector

The Law Council believes that the legal assistance sector is facing an impending crisis over the coming 6 to 12 months as a result of the increased strain on legal aid services arising from the global financial crisis.

It is essential that additional funding is allocated over the coming few federal budgets given the likely increased interaction that individuals will have with the justice system due to the economic downturn. The added strain caused by the global financial crisis on the already stretched resources of the legal assistance sector will create a need for a significant injection of funding in order to simply continue to provide the services currently available.

Without an urgent funding boost the legal assistance sector will be pushed to the point of collapse due to the amplified demand. The situation will be made significantly worse by a parallel decrease in funding flowing from the Public Purpose Funds.

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[1] A copy of the submission is located here: Hhttp://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=8C728719-1C23-CACD-2256-BCEE1C301CAA&siteName=lcaH

[2] Submission available from Law Council Secretariat.

A large proportion of the funding received by Legal Aid Commissions arises from the Public Purpose Funds. For example, in the 2007/08 financial year, Victoria Legal Aid's accounts show that the Public Purpose Fund's grant of $31.8 million provided 29 per cent of the organisation's revenue. The monies for this fund are largely derived from the interest on clients' funds held in trust by solicitors.

This source of revenue is particularly vulnerable to economic fluctuations. Due to governments not providing enough recurrent funding for legal aid, Commissions have come to be over-reliant upon the Public Purpose Funds for their resourcing. With the economic downturn, distributions from these funds will be greatly reduced.

A further drain on the Public Purpose Funds is the imposition on statutory interest accounts and public purpose funds of the Fee to access the Guarantee Scheme for Large Deposits and Wholesale Funding (the guarantee scheme) on deposits over $1 million.

The guarantee scheme was announced on 12 October 2008. Initially the guarantee scheme was applied to all eligible accounts free of charge. However beginning on 28 November 2008 access to the guarantee scheme for deposits over $1 million required the payment of a fee.

The fee amount varies according to the credit rating of the ADI, with AAA to AA- rated institutions paying 70 basis points per annum, A+ to A- institutions paying 100 basis points per annum and BBB+ and below institutions paying 150 basis points per annum.

It has emerged that most ADIs that have opted into the scheme have passed on the fee to account holders by way of making a deduction from the usual interest accruing on an account.

The Government has recently exempted legal practitioner general trust accounts and statutory deposit accounts from the Fee. However statutory interest accounts and Public Purpose Funds, in which interest arising from trust monies is held and invested and ultimately applied to public purposes such as legal aid funding, remain subject to the Fee for balances over $1 million.

The Law Council believes that the ongoing imposition of the Fee on statutory interest accounts and Public Purpose Funds will cause a significant diversion of funding away from public purposes such as legal aid, thus placing further pressure on the legal assistance sector at a time when it can be least afforded.

Access to justice as an economic efficiency measure as well as a tool of social justice

The impending crisis facing the legal assistance sector will have ramifications not only for disadvantaged individuals but also for the Australian court system.

An adequately funded legal assistance sector clearly provides a wide range of social justice benefits. On a broad level, the public's view that the legal system is fair and equitable supports the legitimacy of the legal system as a whole. Equality before the law is meaningless if there are barriers that prevent people from enforcing their rights. The legal assistance sector is therefore critical in maintaining the integrity of the justice system and upholding the rule of law.

Access to legal representation helps to achieve the goals of the justice system and ensures equality before the law. In criminal proceedings, for instance, a legally aided representative will assist a defendant in deciding to plead guilty or proceed to trial, to raise an effective defence, and to access diversion programs that may reduce recidivism. Legal

representation therefore assists courts in making better quality decisions and appropriate sentences, while minimizing the significant social costs that arise from unrepresented defendants.

Providing access to experienced legal representatives also increases the efficiency of the legal system. Experienced representatives are able to deal with issues expeditiously and minimise legal errors which can lead to aborted trials, appeals or retrials. A study conducted in 2007 by the Victorian Department of Justice found that the costs associated with an aborted criminal trial are on average $7,419, and a criminal adjournment costs on average $935.[3] Further, the total average costs of a retrial (conducted over one week in the Supreme Court of Victoria) have been estimated at $47,572.[4]

In recent years, increasing numbers of litigants are entering the court system without legal representation, due largely to the contraction in legal aid funding. The increase in numbers of self-represented litigants that occurred following the funding restrictions placed on legal aid in 1996 have been commented upon in numerous reports by law reform commissions, parliamentary committees and other bodies.[5] It is interesting to note that in the 2007-08 year, the Family Court of Australia reported that in almost 30% of its cases, there was at least one unrepresented litigant.[6]

Self-represented litigants have an impact on courts, in terms of both time and cost, and on the conduct and outcomes of trials. This has lead one judge to comment that: "the question of how to cope with [unrepresented litigants] is the greatest single challenge for the justice system at the present time … cases in which one or more of the litigants is self-represented generally take much longer both in preparation and court time and require considerable patience and interpersonal skills from registry staff and judges."[7] Given the current economic downturn, it is likely that the numbers of self-represented litigants will only increase unless adequate funding is restored to the legal assistance sector.

Providing adequate funding for legal aid and access to justice may initially appear expensive, but as former Chief Justice Gleeson commented:

> *"The expense which governments incur in funding legal aid is obvious and measurable. What is not so obvious, and not so easily measurable, but what is real and substantial, is the cost of the delay, disruption and inefficiency, which results from absence or denial of legal representation. Much of that cost is also borne, directly or indirectly, by governments. Providing legal aid is costly. So is not providing legal aid."*

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[3] Cited by Victorian Bar, *Review of Fees Paid by Victoria Legal Aid to Barristers in Criminal Cases* April 2008; PricewaterhouseCoopers, p 24.

[4] Ibid.

[5] See, for example: Senate Legal and Constitutional References Committee, *Legal Aid Report 3,* AGPS, Canberra, 25 June 1998, [3.21-45]; Professor Stephen Parker, *Courts and the Public* (1998) AIJA 106-111; Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (2000) Report No. 89, [5.51-67], [5.147-157]; The Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia – Final Report* (September 1999) Project No. 92: Family Law Council, *Litigants in Person* (2000) at <http://www.law.gov.au/www/flcHome.nsf/Web+Pages/C40B3532575784A2CA256B49001CF823?Open Document>; Rosemary Hunter, *The Changing Face of Litigation* (2002), Law Society of New South Wales, *Position Paper: Self-Represented Litigants* (27 May 2002): cited by the Australian Institute of Judicial Administration, *Forum on Self Represented Litigants* (2005).

[6] See Family Court of Australia Annual Report 2007 - 2008, located here: Hhttp://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/Business/annual_reports/FCOA_ar_0708H

[7] Davis J, *The Reality of Civil Justice Reform: Why we must abandon the essential elements of our system* (2002) 12 JJA 155 at 168.

Access to justice as a human rights obligation

The Law Council acknowledges that the right to a fair hearing, including, amongst other things, equal access to and equality before the courts and the right to legal advice and representation, is indispensable for the protection of other human rights.

Although access to justice as a human right will not be the focus of this submission, the Law Council supports the issues raised by the submission of the Human Rights Law Resource Centre.

Further, the Law Council notes that the United Nations Human Rights Committee in its concluding observations on Australia has recently recommended that:

> *The State party should take effective measures to ensure equality in access to justice, by providing adequate services to assist marginalized and disadvantaged people, including indigenous people and aliens. The State party should provide adequate funding for Aboriginal and Torres Strait Islander legal aid, including interpreter services*

The Law Council supports these recommendations and awaits the Government's response with interest.

Rural, regional and remote Australia – recruitment and retention issues impacting on access to justice

The Law Council is concerned that ongoing problems in recruiting and retaining legal practitioners in country Australia is negatively impacting on the ability of individuals residing in rural, regional and remote (RRR) areas of Australia to access legal services.

Like many other professional groups such as doctors and allied health professionals, lawyers in regional areas are experiencing increasing difficulties in attracting and retaining suitable staff. These recruitment problems have a direct effect on the legal sector's ability to service the legal needs of regional communities. Many law firms and community legal centres are unable to find suitable lawyers to fill vacancies when they arise and are being impeded by the drain of corporate knowledge caused by a constant turnover of staff.[8] The Law Council considers that these recruitment problems are an additional burden on the legal aid and justice systems in country areas.

Legal services in regional communities are delivered through a partnership of government organisations, community legal centres and the private profession. While Legal Aid and the community sector predominantly service the disadvantaged within regional communities, the private profession also undertakes a substantial role in the delivery of legal aid and pro bono work.

The 2006 TNS study commissioned by the Commonwealth Attorney-General's Department found there is a shortage of lawyers in regional and remote areas with 3 lawyers per 10,000 residents aged 18+ in remote Australia compared to 10.7 lawyers per 10,000 in capital cities of Australia.[9]

[8] For example, according to figures provided by Legal Aid WA, in March 2008 more than 1 in 3 legal positions in the regional community legal sector in Western Australia were vacant. See Jane Stewart, 'The WA Country Lawyers Program', a paper presented to the National Access to Justice Pro Bono Conference Sydney 14-15 November 2008, page 1, Hhttp://www.a2j08.com.au/papers/Stewart_J.pdf

[9] TNS Social Research, *Study of the Participation of Private Legal Practitioners in the Provision of Legal Aid Services in Australia*, December 2006, p 38.

The research also suggests that providers of legal aid in regional and remote areas are 'keeping the system going' with a small number of lawyers providing significant amounts of legal aid.[10] Approximately two-thirds of firms (67%) in regional and remote areas currently provide legal aid compared with approximately half of firms across all locations (48%).[11] Firms in regional and remote Australia provide larger quantities of legal aid work than their city counterparts, with two-fifths (41%) of regional and remote firms providing more than 30 cases per year.[12] A further one in four firms in regional and remote areas (26%) used to provide legal aid but have moved away from providing these services.[13]

The qualitative component of the TNS study found that regional and remote lawyers were particularly concerned by the limited availability of experienced practitioners and graduates in country areas and that reliance was placed on a finite number of solicitors to carry out legal aid work.[14]

There are also widespread concerns within the legal profession that the numbers of solicitors working in country Australia may further decrease in the next 10 years as many older established practitioners working in regional areas reach retirement age. In a 2003 media release, former President of the NSW Law Society Ms Kim Cull noted that 'most country solicitors are aged 45 years and over and it appears that one third of those will retire in the next 10 to 15 years, leaving a gap which must be filled by other practitioners'.[15]

In March/April 2009, the Law Council conducted a survey of lawyers working in RRR areas to obtain data on recruitment and retention issues. The preliminary results of the survey support anecdotal reports that a large number of country practitioners are nearing retirement. Across Australia, 19.9% of the survey respondents indicated that they will most likely leave the legal profession to retire. In Victoria, where 31.3% of survey respondents were aged from 50 to 59, this figure was significantly higher with 34.6% of all respondents indicating that they will be retiring.

The Law Council is concerned that unless effective recruitment and retention strategies are developed to attract lawyers to RRR practice, there will be no one to replace these experienced country practitioners when they retire.

The Law Council considers that a number of targeted government initiatives are urgently required in order to attract lawyers to regional communities and thereby improve access to legal services for regional communities. These initiatives should broadly aim to:

- provide incentives to encourage practitioners to seek employment in disadvantaged areas;
- develop capacity within local communities to address legal need wherever possible, for example by encouraging individuals from country areas to pursue careers in law or strengthening country law networks; and
- promote country legal practice as a viable career option, for example by providing law students with the opportunity to undertake a practical legal placement in RRR areas.

[10] Ibid, p 36.
[11] Ibid, p 39.
[12] Ibid, p 41.
[13] Ibid.
[14] Ibid, p 36.
[15] Trish Mundy, Recruitment and Retention of Lawyers in Rural, Regional and Remote NSW: A Literature Review, July 2008, p 9 Hhttp://www.nrclc.org.au/SiteMedia/w3svc728/Uploads/Documents/RecruitmentRetentionOfLawyers.pdfH

Such government incentives/programs may include:

- repaying, completely or partially, HECS-HELP (or FEE-HELP) liabilities for law graduates and/or practitioners who work in regional areas;
- providing support for country students through government scholarships and also, where possible, providing options for country students to remain in their communities to study, for example, through distance and online education options;
- providing financial incentives, for example through bonuses and tax breaks, to encourage practitioners to work in remote locations which are facing severe shortages; and
- increasing opportunities for legal clinical placements in RRR areas for law students.

The Law Council also notes that community legal centers in regional areas are particularly disadvantaged as they are unable to offer competitive salaries (as compared with the government or private profession) to entice solicitors to relocate from metropolitan areas. Greater government funding of this sector and an improvement of both salaries and resourcing of community legal centres is necessary in order to address the chronic recruitment issues in this sector.

The Law Council, through its Recruitment and Retention Working Group, is currently developing a comprehensive strategy to address recruitment and retention issues in country Australia. This strategy will focus on developing both government and local initiatives aimed at promoting country practice and attracting skilled and suitable lawyers to those areas experiencing severe problems. It is considered that an effective solution to the recruitment problems in country areas will only be achieved through a range of strategies both at a grass roots and national level and in partnerships between government, community and the private sector.

Legal aid in migration cases

The Law Council is concerned that the limitations placed on the availability of legal aid in migration matters have forced many people involved in such matters to enter the legal system unrepresented.

From July 1998 the Commonwealth Government imposed new guidelines on all Legal Aid Commissions for the granting of legal aid in matters arising under Commonwealth law. These guidelines severely restricted the situations in which legal aid could be provided for migration matters.

The guidelines limit the granting of legal assistance for migration proceedings in courts to situations where:

a) there are differences of judicial opinion which have not been settled by the Full Court of the Federal Court or the High Court; or
b) the proceedings seek to challenge the lawfulness of detention, not including a challenge to a decision about a visa or a deportation order.

The effect of these guidelines is to severely limit the availability of legal aid for applicants in migration matters before the courts.

The guidelines also provide that assistance may be available through the Immigration Advice and Application Assistance Scheme. However, those Legal Aid Commissions who receive funding under this scheme receive funding for very limited purposes. The amount

of funding provided to most Commissions under this scheme is so limited that funds are inadequate to meet the high demand. These funds are not available to provide representation in migration matters before the courts.

The limited availability of legal advice and assistance for migration matters contributes to the high number of unmeritorious migration cases in the courts and the high number of cases which are withdrawn by applicants before the court reaches a decision.

If potential applicants in migration matters were able to apply for grants of legal aid, Legal Aid Commissions would apply a general merits test which may have the effect of reducing the number of unmeritorious applications being brought before the courts. It is also likely that an applicant who is fully advised of his or her legal position is less likely to pursue a claim that is devoid of legal merit.

Administration of grants for assistance for primary applications to DIAC and merits review tribunals should be restored to Legal Aid Commissions in relation to:

a) visa applications where there are strong humanitarian or compassionate grounds, including applications for family reunion and protection visa holders and refugee and humanitarian visas;
b) visa cancellations; and
c) deportation decisions.

Commonwealth legal aid guidelines should be amended to expand the migration matters in which Legal Aid Commissions can provide assistance in matters before the courts and review tribunals and adequate funding should be provided to enable them to do so.

The adequacy of legal aid

The major issue effecting the adequacy of legal aid at present is persistent underfunding, which, as described above, is an issue that is likely to become worse over the coming months.

Legal Aid Commissions, community legal centres and Indigenous legal services have been chronically underfunded, particularly in the Commonwealth area, since 1996, when the so-called “Commonwealth/state divide” was introduced by the previous government.

While it is not expected that the current government will be able to alleviate the financial crisis presently facing the legal assistance sector, created by years of underfunding, in one budget, it is imperative that some substantial increase be made in the next Commonwealth budget if this important sector of our justice system is not to be plunged further into crisis. While it is recognised that funding of legal aid is the responsibility of all Governments, the Commonwealth Government has much ground to make up due to the massive cuts to Commonwealth funding from 1997.

Figures assembled by the Government of Western Australia, which are roughly indicative of the amount of extra funding required, show that the Commonwealth's share of total spending on legal aid has declined from 64 per cent in 1996-97 to 45 per cent in 2006-07.[16] This analysis points out that if the federal Government wanted to restore the balance of legal aid funding to pre-Howard levels, the Government would need to spend an additional $177 million. This would increase total Commonwealth spending on legal aid to $326 million.

[16] Cited by *The Australian:* “States hope for changes to federal legal aid funding”, April 25 2008.

Other figures collated by National Legal Aid say that the Commonwealth currently expends nearly $240 million annually on legal aid via commissions, community legal centres and ATSILS. National Legal Aid's National Policy for Legal Aid in Australia calls for an additional annual Commonwealth investment of $165 million.[17]

The Law Council believes that these figures provide an approximate indication of the level of increased funding required to reverse the dramatic funding restrictions that have been placed on legal assistance sector over the past decade. However, it is possible that the ultimate figure may be closer to $250 million.

Due to the size of this funding increase, the additional funds could potentially be implemented gradually over a number of years until adequate funding has been restored.

The division of funding responsibility between the Commonwealth Government, the State Governments and the Public Purpose Funds in the manner that it is currently arranged has lead to a situation where it is unclear exactly who has primary responsibility for the funding of legal assistance. The Law Council recommends that overarching responsibility for the legal assistance sector be clearly delineated in a manner that prevents governments from pointing the finger at other parties who they believe are responsible for addressing the funding gap.

In addition to funding levels, the Law Council has identified a number of other initiatives that may improve the adequacy and functioning of the legal aid system. These measures include:

- The development and adoption by the Commonwealth of a mechanism to break down the Commonwealth/State funding divide;
- The creation of a truly national legal aid means test; and
- The restoration of a national civil legal aid program.

Commonwealth/State funding divide

The Law Council recommends that the Commonwealth develop and adopt a mechanism to begin to break down the Commonwealth/State funding divide. This will allow the ability to transfer Commonwealth funds to priority areas of disadvantage rather than depending upon a requirement that the relevant law be enacted by a Commonwealth or State parliament.

The Law Council has been consistently opposed to the Commonwealth's adoption of the Commonwealth/State law funding divide.

There are a number of undesirable specific consequences of the adoption of this Policy, with the most paramount being:

- the dislocation of funding responsibility (and therefore different commitment) in respect of closely related matters. For example, whilst the Commonwealth takes responsibility for matters under the Family Law Act, closely related legal aid services in child protection and family violence matters fall under State law and have to be funded from State revenue;

[17] National Legal Aid, *A New National Policy for Legal Aid in Australia* (November 2007).

- the inconsistency of an expectation of State funding in respect of action taken by Commonwealth authorities pursuant to State law. For example the prosecution of offences under State law, by the CDPP;

- the restriction of available funding in respect of a number of areas of Commonwealth legislation.

More generally it can be observed that the Commonwealth/State divide funding policy is abhorrent to notions of:

- the Commonwealth, as the predominant revenue gathering tier of Government, not recognizing an aspect of its responsibility for socially and economically disadvantaged Australians. This being an obligation which is otherwise generally accepted in respect of the Commonwealth based social welfare system; and

- entrusting the Legal Aid Commissions (within broad parameters) with the obligation and responsibility of making decisions as to the allocation of available funding to the areas of greatest local priority.

A related issue is the actual lack of availability of funding of legal assistance for Indigenous peoples, a section of Australian society in respect of which the Commonwealth has a clearly accepted special responsibility.

Concomitantly it must be also recognized that there is a significant obligation upon State Governments to contribute to legal aid funding in recognition of their investment in the operation of a system of justice in each respective State and the need to ensure the effective and efficient operation of those justice systems. This consideration is particularly appropriate but not limited to the funding of legal aid in criminal matters.

The Law Council recommends that a funding process be developed that is flexible enough for closely related matters, most likely being dealt with by a single legal practitioner, to be funded from a single source.

Accordingly the primary policy of the Law Council is that the Commonwealth/State funding divide should be forthwith replaced by a return to a co-operative funding model.

However, and acknowledging that this divide is unlikely to be completely disposed of immediately, the interim approach is to pursue a constructive debate about how to relax the division in order to allow Commonwealth funds to be used for State matters in certain circumstances. For example, allowing matters under the Family Law Act and closely related legal aid services in child protection and family violence to be funded from a single source.

Creation and adoption by the Commonwealth of a national means test

Currently, every Legal Aid Commission applies a different means test that must be satisfied before an individual is granted legal aid. Although there is a formula for reaching a national means test, due to the complexity of the means tests and variations amongst jurisdictions, it is not possible to identify a generally applicable national cut-off point for grants of legal aid for representation.

The Commonwealth has indicated that it would like a true national means test to be created which is set at an appropriate level. The Law Council would support the development of a nationally consistent and appropriately set means test.

Currently there are two types of means test that can be used in assessing applicants for legal aid. These are the National Legal Aid Means Test and the Simplified Legal Aid Means Test. The two tests have the same assets test component, but assess income in a different way.

All Legal Aid Commissions except Queensland and Tasmania use the National Means Test (although Tasmania uses the National Means Test for applications that are not lodged electronically). However, there are variations amongst jurisdictions as to how the National Means Test is applied.

The National Means Test allows the various jurisdictions to set different monetary limits to items allowed under the test. This is to cater for economic factors thought to be particular to individual jurisdictions. The test also allows different monetary values to be fixed for different regions within a jurisdiction, such as country and outback regions.

There is no reason to oppose variation in the means test levels if they are found to be necessary in order to achieve equitable outcomes in the light of differing economic conditions in different states, territories and regions of Australia. However, it would be necessary to oppose such variation where it is based on inadequate provision of legal aid funds by governments.

The Legal Aid Commission of New South Wales has in the past stated that non-uniformity in means test levels "also results from LACs' severe budgetary problems which prevents those states with more stringent means tests from raising them in line with the LACs which currently have more generous means tests". The Legal Services Commission of South Australia has stated: "the commission, we believe, operates the tightest means test in Australia. The means test reflects the level of funding that we have available to us, matched against demand."[18]

Legal Aid Commissions have expressed the view that in the absence of additional funding, any modification of the level of the means test may simply lead to a more stringent application of the merits test, as a strictly applied means test is necessary to cope with limited funding. For instance, in 2004 the Northern Territory Legal Aid Commission stated:

> *"Without a substantial increase in funding, the NTLAC is unable to increase the means test to enable more people to qualify for legal aid. If the means test limits were to be increased on existing funding, the NTLAC would have no choice but to read the merits test more narrowly to exclude enough applicants for the NTLAC to remain within budget. The number of self-represented litigants would therefore not be reduced but would simply be caused by other reasons."*[19]

The above issues lead to a similar proposal as that put forward in 1998 by the Senate Legal and Constitutional Affairs Committee.

The Government must ensure that the means test income and asset levels are set at the same amounts for all parts of Australia, unless regional variations can be shown to be justified by differing economic conditions. The Law Council believes that an individual's principle place of residence should be excluded from consideration.

[18] Senate Legal and Constitutional Affairs Committee, Legal Aid Report 3, Chapt 4.
[19] Senate Inquiry into Legal Aid and Access to Justice 2004, Chapt 2 "Legal Aid Funding".

Governments must provide sufficient legal aid funding to alleviate the position of those Legal Aid Commissions that impose more stringent means tests due to inadequate funding.

The Government should, in the light of the upcoming funding arrangements (due to be completed in 2009), institute a review of the appropriateness of the means test levels that currently apply.

The means test should be set at an appropriate level to allow the maximum number of disadvantaged litigants to access the justice system. However, the Law Council recognises that without an injection of additional funding, the Legal Aid Commissions must apply the means test strictly to equitably manage the allocation of limited legal aid funds across jurisdictions.

Without additional funding many people who presently do not qualify for legal aid are also unable to afford the services of private lawyers to conduct their cases, or are unable do so without undue hardship. Funding should therefore be increased to allow the means test to be adjusted to improve access to legal aid for those unable to afford private representation. The increased levels of funding would be commensurate with the overall levels of funding for legal aid discussed above.

National civil legal aid program

The Law Council has a long held policy on the restoration of a national civil legal aid program. As a result of the Commonwealth funding reductions of the mid 1990s, all commissions shut down or dramatically reduced their civil law legal aid programs. With the Commonwealth now funding family law legal aid, most state/territory revenue is used up in the provision of criminal law services. As a result, some states and territories increasingly tend to regard their obligation to support the work of commissions as being confined to criminal law, with the result being that civil law has become a low priority.

It is the Law Council's hope that the Commonwealth will agree that the provision of legal aid for civil law matters will remove a substantial barrier to access to justice.

In this context, "civil" matters are defined as disputes (not involving reliance upon the *Family Law Act 1975,* State or Territory child welfare legislation, or legislative, or common law or equity relating to property of *de facto* or same sex couples) between natural persons or bodies corporate and others including governments and government agencies and instrumentalities which do not involve any party in the matter being prosecuted for breaches of the criminal law.

Since 1996, there have been a number of studies (including those by the Law Council itself) which have identified the following major consequences of the reduction of civil law legal aid programs:

- a multitudinous increase (some studies use the word "explosion") in the number of litigants representing themselves before all courts in all jurisdictions;

- a consequential increase in the work undertaken by administrative staff and judicial officers to cope with litigants in person which has been the subject of adverse comment at the highest level;

- a clear correlation between the erosion of legal representation caused by the changes and the need and increased demand for pro bono services to be provided by the profession;

- increased pressure upon ill-resourced community legal centres and other agencies to provide assistance in what would have been casework provided by lawyers funded by former civil legal aid programs;

- increased pressure upon information agencies to "teach" litigants in person how to conduct cases by various means;

- wastage of funds on various initiatives designed to educate litigants and potential litigants about the process of litigation;

- clear examples of litigants in actions or proposed actions for damages seeking to pressure firms offering contingent litigation packages to take on cases without being prepared (or able) to fund the investigatory work necessary to assess merit, and a consequent increase in pressure on publicly funded LAFs to meet the shortfall; and

- litigants' rights being rendered nugatory because of the limitations on access to justice caused by the litigant in person's lack of necessary skill.

The Law Council's position is that a person who is eligible for a grant of assistance from a Legal Aid Commission on the basis of the person's means should be eligible for a grant of assistance in a civil matter if that person's application meets the following criteria:

i. the person has a right of action against a person, corporation or government which is justiciable in a court or tribunal of competent jurisdiction; or

ii. the person has been or is likely to be the subject of an action in such a court or tribunal; and

iii. the person's legal position is assessed as having merit, *viz* it passes the "reasonable prospects of success" test, the "prudent self funding litigant" test, and the "appropriateness of spending public funds" test.

A grant of legal assistance to the person qualifying for it should comprise grants for discrete stages of matters as follows:-

i. a grant enabling the assisted person's lawyer to take instructions and commence negotiations with the other party or the other party's legal representative with a view to settling the matter, and should include disbursement funding for an appropriately qualified mediator;

ii. if the initial grant fails to resolve the matter, then assistance to prepare and issue proceedings (or documents responding to proceedings, as the case may be) and to attend with the assisted person's lawyer any conference, mediation or other event designed by the court or tribunal to facilitate negotiations with a view to settlement, with further assistance to draw or check documents evidencing the settlement;

iii. if settlement is not achieved then to prepare the matter for hearing or trial (as the case may be), including obtaining counsel's advice on evidence;

iv. to conduct the hearing or trial according to good litigation practice.

Where the grant of assistance is directed to a lawyer not employed by a commission or community legal centre, or in any case where independent counsel would be engaged to perform legal work, then the scale of fees attaching to such grant should be not less than the scale fee provided for in the rules of the jurisdiction in which the matter would ordinarily be litigated, or such fees as would ordinarily be paid by the prudent self-funded litigant in such cases where no scale exists.

In any case where fees would be payable to a court or tribunal by a litigant who is the subject of a grant of assistance under the program, such fees should be waived by the registrar or proper officer upon receipt of a certificate from the assisted person's lawyer that assistance has been granted.

The costs indemnity rule ordinarily applying in jurisdictions in which the matter is litigated should continue to apply notwithstanding the program and should be a debt recoverable by the commission granting assistance to the successful assisted litigant.

In November 2007, National Legal Aid developed a costing for the restoration of a national civil law legal aid program. Developing this costing required a cost estimate for civil law legal advice and an estimate for civil law litigation.

The advice component involved an extrapolation to the national level of the civil law advice programs provided in New South Wales by Law Access, the NSW Legal Aid Commission and NSW community legal centres.

Since there is so little legally aided civil law litigation in Australia, the litigation component was calculated using litigation data from the very similar jurisdictions of England, Wales and Ontario where there are comprehensive civil legal aid programs. Between those jurisdictions, for every legal aid dollar spent on civil law advice, $1.12 is spent on civil law litigation. This ratio was used to estimate an approximate cost of a national civil law legal aid program in Australia.

It was estimated by National Legal Aid that funding a civil law legal aid program of this nature would cost approximately $110 million.

The cost of delivering justice

The current level of fees paid to private practitioners undertaking legal aid work does not accurately reflect the cost of delivering access to justice.

Unless one of the most crucial issues affecting practitioners is addressed - the rate of remuneration paid to lawyers undertaking legal aid work - there will be a steady decline in the number of practitioners willing to take legal aid cases over the next few years, which will severely compromise the availability of legal services to those most vulnerable.

Background and history

The Australian Legal Aid Office was created in 1974. It initially paid 100% of normal fees on referral matters. In about 1976 it commenced to pay 90% of scale fees. After Legal Aid Commissions commenced to operate from 1978 most commissions paid 80% of scale.

In the early 1980s a legal aid scale was legislated into Part V of the Family Law Regulations. Each Legal Aid Commission paid fees in accordance with those regulations. There was no indexation or inflation provision built into the regulations, despite significant inflation at the time, and the scale was not increased and gradually fell

well below the 80% of scale which legal aid commissions had previously paid. In about 1990-91, faced with the embarrassment of a scale which it owned up to being way distant from reality, the Commonwealth gave Legal Aid Commissions the power to negotiate their own scales. None was able to make up for the loss and value caused by the failure to provide an inflator during the 1980s, and by this time the drift of the private legal profession away from accepting legal aid referrals was well under way.

Even when the Commonwealth did provide for an inflator in the early 1990s it did so in a way which saw a reduction in the real value of commission funding, a factor which was pointed out by Law Council submissions at that time.

The consequence is that since the introduction of special legal aid scales the scales have not kept pace with the market.

In 1994 the Law Council of Australia produced a submission to the Federal Government highlighting the need for growth in legal aid funding. Included were the assertions that:

- Demand for legal aid had increased significantly but the level of funding had remained constant.
- To restore funding to the 1987/88 capacity an injection of $50M was needed.
- The remuneration to the private legal profession for legal aid work was too low.
- A legal aid fee based on 80% of a reasonable fee meant that there was very little profit in legal aid work.
- Fixing legal aid fees at too low a level compared with the market rate means that few practitioners will undertake that work. Fees should not be set at a level where more experienced and competent practitioners would refuse to do legal aid work.
- It is noted that the National Legal Aid Advisory Council had recommended the investigation of 100% of a reasonable fee as being an appropriate legal aid basis.

The Coalition won office in 1996. In 1997 it introduced major changes to legal aid financing which led to an immediate reduction in actual expenditure of over $33M each year for the following three years, and a real reduction in the long term. In 2003/04 the Commonwealth's contribution to legal aid funding was $130.4M, compared to its contribution in 1996/97 of $159.2M.[20]

Since 1997 legal aid fees have been subject to lump sum "stage of matter" funding, as well as capping.

In December 1999 the Commonwealth Attorney-General, Daryl Williams QC, announced that the Federal Government would work to improve the fees paid to the private profession who undertake legal aid work. The Federal Government did not carry through on that announcement.

In 2000 the Australian Law Reform Commission, in its report "Managing Justice – a review of the federal civil justice system" noted that:

[20] See LCA Erosion Report para 86.

"By common consensus of practitioners, fee reductions have made it less viable for specialist private solicitors to continue to do legal aid work. Data provided by Legal Aid Qld shows that several preferred supplier firms have pulled out of the scheme. A change in fee scales in NSW to encourage lawyers to take on legal aid matters received an 'under-whelming' response. Recent JRC research has found inverse proportionality between solicitor experience and the amount of legal aid work undertaken. National Legal Aid have recently completed a survey of 260 private firms who do legal aid family law work. The results show "a noticeable exit from legal aid work by private practitioners in Australia".[21]

Specifically the survey showed:

- 52% of firms surveyed did less legal aid work in 1998/99 than they had done in 1994/95 and many firms reported that they no longer did any legal aid work at all;

- While the number of partners in the responded firms had shown almost no decrease, there had been a noticeable decline in the number of partners doing legal aid work and there had been a similar decline in the number of employed solicitors with over 10 years experience doing legal aid work".[22]

In 2003 FMRC Legal Pty Ltd was commissioned by the Law Council of Australia to produce a report on the change in the economics of legal practice over the previous decade. Their report concluded that:

- Over the last decade the nature of legal practice has changed substantially in Australia. The profession has seen the development of a clear structure of a (small) group of large national firms, a "second" tier of smaller but nevertheless still substantial commercial practices, and then a very large array of small to mid-sized practices providing a more community based service.

- Fewer and fewer of these firms are finding themselves in a position to wish to undertake publicly funded pro bono work.

- There is a belief that the increase in the cost of practice in the last decade has outstripped the increase in the hourly rate of publicly funded legal work making it difficult for firms to undertake this work and still achieve a reasonable level of profit.

- The increase in the cost of practice in the last nine years has been substantial, well ahead of CPI. It has only been through "small" productivity gains, escalating charge rates and increasing author gearing that practices have been able to maintain profit. However for many practices, the increases in average staff salaries over the period have been substantially higher than the increases in profit.

The focus of the FMRC report was cost per solicitor chargeable hour. The report identified that the cost of delivering a chargeable hour of legal time per employed solicitor in a major regional city was approximately $140 per hour, including the lawyer salary and ordinary overhead costs. In a suburban practice, it was identified as approximately $153

[21] see para 5.113.
[22] See ALRC Report para 5.113.

per hour – and in a remote country region, approximately $132 per hour. These rates do not include any component for profit to the employer of the employed solicitor. Nor do they include any allowance for a write-down of work in progress or non-recovery of debt.

With legal aid rates in the same period being below $130 per hour, (and more commonly ranging from $88 to $105 per hour), regional, suburban and country practitioners in average practices did not recover their true cost of employing a practitioner to undertake legal aid work. Such legal aid work was undertaken at a loss.

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

The Law Institute of Victoria (LIV) has gathered some more recent figures on this issue. In 2008, LIV surveyed criminal law practices representing approximately 40 criminal lawyers to determine an average private rate for a range of different matter types. The table below shows the range of fees charged to private clients in each matter and the average private rate in comparison to Victoria Legal Aid's payment for the same matter. All fees include GST:

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

These figures demonstrate that Victoria Legal Aid fees have fallen far short of the 80% that has been considered a fair proportion of private fees in the past. At their highest legal

aid rates in Victoria do not even reach 50% of average private fees and in most areas fall significantly short of this.

In December 2006 the report of TNS Social Research, commissioned by the Federal Attorney-General's Department, found that:

- Remuneration matters, including the low hourly rate and issues with the number of hours allocated under the stage of matter payment structure, were the *key reasons* for disengagement from legal aid among all firms.

- Approximately one in three firms that are currently practicing family or criminal law have moved away from the provision of legal aid services.

- If nothing were to be done in terms of making legal aid more attractive for private practitioners, a larger number of firms that are currently providing legal aid would decrease their revenue in the next five years rather than increase.

- Approximately two-thirds of firms in regional and remote areas currently provide legal aid compared with approximately half of firms across all locations. A further one in four firms in regional and remote areas used to provide legal aid but have moved away from providing these services.

- There has been a net drop-out of approximately 10% of firms doing legal aid work in family law matters in regional and remote areas.

- There has been a net drop-out of approximately 3% for legal aid for criminal law matters in regional and remote areas.

- Any decline in the supply of legal aid by firms in regional and remote areas is likely to have a greater impact because there are significantly fewer firms operating in these areas.

- If nothing were to be done in terms of making legal aid more attractive for the private profession in regional and remote areas, a greater proportion of the firms that are currently providing legal aid would decrease their revenue from legal aid in the future rather than increase it.

In response to the findings of the TNS survey the Commonwealth Attorney-General's Department commissioned a review of remuneration arrangements for private practitioners providing legal representation services in family law matters. TNS were commissioned to explore arrangements for engaging and remunerating private practitioners. They consulted with the staff of Legal Aid Commissions as well as conducting telephone interviews with private practitioners.

In relation to remuneration the report found that:

- The key implication emerging from the research is that remuneration must be increased to ensure the sustainability of the legal aid system.

- High volume providers are currently struggling to maintain sustainable legal practices with the fees received from legally aided matters.

- To prevent further disengagement of these providers an increase in legal aid fees is recommended.

- Based on the consultation, high volume providers agreed that an increase in fees to $190 - $200 (GST inclusive) to match court scales, would ensure their long-term future sustainability.

The findings of the TNS surveys mirror to a large extent the findings of the Law Council's Erosion Report released in February 2004.

That report provided further evidence that:

- there is a rise in the number of self-represented litigants for a variety of reasons, one of which is a significant lack of available publicly funded representation;
- there is an inequity in access to representation;
- legal aid fees are below the real cost of generally providing the necessary legal service and increases are needed to at least meet costs;
- there is a significant withdrawal of experienced lawyers from publicly funded legal work;
- there is some diminution in the quality of publicly funded legal representation;
- the courts are disadvantaged by the increased number of self-represented litigants;
- a greater investment in the public funding of legal representation is likely to result in cost savings to the court system and to the justice system as a whole.

In 2008 the Victorian Bar commissioned a similar study conducted by PricewaterhouseCoopers into the fees paid by Victoria Legal Aid to barristers in criminal cases. The report expressed serious concerns that the under-funding of Victoria's criminal justice system over the past 15 years could lead to increased costs from aborted trials and retrials and poorer outcomes for victims and defendants alike.

As the report identifies, to maintain the viability of a fair justice system, it is essential that the under funding of legal aid barristers be addressed. The effective annual income of a junior legal aid barrister is less than $40,000 p.a., which is because their '… real take home pay has fallen by 25% to 40% over the past 15 years while other professions have increased 15% over the same period'.[23] The effect of this reduction in incomes has already been a 26% decline in barristers practising in criminal law over the past 3 years.

Increase in funding to private practitioners undertaking legal aid work required

The Law Council of Australia on behalf of Australian lawyers has always taken the view that lawyers in Australia are prepared to undertake publicly funded legal aid work for less remuneration than would be payable by a private client. Most Legal Aid Commission statutes require that the Legal Aid Commissions in the States and Territories ensure that

[23] Victorian Bar, *Review of Fees Paid by Victoria Legal Aid to Barristers in Criminal Cases* April 2008; PricewaterhouseCoopers, p 10.

the fees determined in respect of a legal service shall be less than the ordinary professional cost of the legal service.[24]

The question for Legal Aid Commissions is: "What fees should be paid for the legal services rendered by the profession to legal aid clients which is 'less than the ordinary professional cost of the service' but still somehow returns an appropriate level of remuneration whilst providing -

- The client with good services from an experienced practitioner;
- The Commission with a level of service to its clients which is appropriate in terms of quality; and
- The practitioner with a level of fees which provides them with some profit and encourages them to continue providing their services to legal aid clients".[25]

Whilst all Legal Aid Commissions attempt to cut their cloth to meet the constraints of their budgets, the Law Council believes that Legal Aid Commissions have, by and large, reached a point where further efficiencies and economies cannot reasonably be expected of them. It is therefore a question of injecting appropriate funds into the system to enable the Legal Aid Commissions to implement their charter to provide appropriate legal assistance for disadvantaged members of the community.

In the long run the impact of increasing fees to private practitioners undertaking legal aid work will be:

- An increase in the number of practitioners prepared to undertake legal aid work;
- An increase in the number of *experienced* practitioners prepared to resume doing legal aid work;
- A reduction in the number of self-represented litigants who currently clog the courts, creating extra expense for others negotiating the legal system, and causing delays within the system;[26]
- Optimizing the delivery of legal aid to the Australian community.

The adequacy of funding and resource arrangements for community legal centres

Community legal centres (CLCs) are independent and community managed non-profit services that provide a range of assistance on legal and related matters to people on low incomes and those with special needs. CLCs provide referrals, advice and assistance to more than 350,000 people each year through over 200 centres.[27] They are a key

[24] For example see section 39 of the NSW Legal Aid Commission Act 1979.
[25] See paper entitled "Legal Costs in Legal Aid Work" presented by Bill Grant, then CEO of the Legal Aid Commission of NSW to the Law Council Access to Justice Conference Melbourne 12.8.06 pages 2-3.
[26] Numerous papers have been written about this including Family Law Council report on litigants in person – August 2000, and ALRC report "Managing Justice" pps 359-388.
[27] NACLC, *Why Community Legal Services are Good Value, H*http://www.naclc.org.au/multiattachments/2287/DocumentName/NACLC_value_web.pdfH

component of Australia's legal aid system, and provide services which complement and extend the services provided by Legal Aid Commissions and the private profession.[28]

Providing adequate funding to CLCs intersects with the need to improve the accessibility of legal services generally, particularly in rural, regional and remote areas and for the most vulnerable.

The *Review of the Commonwealth Community Legal Services Program* conducted by the Attorney-General's Department in March 2008 confirmed that CLCs are a vital resource for the financially and socially disadvantaged:

> *The review has examined Commonwealth Community Legal Services Program data and confirmed that it is providing services to clients who are significantly disadvantaged. For example, 58% of clients received some form of income support, 82% of clients earned less than $26,000 per annum, and almost 9% of clients had some form of disability.*
>
> *In addition, there is a growing body of evidence that many disadvantaged members of the community often face a 'cluster' of problems that, if left unresolved, increase their social exclusion with long term implications for their health, employment capacity and general well being. Community legal centres' client centred approach to service delivery means that they are well placed to address this need.*[29]

There are a total of 44 CLCs in rural, regional and remote areas across Australia, which are experiencing a quickening decline in their ability to meet legal needs. Ensuring that these 44 CLCs have adequate funding is one of the most simple and direct means to tackle the problems faced by those that have difficulties accessing the legal system due to their remote location.

128 CLCs receive funds under the Commonwealth Community Legal Services Program. Funding for the Commonwealth Community Legal Services Program in 2006–07 totalled $24.7m, with $22.1m allocated to the 128 CLCs and the balance used for program support activities. The State contributions totalled $17.6m (including $3.7m provided to State only funded CLCs). The last significant injection of funding into the Commonwealth Community Legal Services Program before 2008 was $3.6m in 1999–2000 to establish five new CLCs in regional and remote areas.[30]

In April 2008, the Federal Government announced a $10 million one-off allocation to CLCs as part of its $17 million injection of funds into the legal assistance sector. Although this was a significant contribution, the National Association of Community Legal Centres has estimated that at least twice that amount is probably required. Federal Attorney-General Robert McClelland acknowledged this point at the time by stating that the one off injection only went some way towards addressing the problem after decades of neglect. "It's a question of doing what we can in the short-term to address what effectively has been a crisis," he said.

Each CLC has a baseline funding requirement for it to operate effectively. In a National Association of Community Legal Centres submission to the Department in September

[28] As defined by the Attorney-General's Department: Hhttp://www.ag.gov.au/www/agd/agd.nsf/Page/Legalaid_CommunityLegalServicesProgram_TheCommunityLegalServicesProgramH

[29] Accessible here: Hhttp://www.ag.gov.au/www/agd/agd.nsf/Page/RWP6DE98B3437EEB6FDCA25742D007B0738H

[30] Attorney-General's Department, Review of the Commonwealth Community Legal Services Program, March 2008.

2007, that amount was placed at around $500 000 per Centre. This baseline funding is based on highly reduced legal rates compared to commercial practices and does not include costs specific to service delivery for CLCs in rural, regional and remote areas.

As an example of the additional funding requirements, the National Association of Community Legal Centres wrote to the Attorney-General in January 2008 updating its 2007 funding proposal, requesting a total of $39 million in new funds. This was comprised of:

i. an immediate grant of $10.3 million to cover the hole created by funding that has not kept place with inflation - in real terms, funding has decreased by 18%;

ii. $13.7 million for rural, regional and remote Australia and specialist services for the most vulnerable; and

iii. $15 million in baseline funding for Centers that currently receive no Government funding.

The Law Council believes that an injection funding along these lines remains necessary to allow CLCs to continue to act as an essential tool of social inclusion. Funding levels should reflect the fact that CLCs are at the forefront of developing policies and programs to ensure fairness in access to justice.

The ability of Indigenous people to access justice

The extreme disadvantage suffered by many Aboriginal and Torres Strait Islander communities in Australia is widely acknowledged. The Australian Legal Assistance Forum (ALAF), of which the Law Council is a member, has determined that the collective experience of legal aid service providers is that Indigenous Australians are the most disadvantaged clients in the communities they serve.

It is widely acknowledged that dedicated Aboriginal and Torres Straight Islander legal service providers (ATSILS) are the preferred and most culturally appropriate providers of legal services to Indigenous Australian peoples.

The importance of dedicated Indigenous legal services and the pivotal role they play in helping Indigenous people access the legal system has been well established. Research has indicated that Indigenous people, especially women, are dissuaded from approaching mainstream legal services. Language barriers and the need for targeted, cultural sensitivity are the key reasons cited. This was first recognized by Governments in the 1980s.

Notwithstanding the extraordinary levels of disadvantage suffered by Indigenous Australians, the ATSILS are the most underfunded sector of all legal aid service providers for the work required of them, that is to say, they still continue to be funded well below mainstream levels.

A shortfall in funding to dedicated indigenous legal services is a curtailing of the most likely means by which indigenous people can seek legal help. ATSILS has calculated its real term funding loss since 1996 at just under 40%. This does not take into account unmet and increased need due to population increases and demographic changes, or changes to the substantive criminal law that particularly affects Indigenous people. Funding increases need to factor in the issues of language, culture, literacy, remoteness and incarceration rates into the cost of service delivery.

A particular ongoing issue for the ATSILS is that poor funding means that recruitment and retention of experienced lawyers who are prepared to undertake the highly demanding work required is very difficult. ATSILS lawyers generally have much lower salaries than their Legal Aid counterparts.

Research undertaken by ALAF has indicated that there are high attrition rates with many ATSILS lawyers resigning to take up positions with Legal Aid Commissions. The key reasons ALAF attributes to this are the better remuneration and better and more certain resourcing available to Legal Aid Commissions, which enables them to offer stability, appropriate training and support, and career paths, which the ATSILS currently cannot offer employees to anywhere near the same extent.

ALAF has determined that on average ATSILS lawyers receive 20-25% less than Legal Aid Commission lawyers for conducting the same type of work, and notes that in some cases the difference is as high as 48.22%. Other issues compound the challenges faced by ATSILS lawyers, such as language and extra travel required by rural and remoteness.

An increase in funding to ATSILS to enable pay parity with Legal Aid Commissions would go some way to addressing the inability to attract and retrain staff.

Other related initiatives may also be beneficial such as the introduction of portability of leave entitlements across legal aid service providers around the country. Without loss of entitlements lawyers would be much more likely to be prepared to transfer between legal aid providers, and it would also increase the chances of keeping experienced lawyers within the legal aid sector generally.

The Law Council calls for an injection of funding to ATSILS to allow them to provide a high quality and professional level of legal representation of Indigenous people. The justice system will continue to fail Indigenous peoples unless the most likely and effective means by which Indigenous Australians are able receive legal services are adequately funded.

Measures to reduce the length and complexity of litigation and improve efficiency

The Law Council recognises that the prohibitive cost of litigating certain civil matters has the potential to make a number of civil remedies unachievable in practice by all but the wealthiest in Australian society. This concept of 'mega-litigation' has in recent times drawn attention to the impact that private disputes can have on the courts and the strain that such litigation can impose on the scarce public resources required to fund the court system.[31]

The costs of lengthy and inefficient litigation are carried not only by the parties themselves but also by taxpayers who fund the operation of the justice system. Judicial salaries, court officer and registry staff salaries, and court premises costs are incurred unnecessarily by

[31] See, for example, Justice Ronald Sackville, *The C7 Case: A Chronicle of a Death Foretold*, paper presented to the New Zealand Bar Association International Conference, Sydney, August 2008.

litigation that is not efficient or cost effective. If inefficient litigation by big business monopolises court resources then those that cannot afford protracted litigation are prevented from accessing the justice system.

Ultimately costs should be keep in proportion to the relief being sought, which means that disputes need to be resolved economically. As Justice Sackville pointed out after presiding over the C7 case, "Once this proposition is accepted, it follows that the courts have a responsibility to manage and control litigation, especially mega-litigation in accordance with the principle of proportionality".[32]

The Law Council recognises that the traditional system of adversarial justice, in which pre-trial procedures are left entirely in the hands of the parties, is no longer considered an efficient model of dispute resolution. It is now well accepted that courts and judges have a role in actively participating in and managing this process. Yet there remain a minority of cases in which litigants may attempt to exploit the procedures available to them, such as discovery, to achieve an advantage regardless of cost or proportionality.[33] Case management procedures, ADR and other proposals all have all have a role to play in improving the efficiency of litigation.

Case management

The Law Council's Federal Litigation Section in 2006 participated in a re-examination of both the individual docket system and case management processes used in the Federal Court. The report recommended a number of proposals for the possible improvement of case management practices.

The principle theme underlying the proposals was that the profession regards it as strongly desirable both that docket judges exert a much stronger and more direct influence on pre-trial steps than is the current practice and that this influence be exerted in the environment of a case management conference conducted in a less formal and less adversarial manner than Directions Hearings and formal Motions.

The report makes a number of detailed recommendations on matters such as the classification of proceedings, case management conferences, discovery, the taking of evidence and expert evidence, dealing with jammed dockets and creating consistency between registries.

The Law Council invites the Committee to consider the proposals contained in this report. A copy of the report can be found at the Law Council's website: http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=8C750BFE-1C23-CACD-2297-E63731F9A733&siteName=lca

The Law Council considers the adoption of such proposals as important efficiency mechanisms designed to keep costs proportionate to the remedies being sought and relieve the court of unnecessary burdens on their resources.

Litigation funding

The Law Council has a long held position that properly managed litigation funding has the potential to provide access to justice to individuals who otherwise would be unable to obtain a remedy due to the likely cost of litigation.

[32] Ibid.
[33] Ibid.

In its 1995 report *"Costs Shifting: Who pays for litigation?"* the Australian Law Reform Commission stated that "Cost is a critical element in access to justice. It is a fundamental barrier to those wishing to pursue litigation. For people caught up in the legal system it can become an intolerable burden." The report further stated: "… it appears that the risk of an adverse costs order can deter or help to deter claims or defenses that should properly be pursued, especially where a party is risk averse*."*[34]

The role of litigation funding companies in the civil justice system has been endorsed in recent years as a means of ensuring justice is served in circumstances where the cost, relative to the amount being claimed, is too great to be borne by law firms or individual claimants.

Litigation funding companies generally fund less risky commercial proceedings, where the award is more easily quantifiable according to the financial loss of the claimants. Proceedings involving personal injury or recoveries that are assessed according to an "approximate" loss are generally considered too risky for funders that engage in proper due diligence, particularly when success is less certain.

Most funded proceedings involve a commercial party, which requires security for the costs of pursuing creditors of an insolvent company. The majority of other cases involve a defendant which has wrongfully obtained a large aggregate benefit from a number of parties, who individually would have no viable prospects of recovery due to the overarching expense of legal action relative to the amount being recovered. There is clearly a public interest in such proceedings being supported or maintained in order for the plaintiffs to receive any benefit at all.

There is public interest in a robust litigation funding market where sufficient capital is available to underwrite the risks associated with large group claims. These benefits could extend, for example, to people injured in major industrial accidents or mass latent injury claims against corporations or other entities, where there is evidence of negligence or recklessness as to employee or community safety.

Justice French, while a judge of the Federal Court of Australia, discussed the efficiency of litigation funding in representative proceedings in a paper presented at the Second Anti Trust Spring Conference on 29 April 2006:

> *"It may be said that the evolution of arrangements under which the costs risk of complex commercial litigation can be spread is arguably an economic benefit if it supports the enforcement of legitimate claims. If such arrangements involve the creation of budgets by commercial funders which are knowledgeable in the costs of litigation it may inject an element of commercial objectivity into the way in which such budgets are framed and the efficiency with which the litigation is conducted. The formation of such a budget does not amount to the assumption by the funder of control of the conduct of the litigation. It is not for the court to judge such arrangements as contrary to the public interest unless it can be shown that a particular arrangement threatens to compromise the integrity of the court's processes in some way. See QPSX v. Ericsson (No. 3) (2000) 66 IPLR 277 at 289 – 90".*

The cost of litigation is clearly a prohibitive factor for many people seeking to right a civil wrong. Litigation funding if properly managed can ensure access to justice for middle

[34] *Cost Shifting: Who pays for litigation*, 1995, ALRC 75. Available at http://www.austlii.edu.au/au/other/alrc/publications/reports/75/ALRC75.html#ALRC75

income earners with a reasonable damages claim, but little prospect of claiming fair compensation due to the prohibitive cost of legal proceedings.

The Law Council holds the view that litigation funding is a fledgling industry in Australia, which must be allowed to develop and expand in the interests of access to justice. The Law Council firmly believes that over-regulation will stifle the industry's growth and inhibit the development of competitive forces required to lower the cost of litigation funding services.

Alternative dispute resolution

Clearly ADR has a critical role to play in reducing the length and complexity of litigation. Even if a civil matter is unable to be directly resolved through ADR processes, the issues in dispute are often more clearly identified and the court proceedings subsequently shortened. Issues related to ADR will be discussed in relation to the following term of reference.

Full cost recovery in civil matters

The Law Council understands that the Commonwealth is considering implementing a system of full cost pricing in civil matters, which means that litigants in certain circumstances would pay court fees that more closely resemble the true cost of running and administering the court. Such a system currently operates in the United Kingdom.

The Law Council's initial reaction to such a proposal is that charging people on a user pays basis for the administration of justice, which is an exercise of government power, is "philosophically problematic", as former Chief Justice Gleeson has observed.[35] Courts should be open to the public and significant increases in court fees could potentially create a serious impediment to access to justice.

Further, if a full cost recovery system were implemented in the federal courts, similar systems would need to be implemented across all comparable jurisdictions to prevent 'forum shopping' by large litigators.

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

Early issues identification

The Law Council supports the position contained in the submission of the NSW Law Society regarding the provision of public funds for early issues identification. The NSW Law Society points out:

> *The recognition of the benefits of early issues definition and projection of liability can and should also inform strategy development in the legal aid system. For those who fall outside the increasingly stringent legal aid criteria, the risks and the costs of pursuing a legal matter can be substantial. The well-documented difficulties and costs associated with the swelling pool of unrepresented litigants are testimony to a substantial weakness in our legal support system. Too many people fall through the cracks of our legal aid system and are left to navigate through the courts with little to guide them.*

[35] "Gleeson calls for court time limits", *The Australian,* 1 February 2008.

A system of legal assistance which includes improved support for those who need a lawyer to assess their matter at an early stage would allow clients to make an informed decision on the merits of proceeding to court or exploring other dispute-resolution avenues. In turn, they would not be taking up valuable court resources on matters which have little chance of successful litigation.

Other innovations

The Law Council notes with interest the range of solutions to inefficient and costly litigation that are currently in operation or being considered in various jurisdictions.

One example is the Western Australian innovation whereby multiple trial judges preside over large cases, with the intention to split witnesses between judges and for them to hear the matter concurrently.

Another is the 'Rocket Docket' list, which has been operating in the Victorian registry of the Federal Court since May 2007. In this instance, cases that would have taken 12 to 18 months are finalised much faster through the use of case summaries for pleadings, limited discovery and pre-trial conferences to narrow the issues.[36]

These illustrations indicate that there are a variety of mechanisms available to reduce the length and complexity of litigation and improve court efficiency, and combined with effective case management, ADR and litigation funding, have the capacity to improve access to justice.

Alternative means of delivering justice;

The Law Council's Alternative Dispute Resolution Committee, which provides policy advice to the Law Council on ADR, including mediation, arbitration, early neutral evaluation, and conciliation, has prepared the response to this term of reference that can be found at **Attachment A.**

Concluding Remarks

Significant injections of funding into each of these priority areas of need is required to allow the legal aid system to continue to function effectively and avoid reaching crisis point over the coming 6 – 12 months.

The real cost of allowing legal assistance funding to remain at these historically low levels will be increased costs to both Commonwealth and State Governments arising from aborted trials and retrials, in addition to poorer outcomes for victims and defendants alike.

The provision of adequate funding for legal assistance services would represent a commitment from the Commonwealth Government to the principle that Australians are entitled to justice and to assert their legal rights regardless of their financial circumstances. Unfortunately, current funding levels do not demonstrate this commitment.

The Law Council reiterates its call for governments to adhere to the following seven principles:

[36] "Black guns for Rocket Docket", *The Australian,* 20 February 2009.

1. Develop and adopt a mechanism to break down the Commonwealth/State funding divide*;*
2. Create and adopt a truly national legal aid means test;
3. Increase fees for private practitioners undertaking legal aid work;
4. Create incentives for lawyers to practice in rural, regional and remote areas;
5. Increase funding for community legal centres;
6. Increase funding for dedicated indigenous legal services; and
7. Restore a national civil legal aid program.

Attachment A: Response of ADR Committee to term of reference 'e'.

COMMENTS BY THE LAW COUNCIL ADR COMMITTEE

INTRODUCTION

Background

1. A motion (moved by Liberal Senator Barnett for Tasmania and amended by Greens Senator Ludlum dated 5 February 2009, "the Motion"), was referred to the Legal Constitutional Affairs Committee for inquiry and report into the Australian judicial system and access to justice by 17 August 2009. A media release dated 5 February 2009 by Liberal Senator Barnett notifying of the "Senate Inquiry into Australia's Judiciary and Access to Justice" was promulgated. The media release included the following comment:

> "The Senate Legal and Constitutional Affairs Committee was appointed …to inquire into …. the ability of people to access to justice, legal aid and community legal centres, measures to reduce the length and complexity of litigation and alternative means of delivering justice…".

2. The Terms of reference for this inquiry were amended on 18 March with the following matters referred to the Legal and Constitutional Affairs Committee for inquiry and report:

   a. the ability of people to access legal representation;
   b. the adequacy of legal aid;
   c. the cost of delivering justice;
   d. measures to reduce the length and complexity of litigation and improve efficiency;
   e. alternative means of delivering justice;
   f. the adequacy of funding and resource arrangements for community legal centres; and
   g. the ability of Indigenous people to access justice.

3. The Law Council ADR Committee, ("the Committee") provides comment in respect to the Motion noted above as to item (e) – "alternative means of delivering justice".

Comments

Definitions.

4. The term "access to justice" in the context of these comments means: "access to the courts and alternative dispute resolution ("ADR") processes". ADR may also include reference to: "appropriate dispute resolution". The definitions or terminology relating to ADR adopted by the Committee for this reference are noted in the National Alternative Dispute Resolution Advisory Council, "Dispute Resolution Terms", September 2003.[37] Hybrid ADR processes, such as med-arb are also included. It is the Committee's view that it is essential that the definitions

[37] A glossary of NADRAC ADR terms can be found here: Hhttp://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/What_is_ADRGlossary_of_ADR_TermsH

used for the range of ADR options accessible in or through Australian Courts be uniform.

5. The Committee considers that there is a significant distinction between access to ADR options through court processes and courts directly administering ADR options. There are also distinctions to be made in respect to the referral of matters by courts to ADR practitioners as private practitioners selected by the parties or as adjuncts on court panels and the use of court personnel to act in the capacity of ADR practitioners. The terms "annexed", "adjunct" and "ancillary" are used in this paper to refer to "court-annexed" ADR processes, being ADR options accessed through court processes or via court referral mechanisms.

   Issues.

6. The Committee supports the development of court processes that encompass access to a wider range of ADR options as a means of more efficiently and effectively managing disputes before the courts.

7. In 1976, Harvard Law School Professor Frank E.A. Sander ("Varieties of Dispute Processing", 70 FRD 79 at 111-134) promulgated the theory of the "multi-door courthouse". The theory involved the prospect of disputes being attracted to a single location, where experts in a wide variety of dispute resolution processes (of which litigation is one) recommend one or more processes, simultaneously or sequentially, to the disputants. Sander suggested that a court house ought to have many doors and that disputants ought to be able to choose what form of dispute resolution might best fit their needs.

8. The successful integration of ADR within the court system and/or more efficient access to ADR via the court structure will require government commitment to funding.

9. If a wider range of ADR processes are to be made available within courts and tribunals, it is important that they are presented in a way that maximises their efficient and effective use. The ADR processes need to be accompanied by clear guidelines for judicial officers, ADR practitioners and disputants, outlining the advantages and disadvantages of each type of process, as well as the types of disputes which each method of ADR is most suited and to identify clearly, categories of matters in different jurisdictions which may not be suitable.

   The referral criteria to be utilised and the method of referral to ADR within courts and tribunals is crucial to the effective provision of ADR services. Within the Australian context this area requires significant development. Through the recognition and documentation of the types of ADR best suited to certain classes of dispute, the potential exists for the future implementation of streamlined processes, designed to direct disputes through the appropriate 'door' - the most appropriate form of ADR - from the time of filing with the court or earlier. Academic analysis of referral criteria to ADR processes include, F. Sander, "Varieties of Dispute Processing" (1976) 70 Federal Rules Decisions 111; K. Mack, "Court Referral to ADR: Criteria and Research" 2003 published by AIJA and NADRAC.

10. Obligations for legal practitioners to advise clients about the alternatives to a contested adjudication of the case have been promulgated in some jurisdictions (for example, NSW Law Society Advocacy Rule 17A and NSW Bar Association Rule 17A):

"Bar Association Rule 17A. A barrister must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the barrister believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation *[NSW Bar Assoc. Rule 17A, Inserted Gazette No.7 of 21 January 2000, p.348]."*

Consideration needs to be given to the further promulgation of similar obligations for legal practitioners in jurisdictions throughout Australia.

11. The Committee suggests "overriding obligations" be inserted in court and tribunal rules of practice which relate to ADR processes provided by or are adjunct to courts or tribunals. It is envisaged that these overriding obligations relate to legal proceedings and to processes such as negotiation, mediation and other ADR processes and to the conduct of the parties, their legal representatives and or any entity or person providing financial or other assistance to any party. The overriding obligations could include: a duty to act in good faith (for example, s27 Civil Procedure Act, (NSW): "It is the duty of each party to proceedings that have been referred for mediation to participate in good faith in the mediation"). Query the need to identify the emerging duties and obligations of legal practitioners representing parties in ADR in the overriding obligations (see *Studer v Boettcher* [2000]NSWCA 263 at 74).

12. Further, extending a court's jurisdiction to encompass a vast array of different ADR mechanisms and compulsory referral to ADR (now entrenched in most jurisdictions) without an uniform approach is not necessarily the best means by which courts will achieve efficiency in case management or the expeditious disposal of matters. Uniformity of definitions of ADR processes and the manner of the provision of ADR services will enable litigants, courts and tribunals to more adequately identify appropriate procedures for resolving their disputes, provide a more useful collection of statistical data for the review and development of ADR services and provide more rigorous analysis of the benefits and less advantageous aspects of the provision of ADR services.

13. Emerging key issues include:

    a) the ramification of mandatory referral to ADR
    b) the extent of confidentiality attributed to ADR processes
    c) accreditation of practitioners
    d) immunity of ADR practitioners
    e) ensuring consistency of the quality of the provision of ADR services provided
    f) the extent that Courts and Tribunals engage in the provision of ADR services
    g) the provision of ADR services in the broader context of the public interest and
    h) the need for uniformity of approach

14. The LCA ADR Committee would be pleased to elaborate on any of the issues noted above. The Committee will be hosting a Symposium on the Multi-Door Courthouse on 27 July 2009 in Canberra to further develop the matters raised in this paper and to provide an opportunity for stakeholders to explore these issues and provide regional and jurisdictional context.

Attachment B: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.