

Senate Legal and Constitutional Affairs Committee
Inquiry into Access to Justice
Questions on Notice to Julia Hall, NALCLC, 11 September 2009

Commonwealth Community Legal Services Program Service Agreement 2005-08 as extended

(question from Chair, page 26 of Proof Committee Hansard transcript)

The current CLSP Service Agreement was for the period 2005-08. This Agreement was extended for one year and has recently been extended for another year. Service Agreements run on the financial year. Thus the current Agreement will expire at the end of June 2010.

List of Community Legal Centres in the CLSP showing breakdown of State/Commonwealth CLSP funding

(question from Chair, page 27 of Proof Committee Hansard transcript)

Table attached. Please note that this table was provided by the Commonwealth Community Legal Services Program section of the Attorney-General's Department. It contains all the CLCs funded by the Commonwealth under the CLSP and the CLCs funded only by the State through the State CLSP. Importantly, this latter group includes services in some states that receive funding obtained only from that state's Public Purpose Fund but which the State has chosen to put through the State CLS Program.

In Queensland, for example, this includes several services that are not members of the Queensland State Association of CLCs and are not under the umbrella of NALCLC. Some of those services have features that are inconsistent with the CLC sector's definition of a community legal centre. In our view, it would be preferable for them not to be included in a CLSP funding table.

PPF funding is of course subject to the variables affecting the health and size of the fund, and is in any event at the discretion of the Fund's trustees. It was traditionally used for 'one off' grants for projects but a couple of states have started to make PPF grants for services, or aspects of services, for one to three years. Including these amounts can, in our view, give a misleading impression about a State's contribution and commitment to the CLSP.

Are all Community Legal Centres that receive Commonwealth funds under the CCLSP incorporated associations?

(question from Chair, page 29 of Proof Committee Hansard transcript)

NALCLC does not have one central record of every CLC's legal status and although we could ascertain this by reviewing all the centres' annual reports, we have been unable to do so in this limited time. The concern, as we understand it, is though perhaps addressed by the terms of the current CLSP Service Agreement (2005-08

as extended); it provides that:

4.4.4 The Organisation is only eligible to receive funds under this Agreement if it is an Australian company, an association incorporated under the legislation of the State or Territory in which it operates or an Aboriginal association incorporated under the *Aboriginal Councils and Associations Act 1976* (Cth).

Community Legal Centres' work - breakdown by areas of law and State/Territory

(question from Chair, pages 30-1 of Proof Committee Hansard transcript)

See diagrams and graphs attached. Please note that the data in those graphs and diagrams is for 2008-09 and refers to advices and casework only ie it excludes information and referrals - a very large component of CLCs' work - and community legal education and law reform.

The information is obtained from the CLSIS database, which collects data from CLCs funded under the Commonwealth and State Community Legal Services Programs - it records service delivery for only about 80% of the over 200 CLCs in Australia.

Role of State/Territory Governments with respect to funding of Community Legal Centres

(question from Chair, page 31 of Proof Committee Hansard transcript)

The outcome statement for the Commonwealth Community Legal Services Program is:

Equitable access to legal assistance services for disadvantaged members of the Australian community and those with special needs.¹

NACLC believes that all governments in Australia should demonstrate their commitment to and support for this outcome - including by way of a significant financial contribution to the CLSP.

NACLC does not believe that it is its role to resolve what the Commonwealth and State and Territory governments have not yet been able to do: the appropriate and equitable allocation between governments of financial and other responsibilities for the administration and funding of community legal services. There are though, we believe, some fundamental principles:

¹ *Commonwealth Community Legal Services Program Guidelines*, www.ag.gov.au/cclsp

- Total funding for CLCs should be determined on clearly expressed principles, the most important being evidence of legal need (met and unmet).
- The Commonwealth and each State and Territory should contribute significantly to the funding of community legal services and the administration of the program. In deciding the appropriate State/Commonwealth proportion in any particular jurisdiction, one consideration may be the estimated proportion of 'State' or 'Commonwealth' matters, both actual in the last period and predicted in the next, but this should not be prescriptive or determinative. One reason for this is that disadvantaged people commonly have multiple and intermeshed legal issues that cannot be easily or neatly severed and categorised. A woman with children presenting with an immediate housing problem (State law) may have family law (Commonwealth) and family violence (State criminal) legal needs – to give a simple example. The focus should always be on the client and addressing their needs, and not on an artificial and technical classification of applicable jurisdiction/s.
- The respective proportions of funding to be contributed by the Commonwealth and respective States/Territories should not be prescribed in percentages of the total – to do so could mean that if one government chooses to contribute less in any one year or period, the other party may or must allocate a smaller dollar amount than they may otherwise have done.
- The CLC sector, through NACLC as appropriate, should be involved in and consulted about the setting of any funding principles, model or formula.

Recommendation 12, 2004 Access to Justice Report

(question from Senator Crossin, page 33 of Proof Committee Hansard transcript)

NACLC supports recommendation 12 and the Committee's view in the 2004 Access to Justice report that a 'reassessment of the application of the Commonwealth guidelines and priorities to determine grants of assistance is urgently required'. As the Committee states in the Report, while legal aid guidelines appear to be gender-neutral in that they do not distinguish between men and women applicants, the guidelines do not produce the same results for men and women in practice.²

Women continue to receive significantly less legal aid than men. In the 2007-2008 financial year:

- NSW: 27.8% of legal aid case and in-house duty clients were women;³
- Vic: women received 36% of legal aid grants;⁴
- SA: women received 27% of legal aid grants;⁵

² Senate Legal and Constitutional Affairs Committee (2004) *Inquiry into Legal Aid and Access to Justice*, pp 46-48.

³ Legal Aid NSW (2008) *Annual Report 2007-2008*, p 26.

⁴ Victoria Legal Aid (2008) *Annual Report 2007-2008*, p 17.

⁵ Calculated from figures provided in Legal Services Commission of South Australia (2008) *Annual Report 2007-2008*, p 21.

- WA: women received 31% of legal aid grants;⁶
- ACT: women received 41% of legal aid grants (based on approved applications)⁷

The lower levels of legal aid granted to women can be attributed to the higher level of legal aid funding provided to criminal law matters where men make up the vast majority of recipients. In the 2007-2008 financial year:

- NSW: 50.3% of Legal Aid NSW's overall budget was spent on criminal law services and 31.6% was spend on family law services;⁸
- Vic: over 60% of all grants of legal assistance were for criminal law matters;⁹
- Qld: 62% of applications approved were for criminal matters and 26% for family matters;¹⁰
- SA: 77% of legal aid granted was for crime matters and 18% for family matters;¹¹
- WA: 63% of applications granted were for crime matters and 34% for family matters;¹²
- Tas: 74% of applications approved in-house or assigned were for crime matters and 25% for family matters;¹³
- ACT: 54.14% of applications approved were for criminal matters and 31.45% for family matters;¹⁴
- NT: 70% of applications approved were for criminal matters and 23% for family matters.¹⁵

Should family violence prevention legal services and Indigenous legal aid services assist perpetrators and victims?

(question from Senator Crossin, pages 33-4 of Proof Committee Hansard transcript)

NACLC's view is that it is important that both perpetrators and victims have access to legal aid services, but that these services should be provided by separate organisations. NACLC notes that the operational framework for the family violence prevention legal services states that services must be focussed on victims-survivors of family violence and sexual assault, and that services cannot be provided to perpetrators.

⁶ Calculated from figures provided in Legal Aid WA (2008) *Annual Report 2007/2008*, p 16.

⁷ Legal Aid ACT (2008) *Annual Report 2007-2008*, p 27. The annual reports for Queensland, Northern Territory and Tasmania legal aids do not provide a gender breakdown of legal aid grants made, applications approved or legal aid services provided across all matter types. Queensland provides statistics on the gender breakdown for civil and family law matters only: Legal Aid Queensland, *Annual Report 2007-2008*.

⁸ Legal Aid NSW (2008) *Annual Report 2007-2008*, pp 18 and 20.

⁹ Victoria Legal Aid (2008) *Annual Report 2007-2008*, p 17.

¹⁰ Legal Aid Queensland (2008) *Annual Report 2007-2009*, table 11.

¹¹ Calculated from figures provided in Legal Services Commission of South Australia (2008) *Annual Report 2007-2008*, p 21.

¹² Calculated from figures provided in Legal Aid WA (2008) *Annual Report 2007/2008*, p 2.

¹³ Note: These are the 2006-2007 statistics: Legal Aid Tasmania, *Annual Report 2006-2007*. The 2007-2008 annual report is not available on Legal Aid Tasmania's website.

¹⁴ Legal Aid ACT (2008) *Annual Report 2007-2008*, p 26.

¹⁵ Calculated from figures provided in Northern Territory Legal Aid Commission, *Annual Report 2007-2008*, p 26.

In Western Australia, the Aboriginal Legal Service is auspicing some family violence prevention legal services. NACLC does not support this auspicing model, as it does not ensure that the services are appropriate for Aboriginal women. The Aboriginal Legal Service has adopted a key focus on criminal law services, and as a result is defendant oriented in legal practice and organisational culture. This is in direct conflict with the aims of the family violence prevention legal services, which focus on the victims/survivors of domestic and family violence and sexual assault. The Aboriginal Legal Service assists perpetrators and this causes a problem for victims who do not feel safe using the service.

The establishment of the family violence prevention legal services program was in part to address the specific legal needs of Aboriginal women, which were not being met by the Aboriginal Legal Service. To ensure that Aboriginal women have access to justice, the family violence prevention legal services and other Aboriginal and Torres Strait Islander women's legal services should be funded to be run by Aboriginal and Torres Strait Islander women.

Should separate Indigenous women's legal services be established?

(question from Senator Crossin, pages 34-5 of Proof Committee Hansard transcript)

Yes, there is an urgent need for funded legal services for Aboriginal and Torres Strait Islander women in all states that are both appropriate and accessible. Aboriginal and Torres Strait Islander women should be involved centrally in the development, implementation, delivery and management of those services.

The need for separate legal services for Aboriginal and Torres Strait Islander women was identified by the Australian Law Reform Commission in its 1994 report, *Equality Before the Law: Justice for Women*.¹⁶ The Commission found that Aboriginal and Torres Strait Islander women were not adequately served by the legal system and that most existing Aboriginal and Torres Strait Islander legal services discriminated against women and did not benefit men and women equally. The Commission recommended funding 'the establishment of legal services for Aboriginal and Torres Strait Islander women in areas where consultation with local indigenous women indicates a demand for such a service', with services 'to be staffed and managed by Aboriginal and Torres Strait Islander women'.

Fifteen years on, there is still an urgent need for separate legal services for Aboriginal and Torres Strait Islander women. As stated above, Aboriginal and Torres Strait Islander Legal Services do not generally meet the needs of Aboriginal and Torres Strait Islander women as they have focussed on criminal law services and are defendant oriented in practice. Some Aboriginal and Torres Strait Islander women have reported feeling reluctant to seek advice and support from Aboriginal and Torres Strait Islander Legal Services because the legal service may be defending the perpetrators of violence the women are trying to escape.¹⁷

¹⁶ Australian Law Reform Commission (1994) *Equality Before the Law: Justice for Women*, Report no 69, [5.24]-[5.37].

¹⁷ DRAFT Australian Aboriginal and Torres Strait Islander Women's Parallel NGO Report on the implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) 2009.

Funding for Aboriginal and Torres Strait Islander women across Australia is fragmented and inadequate. Separate legal services for Aboriginal and Torres Strait Islander women are not available in all states, territories and regions. For example, Tasmania and the Torres Strait Islands have no Aboriginal and/or Torres Strait Islander women's legal program or service for women escaping family violence. Similarly, there are no Aboriginal women legal services in Western Australia. Where they are available, Aboriginal and Torres Strait Islander women's legal services are not funded adequately to meet the high demand for their services. While family violence prevention legal services assist some women, they do not provide services to women in cities.

While Aboriginal and Torres Strait Islander women are disadvantaged in their access to legal services, they also experience a high level of legal needs. The level of violence in Aboriginal and Torres Strait Islander communities remains unacceptably high and the victims of family violence are disproportionately women and children. Aboriginal and Torres Strait Islander women were 35 times more likely than non-Indigenous women to be hospitalised due to family violence related assaults.¹⁸ Aboriginal and Torres Strait Islander women are also severely overrepresented in prison and are the fastest growing prison population in Australia.¹⁹ A NSW study found that 70% of Aboriginal and Torres Strait Islander women prisoners have been victims of child sexual abuse.²⁰ Rates of child sexual abuse in Indigenous communities remain unacceptably high. The Australian Crime Commission has made preliminary findings on child sexual abuse in Indigenous communities that highlight the endemic nature of violence in many Indigenous communities, and the common occurrence of under-reporting and non-reporting of violence and abuse.²¹

Key principles of funding arrangement

(question from the Chair, pages 37-8 of Proof Committee Hansard transcript)

Other Inquiries have commented on the ad hoc nature of the current distribution of funding between individual centres that reflect the origins of the CLSP as an application-based grants program²² - and, we would add, in some cases the effect of subsequent political considerations.

Reviews have previously considered the question of setting principles or formulas for funding. They tend, in our view, to come up with similar conclusions, leaving one to wonder why more progress has not been made.

¹⁸ Australian Government Productivity Commission Steering Committee for the Review of Government Service Provision (2009) *Overcoming Indigenous Disadvantage: Key Indicators 2009 Fact Sheet: Women, men and children*. The Commission also noted that these figures are only based on reported violence and are likely to underestimate the true extent of violence.

¹⁹ Aboriginal and Torres Strait Islander Social Justice Commissioner (2009) *2008 Social Justice Report*, p 304.

²⁰ Aboriginal Justice Advisory Committee (2003) *Speak out, Speak strong*, p 5 cited in Aboriginal and Torres Strait Islander Social Justice Commissioner (2009) *2008 Social Justice Report*, 156.

²¹ Australian Crime Commission, 'National Indigenous Violence and Child Abuse Intelligence Task Force (NIITF) - Special Intelligence Operation', at <http://www.crimecommission.gov.au/our_work/determinations/niitf.htm>.

²² See, eg, *Review of the NSW Community Legal Centres Funding Program Final Report* (June 2006), p 161.

For example, the Final Report of the Commonwealth and State Attorneys-General commissioned Review of the NSW Community Legal Centres Funding Program (June 2006) proposed five, broad principles for what it called “the funding framework of the future”. They were:

1. Support for the unique nature of CLSP services (including that the Commonwealth and State governments share responsibility for the CLSP and work cooperatively)
2. Quality and impact of service
3. Flexibility of service
4. Maximising community benefit, and
5. Sustainability of services (which included not only that funding should be at least at a base level of effectiveness, but that other important considerations included identifying ‘highest need’ and equity issues).²³

NACLC believes that these principles, set out in more detail in the NSW Report, are sound ones and should be applied to any new framework. We would add a principle that includes a commitment to consult with the CLC sector and NACLC on the setting of principles, a funding model or models and/or the manner and form of its/their implementation (as distinct from on actual specific funding decisions).

The Commonwealth CLSP Review Final Report proposed a funding model that incorporated three components: minimum funding (allowing for the establishment of a minimum level of funding for centres, taking into account different operational priorities), needs based funding (providing additional funding for CLCs depending on a needs, demands and costs assessment of a CLC’s potential population), and unmet needs funding (providing additional funding to meet demands in areas not currently being serviced adequately or at all).²⁴ NACLC had no objection to the articulation of these components, although they are perhaps narrower than the NSW Review principles.

As it has made clear in various communications with AGD, NACLC believes that there are some shortcomings in the proposed funding model that was subsequently shown to us. These relate to matters that could all be addressed, and we have made suggestions about them. They include that the Department’s model cannot be applied together to generalist and specialist centres; that it should look at a centre’s actual catchment area, not just where services have been delivered in an immediate past period; and the need for a more sophisticated analysis of legal needs indicators (as distinct from a measure of services delivered to date - which among other things greatly advantages the larger and more established centres - and as distinct from indicators of disadvantage) in a community and factoring in other services available in/to the area.

We have provided a demonstration to AGD of a Legal Needs Assessment Framework that we believe would provide a better basis for the model, not least because it provides more information about unmet legal need in the catchment area.

²³ Ibid. p 167.

²⁴ *Review of the Commonwealth CLSP Final Report* (March, 2008), p 61.

None of the issues are insurmountable as we see them and we are available to discuss the development of a model further.

What period should a new approach or model of CLSP funding apply?

NACLC has previously argued for funding to be made on a five year cycle to give greater certainty for planning and delivery, however the Commonwealth Review recommended that it should run a three year cycle²⁵. While we maintain our position, if it is to be shorter, we stress that it should not be any shorter than three years. Recruitment and other commitments, as well as planning and implementation requirements, require longer times.

To what should a new approach to CLSP funding apply?

Both the Review of the NSW Community Legal Centres Funding Program and the more recent Commonwealth Review of the CLSP decided not to recommend the reallocation of funds between centres, or to consider relocating or amalgamating them. The NSW Review report said:

To do so would seriously disrupt service provision, compromise momentum towards legal system reform, undermine relationships and networks, and damage long-accumulated social capital.²⁶

The Commonwealth Report said:

The Review considered the appropriateness of redistributing the current Commonwealth Community Legal Services Program funding allocation using the funding model tool. The Department determined that it would be too disruptive to attempt to redistribute the current funding allocations, as current levels of funding do not provide the scope to allocate a minimum base level of funding to all centres. Applying the funding model for redistributing current funds may skew funding to such an extent that the number of community legal centres disadvantaged by the distribution would far outweigh those that would be advantaged. The proposed funding model is most appropriately applied as a tool ... to use in exploring how best to allocate any new funding.²⁷

NACLC believes that this conclusion is the correct one for the time being. NACLC believes though that all CLCs should utilise evidence based research and analysis of their community's legal needs and other factors relevant to best possible strategic planning of the centre's services and operations, insofar as their resources allow them to do so. Importantly, CLCs should be funded and resourced to enable them to do so.

A national rollout of a Legal Needs Assessment Framework and the related Strategic Planning toolkit developed recently in a NSW CLC project, and for which NACLC has sought funding from the Commonwealth to have adapted for use around the country, would greatly facilitate this. We believe that as this work is

²⁵ *Review of the Commonwealth CLSP Final Report* (March, 2008), p 62

²⁶ *Review of the NSW Community Legal Centres Funding Program Final Report* (June 2006), p 166.

²⁷ Commonwealth CLSP Review Report (March 2008), p 61-2.

developed further through the sector, the profile of existing centres' services may change, in some cases significantly. This process should be allowed time to occur to ensure the needs and expectations of communities with existing services are met.

In a few years, the question of whether the funding model as adapted over time, should be applied to existing centres, should be revisited and discussed by AGD, SPMs and NACLC and CLCs.

So much in common, why aren't we further advanced?

In September 2007, NACLC made a submission to the Attorney-General's Department, *Revised Funding Formula for Community Legal Centres*. A copy is attached.

It proposed two funding streams: funding for staffing and premises based on levels of legal need in the areas in which CLCs operate (ie their catchment areas); and funding for special circumstances – both for additional operational requirements that incur additional costs eg those RRR centres that incur higher costs, and for 'unexpected' situational developments eg, where a large employer has closed down, or the community has been affected by fire or flood, and there is a resulting upsurge in legal needs.

These principles are simply expressed and in our view, subject to the understanding that the submission refers to met and unmet legal need, it says it all.

The submission is slightly out of date in some respects; for example, the National Legal Aid Survey results are now expected in later 2010. On the other hand, we have already developed the Legal Needs Assessment Framework for NSW, and hope to adapt it for use by CLCs (and funders) for national rollout. It would be revised, as would any funding model, once the NLA Survey results are available (and indeed for any relevant new information, eg SEIFA data, after the next Census, etc.).

In summary, though, that submission emphasised what NACLC still believes to be central to the principles that should underlie any funding model:

- a base level of funding for a CLC based on the cost effective Strategic Service Delivery Model (SSDM) explained in the submission;
- a new funding formula or model to be applied to new funding only (at this stage at least);
- evidence based legal needs identification and analysis of met and unmet legal needs of CLCs' catchment areas' community, using evidence based legal needs indicators and taking into account disadvantage factors and existing services available – to be the basis for both a funding formula and strategic service planning;
- a pool of funding for special circumstances affecting legal needs and ability to meet them – for both additional costs for special circumstances for some services and unpredicted events affecting demand/service delivery such as natural disasters;

- funding by cycles of ideally five but at least three years to ensure effective planning and service delivery

As mentioned at the beginning of our response on this question, there are many common threads in this 2007 submission with the cited Reviews' recommendations. Given that, it is disappointing that this issue has not progressed further.

NACLC continues to be available for consultation to develop a more precise funding framework. To be most effective, it would be beneficial if prior to that consultation Commonwealth and State/Territory governments agreed on the basis upon which they would each respectively support CLSP funding and had identified any issues with regard to the funding decision making process still to be resolved.