

## CHAPTER 2

### The ability of people to access legal representation

2.1 Term of reference (a) asks the committee to consider the ability of people to access legal representation, an issue which has been raised previously in various reviews and inquiries throughout Australia.<sup>1</sup>

2.2 Some of these were enumerated in the submission from legal experts, Assoc. Prof. Simon Rice OAM and Assoc. Prof. Molly O'Brien:

The questions raised by the terms of reference have been addressed repeatedly in inquiries similar to the Committee's current inquiry, and in the resulting reports and recommendations, in the 35 years, since Ronald Sackville's landmark reports:

- Commissioner for Law and Poverty, *Legal aid in Australia*, AGPS, 1975
- Commissioner for Law and Poverty, *Legal aid in Australia: discussion paper*, November 1974.

Parliamentary committee reports in that time include:

- Joint Committee of Public Accounts and Audit Title: Report 403: *Access of Indigenous Australians to Law and Justice Services*, 2005
- Senate Legal and Constitutional Affairs Committee:
  - *Legal aid and access to justice*, 2004
  - *Interim report – Legal aid and access to justice*, 2004
  - *Australian Legal Aid System: Third Report*, 1998
  - *Australian Legal Aid System: Second Report*, 1997
  - *Australian Legal Aid System: First Report*, 1997
  - *The Cost of Justice – Checks and Imbalances: The Role of Parliament and the Executive (Second Report)*, 1995
  - *The Cost of Justice – Foundations for Reform*, 1993
  - *Cost of Legal Services and Litigation – Legal Aid 'For Richer and for Poorer'*, Discussion Paper No. 7, April 1992

---

<sup>1</sup> For example, Law Council of Australia, *Submission 12*, p. 4; Assoc. Prof. Simon Rice OAM & Assoc. Prof. Molly O'Brien, *Submission 3*, p. 2; Care Inc. Financial Counselling Service and the Consumer Law Centre of the ACT, *Submission 9*, p. 1; and Combined Community Legal Centres' Group NSW (Inc), *Submission 44*, p. 2.

- House of Representatives Standing Committee on Aboriginal Affairs, *Aboriginal Legal Aid*, 1980.

Reports of the Commonwealth Attorney General's Department and public agencies in that time include:

- Attorney General's Department, *Review of the Commonwealth Community Legal Services Program*, 2008
- Australian Law Reform Commission:
  - *Managing Justice: A review of the federal civil justice system*, Report No 89, 2000
  - *Part III (Access to Justice), Equality before the law: Justice for women*, Report No 69, 1994
- Attorney General's Department, *The Justice Statement*, May 1995 <http://www.austlii.edu.au/austlii/articles/scm/jcontents.html>
- Access to Justice Advisory Committee, *Access to justice: an action plan*, AGPS, 1994
- National Legal Aid Advisory Committee:
  - *Legal Aid for the Australian community*, 1990
  - *Funding, Providing and Supplying Legal Aid Services*, 1989
- G.G. Meredith, *Legal aid : cost comparison, salaried and private lawyers*, Commonwealth Legal Aid Council, AGPS, 1983
- M. Cass and J.S. Western, *Legal aid and legal need*, Commonwealth Legal Aid Commission, 1980

A complete bibliography would show as well the many reports on access to justice issues produced by legal aid agencies, community legal centres, professional associations and law foundations.<sup>2</sup>

2.3 Other evidence to this inquiry particularly referred to the committee's report from its 2003-04 inquiry (2004 Report), with one submission neatly summarising the thrust of that evidence as follows:

The main messages to the 2003 Inquiry into Legal Aid and Access to Justice were that Legal Assistance Service Providers, despite working co-operatively to maximise service delivery, were even then unable to meet the demand that was presenting at the door; and that they believed that there were also significant numbers of people with legal needs who did not reach service delivery points.<sup>3</sup>

---

2 Assoc. Prof. Simon Rice OAM & Assoc. Prof. Molly O'Brien, *Submission 3*, p. 2.

3 Victorian Aboriginal Legal Service Co-operative Ltd, *Submission 42*, p. 1; and Australian Legal Assistance Forum, *Submission 24*, p. 2.

2.4 The 2004 Report made 63 recommendations, many of which were aimed at determining and meeting legal needs in Australia, including the legal needs of Aboriginal and Torres Strait Islander peoples, people living in rural, regional and remote (RRR) areas, and people involved in family law matters.

2.5 Submissions noted that most of the 2004 Report recommendations have not been accepted.<sup>4</sup> Where partially accepted, submissions stated that the recommendations have not been implemented. In view of this (and other) inaction, submitters and witnesses expressed reluctance to expend valuable resources participating in the inquiry; questioned the committee's motives in instigating the inquiry; and were highly doubtful that the inquiry would be in the least productive.

2.6 Assoc. Prof. Rice and Assoc. Prof. O'Brien submitted that the lack of government response over the past 35 years demonstrates a lack of coherence and direction in Australian justice policy. They suggested that:

The Australian Government take the necessary steps to establish a standing, independent capacity for justice-related research that will inform public policy in the provision and funding of legal aid, community legal services, [and] indigenous legal services courts.<sup>5</sup>

2.7 In 1998, the committee made a similar recommendation,<sup>6</sup> and Assoc. Prof. Rice and Assoc. Prof. O'Brien argued that such a body would eliminate the need for parliamentary inquiries into access to justice, warning that:

Without a dedicated, independent and permanent research capacity to support, monitor and evaluate justice policy, Australia will, through various public inquiries from time to time, continue to ask the same questions about justice policy, and make the same recommendations for reform.<sup>7</sup>

2.8 The Law Council of Australia (Law Council) also questioned the point of conducting yet another inquiry, stating that legal aid concerns have been drawn to the attention of governments numerous times:

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

---

4 Government Response, *Senate Hansard*, 7 February 2006, pp 61-83

5 Assoc. Prof. Simon Rice OAM & Assoc. Prof. Molly O'Brien, *Submission 3*, p. 3.

6 Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the legal aid system (third report)*, June 1998, Recommendation 14, p. 135.

7 Assoc. Prof. Simon Rice OAM & Assoc. Prof. Molly O'Brien, *Submission 3*, p. 3.

which already exist and which continue to be relevant be implemented immediately.<sup>8</sup>

2.9 The National Association of Community Legal Centres (NACLC) was one of the aforementioned submitters, having earlier contributed to the committee's 2003-04 inquiry and the Joint Committee of Public Accounts and Audit's June 2005 inquiry into Access of Indigenous Australians to Legal Services. The NACLC told the committee:

Our views have not changed as the main issues have not changed, other than that the funding provided is even more inadequate as it has not kept pace with the increased costs of running existing services and the need for services has increased.<sup>9</sup>

2.10 The NACLC indicated dissatisfaction with organisations having to continually make fruitless and unnecessary representations to government, particularly when this significantly expends limited resources. Submissions from across the legal assistance sector also reflected this view.<sup>10</sup>

2.11 Throughout this report, including annexes the committee reiterates, amends and expands certain recommendations from its 2004 Report, and makes new recommendations which it considers will promote and strengthen the Australian legal aid system, if adopted by governments.

2.12 This chapter discusses:

- the current context of funding;
- the National Legal Needs Survey;
- Australia's human rights obligations;
- current Australian Government legal aid programs; and
- lack of access to legal representation.

### **The current context of funding**

2.13 Access to legal representation is a topic which should be placed in context. According to evidence, two factors currently affect disadvantaged people's ability to obtain access to legal representation: firstly, the inter-relationship between legal assistance service providers; and second, the global financial crisis.

---

8 Law Council of Australia, *Submission 12*, p. 4; Australian Legal Assistance Forum, *Submission 24*, p. 2; and Victorian Aboriginal Legal Service Co-operative Ltd, *Submission 42*, p. 1.

9 National Association of Community Legal Centres, *Submission 1*, p. 2; Combined Community Legal Centres' Group NSW (Inc), *Submission 44*, p. 3; and PIAC, *Submission 50*, p. 2.

10 National Association of Community Legal Centres, *Submission 1*, pp 2-3; Combined Community Legal Centres' Group NSW (Inc), *Submission 44*, p. 4; and Aboriginal Legal Rights Movement Inc. *Submission 61*, p. 1.

2.14 The NACLCL described to the committee how legal aid funding for Legal Aid Commissions (LACs) – the first consideration – impacts on Community Legal Centres (CLCs):

Many CLC submissions and reviews in the past have documented the increasing demand on CLC services when legal aid is cut, in real or effective terms, and, for that matter, when legal aid policy or resource allocation is changed. The inadequacy of legal aid funding, especially the Australian Government's failure over the last decade or more to match State funding, has had a significantly deleterious effect not only on the legal aid bodies themselves, but on CLCs and, of course, on their clients and would be clients.

2.15 The NACLCL indicated that unless the entire legal aid system is effectively resourced, then the inability of one service provider to deliver services will result in that responsibility being shifted to another service provider who might similarly be pressed for adequate resources:

Increasing funding to CLCs to address the effective reduction in funding over the past decade or more will help CLCs to be able to meet the client demand of that time. But if other services in their areas are not available and/or are not properly resourced, then the CLC will experience much higher client demand and they will still be forced to turn away many people who should have access to legal assistance.<sup>11</sup>

2.16 Submissions suggested that access to legal representation depends on both resources and the availability of legal practitioners throughout the legal aid system, which, as discussed in this report, cannot always be taken for granted.

2.17 In relation to the global financial crisis, the 2008-09 economic downturn is widely expected to affect a significant number of Australians. Submissions referred to various affects, including: higher rates of unemployment; greater numbers of eligible applicants for legal aid; more people experiencing financial hardship; and consequently, increased demand for legal assistance services and associated funding.<sup>12</sup>

2.18 National Legal Aid (NLA) warned that:

Without increased funding to meet this demand legal aid commissions will have no option but to prioritise applications in some way. This will have the effect of further limiting the proportion of people who are eligible for aid.<sup>13</sup>

2.19 The NACLCL supported NLA's forecast, stating that nationally CLCs are already experiencing increased demand for certain types of legal assistance. Its

---

11 National Association of Community Legal Centres, *Submission 1*, p. 9; and Combined Community Legal Centres' Group NSW (Inc), *Submission 44*, p. 8.

12 For example, Australian Legal Assistance Forum, *Submission 24*, p. 3.

13 National Legal Aid, *Submission 34*, p. 16; Australian Legal Assistance Forum, *Submission 24*, p. 3; and Victorian Aboriginal Legal Service Co-operative Ltd, *Submission 42*, p. 2.

comparative analysis of client service data shows significant increases in: credit/debt services (10 per cent); employment services (22 per cent); tenancy services (25 per cent); and consumer/complaint services (16 per cent), as compared with the same period in the previous financial year.<sup>14</sup>

2.20 The Law Council predicted an impending crisis in the legal assistance sector over the next 6 to 12 months as a result of increased demand for services arising from the global financial crisis. It intimated that the crisis could be averted with a significant injection of legal aid funding:

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.<sup>15</sup>

2.21 The committee understands that the adequacy of legal assistance service providers' resources affects people's access to legal representation, and that extraneous factors – such as the global financial crisis – can place further pressures on these resources. If demand for legal assistance services exceeds, or continues to exceed, supply, then the committee expresses concern for the ability of disadvantaged Australians to access legal representation and justice.

### **The National Legal Needs Survey**

2.22 As indicated above, relevant statistical data is in short supply, a fact remarked upon during the 2003-04 inquiry. At that time, the committee found that in order to assess the state of access to justice in Australia, there needed to be a better understanding of the level of demand and unmet need for legal assistance throughout Australia.<sup>16</sup> Accordingly, the committee recommended that:

---

14 National Association of Community Legal Centres, *Submission 1*, p. 9; Mr Norman Reaburn, Chair, National Legal Aid, *Committee Hansard*, Melbourne, 15 July 2009, p. 65; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission 42*, p. 2; Mr Robert Stary, Executive Committee, Criminal Law Section, LIV, *Committee Hansard*, Melbourne, 15 July 2009, p. 72; PILCH, *Submission 33*, p. 34; Care Inc. Financial Counselling Services and Consumer Law Centre of the ACT, *Submission 9*, p. 4; and Gilbert & Tobin, *Submission 45*, p. 4.

15 Law Council of Australia, *Submission 12*, p. 4; and

16 Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, p. 39.

---

The Commonwealth Government should fund a national survey of demand and unmet need for legal services, to be undertaken in cooperation with state legal aid commissions and community legal centres. The objectives of the survey should be to ascertain the demand and unmet need for legal services across the country and to identify obstacles to the delivery of such services, particularly to the economically and socially disadvantaged.<sup>17</sup>

2.23 In its response to the 2004 Report, the Australian Government disagreed with the recommendation, querying the value of such a survey, and rejecting that the Australian Government alone should fund it:

The Government has undertaken a significant amount of work to ensure that the funds it provides for legal aid services are distributed equitably across the States and Territories, using relevant demographic factors...The Government will continue to set priorities and guidelines for the provision of assistance in Commonwealth law matters. Governments and legal aid bodies should ensure that available resources are used efficiently and cost-effectively to provide services. The emphasis is to target services appropriately; for example, to ensure that they are located correctly and that disadvantaged clients who require assistance are identified.<sup>18</sup>

2.24 In late 2007, the Law and Justice Foundation of NSW in conjunction with NLA commissioned a national legal needs survey (the *Survey of Legal Needs in Australia*). Some results are expected in late 2010, with the main reports (national, state and territory) to be released in mid- to late 2011:

We have had interim results. They have not been published because they are very interim results and a lot of that sort of statistical magic stuff has to happen to the survey results—when statisticians talk about cleansing and waiting, things like that. That process is under way at the moment. It will only be at the conclusion of that process that statisticians will feel sufficiently confident in the integrity of the data and its ability to respond to detailed examination that they will be publishing results.<sup>19</sup>

2.25 The *Survey of Legal Needs in Australia* will be Australia's first, largest and most comprehensive assessment of national legal needs, providing empirical data on:

- the incidence of legal events in the 12 months prior to the survey, including: the percentage who experienced events; and number of events per participant;
- the response to legal events, including: the percentage who used legal services; used non-legal advisers; handled the event alone; or did nothing and the reasons for doing nothing;

---

17 Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, Recommendation 11, p. xxiv.

18 Government Response, *Senate Hansard*, 7 February 2006, p. 66.

19 Mr Norman Reaburn, Chair, National Legal Aid, *Committee Hansard*, Melbourne, 15 July 2009, p. 59.

- satisfaction with assistance received, including: the percentage of those who were satisfied or dissatisfied; the nature of the help received; and barriers to assistance;
- resolution of legal events; and
- satisfaction with the outcome.<sup>20</sup>

2.26 NLA told the committee that there is both value in and a need for governments to adopt evidence-based approaches to funding, planning, delivery and evaluation of legal assistance programs. It submitted that the *Survey of Legal Needs in Australia* will assist in this regard, providing evidence to enable the Australian Government to develop a legal assistance policy that provides an appropriate level of funding and equitable access to justice throughout Australia.<sup>21</sup>

2.27 Evidence to the committee overwhelmingly stated that, at present, Australian Government funding levels are not adequate, and inhibit access to justice, including legal representation. This evidence, which is primarily discussed in Chapters 3, 7 and 8, suggests that Australian Government resources might not be being appropriately targeted.<sup>22</sup>

2.28 In 2003-04, the committee observed:

The unmet need for legal aid cannot be included in the funding model until an assessment of unmet need has been made. Assessing the level of unmet need for legal aid in Australia is clearly a priority if the Commonwealth is to be able to develop a funding model that optimises the level of access to justice for all Australians.<sup>23</sup>

2.29 The committee commends NLA and the Law and Justice Foundation of NSW for seeking to provide much needed information on unmet need in the Australian justice system. Due to its findings and the imminent negotiation of National Partnership agreements within the Federal Financial Relations framework, as discussed in Chapter 3, the committee urges NLA and the Law and Justice Foundation of NSW to release preliminary results of the survey no later than February 2010.

2.30 The committee notes that the *Survey of Legal Needs in Australia* meets the substance of its earlier recommendation, with the proviso that it will not encompass sufficient samples of some of the most difficult to reach groups in the Australian community (such as people in isolated Indigenous communities).

---

20 National Legal Aid, *Submission 34*, pp 12-13.

21 National Legal Aid, *Submission 34*, pp 3, 10, 13 & 16-17; Australian Legal Assistance Forum, *Submission 24*, p. 2; and Victorian Aboriginal Legal Service Co-operative Ltd, *Submission 42*, p. 2.

22 For example, Disability Advocacy NSW Inc., *Submission 60*, p. 4.

23 Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, p. 15.



2.31 NLA told the committee that:

To get a complete and accurate picture of the situation with Indigenous respondents we would need to have a component of that survey that was very intensively done by people going out into particular regions and doing interviews.<sup>24</sup>

2.32 Consistent with its argument, NLA recommended that the federal, state and territory governments give immediate priority to funding a legal needs study of Aboriginal and Torres Strait Islander peoples living in remote communities.<sup>25</sup>

2.33 As discussed in Chapter 8, the position of Indigenous peoples in the Australian justice system has been thoroughly examined in recent years. All available information and evidence to this inquiry suggests that Indigenous peoples have high unmet legal needs for which statistical data would be highly beneficial.

2.34 Given the opportunity afforded by the *Survey of Legal Needs in Australia*, the committee makes the following recommendation with a view to comprehensively mapping legal need throughout Australia.

### **Recommendation 1**

**2.35 The committee recommends that the federal, state and territory governments jointly fund a comprehensive national survey of demand and unmet need for legal assistance services in Aboriginal and Torres Strait Islander communities, with particular identification of rural, regional and remote communities and Indigenous women's needs, to be jointly undertaken with state/territory legal aid commissions, community legal centres, Aboriginal legal services, National Legal Aid and the Law and Justice Foundation NSW.**

2.36 The committee notes that, at its August 2009 meeting, the Standing Committee of Attorneys-General (SCAG) committed to identifying and evaluating existing Indigenous justice programmes, enabling governments to make targeted funding decisions.<sup>26</sup>

2.37 Throughout this report, the committee discusses and makes recommendations relating to the funding of other Australian justice programs. While acknowledging the SCAG commitment, the committee therefore also makes the following recommendations.

---

24 Mr Norman Reaburn, Chair, National Legal Aid, *Committee Hansard*, Melbourne, 15 July 2009, p. 59.

25 National Legal Aid, *Submission 34*, p. 5.

26 Standing Committee of Attorneys-General, *Communiqué*, 6-7 August 2009, p. 2.

## Recommendation 2

**2.38** The committee recommends that the federal, state and territory governments, in conjunction with relevant stakeholders, and using an evidence-based approach, review existing legal assistance service programs to determine whether the legal aid system is meeting the needs of the Australian people.

## Recommendation 3

**2.39** The committee recommends that the federal, state and territory governments, in conjunction with relevant stakeholders, and using an evidence-based approach, review existing funding programs for legal aid commissions, community legal centres, Aboriginal and Torres Strait Islander legal services, and Family Violence Prevention Legal Services units with a view to sufficiently resourcing the legal aid system to meet the legal needs of the Australian people, including appropriate loadings for high needs areas such as remote, rural and regional areas.

## Australia's human rights obligations

2.40 Australia is party to a number of international instruments containing obligations relating to equality before the law and access to justice.<sup>27</sup> However, there is no internationally recognised right to legal assistance or access to the law. Such 'rights' are usually considered ancillary to other recognised rights, particularly the right to a fair hearing, which is enshrined in Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR):

- (1) All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...<sup>28</sup>

2.41 The basic requirements of a fair hearing are established by international law jurisprudence and include:

- equal access to and equality before the courts;
- the right to legal advice and representation;
- the right to procedural fairness, including a hearing without undue delay;
- the right to the free assistance of an interpreter where necessary;
- the right to a public hearing; and

---

27 Attorney-General's Department, *Submission 54*, p. 8.

28 Article 14(1) & (3) of the International Covenant on Civil and Political Rights; and United Nations Human Rights Committee, *General Comment 32*, CCPR/c/GC/32, 23 August 2007, p. 10.

- the right to a competent, independent and impartial tribunal.<sup>29</sup>

2.42 Evidence from legal practitioners stated that there is a modern trend toward recognising access to the law as a fundamental human right,<sup>30</sup> with submissions citing its embodiment within the Victorian Charter of Human Rights and Responsibilities and Australian Capital Territory legislation as evidence of a commitment to access to justice.<sup>31</sup>

2.43 Liberty Victoria told the committee:

It is a fundamental principle of any democratic society that all those living within it have equal access to a justice system where they can expect, and be given, a determination of their rights without fear or favour, and free from external pressures upon a court or tribunal.<sup>32</sup>

2.44 Expanding upon this argument, the Law Society of NSW submitted:

Closely allied to access to justice is the right of an individual to legal representation. Access to justice and the right to legal representation have been eroded in recent times due to numerous factors, the major one being lack of funding for legal aid. In addition, there has been a tendency to exclude the right to legal representation as of right in a number of tribunals. This is of serious concern because, contrary to common belief, legal representation reduces the time taken to resolve disputes and, on the other hand, self-represented parties tend to lengthen proceedings.<sup>33</sup>

2.45 While the abovementioned evidence tended to discuss access to justice in an abstract fashion, other submissions focussed upon the practical application of Australia's international obligations, particularly in relation to Indigenous people and children.

2.46 The Aboriginal Family Violence Prevention & Legal Service Victoria, for example, submitted that access to justice is significantly impaired in key law and justice areas.<sup>34</sup> Its submission referred to the United Nations Human Rights Committee's recent report on Australia's compliance with the *International Covenant on Civil and Political Rights*.

---

29 PILCH, *Submission 33*, p. 10; and NSW Young Lawyers, Human Rights Committee, *Submission 28*, p. 2.

30 NSW Young Lawyers, Human Rights Committee, *Submission 28*, p. 3.

31 Section 24 of the Charter of Human Rights and Responsibilities (Victoria)

32 Liberty Victoria, *Submission 25*, p. 1; Law Institute of Victoria, *Submission 11*, p. 6 ; and Australian Lawyers for Human Rights, *Submission 46*, p. 4.

33 Law Society of NSW, *Submission 41*, p. 2; Law Council of Australia, *Submission 12*, p. 7; and NSW Young Lawyers, Human Rights Committee, *Submission 28*, p.1.

34 Aboriginal Family Violence Prevention & Legal Service Victoria, *Submission 38*, p. 4.

2.47 In that report, the United Nations Human Rights Committee noted with concern 'the lack of adequate access to justice for marginalized and disadvantaged groups, including indigenous peoples and aliens'. That committee recommended Australia:

...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.<sup>35</sup>

2.48 In relation to children, the National Children's and Youth Law Centre cited critical observations noted in the United Nations Committee on the Rights of the Child's 2005 report on Australia's compliance with the *Convention on the Rights of the Child*,<sup>36</sup> and the largely unfulfilled recommendations of the 1997 Australian Law Reform Commission and (then) Human Rights & Equal Opportunity Commission joint report *Seen and Heard: Priority for Children in the Legal Process*.<sup>37</sup>

### **Current Australian Government legal aid programs**

2.49 In Australia, there are a number of avenues by which disadvantaged people can obtain access to legal representation, including:

- legal aid commissions;
- community legal centres (both general and specialist);
- Aboriginal and Torres Strait Islander legal services;
- Family Violence Prevention Legal Services (FVPLS); and
- referral schemes for pro bono assistance.

2.50 These are the primary legal assistance service providers examined during this inquiry and discussed in this report.

---

35 United Nations Human Rights Committee, *Consideration of the Reports Submitted by States Parties Under Article 40 of the Covenant : Concluding Observations of the Human Rights Committee*, Ninety-Fifth session, 2 April 2009 (CCPR/C/AUS/CO/5) para 25

36 United Nations Committee on the Rights of the Child, *Consideration of the Reports Submitted by States Parties Under Article 44 of the Convention : Concluding Observations-Australia*, Fortieth session, 20 October 2005 (CRC/C/15/Add) para 268

37 Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84, 1997; and National Children's and Youth Law Centre, *Submission 55*, pp 2-6.

2.51 LACs are independent statutory authorities, established to provide legal aid to economically and socially disadvantaged people. At present, there is a head office in each state/territory and 83 regional offices nationally.<sup>38</sup> The Attorney-General's Department (department) administers Australian Government funding for LACs via the Legal Aid Program (LAP).

2.52 CLCs assist people who do not receive a grant of legal aid from LACs, but who cannot afford private legal representation. There are over 200 CLCs throughout Australia however the department administers Australian Government funding to 128 CLCs only in urban, regional and remote locations via the Community Legal Services Program (CLSP). States also provide funding to CLCs within their jurisdiction.<sup>39</sup>

2.53 ATSILS and FVPLS provide high quality and culturally sensitive, Indigenous-specific services to meet the complex legal needs of eligible Indigenous peoples. There are 115 metropolitan, regional and remote offices, and various regional and remote court circuits throughout Australia, comprising 84 ATSILS and 31 FVPLS units.<sup>40</sup> The Australian Government provides funding for these services via the Commonwealth's Indigenous law programs.

### **Lack of access to legal representation**

2.54 Although governments provide a number of legal assistances services, evidence to the inquiry unanimously stated that the inability of service providers to meet demand hinders access to legal representation.

2.55 Liberty Victoria told the committee:

It is a fundamental obligation of governments to adequately fund legal aid services. So much is inherent in any promise of access to justice, in a society where many cannot afford lawyers...We must ensure effective legal assistance for those who would otherwise be shut out of the legal system because they don't understand it and cannot afford it.<sup>41</sup>

2.56 Liberty Victoria referred to one barrier to access to legal representation – affordability – but there are many other such barriers as indicated by the Australian Lawyers Alliance:

All people should have access to effective legal advice and, where appropriate, legal representation, and should not face barriers to obtaining legal assistance on the basis of their age, gender, cultural background,

---

38 Attorney-General's Department, *Submission 54*, p. 1.

39 Attorney-General's Department, *Submission 54*, p. 1.

40 Attorney-General's Department, *Submission 54*, pp 1-2.

41 Liberty Victoria, *Submission 25*, p. 2.

physical or intellectual disabilities, geographical location or financial circumstances.<sup>42</sup>

2.57 The rest of Chapter 2 discusses barriers to accessing legal representation, beginning with the cost of private legal representation and followed by pro bono legal assistance issues, RRR areas, and access to legal information and identification of legal problems.

### ***The cost of private legal representation***

2.58 The private legal profession is a widely accessed form of legal representation, but engaging a private legal practitioner can be expensive. In the best of circumstances, people might not wish to spend a significant amount of money on private legal representation, particularly in low-stakes matters, and in other circumstances, people simply do not have, or do not think they have, the financial capacity to engage a private legal practitioner.<sup>43</sup>

2.59 In the latter situation, people can be prevented from accessing legal representation, resulting in disengagement with the justice system either at the outset or in subsequent stages of proceedings, regardless of legal rights and the merits of a case.<sup>44</sup>

2.60 The Australian legal aid system attempts to bridge the gap between legal need and affordability by providing free or reduced cost legal assistance to the most disadvantaged people in the Australian community.<sup>45</sup> While legal assistance service providers perform significant and essential work, their ability to provide access to legal representation is limited.

2.61 In its 2004 Report, the committee wrote, 'Evidence to this inquiry suggests that reduced legal aid funding is directly responsible for the lack of legal representation for many [people].'<sup>46</sup>

2.62 The adequacy of Australian Government legal assistance funding is discussed in Chapters 3, 7 and 8 of this report, and evidence to the inquiry confirms the committee's 2003-04 comments, albeit with respect to the entire legal aid system.

---

42 Australian Lawyers Alliance, *Submission 27*, p. 5; and Australian Lawyers for Human Rights, *Submission 46*, p. 4.

43 NSW Young Lawyers, Human Rights Committee, *Submission 28*, p. 6; and Mr Mark Woods, Law Council of Australia, *Committee Hansard*, Canberra, 27 October 2009, p. 26.

44 Australian Lawyers Alliance, *Submission 49*, pp 7-8; PILCH, *Submission 33*, p. 18; and NSW Young Lawyers, Human Rights Committee, *Submission 28*, p. 5.

45 National Legal Aid, *Submission 34*, p. 3.

46 Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, p. xx; North Australian Aboriginal Justice Agency, *Submission 6*, pp 7-10; and Women's Legal Service (SA) Inc., *Submission 56*, p. 6.

---

### *Pro bono legal assistance issues*

2.63 In addition to the publicly funded legal aid system, disadvantaged Australians can sometimes obtain pro bono assistance from the private legal profession. In recent years, legal professional associations, public interest law clearing houses and some courts have developed pro bono referral schemes to improve the delivery of legal assistance to disadvantaged people and self-represented litigants.<sup>47</sup>

2.64 The Federal Court of Australia (Federal Court) and the Federal Magistrates Court (FMC), for example, administer the Order 80 scheme and Part 12 scheme, respectively, in each state/territory. These schemes enable a judge or magistrate to refer a self-represented litigant to a legal practitioner on the court's pro bono panel, and, according to DLA Phillips Fox, are increasingly utilised.<sup>48</sup>

2.65 The National Pro Bono Resource Centre (NPBRC), an independent not-for-profit organisation that aims to promote pro bono work throughout the legal profession, commented on the various pro bono referral schemes as follows:

- the schemes receive far more applications than they are able to refer;
- in the period 2005-2008, the schemes recorded increases in the number of inquiries for assistance;
- not all schemes provide free legal assistance: assistance under some schemes may be provided on a speculative, reduced fee, no fee or negotiated fee basis.<sup>49</sup>

2.66 As indicated, there are multiple entry points into the pro bono legal assistance system, and people seeking that assistance might need to be persistent, telling and re-telling their story to a range of different service providers before finding a source of assistance. This might include the complicating factors of lack of coverage and demand exceeding supply:

Around Australia, dedicated legal centre volunteers staff telephone lines that ring endlessly throughout the day, with large numbers of callers simply being referred to the next volunteer at the next legal centre. The effort

---

47 For example, the ACT Pro Bono Clearing House, NSW Law Society Pro Bono Scheme, Public Interest Law Clearing House (NSW), NSW Bar Association Legal Assistance Referral Scheme, Queensland Public Interest Law Clearing House, Bar Association of Queensland, Homeless Persons Legal Clinic (Victoria), Public Interest Law Clearing House (Vic), Victorian Bar Legal Assistance Scheme, Law Society of Western Australia Law Access Public Interest Law Clearing House, and Northern Territory Pro Bono Clearing House.

48 Federal Court of Australia, *Submission 57*, p. 1; Federal Magistrates Court, Answer to Question on Notice (7 August 2009) p. 4; DLA Phillips Fox, *Submission 32*, pp 7-8; and National Pro Bono Resource Centre, *Submission 49*, p. 6.

49 National Pro Bono Resource Centre, *Submission 49*, p. 4.

expended in this process is substantial, and the callers rarely reach a service that can cater to the clients' needs.<sup>50</sup>

### *A single referral pathway*

2.67 To improve access to legal representation, submissions suggested that the multiple pro bono entry points be consolidated into a single referral pathway. By doing this, frontline agencies could effectively co-ordinate and refer pro bono matters to pro bono service providers.

2.68 The NPBRC told the committee that the best practice model currently exists in Victoria, where the Law Institute of Victoria (LIV) Pro Bono Scheme, the Victorian Bar Association Referral Scheme, and the Public Interest Law Clearing House (VIC) all operate under one roof, providing a 'one-stop-shop' for pro bono legal assistance services in Victoria:

From a client perspective, PILCH (Vic)'s single pathway avoids confusion and the 'referral roundabout' by enabling staff to readily direct clients to the appropriate scheme and while this model may not fit all jurisdictions, better coordination of service delivery should be an objective in each state and territory. It requires broad acceptance of better coordination models as a worthwhile goal and then active support from existing referral schemes, legal professional bodies and government.<sup>51</sup>

2.69 Legal practitioners providing pro bono services implicitly supported the concept of a single referral pathway, advising the inquiry that they rely on frontline agencies to appropriately refer potential clients, and without the assistance of those agencies, potential clients would rarely gain access to pro bono legal representation.<sup>52</sup>

2.70 DLA Phillips Fox stated that:

Inadequate funding results in numerous gaps in frontline service delivery, which act as barriers to accessing legal services and pro bono legal services for many sections of the community.<sup>53</sup>

2.71 The committee understands that the variety of pro bono referral schemes create inconsistencies and inefficiencies in the provision of pro bono legal assistance services, neither of which enhances access to legal representation.

2.72 The committee urges state and territory governments to acknowledge the benefits of enhanced co-ordination between frontline agencies, and in conjunction with frontline agencies, explore options for a better co-ordination model.

---

50 DLA Phillips Fox, *Submission 32*, p. 24.

51 National Pro Bono Resource Centre, *Submission 49*, p. 9.

52 DLA Phillips Fox, *Submission 32*, p. 5; and Gilbert & Tobin, *Submission 45*, p.1.

53 DLA Phillips Fox, *Submission 32*, p. 6.



---

### *Demand for pro bono legal assistance*

2.73 Each year, pro bono legal assistance service providers undertake a significant amount of pro bono work. In 2007-08, the NPBRC conducted three surveys to quantify this contribution to the Australian justice system. Its finding included that, on average in 2007:

- about \$250 million of pro bono legal work was undertaken by Australian solicitors, equating to approximately one week per year of every solicitor's time (nearly as much as the Australian Government's funding for the Legal Aid Program<sup>54</sup>);
- approximately 44.5 hours of pro bono legal work was conducted by Australian barristers; and
- 25 of Australia's biggest law firms undertook about \$48.5 million of pro bono legal work, a total of about 194 500 hours or an average of 3 740 hours a week.<sup>55</sup>

2.74 The NPBRC told the committee that, notwithstanding the extent of this contribution, the demand for pro bono legal assistance appears to be increasing:

Anecdotal evidence from large law firms suggests that the demand for pro bono legal services has increased considerably in the past three years, with some firms reporting a 'substantial' or 'significant' increase in the number of pro bono inquiries.<sup>56</sup>

2.75 Gilbert & Tobin, for example, submitted that it receives more requests for assistance than it is able to accept: in the last 12 months that firm assisted in over 300 matters, approximately 30 per cent of the referrals received.<sup>57</sup> DLA Phillips Fox advised that it was in an identical situation, having to turn away at least as many applicants as those who successfully applied for assistance.<sup>58</sup>

2.76 The Public Interest Law Clearing House (Vic) (PILCH) emphasised that pro bono legal assistance is a last resort, or safety net, for disadvantaged people who have exhausted all other avenues of legal assistance. Even then, not all applicants for pro bono legal assistance will receive it. DLA Phillips Fox told the committee:

---

54 Mr Mark Woods, Law Council of Australia, *Committee Hansard*, Canberra, 27 October 2009, p. 22.

55 National Pro Bono Resource Centre, *Report on the pro bono legal work of individual Australian Solicitors*, December 2007, p. 4; National Pro Bono Resource Centre, *Report on the pro bono work of individual Australian Barristers*, November 2008, p. 11; National Pro Bono Resource Centre, *Report on the pro bono legal work of 25 large Australian Law Firms*, September 2008, p. 4.

56 National Pro Bono Resource Centre, *Submission 49* p. 8.

57 Gilbert & Tobin, *Submission 45*, pp 1-2.

58 DLA Phillips Fox, *Submission 32*, p. 7.

Whenever a client applies for, and qualifies for pro bono assistance, but nevertheless fails to obtain assistance due to capacity constraints, it can generally be assumed that the client will not access legal advice or representation.<sup>59</sup>

2.77 PILCH submitted that the number of requests and referrals for pro bono assistance indicate that there is a significant gap in the availability of publicly funded legal assistance services.<sup>60</sup> Other evidence to the inquiry echoed these sentiments.

*Goodwill of the private legal profession*

Pro bono work has become a de facto substitute for legal aid. Pro bono lawyers step in, in cases of obvious injustice where legal aid is unavailable. Governments occasionally murmur comforting words about the contribution of pro bono lawyers, and well they might because pro bono lawyers help compensate for the inadequacies of Government funding of legal aid.<sup>61</sup>

2.78 Evidence presented to the committee cautioned against substituting the goodwill of the private legal profession for adequately funded public legal assistance services. The NPBRC, for example, submitted that:

The legal profession provides excellent pro bono legal services to disadvantaged people however these services must complement rather than be a substitute for appropriately funded legal services by Government.<sup>62</sup>

2.79 DLA Phillips Fox also described the work of the sectors as complementary, but, 'not alternative solutions to a single problem':

Neither the continued existence of voluntary contributions of lawyers, nor any increase in such contributions, can make up for the shortfall in funding for legal aid and CLCs. The role of frontline services is invaluable, and in reality, it is the funds available to these services that dictate the extent to which community need can be met.<sup>63</sup>

2.80 The Australian Lawyers Alliance agreed, particularly recommending that, due to their coverage of legal needs not funded under the LAP, Australian Government funding to CLCs be increased:

---

59 DLA Phillips Fox, *Submission 32*, p. 2; and PILCHConnect, *Submission 20*, p. 6.

60 PILCH, *Submission 33*, pp 18-19.

61 Mr Julian Burnside QC quoted in DLA Phillips Fox, *Submission 32*, p. 10.

62 National Pro Bono Research Centre, *Submission 49*, p. 10; PILCH, *Submission 33*, p. 19; Gilbert & Tobin, *Submission 45*, p.3; and PIAC, *Submission 50*, p. 6.

63 DLA Phillips Fox, *Submission 32*, pp 10-11; and Law Society of NSW, *Submission 41*, p. 3.

---

CLCs recognise the limitations of Legal Aid in terms of its coverage of certain matters, and attempt to address this by creating a certain number of specialist legal centres (such as the Environmental Defenders' Office, the Immigration Rights and Advice Centre) or providing advice in matters that Legal Aid does not assist with, such as industrial matters, tenancy, neighbour disputes and wills and estates among other matters.<sup>64</sup>

2.81 Australian Lawyers for Human Rights identified the role of CLCs in addressing systemic issues and working toward holistic solutions as a further reason for additional support. By way of example, its submission cited the national proliferation of homeless persons' legal clinics.<sup>65</sup> The legal needs of homeless persons are discussed later in this chapter.

2.82 At its Melbourne hearing, the committee were told that there are limits to the goodwill of the legal profession, and according to the LIV, that goodwill is nearly exhausted:

There is a concern amongst our members that that goodwill that they have been exercising over many years is perhaps being taken for granted somewhat and they are being used as a de facto government provider of free legal services in the absence of a proper legal aid system and they are being asked to do more and more because people are being knocked back for legal aid funding and, rather than turn these people away or let them to go to court unrepresented, more and more often our members are doing it themselves. I think there is a limit to the level of that goodwill, and the bucket is nearly empty.<sup>66</sup>

2.83 That the private legal profession contributes immensely toward access to justice, providing a large number of disadvantaged people with access to legal representation, is beyond doubt. This contribution might be due to commercial, professional or moral motivations,<sup>67</sup> but in any case, the committee highly commends those members of the profession who each year deliver a significant amount of pro bono services to the Australian community.

#### *Encouraging the continuation of pro bono legal assistance*

2.84 Evidence to the inquiry also acknowledged the importance of pro bono legal assistance in the Australian justice system, and suggested that there might be ways in

---

64 Australian Lawyers Alliance, *Submission 27*, p. 20; and North Australian Aboriginal Justice Agency, *Submission 6*, p. 14.

65 Australian Lawyers for Human Rights, *Submission 46*, p. 8; and United Nations Human Rights Committee, *Consideration of the Reports Submitted by States Parties Under Article 40 of the Covenant : Concluding Observations of the Human Rights Committee*, Ninety-Fifth session, 2 April 2009 (CCPR/C/AUS/CO/5) para 18

66 Mr Danny Barlow, President, LIV, *Committee Hansard*, Melbourne, 15 July 2009, p. 75.

67 Mr Danny Barlow, President, LIV, *Committee Hansard*, Melbourne, 15 July 2009, p. 74; and Mr Tim Mulvany, LIV, *Committee Hansard*, Melbourne, 15 July 2009, p. 75.

which the profession could be encouraged to continue making these significant contributions.

2.85 While tax incentives might be ineffective,<sup>68</sup> the NPBRC suggested that the number of legal practitioners undertaking pro bono legal assistance work could be improved by:

- all classes of practising certificate having a mandatory pro bono legal work requirement; or
- practising certificate fees being waived for those practitioners who undertake pro bono legal work only.<sup>69</sup>

2.86 The committee accepts these suggestions. While neither option would necessarily increase the amount of pro bono work currently being conducted by some members of the private legal profession, both options could draw in those legal practitioners who do not currently deliver any pro bono legal assistance to disadvantaged Australians.

#### **Recommendation 4**

**2.87 The committee recommends that state/territory governments and legal professional associations throughout Australia take such steps as are necessary to:**

- **advertise and promote participation in formal pro bono schemes, including the National Pro Bono Aspirational Target scheme;**
- **mandate a pro bono legal work requirement for all classes of practising certificate, including those issued to government employees; and**
- **abolish the practising certificate fee for legal practitioners whose practise involves pro bono legal work only.**

2.88 The committee acknowledges that the relationship between the private legal profession and governments is, to some extent, symbiotic, and that each sector should play an appropriate part in the provision of legal aid services.<sup>70</sup>

2.89 This report reflects means by which the committee considers that the Australian and other governments could further enhance access to justice. Under this term of reference (a), the committee reflects on evidence relevant to the ways in which governments could assist or encourage the private legal profession to deliver pro bono legal assistance.

---

68 Mr Nicolas Patrick, *Committee Hansard*, Sydney, 11 September 2009, p. 46.

69 Mr John Corker, President, National Pro Bono Resource Centre, *Committee Hansard*, Sydney, 11 September 2009, p. 62.

70 Mr John Corker, President, National Pro Bono Resource Centre, *Committee Hansard*, Sydney, 11 September 2009, p. 65.

---

*Government initiatives to promote pro bono legal assistance*

2.90 PILCH submitted that governments could encourage the private legal profession to undertake pro bono work by:

- reinforcing and strengthening provisions in government legal services contracts, and through tendering requirements, requiring law firms (and other professional service providers) to contribute to pro bono;
- abrogating the indemnity principle in pro bono cases through uniform amendments to the state/territory legal profession legislation; and
- establishing a scheme to enable and encourage the participation of lawyers employed by government agencies and legal services, such as the department, the state/territory Departments of Justice, the Australian Government Solicitor, and state/territory government solicitors, in the provision of pro bono legal services.<sup>71</sup>

2.91 At the Melbourne hearing, the committee heard that firms on the Victorian Government's legal panel are required to return five to fifteen per cent of the value of their commercial contracts in pro bono work in return for a commercial contract.<sup>72</sup> DLA Phillips Fox agreed that this practice works reasonably well, except for those law firms whose pro bono work already exceeds the minimum requirement.<sup>73</sup>

2.92 Similarly, a requirement for law firms to adhere to the National Pro Bono Aspirational Target (at least 35 hours per solicitor per year) does not necessarily increase the delivery of pro bono legal services: law firms must first sign up to the scheme; and failure to reach the target or to conduct pro bono work then carries no consequences, other than the commercial imperative to comply with conditions of tender.<sup>74</sup>

2.93 The committee notes however the findings of the Second Performance Report on the Target, showing that an average of 41.9 hours of pro bono work was done in the last financial year by lawyers who have signed up to the National Pro Bono Aspirational Target, an increase of 2.1 hours since creation of the scheme in 2007. Furthermore, the committee notes that the scheme currently covers 5 700 practitioners, an increase of nearly 50 per cent in the last financial year.<sup>75</sup>

---

71 PILCH, *Submission 33*, pp 19-20; and Mr Mathew Tinkler, PILCH (Vic), *Committee Hansard*, Melbourne, 15 July 2009, pp 38-39.

72 Mr Mathew Tinkler, PILCH (Vic), *Committee Hansard*, Melbourne, 15 July 2009, p. 38.

73 Mr Nicolas Patrick, *Committee Hansard*, Sydney, 11 September 2009, p. 49

74 Mr Mathew Tinkler, PILCH (Vic), *Committee Hansard*, Melbourne, 15 July 2009, pp 38, 46 & 50-51.

75 National Pro Bono Resource Centre, 'Lawyers Aspiring to do More', Media Release, 1 October 2009; and National Pro Bono Resource Centre, *Second Performance Report on the National Pro Bono Aspirational Target*, September 2009, p. 2.

2.94 The committee commends the National Pro Bono Aspirational Target scheme, which clearly plays an important role in the promotion and delivery of pro bono legal work.

2.95 In September 2008, the Australian Government amended the *Legal Services Directions 2005* to require each agency, in the procurement of legal services, to consider:

the amount and type of pro bono work the legal services provider has carried out or will carry out;

whether the legal services provider has signed up to the National Pro Bono Aspirational Target of the National Pro Bono Resource Centre.<sup>76</sup>

2.96 The committee agrees that the National Pro Bono Aspirational Target is not as compelling as the requirement established by the Victorian Government for the procurement of its legal services, and the committee acknowledges that the *Legal Services Directions 2005* allows for flexibility in the procurement of Australian Government legal services. However, the committee suggests that the Australian Government should equally be aiming to encourage small to medium sized legal firms to participate in pro bono legal work.

### **Recommendation 5**

**2.97 The committee recommends that the Australian Government investigate means by which small to medium sized legal firms could be encouraged to further participate in the provision of pro bono legal services.**

#### ***Rural, regional and remote areas***

2.98 In 2003-04, the committee accepted that there are a number of issues affecting people living in RRR communities, which are beyond the legal needs they share with people in metropolitan areas:

Gaps in the legal aid system are greatly magnified in RRR areas. Overwhelmingly, the evidence suggests that the current arrangements throughout RRR areas of Australia are inconsistent and inadequate, and generally fall well below acceptable standards for achieving geographic equity and uniform access to justice. In fact, it appears as though there is a growing crisis in effective legal aid service delivery in RRR areas.<sup>77</sup>

2.99 One problem is the ability to access legal representation, with evidence to the inquiry pointing to a number of contributory causes, including that:

---

76 Attorney-General's Department, *Legal Services Directions 2005*, Appendix F, para 4.

77 Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, p. 134.

- there are fewer LACs, CLCs and Aboriginal legal services (ALS);
- there are fewer legal practitioners, including those participating in pro bono work;
- the cost of travel to access or provide legal services can be prohibitive;
- due to the smaller number of legal practitioners, there is a greater likelihood that a legal practitioner or legal service provider will have a conflict of interest; and
- resource allocations do not include adequate consideration of the additional costs of delivering services, including outreach programs.<sup>78</sup>

2.100 In its 2004 Report, the committee took the view that:

The provision of legal and legal-related services to RRR areas of Australia is critical to the operation of an equitable legal system for all Australians. The Commonwealth and state/territory governments have a shared responsibility to ensure that people living in such areas have equitable access to legal aid.<sup>79</sup>

2.101 In accordance with this view, the committee made a number of recommendations aimed at increasing access to legal representation in RRR areas.<sup>80</sup> Some of those recommendations are discussed below.

#### *Funding for legal aid commissions and community legal centres*

2.102 In relation to LACs and CLCs, the committee recommended that the federal, state and territory governments:

provide additional funding to state/territory legal aid commissions and community legal centres to allow them to expand their services, including outreach services, to rural, regional and remote areas which are currently seriously under-funded. Additional funding must take into account the significant resources that are required by legal aid commissions and community legal centres in undertaking resource-building initiatives in rural, regional and remote areas.<sup>81</sup>

2.103 This recommendation – Recommendation 35 – was not accepted by the Australian Government. Its response acknowledged the importance of providing RRR

---

78 PILCH, *Submission 33*, pp 20-21; NSW Young Lawyers, Human Rights Committee, *Submission 28*, p. 7; Women's Legal Service (SA) Inc., *Submission 59*, p. 19; and Mr Mark Woods, Law Council of Australia, *Committee Hansard*, Canberra, 27 October 2009, p. 28.

79 Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, p. 135.

80 Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, Recommendations 34-40, pp xxviii-xxix.

81 Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, Recommendation 35, p. xxviii.

communities with access to legal assistance services, but cited its in-office record as evidence of its commitment and measures toward improving access.<sup>82</sup>

2.104 Nonetheless, evidence to the inquiry demonstrated continued support for the committee's 2004 recommendation, with most submissions focussed upon the fundamental problem: a lack of legal practitioners willing to locate to and work in RRR areas.

*Recruitment and retention of legal practitioners*

2.105 As discussed in Chapter 3, there are a significant number of law firms and legal practitioners who are not willing to undertake legal aid work due to its low remuneration rates. Other chapters of this report refer to difficulties in recruiting and retaining in-house LAC, CLC, and ATSILS solicitors due to low remuneration and enhanced job pressures.

2.106 In RRR areas, the problems are greatly magnified. The Aboriginal Legal Service of Western Australia told the committee:

The reality is that if you want to attract appropriately skilled legal staff to work in remote areas there must be financial and other incentives built in to offset the often difficult working conditions.<sup>83</sup>

2.107 Five years ago, the committee expressed concern about the apparent shortage of lawyers in RRR areas, recommending that federal, state and territory governments, in conjunction with state/territory law societies and the Law Council:

...fully investigate the viability of providing a subsidy (or any other relevant incentives), and developing a coordinated national approach, aimed at attracting and retaining lawyers to live and work in rural, regional and remote areas of Australia.<sup>84</sup>

2.108 This recommendation was not supported by the Australian Government, which told Parliament that subsidies and other incentives would be costly and ineffective to administer at the national level. The response suggested that the matter would be best addressed by the states/territories taking into account local considerations.<sup>85</sup>

2.109 Submitters and witnesses told the committee that the recruitment and retention of legal practitioners remains a significant problem in RRR Australia. The Law Council, for example, submitted:

---

82 Government Response, *Senate Hansard*, 7 February 2009, p. 76; and Attorney-General's Department, *Submission 54*, p. 2.

83 Aboriginal Legal Service of Western Australia, *Submission 62*, p. 6.

84 Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, Recommendation 37, p. xxviii.

85 Government Response, *Senate Hansard*, 7 February 2009, p. 76.



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. The Law Council considers that these recruitment problems are an additional burden on the legal aid and justice systems in country areas.<sup>86</sup>

2.110 In addition, evidence referred to widespread concerns within the legal profession that the number of solicitors working in RRR Australia may further decrease in the next 10 years as older practitioners reach retirement age.

2.111 The preliminary results of a recent survey conducted by the Law Council reinforce anecdotal evidence to this effect, with 19.9 per cent of national respondents indicating that they will most likely shortly retire from the legal profession. In Victoria, this figure was significantly higher, with 34.6 per cent of all respondents indicating that they will shortly be retiring.<sup>87</sup>

2.112 In mid 2009, the Attorney-General announced \$40 000 of Australian Government funding for a project to help retired solicitors, and solicitors taking a career break, to become involved in pro bono legal work. In announcing the project, the Attorney-General remarked:

Lawyers approaching retirement and lawyers taking a break from their careers are a valuable and underutilised resource for providing pro bono assistance, particularly in regional and rural areas of Australia where there is a shortage of lawyers.<sup>88</sup>

2.113 The committee acknowledges the Australian Government's attempts to resolve the shortage of legal practitioners in RRR areas, including, for example, its mid 2008 announcement of the allocation of \$5.8 million over four years for the Regional Innovations Program for Legal Services.<sup>89</sup> This is a particularly useful measure which the committee considers could be expanded. However, the committee encourages the Australian Government to focus upon long-term solutions.

---

86 Law Council of Australia, *Submission 12*, p. 7.

87 Law Council of Australia, *Submission 12*, p. 8; and Mr Danny Barlow, President, LIV, *Committee Hansard*, Melbourne, 15 July 2009, p. 80.

88 The Hon. Robert McClelland MP, Attorney-General, 'Funding for retired and career break lawyers project', Media Release, 10 June 2009

89 Attorney-General's Department, *Submission 54*, p. 2.

*Financial and other incentives*

2.114 Evidence to the inquiry acknowledged that governments need to implement targeted initiatives to attract legal practitioners to practise in RRR areas. The Law Council proposed that such initiatives should broadly aim to:

- provide incentives to encourage legal practitioners to seek employment in disadvantaged areas;
- develop capacity within local communities to address legal need wherever possible, for example by encouraging people 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.<sup>90</sup>

2.115 In particular, the Law Council suggested the following specific incentives or programs:

- repaying, completely or partially, HECS-HELP (or FEE-HELP) liabilities for law graduates and/or legal practitioners who work in RRR 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 legal practitioners to work in remote locations which are facing severe shortages;
- increasing opportunities for legal clinical placements in RRR areas for law students.<sup>91</sup>

2.116 In evidence, the Law Council also intimated that governments could purchase legal services from RRR law firms rather than their metropolitan counterparts, thereby bolstering the need for legal practitioners in RRR areas:

---

90 Law Council of Australia, *Submission 12*, p. 8; and Australian Lawyers for Human Rights, *Submission 46*, p. 4.

91 Law Council of Australia, *Submission 12*, p. 9; Mr Danny Barlow, President, LIV, *Committee Hansard*, Melbourne, 15 July 2009, p. 80; Central Queensland Community Legal Centre Inc., *Submission 47*, p. 5; and Gilbert & Tobin, *Submission 45*, p. 7.

---

Government purchase of legal work that should be done out in regional and rural areas has been centralised in capital cities; it has not been afforded to the legal firms that are perfectly capable of doing it out there in regional and remote locations.<sup>92</sup>

2.117 Submitters and witnesses favoured also the provision of tax and other financial incentives as a means of encouraging legal practitioners to practise in RRR areas. While this partially reflects the committee's earlier recommendation, the committee is not persuaded that the problem can be resolved with short-term financial fixes.

2.118 Earlier in this chapter, the committee heard evidence that tax incentives would not encourage legal practitioners to more fully participate in the pro bono legal assistance system. Furthermore, the committee notes that the factors discouraging legal practitioners from practising in RRR areas are not wholly financial. In the committee's view, a long-term solution must focus on those factors.

2.119 The Law Council is currently developing a comprehensive strategy to address recruitment and retention issues in country Australia. The strategy will focus on government and local initiatives to promote country practice, and attract skilled and suitable lawyers to those areas experiencing severe problems:

An effective solution to the recruitment and retention problems in country areas will only be achieved through a range of strategies at a grass roots and national level, and in partnerships between government, community and the private sector.<sup>93</sup>

2.120 The committee remains concerned with the apparent shortage of legal practitioners in RRR areas of Australia, and commends the Law Council for its work in identifying a long-term solution to the problem.

2.121 The committee agrees that a collaborative approach will be required at all levels, and consistent with views expressed elsewhere in this report, urges all stakeholders to meaningfully participate in the process.

2.122 In view of these comments, and evidence presented in Chapters 3, 7 and 8, the committee reiterates Recommendation 35 of its 2004 Report (now labelled Recommendation 6) and makes the following new Recommendation 7.

### **Recommendation 6**

**2.123 The committee recommends that the federal, state and territory governments provide additional funding to legal aid commissions, community legal centres and Indigenous legal services with a view to expanding service**

---

92 Mr Mark Woods, Law Council of Australia, *Committee Hansard*, Canberra, 27 October 2009, p. 30.

93 Law Council of Australia, *Submission 12*, p. 9.

**delivery in rural, regional and remote areas. This funding must take into account the significant resources required by legal aid commissions, community legal centres and Indigenous legal services in undertaking resource-building initiatives in rural, regional and remote areas.**

### **Recommendation 7**

**2.124 The committee recommends that incentives be considered to encourage lawyers to practice in rural, regional and remote areas.**

#### *Access to information and identification of legal problems*

2.125 There are several reasons why people, including disadvantaged people do not have access to justice. A lack of access to legal representation is one such reason, and closely related is a lack of access to information. Without access to information, people do not know what are their legal rights and responsibilities, and are therefore not in a position to either assert or defend their legal rights.<sup>94</sup>

2.126 The Hunter Community Legal Centre Inc. described to the committee how this impacts on persons involved in family law (and other) litigation:

Many matters which end up at the Family Court are matters in which either one or both parties have not had either the opportunity or the resources to obtain legal advice and representation before they make their application or before they turn up at court on the day of their hearing. What that means is that both parties have no understanding of their legal rights or their legal responsibilities under the Family Law Act. If they have no understanding of their rights and responsibilities, they are not able to enter into negotiations for settlement of the matter and they are not able to understand the basis on which the court might make orders against them or in their favour.<sup>95</sup>

2.127 Justice Action, an organisation committed to protecting the rights of people involved within the criminal justice system, provided the committee with an illustration of how better access to legal information might promote access to justice in the earliest stages of proceedings:

Prisoners...remain [in their cells] for around 18 hours each day unable to properly use their time. They need the discs with the evidence relating to their charges. They would be able to study that evidence and provide appropriate instructions to their lawyers. In addition, many prisoners have the capacity to assist with research on the law relating to their cases. Unfortunately for those prisoners, the library resources in prisons which could provide a source of information are either not available to prisoners

---

94 For example, Care Inc. Financial Counselling Services and Consumer Law Centre of the ACT, *Submission 9*, p. 4.

95 Ms Liz Pinnock, Hunter Community Legal Centre Inc., *Committee Hansard*, Canberra, 27 October 2009, p. 7.

---

on remand, or [are] inadequate or out of date...They could have dedicated access to a legal information website such as *austlii*.<sup>96</sup>

2.128 Austlii, a provider of free online access to essential legal information (legislation, regulations, case law, etc.) from all Australian jurisdictions, described public access to information about the law as 'an essential element of access to justice and support for the rule of law.'<sup>97</sup>

2.129 The report *A Strategic Framework for Access to Justice in the Federal Civil Justice System* acknowledged the importance of information in people's access to justice:

The elements of the framework build on five principles: accessibility, appropriateness, equity, efficiency and effectiveness. But underneath those is what we call a methodology that translates those broad principles into action. The key ones include information, and by that we mean enabling people to understand their position and the options they have in deciding what to do. That is designed to get over the information failure that right from the start disadvantages people. What we found was that the three most commonly reported barriers to obtaining justice have a sense of disempowerment about them. They were things like not knowing what to do, not knowing where to go or not doing anything because it would make matters worse. Those are classic disempowerment things. So better access to information and support was one of the key things we thought was appropriate.<sup>98</sup>

2.130 Evidence to the inquiry described various groups within the Australian community who lack access to information,<sup>99</sup> as well as attempts to provide that information free-of-charge to people across the country.

2.131 The committee notes however that some means of communication require access to telephone or internet services, while the format of some means of communication will not always be appropriate for their targeted audience.<sup>100</sup>

2.132 Access to information is also closely related to identification of a legal problem. Without information about the law, not everyone can recognise when they have a legal problem requiring legal redress and access to legal representation. The

---

96 Justice Action, *Submission 68*, p. 3.

97 AustLII, *Submission 23*, p. 2.

98 Mr Matt Minogue, Assistant Secretary, AGD, *Committee Hansard*, Canberra, 27 October 2009, pp 38-39.

99 For example, National Children's and Youth Law Centre, *Submission 54*; Mr Brett Collins, Co-ordinator, Justice Action, *Committee Hansard*, Sydney, 11 September 2009, pp 75-76.

100 NSW Young Lawyers Human Rights Committee, Answer to Question on Notice (22 September 2009), pp 2-3.

West Heidelberg Community Legal Service told the committee that this is complicated by many peoples' trepidation about going to see a lawyer.<sup>101</sup>

### ***Prisoners within the criminal justice system***

2.133 Throughout the inquiry, the committee received submissions and evidence regarding disadvantaged groups within the community who cannot access legal representation, for example: not-for-profit community organisations; children and youth; public interest litigants; the homeless; refugees and asylum seekers; Indigenous peoples; and prisoners.

2.134 The committee particularly heard about the needs of persons in custody, including from DLA Phillips Fox who submitted:

Prisoners are amongst the most marginalised in our community. In addition to having being denied of their liberty, they have frequently experienced mental illness, substance abuse, broken relationships and poverty. As a result, they are extremely disadvantaged when it comes to enforcing or protecting their rights at law and many are in need of special assistance to overcome these barriers.<sup>102</sup>

2.135 At present, legal assistance programs assist prisoners with criminal law issues only, but many prisoners also require civil and family law legal assistance:

Prisoners commonly face a range of other civil and family law issues as well. Some arise from their chaotic lives and financial disadvantage prior to custody, including outstanding debt, unpaid fines, unresolved family law issues and apprehended violence orders. Imprisonment itself also may lead to further legal issues as the person is suddenly excised from their everyday life. Prisoners' housing, child custody arrangements, the retention of their personal effects, employment, the operation of any business and/or social security payments are all affected by their sudden separation from the community through incarceration.<sup>103</sup>

2.136 Women's Legal Services Australia and the Women's Law Centre WA told the committee that they attempt to bridge the gap by providing an outreach program to women in jail. The outreach program covers family and child protection law, as well as civil law matters.<sup>104</sup>

---

101 West Heidelberg Community Legal Services, *Submission 37*, p. 4; and NSW Young Lawyers, Human Rights Committee, *Submission 28*, p. 7.

102 DLA Phillips Fox, *Submission 32*, p. 18.

103 Grunseit A, Forell S, McCarron E, *Taking Justice into custody: the legal needs of prisoners*, June 2008, Law and Justice Foundation, p. xvii.

104 Ms Kate Davis, Women's Legal Services Australia and Women's Law Centre WA, *Committee Hansard*, Perth, 13 July 2009, pp 15-16.

2.137 Apart from such programs, DLA Phillips Fox submitted that prisoners' non-criminal legal needs are largely unmet. In some states, such as New South Wales, there are no legal assistance services with a focus on prisoners, and existing programs, such as the Queensland Prisoners' Legal Service Inc, are piecemeal and largely insufficient to cope with demand:

The clear gap in prisoners' legal service programs has become apparent to many pro bono legal service providers and some have instigated independent measures in [an] attempt to address the situation.<sup>105</sup>

2.138 DLA Phillips Fox told the inquiry that if prisoners' legal needs were adequately met whilst incarcerated, their chances of successful re-integration into the community would be much improved:

Providing prisoners with legal assistance in all areas, not just in criminal matters, is essential for the protection of their rights and interests whilst incarcerated. In addition, it has the potential to assist prisoners to have their affairs in order so that upon their release, they are not overwhelmed by the social, family and economic problems they face.<sup>106</sup>

2.139 The committee agrees that persons in custody should have access to legal representation, and that such access assists in the rehabilitative process. Accordingly, the committee urges state/territory governments to set aside a portion of the additional LAC funding called for in Recommendation 9 for the targeted provision of legal assistance services to persons in custody throughout Australia.

---

105 DLA Phillips Fox, *Submission 32*, p. 21; and Justice Action, *Submission 68*, p. 3.

106 DLA Phillips Fox, *Submission 32*, pp 22-23.





