

ADDITIONAL COMMENTS BY THE AUSTRALIAN GREENS

1.1 The Australian Greens support the 31 recommendations made in this report, and suggest five additional recommendations outlined below to address the serious and long-standing gaps in our legal system identified by the committee.

1.2 Legal services in rural and regional areas remain under-resourced, while disadvantaged and marginalised groups continue to slip through the cracks. The numbers of self represented litigants continues to increase due to inadequate legal aid and community legal sector funding.

1.3 As identified in the early part of this report, much of this ground has been traversed many times by the L&C committee and many other reviews, audits and reports. It is essential that the recommendations contained within are responded to with urgency, to begin the long task of rebalancing the justice system so that the authors of the next report are able to tell a different story.

Purchaser/provider funding arrangements

1.4 After more than a decade of chronic under-funding, the provision of legal aid in Australia is highly inadequate. Many submissions, including the Law Council of Australia, attributed the 'funding crisis' to the implementation of the Commonwealth/state funding divide in 1996, which led to subsequent uncertainty regarding funding responsibility.

1.5 This funding arrangement has enabled the Commonwealth to systematically under-fund legal aid. The Law Council of Australia submission cited figures assembled by the Government of Western Australia that show that the Commonwealth's share of total legal aid spending has declined from 64 per cent in 1996-97 to 45 per cent in 2006-07.

1.6 The purchaser/provider funding arrangement has not only led to a drastic decrease in legal aid funding, it has also placed a large administrative burden on legal aid providers who now have to access different funding to represent a single client when state and Commonwealth issues arise in a matter.

Recommendation 1

1.7 The Australian Greens recommend that the current purchaser/provider funding arrangement be abolished.

A right to legal representation

1.8 As noted in many submissions to the inquiry, the significance of legal representation in relation to the ability to access justice outcomes is almost undisputed, and yet legal representation remains largely inaccessible for many people due to high costs.

1.9 In a recent General Comment by the United Nations Human Rights Committee, it was noted that the 'availability or access to legal assistance is often determinative of whether or not a person can access the relevant judicial proceedings or participate in them in a meaningful way.'

1.10 As submitted by the Law Council of Australia, increasing numbers of litigants are entering the court system without legal representation.

1.11 The International Covenant on Civil and Political Rights, Article 14(3)(d) states that legal representation should be provided at all stages of the criminal justice process.

Recommendation 2

1.12 In conformity with Australia's obligations under the International Covenant on Civil and Political Rights the Australian Greens recommend the enactment of a right to legal representation.

The Migration Act 1958

1.13 Ms Skye Rose, Project Manager, and Mr John Corker, President of the National Pro Bono Resource Centre gave evidence to the committee in Sydney on 11 September 2009 about the provisions of the *Migration Act 1958*. The relevant provisions are sections 468E and 468F which require lawyers to provide a certificate stipulating that there are 'reasonable prospects of success' in the matter and which enable cost orders to be made against lawyers in unsuccessful cases.

1.14 These provisions are a 'serious deterrent' for pro bono providers, who are placed in a difficult position taking on pro bono migration matters, because the complex nature of this area of the law makes it difficult to assess the prospects of success. If these prospects are determined by the court to have been inaccurately assessed, lawyers will be personally liable for cost orders.

1.15 Ms Rose gave evidence that these provisions are 'a genuine concern for people wanting to represent people on migration matters.' In the submission received from the National Pro Bono Resource Centre, it was noted that these provisions 'can have a chilling effect on pro bono by deterring lawyers from assisting disadvantaged people to pursue their rights'.

1.16 The Australian Greens believe that pro bono legal services should be encouraged not deterred and as such, recommend that sections 468E and 468F of the *Migration Act 1958* be repealed.

Recommendation 3

1.17 The Australian Greens recommend that sections 486E and 486F of the *Migration Act 1958*, obligation where there is no reasonable prospect of success and cost orders, be repealed.

Legal Services Research Centre

1.18 Associate Professor Simon Rice AOM and Associate Professor Molly Townes O'Brien submitted that Australian justice policy lacks coherence and direction, noting that previous inquiries have largely failed to provoke reform.

1.19 Professor Rice AOM and Professor O'Brien proposed that the UK Legal Service Research Centre model for justice related research be adopted in Australia.

1.20 A justice research centre could undertake the necessary quantitative and qualitative research, along with theoretical analysis of the political, social and philosophical underpinnings of publicly funded legal services in order to direct improved use of services consequently improving access to justice.

1.21 A number of the recommendations made in this report refer to the need to 'review' or 'investigate' access to justice needs. A permanent, independent justice related research centre would be best placed to complete such work.

1.22 The availability of better data and research would enable governments and community organisations to allocate and utilise funding more efficiently.

Recommendation 4

1.23 The Australian Greens recommend the establishment of a permanent, independent, justice research centre.

Political neutrality and CLC funding

1.24 The Australia Greens do not support the comments made at paragraph 7.62 of the report, which suggest that 'in its current consideration of a new CLSP funding model, the department should have regard to eligibility criteria, including the admission of CLCs not currently covered by the program and the exclusion of CLCs which are not politically neutral, for example, those Environmental Defender's Offices who engage in political activities.'

1.25 The Australian Greens do not believe that CLC funding should be dependent on political neutrality. Applying this rule systematically would endanger the valuable advocacy role performed by many CLCs (of which the L & C committee has been the beneficiary on this and many other occasions.)

Senator Scott Ludlam
Australian Greens