

The Senate

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Legal and Constitutional Affairs  
References Committee

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Access to Justice

December 2009

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# **TERMS OF REFERENCE**

Access to justice, with particular reference to:

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



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# ABBREVIATIONS

2004 Report	Senate Legal and Constitutional References Committee, <i>Legal aid and access to justice</i> , June 2004
ADR	alternative dispute resolution
AHRC	Australian Human Rights Commission
ALRC	Australian Law Reform Commission
ALS	Aboriginal Legal Service
ATSILS	Aboriginal & Torres Strait Islander Legal Service
Bill	Access to Justice (Civil Litigation Reforms) Amendment Bill 2009
CLC	Community Legal Centre
CLSP	Community Legal Services Program
CLSP Review	Attorney-General's Department, <i>Review of the Commonwealth Community Legal Services Program</i> , March 2008
department	Attorney-General's Department
FCA	Family Court of Australia
FDR	family dispute resolution
FMC	Federal Magistrates Court
FVPLS	Family Violence Prevention Legal Service
ICCPR	International Covenant on Civil and Political Rights
IWP	Indigenous Women's Projects
LAC	Legal Aid Commission
LAP	Legal Aid Program
LAT	Less Adversarial Trial

Law Council	Law Council of Australia
LEGA	Legal Aid for Indigenous Australians program
LIV	Law Institute of Victoria
NAAJA	North Australian Aboriginal Justice Agency
NACLC	National Association of Community Legal Centres
NADRAC	National Alternative Dispute Resolution Advisory Council
New National Policy	National Legal Aid, <i>A New National Policy for Legal Aid in Australia</i> , November 2007
NFPs	not-for-profit (organisations)
NLA	National Legal Aid
NPBRC	National Pro Bono Resource Centre
PILCH	Public Interest Law Clearing House
Priorities & Guidelines	Legal Aid Priorities & Guidelines
RRR	rural, regional and remote
Rules	Family Law Rules 2004
SCAG	Standing Committee of Attorneys-General
SRL	self-represented litigant

# OVERVIEW AND CONCLUSIONS

This inquiry presented an opportunity for the committee to re-examine access to justice, following its previous reports in March and June 1997, July 1998 and June 2004. For most of this period, and to date, funding for the Australian legal aid system has been dominated by the Commonwealth's 'purchaser/provider' funding model.

These funding arrangements influence all aspects of the legal aid system, as will become apparent, however, the committee's inquiry focussed less on funding for the system and more on individuals' ability to access justice. The broad terms of reference capture, in essence, whether members of the Australian community, and especially its disadvantaged members, are able to: access justice; what impediments there are to accessing justice; and potential means of improving access to justice.

## Access

The report begins with a consideration of people's ability to access legal representation, including a summary of previous reviews and inquiries, the non-government National Legal Needs Survey, current Australian Government legal aid programs, and reasons for a lack of access to legal representation.

The committee heard significant and on-going criticisms of overall levels of funding, and noted cynicism that the Australian Government will adequately increase funding for the legal aid system. The committee accepts that the legal aid system is not adequately funded, and accordingly, in conjunction with other measures, recommends that governments and relevant stakeholders review existing funding arrangements and service delivery levels to ensure that the legal aid system is properly resourced to meet the needs of the Australian people, as well as recommending an increase in funding for legal aid service providers, particularly in rural, regional and remote areas.

Most importantly, the committee acknowledges contemporaneous initiatives to empirically determine the demand for legal aid services and unmet legal needs of the community. The committee considers such data fundamental to identifying the current weaknesses of the legal aid system, and formulating appropriate, long-term policies and strategies for a strong system which universally delivers access to justice. To complete current surveys, the committee recommends governments fund a comprehensive national survey of demand and unmet legal need in Indigenous communities. The committee also calls for the publication of interim results for the National Legal Needs Survey no later than February 2010.

Specifically in relation to access to legal representation, the committee singles out for mention, and commends, those members of the private legal profession who undertake pro bono legal work. The committee heard that a significant amount of pro bono legal services are delivered each year by legal practitioners. Without this contribution, the committee acknowledges that many disadvantaged Australians would likely not be able to access any form of legal representation.

The committee promotes and encourages pro bono work throughout the legal profession, and makes a number of recommendations designed to facilitate the provision of pro bono legal services, including, for example, the introduction of a mandatory pro bono legal work requirement for all classes of practising certificate.

### **Legal aid commissions**

The report continues with a more detailed examination of the adequacy of funding to legal aid commissions, particularly under the Legal Aid Program, including government levels of funding, areas of unmet legal need, the Commonwealth/state funding divide, the Federal Financial Relations Framework, and the Legal Aid Priorities and Guidelines.

The committee heard that there are areas of law not sufficiently funded for the provision of essential legal aid, namely family law and civil law services. Part of this problem is reflected in the adoption and implementation of strict means tests which set unrealistic eligibility criteria. The committee is concerned that the lack of legal aid funding adversely affects the best interests of children, as well as those members of the Australian community who are most disadvantaged.

For this reason, the committee recommends an increase in funding for the Legal Aid Program, the development and implementation of realistic and consistent national means test income and assets levels (with inbuilt inflators), and the development and implementation of a national civil law program in identified high need areas.

Evidence to this inquiry, as with earlier inquiries, continued to express dissatisfaction with the Commonwealth/state funding divide, which, it was argued, arbitrarily distinguishes between Commonwealth and other law matters, complicating effective service delivery. The committee reaffirms its preference for the abolition of the 'purchaser/provider' funding arrangements which create the controversial divide.

### **Cost**

The fourth chapter broadly examines the financial cost of delivering justice by canvassing the annual costs of the federal court system, the cost of disbursements in litigation matters, exposure to adverse costs orders, and the cost of legal representation.

Evidence stated that financial costs inhibit individuals' access to justice, with potential and actual litigants unable to afford disbursements, and various inconsistent disbursement schemes not able to significantly dispel the barrier. The committee considers this impediment capable of remediation, and recommends that governments develop and implement uniform disbursement funds throughout Australia, including for pro bono legal matters. Also in relation to such matters, the committee recommends that the indemnity principle be abrogated to encourage legal practitioners to accept pro bono clients.



On a different front, the committee also heard that the high cost of private legal representation and relatively low remuneration scales for private practitioners undertaking legal aid work inhibit individuals' access to legal representation. After acknowledging the invaluable role of the private legal profession in the legal aid system, the committee recommends a nationwide review and modernisation of legal aid fee scales (with inbuilt inflators) so as to promote practitioners' continued participation in the system.

### **Length, complexity and efficiency**

During the inquiry, the committee investigated measures to reduce the length and complexity of litigation, and improve efficiency, particularly measures relating to civil and family law litigation, and self-represented litigants.

The committee heard that people with limited financial resources cannot afford lengthy, complex and inefficient litigation, and that a number of civil and family law courts have introduced targeted measures to improve these people's access to justice. The committee commends the courts concerned for these proactive measures which should enable more Australians to access the judicial system, and encourages all courts without such measures to consider their implementation in the very near future.

Self-represented litigants experience particular difficulties accessing justice, and the number of such litigants is by all accounts increasing (for various reasons). While much has been said regarding the impact of self-represented litigants on the judicial system, the committee expresses concern at the apparent lack of relevant empirical data, and the quality of justice that self-represented litigants are able to achieve.

Accordingly, the committee recommends that governments commission research to quantify the economic effects that self-represented litigants have on the judicial system, as well as funding the establishment of a comprehensive duty solicitor scheme in high need areas throughout Australia.

### **Alternative means**

In addition to judicial measures, the committee examined alternative means of delivering justice, including early intervention and prevention, alternative dispute resolution, restorative justice, justice reinvestment, clinical legal education, and Indigenous specific issues.

The committee found that early intervention and 'triage' serve an invaluable purpose in diverting people away from the justice system on more appropriate, efficient and cost effective pathways. The committee also found that a holistic approach would most benefit those members of the community experiencing multi-faceted and complex problems, and commends those legal assistance service providers who have adopted this client-focussed approach.

The committee heard that restorative justice programs are an alternative and more capable means of delivering justice than the traditional criminal justice system, particularly for Indigenous peoples who are over-represented in that system. The

committee makes a recommendation for the Australian Government to consider funding a number of restorative justice pilot programs in areas where there is an over-representation of offenders in the criminal justice system.

A related topic was justice reinvestment where the committee approves the concept of diverting funds from incarceration to community-based programs and services that address the underlying causes of crime. The committee notes that this policy could result in reduced rates of incarceration and significant costs-savings, better outcomes for both individuals and governments.

The committee encourages state and territory governments to promote these outcomes, financially and by reviewing local policies and laws which have the effect of increasing rates of incarceration. The committee recommends also that governments fund and develop a targeted justice reinvestment pilot program in the criminal justice system.

### **Community legal centres**

Picking up on an earlier thread, the report then examines the adequacy of funding to community legal centres under the Community Legal Services Program, including funding levels, areas of unmet legal need, and recruitment and retention issues.

The committee heard criticisms of the highly unpredictable application-based grants process, whose replacement with a new funding model was recommended in March 2008. The committee recommends that the development of that model be expedited for the benefit of all community legal centres.

As with legal aid commissions, the committee also heard significant criticisms of core funding levels, the low level of which, it was said, results in community legal centres not being able to deliver services, retain staff or properly resource their work environment. The committee acknowledges the cost-benefit of centres, and considers that they need to be properly funded to cope with demand presenting and not presenting at their doors.

However, as a necessary corollary of increased funding, the committee considers it reasonable to review and where necessary introduce accountability and transparency requirements, for example, measurable key performance indicators and benchmarks for all publicly funded community legal centres. Accordingly, the committee makes two targeted recommendations, including an increase in funding for community legal centres, subject to enhanced accountability and transparency requirements.

### **Indigenous legal services**

The final chapter of this report concerns the ability of Indigenous people to access justice, and covers topics such as an appropriate legal assistance service, the adequacy of funding to Aboriginal legal services, including Family Violence Prevention legal services, and the Indigenous Law and Justice Framework.

Again, the committee heard significant criticisms of core funding levels, particularly as compared to other legal aid service providers and notwithstanding additional expenses associated with the provision of Indigenous legal services. The committee is concerned that this adversely impacts on one of the community's highest needs groups, Indigenous Australians and their ability to access justice.

The committee therefore recommends increasing the level of funding for Indigenous legal services (with loadings for additional expenses), as well as recommending that governments inquire into and report on joint funding for the Legal Aid for Indigenous Australians program with a view to more equitably apportioning responsibility for the provision of legal aid services to Indigenous peoples.

Language was a specific barrier to access to justice. The committee heard that interpreter services throughout Australia are limited in their capacity to provide translation services and whilst essential, and when available, legal aid providers are not able to afford such services. The committee recommends a partial solution, increased funding to court-based interpreter services, but considers that non-financial solutions such as enhancing English language skills among Indigenous communities must also be explored, a matter beyond the scope of this inquiry.

The committee heard that Indigenous legal services experience difficulty attracting permanent and experienced legal practitioners due to demanding working conditions and relatively low levels of remuneration. The committee agrees that this impacts on the consistency and quality of legal services provided to Indigenous peoples, and recommends that it be addressed, commencing with a joint government review of current salary levels across legal aid commissions and Indigenous legal services, and followed by proposals for salary level reforms.

The committee also received evidence concerning Indigenous women's chronic disadvantage in their ability to access justice, including in relation to domestic/family violence and sexual assault. In this regard, the committee considers it highly important for governments to provide Indigenous women with appropriate victim support measures, as well as addressing their legal needs.

However, the committee heard that some Indigenous legal services are inaccessible to Indigenous women due to perceived or actual conflicts of interest, and also the limited location of some services. Fundamentally, the committee noted evidence that Indigenous women's needs are not being met because they are not involved in the strategic development of Indigenous women's legal services. The committee therefore supports the development of targeted Indigenous women's law and justice strategies.

## Summary

The committee considers that the legal system is not sufficiently providing members of the Australian community with access to justice. The inquiry highlighted numerous areas where reforms would be beneficial, and the committee makes findings and recommendations, as appropriate.

Clearly, weaknesses in the legal system could be partially rectified, or rectified in the short-term, with increased, and targeted, levels of funding. However, in the current economic climate, this might not be feasible. Nor would it be necessarily prudent.

The inquiry emphasised what has been said before, including to previous committee inquiries: that the Australian legal system is beset with various weaknesses, some endemic, some deeply rooted and some based in non-legal causes, all of which are interconnected, thus requiring large scale rather than microeconomic reforms.

The committee is not convinced that the weaknesses in the legal system have been appropriately recognised, or identified, making remediation nigh on impossible. In the committee's view, this has concurrently lead to long-term and on-going criticisms, reviews and inquiries into the system, none of which are ultimately productive.

The committee advocates a decisive commitment on the part of all governments, all legal service providers, the legal profession and all other interested stakeholders if Australia is to have a strong, viable and cost-effective legal system.

However, the committee has reservations as to whether there is enough will and impetus to embark on a large scale reform of the legal system, and if there were, when practical reforms might reasonably occur.

Consequently, in this report, the committee makes recommendations focussed upon short-term solutions, with the express provision that the committee does not view these recommendations as the ultimate solution to achieving a strong and appropriate legal system for all Australians.

The committee urges all governments to bear in mind that the legal system is currently afloat, arguably badly, due to a considerable amount of goodwill, but that this could evaporate at any time, creating a crisis in the delivery of legal services and resulting in diminished access to justice for many Australians.

The committee commends informed forward planning. At present, reforming the legal system might appear difficult, onerous and expensive, but the committee believes that, ultimately, the investment of effort, time and money will result in significant benefits to all concerned. Otherwise, the committee predicts that within a decade it will again be inquiring into a failing, or failed, legal system and asking, 'why wasn't something done about this ten years ago?'

# RECOMMENDATIONS

## 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.

## 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.

## 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.

## 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.

## **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 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.

## **Recommendation 8**

**3.81** The committee recommends that the federal, state and territory governments, in conjunction with relevant stakeholders, jointly develop and implement a national civil law program in identified high need areas.

## **Recommendation 9**

**3.110** The committee recommends that the Australian Government increase the level of funding for the Legal Aid Program with a view to sufficiently resourcing the legal aid system to meet the legal needs of the Australian people, including specific funding for community education programs and telephone advice schemes.

## **Recommendation 10**

**3.126** The committee recommends that the Australian, state and territory governments jointly develop and implement realistic and consistent national means test income and assets levels with an in-built mechanism for ensuring that the levels do not stagnate over time.

## **Recommendation 11**

**4.11** The committee recommends that each state and territory registry of the Federal Court of Australia be permanently staffed by a locally-based and legally trained registrar.

## **Recommendation 12**

**4.17** The committee recommends that the federal, state and territory governments create and fund a specific disbursement fund for pro bono matters, with eligibility criteria designed to promote the provision of pro bono legal services by the private legal profession.

## **Recommendation 13**

**4.23** The committee recommends that the federal, state and territory governments develop and implement uniform general disbursement funds throughout Australia to be accessed according to defined criteria with a view to easing the cost of justice for disadvantaged Australians.

#### **Recommendation 14**

**4.38** The committee recommends that the federal, state and territory governments enact legislation to abrogate the indemnity principle, to the extent necessary, to ensure that litigation costs can be awarded and recovered in pro bono matters.

#### **Recommendation 15**

**4.76** The committee recommends that the federal, state and territory governments, in conjunction with affected stakeholders, review and modernise existing legal aid fee scales including an inflator to promote participation of the private legal profession in legal aid service delivery.

#### **Recommendation 16**

**5.39** The committee recommends that the federal, state and territory governments commission research to quantify the economic effects that self-represented litigants have on the Australian justice system, including court, tribunal, other litigant, legal aid system and social welfare system costs.

#### **Recommendation 17**

**5.40** The committee recommends that the federal courts and tribunals should report publicly on the numbers of self-represented litigants and their matter types, and urges state and territory courts to do likewise.

#### **Recommendation 18**

**5.55** The committee recommends that the federal, state and territory governments jointly fund and establish a comprehensive duty solicitor scheme in identified high need areas throughout Australia with a view to reducing the length of litigation and increasing judicial efficiency in self-represented matters.

#### **Recommendation 19**

**5.61** The committee recommends that judicial and court officers receive training in relation to assisting self-represented litigants.

#### **Recommendation 20**

**6.47** The committee recommends that the Australian Government consider funding a number of restorative justice pilot programs in areas where there is an over-representation of minor offenders in the criminal justice system.

#### **Recommendation 21**

**6.56** In conjunction with Recommendation 1, the committee recommends that the federal, state and territory governments recognise the potential benefits of justice reinvestment, and develop and fund a justice reinvestment pilot program for the criminal justice system.

#### **Recommendation 22**

**7.23** The committee recommends that the Attorney-General's Department, in consultation with interested stakeholders, expedite the development of a new

funding model for the allocation of Australian Government funding to all community legal centres.

#### **Recommendation 23**

**7.60** Subject to increased accountability and transparency requirements, including measurable key performance indicators and benchmarks, the committee recommends that the federal, state and territory governments increase the level of funding for community legal centres with a view to sufficiently resourcing this sector of the legal aid system to meet the needs of the Australian people.

#### **Recommendation 24**

**7.63** In conjunction with Recommendation 22, the committee recommends that the Australian Government reconsider the eligibility criteria of the Community Legal Services Program with a view to allowing for the admission of suitable community legal centres throughout Australia.

#### **Recommendation 25**

**7.88** The committee recommends that the Australian Government provide the Federation of Community Legal Centres with some funding support for its proposed Community Legal Centre Graduate program and that future Community Legal Centre graduate schemes be similarly supported.

#### **Recommendation 26**

**8.27** The committee recommends that the federal, state and territory governments inquire into and report on joint funding for the Legal Aid for Indigenous Australians program and related services with a view to more equitably apportioning financial responsibility for Indigenous legal services funding.

#### **Recommendation 27**

**8.43** The committee recommends that the Australian Government increase the level of funding for Indigenous legal services with a view to sufficiently resourcing this sector of the legal aid system to meet the needs of Indigenous peoples, including appropriate loadings for extra service delivery costs.

#### **Recommendation 28**

**8.61** The committee recommends that:

- the federal, state and territory governments provide additional funding to court-based interpreter services in each state and territory with a view to expanding that service in high need areas; and
- the Australian Government commence a process of consultation to seek solutions to the translating difficulties associated with some Indigenous languages, with a view to reducing language barriers to access to justice.



### **Recommendation 29**

**8.77** The committee recommends that the federal, state and territory governments jointly, and in conjunction with affected stakeholders, review current salary levels across legal aid commissions and Aboriginal and Torres Strait Islander legal services, and propose salary level reforms for this sector of the legal aid system with a view to eliminating wage disparity.

### **Recommendation 30**

**8.78** The committee recommends the introduction of portable leave entitlements across legal aid service providers in Australia with a view to enhancing the retention of staff in these sectors.

### **Recommendation 31**

**8.134** The committee recommends that the Australian Government respond to this report no later than March 2010.



# CHAPTER 1

## Introduction

### Background

1.1 On 5 February 2009, the Senate referred an inquiry into Australia's Judicial System, the Role of Judges and Access to Justice to the Senate Legal and Constitutional Affairs Committee for report by 17 August 2009.

1.2 This reference was withdrawn on 19 March 2009 and in its place, the Senate referred two separate inquiries: one into Australia's Judicial System and the Role of Judges; and one into Access to Justice. The reporting dates were later extended to 8 December 2009.

1.3 The terms of reference for the inquiry into Access to Justice require the committee to have particular reference to:

- (a) the ability of people to access legal representation;
- (b) the adequacy of legal aid;
- (c) the cost of delivering justice;
- (d) measures to reduce the length and complexity of litigation and improve efficiency;
- (e) alternative means of delivering justice;
- (f) the adequacy of funding and resource arrangements for community legal centres; and
- (g) the ability of Indigenous people to access justice.<sup>1</sup>

### Previous reports

1.4 The committee has previously conducted an inquiry into the Australian Legal Aid System, reporting in March & June 1997 and July 1998, and Legal Aid and Access to Justice, reporting in June 2004 (the 2004 Report).<sup>2</sup>

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1 Journals of the Senate No. 66, 19 March 2009, pp 1783-1784.

2 Senate Legal and Constitutional References Committee, *Inquiry into Legal Aid and Access to Justice*, June 2004.

## **Conduct of the inquiry**

1.5 The committee advertised the inquiry fortnightly in *The Australian* from 8 April 2009 to 17 June 2009. Submissions were invited by 30 April 2009 but submissions continued to be accepted after that date. Details of the inquiry and associated documents were placed on the committee's website. The committee also wrote to 74 organisations and individuals inviting their submissions.

1.6 The committee received 71 submissions from various individuals and organisations, and these are listed at Appendix 1. Submissions were placed on the committee's website for ease of access by the public.

1.7 Public hearings were held in Perth on 13 July 2009, Melbourne on 15 July 2009, Sydney on 11 September 2009, and Canberra on 27 October 2009. A list of witnesses who appeared at the hearings is at Appendix 2, and copies of the Hansard transcripts are available at <http://aph.gov.au/hansard>.

## **Acknowledgement**

1.8 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearings.

## **Note on references**

1.9 References in this report are to individual submissions as received by the committee, not to a bound volume. References to the Committee Hansard are to the proof Hansard: page numbers may vary between the proof and the official Hansard transcript.

## 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

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<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>

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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

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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.

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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

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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:

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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.

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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;

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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).

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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.

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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

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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*.

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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.

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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,

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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.

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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.

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### *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

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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.

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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.

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*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:

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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:

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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

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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.

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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.



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*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>

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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:

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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

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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:

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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.

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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:

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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.

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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**

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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

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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.



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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

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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>

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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.

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

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



# CHAPTER 3

## The adequacy of legal aid

3.1 Volumes could be written about the Australian legal aid system, and term of reference (b) does little to narrow the potential discourse. For the purposes of this inquiry however submissions and evidence focussed on various topics concerning the Australian Government's legal aid program. This chapter discusses:

- an overview of legal aid commissions;
- the Legal Aid Program;
- the adequacy of funding;
- the Commonwealth/state funding divide;
- funding in the Federal Financial Relations framework; and
- the Legal Aid Priorities and Guidelines.

### **An overview of legal aid commissions**

3.2 Legal Aid Commissions (LACs) are independent statutory authorities, established to provide legal aid to economically and socially disadvantaged people. They provide a comprehensive range of legal services, including information and advice, family dispute resolution, duty lawyer services, and grants of aid for litigation in Commonwealth law matters.<sup>1</sup>

3.3 LACs work co-operatively with other legal assistance service providers to maximise access to justice. At a national level, this co-operation is facilitated through the Australian Legal Assistance Forum, comprising representatives of the LACs' peak body, National Legal Aid (NLA), Community Legal Centres (CLCs), Aboriginal and Torres Strait Islander Legal Services (ATSILS), and the Law Council of Australia (Law Council).

3.4 The Australian, state and territory governments fund LACs in each state/territory, with Australian Government funding administered by the Attorney-General's Department (department) through the Legal Aid Program (LAP).

### **The Legal Aid Program**

#### *Australian Government funding*

3.5 In 2003-04, the committee examined Australian Government legal aid funding from 1996 to 2004, a period which saw the introduction and implementation of new Legal Aid Priorities and Guidelines (Priorities & Guidelines). Under this policy, from

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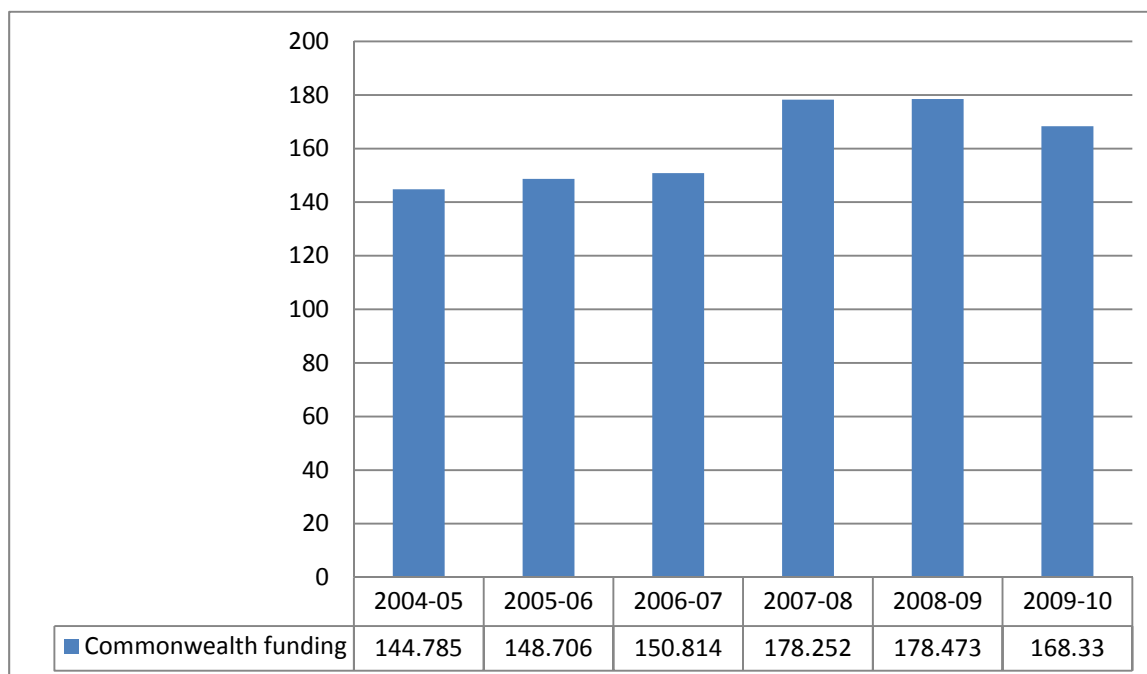
1 Attorney-General's Department, *Submission 54*, p. 2.

1 July 1997, LACs could only allocate Australian Government funding to legal matters arising under a law of the Commonwealth and defined as a Commonwealth Legal Aid Priority.<sup>2</sup>

3.6 In its 2004 report, the committee noted steady reductions in Australian Government legal aid funding from 1996-2000, followed by a four year funding package which ultimately returned funding to below what it was in 1996-97 (in real terms, \$27 million less).<sup>3</sup>

3.7 Figure 3.1 below depicts the subsequent history of Australian Government funding for LACs. This funding has steadily increased, except for the last financial year when the funding marginally decreased.

**Figure 3.1 – Legal Aid Commission funding: 2004-2009**

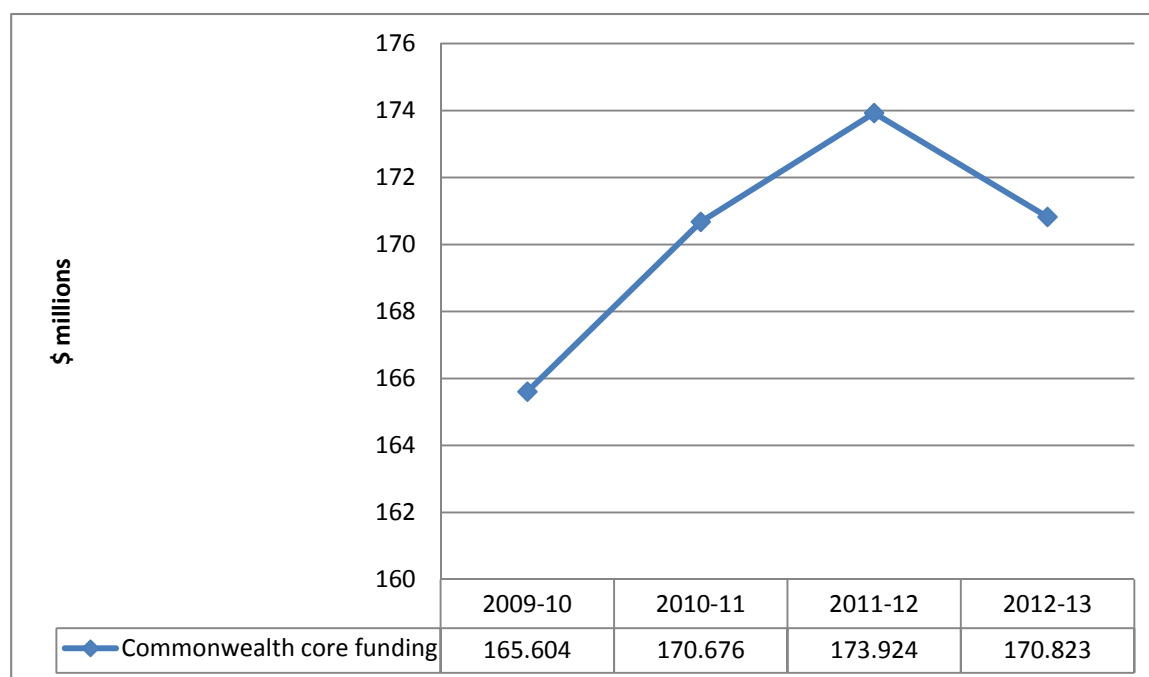


Source: Based on figures from National Legal Aid website, accessed 26 October 2009: <http://www.nla.aust.net.au>

3.8 Figure 3.2 depicts Australian Government core funding provided for in the 2009-10 Budget and to be provided in the 2010-13 budgets, totalling \$681.027 million over the next four years. In Senate Estimates Hearings, the department stated that 2009-10 funding levels have been maintained from 2008-09, with an indexation adjustment.

2 Attorney-General's Department, *Commonwealth Legal Aid Priorities and Guidelines*, July 1997, Guideline 2(1)(a) & (b)

3 Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, pp 3-8.

**Figure 3.2 – Commonwealth core legal assistance funding: 2009-2013**

Source: Treasury Portfolio, Portfolio Budget Statements 2009-10, p. 27; and Attorney-General's Department, Estimates Answer to Question on Notice (27 May 2009)

(Note: These figures do not include amounts budgeted in the Attorney-General's Portfolio, Portfolio Budget Statements, pp 29-30 or additional funding injections.)

3.9 While there is some confusion evident in this data, Australian Government legal aid funding appears to have generally increased over the past five years. The Australian Government also recently made a \$10.1 million one-off targeted funding injection to address immediate pressures on service delivery and support measures, such as improved mediation conferencing services, upgraded information technology and video-conferencing equipment, and tailored training opportunities focussing on mediation skills and family violence identification and management. Further funding injections have not been budgeted.<sup>4</sup>

### ***Allocation of Australian Government funding***

3.10 Australian Government legal aid funding is apportioned between the states/territories using a funding model based on demographic, social and economic variables, and cost factors affecting service delivery in each state and territory (the Rush-Walker funding model).

3.11 In 2009-10, Australian Government LAC funding is expected to be allocated to the states and territories as follows.

4 The Hon. Robert McClelland MP, Attorney-General, 'Funding for Legal Assistance Services', Media Release, 9 May 2009; and Mr Roger Wilkins AO, Attorney-General's Department, Estimates Hansard, 27 May 2009, p. 39.

**Table 3.1 – Estimated payments to the states/territories for legal aid**

<b>\$ million</b>	<b>NSW</b>	<b>VIC</b>	<b>QLD</b>	<b>WA</b>	<b>SA</b>	<b>TAS</b>	<b>ACT</b>	<b>NT</b>	<b>Total</b>
<b>2008-2009</b>	<b>53.1</b>	<b>35.4</b>	<b>35.4</b>	<b>16.3</b>	<b>13.8</b>	<b>5.8</b>	<b>4.1</b>	<b>4.2</b>	<b>168.1</b>
<b>2009-2010</b>	<b>52.2</b>	<b>35.1</b>	<b>35.5</b>	<b>15</b>	<b>14.1</b>	<b>5.5</b>	<b>4.2</b>	<b>3.7</b>	<b>165.3</b>

Source: Attorney-General's Department, *Estimates Answer to Question on Notice* (27 May 2009)

3.12 The committee has previously heard criticisms of the Rush-Walker funding model,<sup>5</sup> and in its 2004 Report recommended that:

The Commonwealth Government develop a new funding model to ensure a more equitable distribution of funding between the State [sic] and Territories. This model should be based on the work of the Commonwealth Grants Commission model, but with increased funding for the Northern Territory to account for the special challenges it faces in light of its high Indigenous population and remoteness.<sup>6</sup>

3.13 The committee notes that the Commonwealth Grants Commission subsequently developed a new funding model, which was rejected by both NLA and the department as it did not reflect the operational circumstances of a number of jurisdictions.<sup>7</sup> However, the committee does not comment further as submissions and evidence presented during the inquiry insufficiently addressed the issue to allow the committee to come to an informed view.

3.14 The committee notes however that the Rush-Walker funding model appears to produce funding inconsistencies. In 2008-09, for example, Victoria Legal Aid reported the lowest funding of all LACs, including an overall operating deficit of \$20.3 million dollars of which \$14.3 million dollars represented the deficiency in Commonwealth funding.<sup>8</sup>

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5 Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, pp 9-12.

6 Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, Recommendation 2, p. xxiii.

7 Government Response, *Senate Hansard*, 7 February 2006, p. 63.

8 Victoria Legal Aid, Annual Report 2007-08, p. 3; and PILCH, *Submission 33*, p. 27.

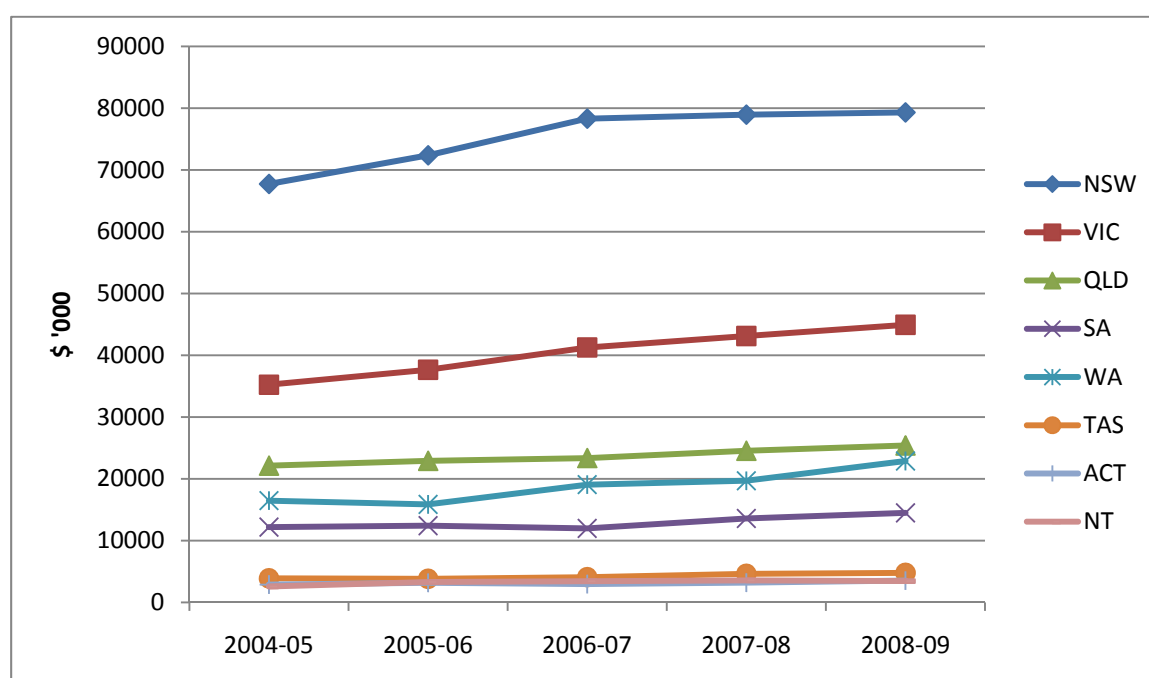


3.15 When asked about this by the committee, the department responded that LACs are expected to operate in accordance with their budget and not incur a budget deficit. The department added that in earlier years Victoria Legal Aid reported a surplus so substantial that it provided sufficient seed funding for the establishment of the Expensive Commonwealth Criminal Cases Case Fund.<sup>9</sup>

### *State and territory government funding*

3.16 In addition to the Australian Government, LACs receive funding from state/territory governments. Figure 3.3 below details each state and territory's funding contributions from 2004 to 2009. In general, these contributions marginally increased for the period.

**Figure 3.3 – State/territory legal assistance funding: 2004-2009**



Source: Based on figures from National Legal Aid website, accessed 26 October 2009: <http://www.nla.aust.net.au>

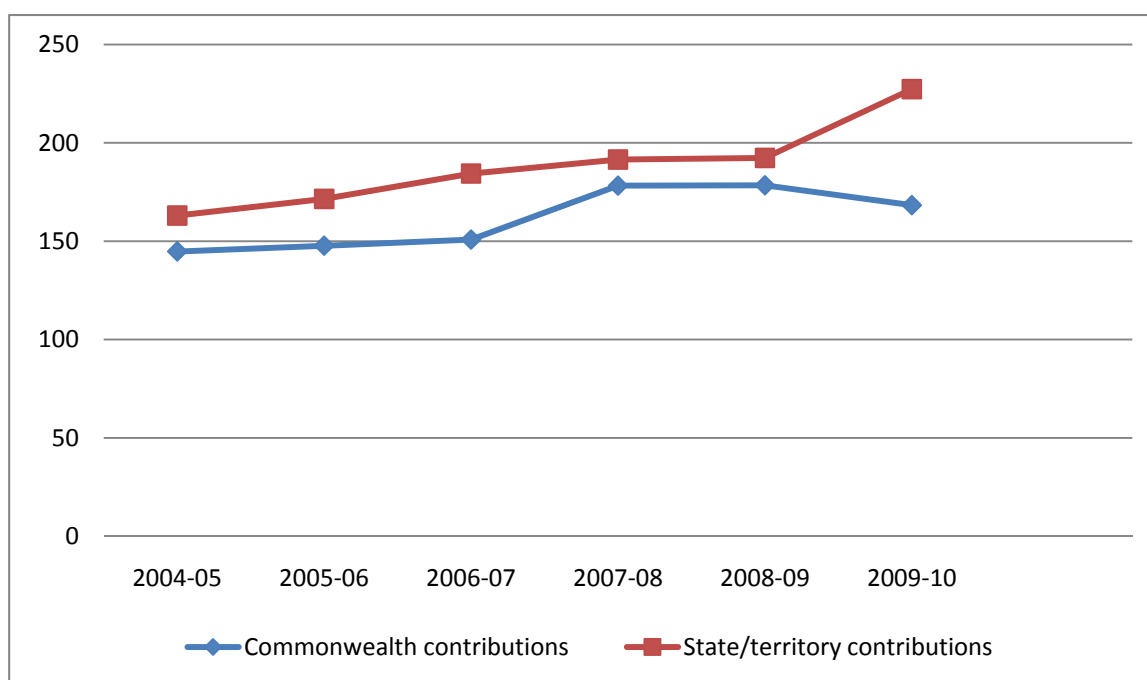
3.17 No state or territory government participated in the inquiry, resulting in evidence only peripherally remarking on their financial contributions to LAC funding. This comment compared Australian Government LAC funding with state/territory and/or other sources of LAC funding.

3.18 At the Melbourne public hearing, for example, NLA described current contributions to LAC funding as follows:

9 Dr Albin Smrdel, Assistant Secretary, AGD, *Committee Hansard*, Canberra, 27 October 2009, p. 44.

In 1996-97 the Commonwealth contribution was \$128½ million out of a total income for legal aid commissions around the country of \$264½ million. So, in 1996-97, you are basically looking at, fractionally, about 50-50 when you take into account all the sources...With the new arrangements the Commonwealth contribution was \$108½ million out of \$244 million, so it went down a bit below 50 per cent. But in this year's budget the Commonwealth contribution is \$168 million out of a total of \$518 million, so it is down to about 33 or 34 per cent-something like that. But, of course, the state contribution has gone up enormously...This year the state figure is \$227½ million.<sup>10</sup>

**Figure 3.4 – Australian, state and territory government funding for Legal Aid Commissions: 2004-2010**



Source: Based on figures from National Legal Aid website, accessed 27 October 2009: <http://www.nla.aust.net.au>

3.19 According to NLA statistics, state and territory government contributions to LAC funding have exceeded those of the Australian Government for at least the past six years.

10 Mr Norman Reaburn, Chair, National Legal Aid, *Committee Hansard*, Melbourne, 15 July 2009, pp 61-62.

### ***Public purpose funds***

3.20 LACs also derive a large proportion of their funding from Public Purpose Funds. In 2007-08, for example, Victoria Legal Aid received \$31.9 million (28 per cent) of its revenue from the Victorian Public Purpose Fund.<sup>11</sup> In the same period, NSW Legal Aid received \$37.7 million (17.5 per cent) of its funding from the NSW Public Purpose Fund.<sup>12</sup>

3.21 The monies for Public Purpose Funds are primarily generated by the interest earned in solicitors' trust accounts, a revenue source vulnerable to economic fluctuations, and, at present, reduced by the payment of fees on the Guarantee Scheme for Large Deposits and Wholesale Funding.

3.22 The Law Council submitted that LACs over-rely on the Public Purpose Funds, and when these funds are limited, further pressures are placed on the entire legal assistance sector.<sup>13</sup> NLA acknowledged that part of the funding crisis facing LACs over the next 12-18 months will be a loss of these funds:

17 or 18 per cent of total national funding for legal aid commissions comes from those solicitor trust fund moneys where the interest on trust accounts is put into a special fund...It varies from jurisdiction to jurisdiction. In some jurisdictions it is a really important component of the money they get. That is a funding source which is rapidly drying up. It is drying up because of lower interest rates and it is drying up because of the declining volume of transactions that will lead to moneys being held in trust by solicitors.<sup>14</sup>

## **The adequacy of funding**

### ***Impact on service delivery***

3.23 In 2003-04, the committee recognised that the significant reduction in Australian Government legal aid funding adversely affected the ability of LACs to provide legal assistance to economically and socially disadvantaged people.

3.24 Accordingly, the committee made recommendations aimed at determining legal needs throughout Australia, and providing the necessary resources to meet those needs. As noted in Chapter 2, many of those recommendations have not been implemented.

3.25 Submitters and witnesses told the committee that, since 2004, legal assistance service providers' funding positions have worsened, with demand for and the cost of

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11 Victoria Legal Aid, Thirteenth Statutory Annual Report: 2007-08, p. 4.

12 NSW Legal Aid, Annual Report 2007-08, p. 62.

13 Law Council of Australia, *Submission 12*, p. 5.

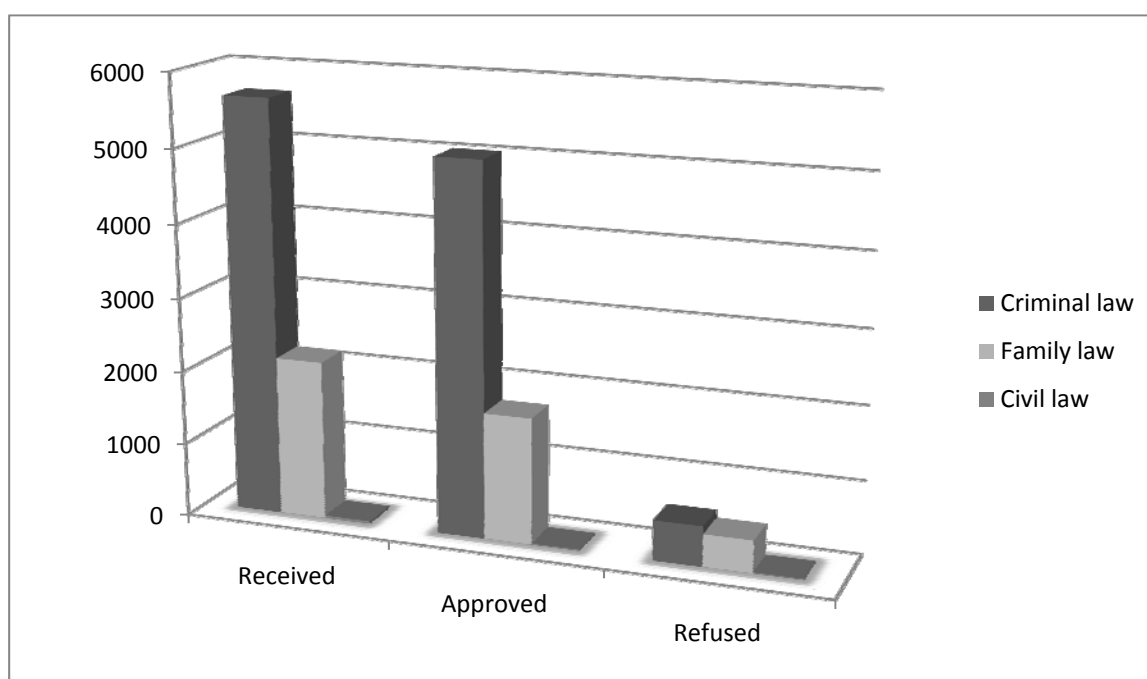
14 Mr Norman Reaburn, Chair, NLA, *Committee Hansard*, Melbourne, 15 July 2009, pp 60-61; and Mr Danny Barlow, President, LIV, *Committee Hansard*, Melbourne, 15 July 2009, p. 76.

legal services rising. Chapter 7 discusses the position of CLCs, and Chapter 8 discusses the position of ATSILS and Family Violence Prevention Legal Services (FVPLS).

3.26 Under this term of reference, evidence suggested that LACs struggle to maintain financial viability whilst meeting the needs of their clients. As a result, a number of coping mechanisms have been implemented, including: prioritisation of matters; strict application of eligibility criteria; and reduction of services. However, these strategies result in many disadvantaged people not securing a grant of legal aid, and being hindered or prevented from accessing justice.<sup>15</sup>

3.27 In Tasmania, for example, approximately 10 per cent of applications for legal aid are currently rejected on the basis of a lack of funding.<sup>16</sup> According to Tasmania Legal Aid's 2007-08 Annual Report, it appears that the majority of rejections occur in the areas of family and civil law.

**Figure 3.5 – Tasmania Legal Aid: Applications Received, Approved, Refused: 2007**



Source: Based on figures from Tasmania Legal Aid website, accessed 24 November 2009: <http://www.legalaid.tas.gov.au>

15 Australian Legal Assistance Forum, *Submission 24*, p. 2; Women's Legal Centre (ACT & Region) Inc., *Submission 51*, p. 3; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission 42*, p. 2; NSW Young Lawyers, Human Rights Committee, *Submission 28*, pp 8-9; and DLA Phillips Fox, *Submission 32*, p. 6.

16 Mr Norman Reaburn, Chair, National Legal Aid, *Committee Hansard*, Melbourne, 15 July 2009, pp 63-64.

3.28 In Queensland, 7.8 per cent of applications for criminal law legal aid were rejected in 2007-08.<sup>17</sup> In Victoria, criminal law legal aid matters in the lower courts have dropped to pre 2004-05 levels.<sup>18</sup>

3.29 NLA submitted:

Limited funding to commissions and the requirements of funding agreements (including means and merits testing and priorities and guidelines for granting legal assistance) result in commissions making most grants of legal assistance in family law where children are involved and/family violence is a factor and criminal law where a person's liberty is at risk. Because of these constraints, increased demand, and the rising cost of services, commissions are not able to meet the demand in these areas and even less so in other areas such as civil law which includes matters such as employment, social security, credit/debt, mortgage repossessions, housing and tenancy, consumer protection, and older people's issues.

Currently, Commonwealth funding is insufficient to maintain even the existing level of service in the family law area where children are involved. Some jurisdictions do not have enough Commonwealth money. Others are only just holding their heads above water. An increase in the demand for services as a result of the GFC or for any other reason will mean all commissions will be under water. The Commonwealth should acknowledge this. On top of this there are real problems in having to operate within the current parameters, with the means test being way too restrictive and prioritising matters becoming almost impossible. There will need to be either a substantial reallocation of the types of matters for which people can get assistance or additional funding.<sup>19</sup>

3.30 Other submissions warned that clients' perception of the quality of legal aid and the fairness of the justice system might be damaged by limited funding and inadequate resourcing of LACs.

3.31 By way of illustration, Justice Action told the committee:

Legal aid lawyers have huge case loads because there are simply not enough of them. That means they have less time to do their work and to work with their clients in the participation and conduct of their cases. That, in turn, has led to a growing disconnect in the prison yards between prisoners and their lawyers. Complaints range from lawyers spending very little time with their clients—some say five minutes is all they get before they go to court—and not being prepared to properly listen to the client's side of the story. They feel they have not had a chance to ventilate their side of the story. Also, pressure being placed on clients to plead guilty and a complete lack of understanding on the part of clients of the trial process and what they are going through. That means that in very many cases that,

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17 Queensland Legal Aid, Annual Report 2007-08, p. 97; and Russo Lawyers, *Submission 58*, p. 4.

18 Law Institute of Victoria, *Submission 11*, p. 6.

19 National Legal Aid, *Submission 34*, pp 18 & 24.

whilst people have actually had their day in court, as the maxim suggests, justice in their eyes and in the eyes of their families and friends has neither been done nor been seen to be done. That causes anger and despair.<sup>20</sup>

3.32 More broadly, the Law Council submitted that adequately funding the legal aid sector provides a wide range of social justice benefits:

On a broad level, the public's view that the legal system is fair and equitable supports the legitimacy of the legal system as a whole. Equality before the law is meaningless if there are barriers that prevent people from enforcing their rights. The legal assistance sector is therefore critical in maintaining the integrity of the justice system and upholding the rule of law.<sup>21</sup>

3.33 Concluding its argument, the Law Council cited former Chief Justice Murray Gleeson, who 10 years ago remarked:

The expense which governments incur in funding legal aid is obvious and measurable. What is not so obvious, and not so easily measurable, but what is real and substantial, is the cost of the delay, disruption and inefficiency, which results from absence or denial of legal representation. Much of that cost is also borne, directly or indirectly, by governments. Providing legal aid is costly. So is not providing legal aid.<sup>22</sup>

#### ***Areas of unmet need in legal aid***

3.34 While the results of the National Legal Needs Survey referred to in Chapter 2 will not be known until mid- to late 2010, evidence presented to the inquiry indicated priority areas in need of legal aid funding. In general, civil law and family law matters drew the attention of submitters and witnesses.

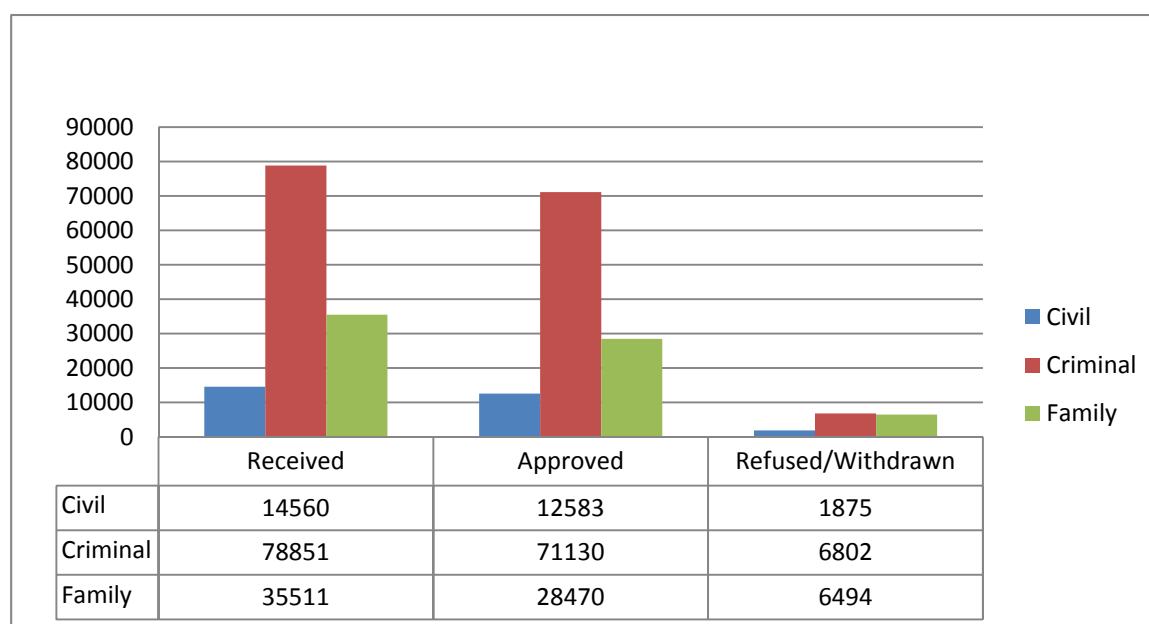
3.35 Figure 3.6 below shows the relative number of civil, criminal and family law applications received by LACs in 2007-08. Criminal law matters comprise the bulk of legal aid applications, with family law matters and civil law matters ranking well behind.

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20 Mr Michael Poynder, Co-ordinator, Justice Action, *Committee Hansard*, Sydney, 11 September 2009, p. 71; Law Society of NSW, *Submission 41*, p. 2; and Australian Lawyers for Human Rights, *Submission 43*, p. 3.

21 Law Council of Australia, *Submission 12*, pp 5-6.

22 Chief Justice Murray Gleeson, *State of Judicature* (speech delivered at the Australian Legal Convention, Canberra, 10 October 1999)

**Figure 3.6 – Legal Aid Commission applications by matter type: 2007-2008**

Source: Based on figures from National Legal Aid website, accessed 27 October April 2009: <http://www.nla.aust.net.au>

3.36 The committee notes that these figures do not accurately portray the true state of the legal aid system: the figures do not take into consideration those people who, for whatever reason, do not apply to LAC for legal assistance.

#### *Family law matters*

3.37 The Family Court of Australia (FCA) and the Federal Magistrates Court (FMC) submitted that legal aid funding is crucial for people attempting to access the family law courts.<sup>23</sup> As previously mentioned, NLA advised that low funding levels are significantly and adversely affecting LAC's family law core service delivery.<sup>24</sup>

3.38 By way of illustration, the family law courts and LIV submitted that the contraction in Australian Government legal aid funding caused Victoria Legal Aid to: cut the number of independent children's lawyers by 600; tighten the means test; and stop funding lawyers to instruct in family law trials (including independent children's lawyers) in early 2008.<sup>25</sup>

3.39 Independent children's lawyers are lawyers appointed by the court to form a view as to what orders would be in a child's best interests, and make submissions in

23 Chief Justice Diana Bryant, Family Court of Australia & Chief Federal Magistrate John Pascoe, *Committee Hansard*, Melbourne, 15 July 2009, p. 2.

24 National Legal Aid, *Submission 34*, p. 18.

25 Victoria Legal Aid, Annual Report 2007-08, p. 3; Family Court of Australia & Federal Magistrates Court, *Submission 31*, p. 7; and PILCH, *Submission 33*, p. 28.

accordance with that view. They do not represent the child or act on a child's instructions. The types of matters where independent children's lawyers are appointed include where:

- there are allegations of abuse against the child;
- there is intractable conflict between the parents;
- the conduct of the parents is likely to impinge on the child's welfare; and
- both parties are self-represented.

3.40 As a result, the FCA warned that it could be prevented from fulfilling its obligation to further the best interests of children involved in family law proceedings. For its part, the LIV questioned whether Australia was now in breach of the United Nations' Convention on the Rights of the Child.<sup>26</sup>

3.41 In relation to the funding cap on independent children's lawyers, Her Honour Chief Justice Diana Bryant told the committee:

They have a quota each month for the Family Court and the Federal Magistrates Court. If that quota is reached in a month, despite the fact that the court has made an order for representation, then that representation will not be available, because of the lack of legal aid funds. That really is quite crucial. It is important that parties be represented but, if parties cannot be, then it is essential that there is an independent children's representative for the child.<sup>27</sup>

3.42 A member of the independent children's lawyer panel told the committee that:  
12 months ago or two years ago I would receive three or four appointments per month and three or four requests to act. I now get one request to act every six weeks, one appointment perhaps every two months.<sup>28</sup>

3.43 In addition, the LIV submitted that independent children's lawyer caps is a disadvantage in lengthy trials where funding expires prior to commencement of final hearings:

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26 Mr Robert Stary, Executive Committee, Criminal Law Section, LIV, *Committee Hansard*, Melbourne, 15 July 2009, p. 70.

27 Chief Justice Diana Bryant, Family Court of Australia, *Committee Hansard*, Melbourne, 15 July 2009, pp 2-3, 10 & 12; Chief Federal Magistrate John Pascoe, Federal Magistrates Court, *Committee Hansard*, Melbourne, 15 July 2009, p. 11; Family Court of Australia & Federal Magistrates Court, *Submission 31*, pp 7-8; and Law Institute of Victoria, *Submission 11*, p. 7.

28 Mr Tim Mulvany, LIV, *Committee Hansard*, Melbourne, 15 July 2009, p. 77.



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About 10 per cent of my cases would reach cap. Then you have to apply to legal aid and you are customarily knocked back if you are in excess of cap. The one exception is the Magellan process, where the cap does not apply if you are in the Magellan Program.<sup>29</sup>

3.44 The committee accepts that family law legal aid funding plays an important role in access to justice, including access to justice for children. The committee is concerned that Victoria Legal Aid, and perhaps other LACs also, cannot safeguard or help promote children's best interests with the appointment of independent children's legal representatives due to funding constraints and in circumstances where that representation appears wholly necessary.

3.45 In 2003-04, the committee examined children's representation in the family law courts, recommending that:

A separate pool of funding for child representation ultimately be established so that decisions made by the Family Court and/or the Federal Magistrates Court to appoint child representatives do not impact on the availability of legal aid funds for parents in family law proceedings.

[and]

The Family Court and legal aid commissions closely monitor the new Family Court guidelines on child representatives to determine what impact, if any, they have on legal aid budgets for family law matters generally.<sup>30</sup>

3.46 The committee is not aware whether the second mentioned recommendation was adopted by the FCA and LACs, but the Australian Government did not accept the first recommendation, stating that it would reduce the flexibility of LACs to manage their budgets according to client needs.<sup>31</sup>

3.47 On the evidence, it is apparent that the appointment of children's legal representatives impacts on family law legal aid funding sufficient to impel, Victoria Legal Aid, at least, to institute some control measures.

3.48 Accordingly, and in view of its above comments, the committee endorses Recommendation 21 from its 2004 Report, and urges state/territory governments to set aside a portion of LAC family law funding for the targeted provision of independent children's representatives in family law matters where ordered by the FCA or FMC.

3.49 The Women's Legal Services (SA) Inc. provided another example of how reductions in family law legal aid funding impact on clients and their access to justice. It argued that the approximate \$10 000 'cap' in family law matters discriminates against women as:

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29 Mr Tim Mulvany, LIV, *Committee Hansard*, Melbourne, 15 July 2009, p. 76.

30 Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, Recommendations 21 & 22, p. xxvi.

31 Government Response, *Senate Hansard*, 7 February 2006, p. 71.

- a person may reach the 'cap' at a crucial stage in the proceedings (such as just prior to a hearing), thus losing the benefit of legal aid;
- the 'cap' in criminal law proceedings is much higher, approximately \$15 000-\$60 000; and
- in domestic violence matters, respondents make repeated applications to the court, exhausting a legal aid grant and leaving applicants without the benefit of legal assistance.<sup>32</sup>

3.50 Five years ago, the committee endorsed its 1998 recommendation for the Australian Government to act to ensure the necessary data on the operation of the 'cap' in family law matters is collected, analysed, published and acted upon to ensure that capping does not deny justice in particular cases.<sup>33</sup>

3.51 This recommendation was partially accepted, with the Australian Government considering that 'there are adequate measures in place to monitor the operation of the family law cost caps.'<sup>34</sup>

3.52 In 2004, the committee also accepted that there is gender disparity in the practical distribution of legal aid funds, resulting in indirect but significant discrimination against the circumstances and needs of women in their access to justice. The committee expressed concern about the Australian Government's apparent lack of recognition of some of the particularly grave consequences of family law disputes, and the preferential funding given to criminal law matters.<sup>35</sup>

3.53 The committee recommended that:

The Commonwealth Government address discrimination against the circumstances of women in the application of the current family law legal aid funding guidelines and priorities, by commissioning national research into the perceived gender bias in legal aid decision-making.<sup>36</sup>

3.54 The Australian Government did not accept this recommendation, stating that the Commonwealth legal aid funding Guidelines and Priorities apply equally to men and women in Commonwealth matters, and LACs are responsible for decisions regarding grants of legal aid.<sup>37</sup>

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32 Women's Legal Service (SA) Inc., *Submission 59*, pp 12-13; and Women's Legal Service Victoria, *Submission 71*, p. 6.

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

34 Government Response, *Senate Hansard*, 7 February 2006, p. 68.

35 Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, p. 48; and Women's Legal Service Victoria, *Submission 71*, pp 4-5.

36 Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, Recommendation 12, p. xxiv.

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

3.55 The NACLC observed that while the Guidelines and Priorities appear to be gender neutral, in practice they do not produce the same results for men and women, with women continuing to receive significantly less legal aid than men. This was attributed to the higher level of criminal law legal aid funding where men comprise the vast majority of grant recipients rather than cost capping in individual matters.<sup>38</sup>

3.56 For this inquiry, the committee received little evidence regarding both cost caps and discrimination against women in the practical application of family law legal aid funding. The committee agrees in principle however with the 2004 Report findings and its Recommendations 12 and 16.

3.57 In relation to family law legal aid funding, the committee has recommended previously that:

The Commonwealth Government increase as a matter of urgency the level of funding available for family law matters.<sup>39</sup>

3.58 In 2006, the Australian Government advised that it had provided a substantial increase in resources for LACs for Commonwealth law matters, which would predominantly provide additional services in family law, including duty lawyer services and increased remuneration rates for legal practitioners undertaking legal aid work.<sup>40</sup>

3.59 As shown in Figure 3.1 above, a substantial increase in LAC funding occurred in 2006-07 however it is not clear whether this was an increase in real terms. Furthermore, NLA informed the committee that, in its view, the legal aid funding situation has deteriorated further since 2004.<sup>41</sup>

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38 National Association of Community Legal Centres, Answer to Question on Notice (11 September 2009)

39 Senate Legal and Constitutional References Committee, *Inquiry into legal aid and access to justice*, June 2004, Recommendation 14; and Family Court of Australia & Federal Magistrates Court, *Submission 31*, p. 4.

40 Government Response, *Senate Hansard*, 7 February 2006, p. 67.

41 National Legal Aid, *Submission 34*, p. 24; and Women's Legal Centre (ACT and Region), *Submission 51*, p. 7.

*Civil law matters*

3.60 LACs eliminated or drastically reduced their civil law legal aid programs upon introduction of the Priorities and Guidelines. As a result, people can no longer as readily obtain legal aid, if at all, in relation to matters such as employment, social security, credit/debt, mortgage, housing and tenancy, consumer protection, and older people's issues.<sup>42</sup>

3.61 Several submissions cited migration law matters as an illustration of how a limited legal aid civil law program creates difficulties for disadvantaged people.

3.62 Part 4 Guideline 3.1(1) allows for grants of legal aid in migration law (and other) matters but only in proceedings before the FMC and only if:

- there are differences of judicial opinion which have not been settled by the Full Court of the Federal Court of Australia or the High Court of Australia and relate to an issue in dispute in the matter; or
- the proceedings seek to challenge the lawfulness of detention, not including a challenge to a decision about a visa or a deportation order.<sup>43</sup>

3.63 In effect, this limits the availability of legal aid for disadvantaged people in migration matters, resulting in pressure on other legal assistance service providers, self-representation, or abandonment of proceedings.

3.64 In addition to access to justice issues, submissions cited broader benefits that the availability of legal aid in migration law matters might bring to the judicial system. The Law Council, for example, told the committee:

If potential applicants in migration matters were able to apply for grants of legal aid, Legal Aid Commissions would apply a general merits test which may have the effect of reducing the number of unmeritorious applications being brought before the courts. It is also likely that an applicant who is fully advised of his or her legal position is less likely to pursue a claim that is devoid of legal merit.<sup>44</sup>

3.65 The themes of early intervention and triage appeared in other submissions, such as that of La Trobe University who added that there is need for more not-for-profit migration agents:

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42 National Legal Aid, *Submission 34*, pp 19-20; Law Council of Australia, *Submission 12*, pp 14-15; National Pro Bono Resource Centre, *Submission 49*, p. 12; Care Inc. Financial Counselling Services and Consumer Law Centre of the ACT, *Submission 9*, p. 3; PILCH, *Submission 33*, p. 27; and Australian Environmental Defender's Office, *Submission 29*, p. 7.

43 Commonwealth Priorities and Guidelines, Part 4, Guideline 3.1(1)

44 Law Council of Australia, *Submission 12*, pp 9-10; Federal Court of Australia, *Submission 57*, pp 1-2; and Mr Norman Reaburn, Chair, National Legal Aid, *Committee Hansard*, Melbourne, 15 July 2009, p. 63.

International research has shown time and time again that some of the most vulnerable groups in a society who have access to justice issues are newly arrived migrants. In addition, when people are granted asylum, anxiety and trauma does not abate until refugees are sure that their family is safe. Migration agents placed in community legal centres that have a high immigrant/refugee demographic would provide legal support in the form of submissions to the DIAC.<sup>45</sup>

3.66 Asylum seekers rarely have funds to pay a migration agent, and in any event, Gilbert and Tobin preferred greater funding and support for organisations such as the Refugee Advice + Casework Service which provide legal assistance in the first stages of applications:

The bases on which those who fail to procure protection visas before the Refugee Review Tribunal (RRT) can seek review in the Federal court system are limited and highly technical. Many failed asylum seekers seek review of their matter without understanding whether they have arguable grounds for review. Often they do so because they have not been able to properly put their claim to the RRT either through their own inabilities or the inadequacy of their migration agent. This results in expending much by way of court and lawyer resources to address review claims through the Federal Court system.<sup>46</sup>

3.67 The Law Council dismissed the efficacy of Guideline 3.1(3), which diverts legal aid applicants in migration matters to the 'under-funded' Immigration Advice and Application Assistance Scheme. Instead:

Commonwealth legal aid guidelines should be amended to expand the migration matters in which Legal Aid Commissions can provide assistance in matters before the courts and review tribunals and adequate funding should be provided to enable them to do so.<sup>47</sup>

3.68 In 2004, the committee expressed the view that services for migrants and refugees would best be provided by LACs, recommending that:

The Commonwealth Priorities and Guidelines relating to the provision of migration assistance be amended such that assistance is available to those applicants meeting the means and merits tests, for preliminary and review stages of migration matters, including challenges to visa decisions and deportation orders.

The Commonwealth provide the necessary funding to legal aid commissions to meet the need for such services.<sup>48</sup>

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45 La Trobe University, *Submission 13*, p. 2.

46 Gilbert & Tobin, *Submission 45*, p. 2.

47 Law Council of Australia, *Submission 12*, p. 10; and National Legal Aid, *Submission 34*, p. 25.

48 Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, Recommendations 41 & 42, pp 143 & 146.

3.69 Neither recommendation was accepted on the grounds that the case put forth was neither novel nor persuasive, and also that:

Visa decisions are often challenged in tribunals and courts. In 2003-04, over 20, 900 migration matters were finalised in the Migration Review Tribunal (MRT), Refugee Review Tribunal (RRT) and the Administrative Appeals Tribunal (AAT), including 4, 709 finalised cases in the courts.

Migration applicants thus have the opportunity to have their case considered at two levels —at the primary decision stage and by administrative review in the MRT, RRT or AAT. If applicants choose to pursue their case further by way of judicial review, this should generally be at their own expense, subject to the current exceptions in the Commonwealth legal aid priorities and guidelines.<sup>49</sup>

3.70 The committee promotes efforts to increase access to justice but considers the Australian Government's response to its earlier recommendations to be both reasonable and cognisant of the legal need and resource requirements of the entire legal aid system.

3.71 In relation to civil law generally, submissions argued that the existing limitations of the legal aid program reduce access to justice, and place pressure on other legal assistance service providers in the legal aid system.

3.72 As noted in Chapter 2, the system interconnects legal assistance service providers so that one provider's funding or service delivery can affect other providers. As explained and illustrated by the SCALES Community Legal Centre:

Legal Aid and community legal centres are aligned significantly and when there is a shortfall of funds in one of them, there is likelihood that the shortfall would impact the other one. For instance when legal aid funding is reduced, then legal aid bodies are forced to cut down on the level of their services to keep in line with the new budget. As a consequence, some of the clients that would have been offered legal aid prior to the funding changes would not meet the legal aid criteria. These clients then seek assistance from already stretched community legal centres.<sup>50</sup>

3.73 As discussed in Chapter 7, civil law matters comprise a significant proportion of CLCs' work. The Central Queensland Community Legal Centre Inc. told the committee that, for the period 2006-07, the Community Legal Services Information System recorded this proportion as 62 per cent.<sup>51</sup>

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49 Government Response, *Senate Hansard*, 7 February 2006, p. 77.

50 SCALES Community Legal Centre, *Submission 39*, p. 8; National Pro Bono Resource Centre, *Submission 49*, p. 11; and Tony Woodyatt, 'Working Together: Self-Representation', paper presented at the National Access to Justice and Pro Bono Conference, November 2008, p. 2.

51 Central Queensland Community Legal Centre Inc., *Submission 47*, p. 4; and Women's Legal Service (SA) Inc., *Submission 56*, p. 6.

3.74 For those jurisdictions with some form of civil law legal aid program, such services also feature in reported statistics of applications for assistance. In Victoria, for example, in 2007-08, out of a total of 42 044 grants of legal aid, 6 457 grants were made in relation to civil law matters (6-7 per cent).<sup>52</sup> In NSW, its limited civil law legal aid program covers only elder law, coronial inquiries, and other advice services. Over 9 per cent (\$19.835 million) of its overall budget was spent on civil law services.<sup>53</sup>

3.75 NLA acknowledged that civil law is an important legal area no longer comprehensively covered by LACs under the LAP:

Civil law legal aid has fallen through the cracks, tenancy, consumer, employment and social security legal services...are no longer core commission priorities although problems in these jurisdictions equally have profound consequences on peoples' lives.<sup>54</sup>

3.76 Australian Lawyers for Human Rights agreed with this view, emphasising that access to civil law legal aid is an essential component of Australia's justice system:

There has long been a recognition of the fundamental purpose that legal aid plays in the Australian justice system, not only in ensuring that individuals have adequate representation before the courts, but also to ensure that our marginalised citizens are able to effectively participate in our judicial system and access the rights and remedies available to them in a variety of legal areas. The need for affordable legal services in a variety of areas, beyond the core areas of family and criminal law, is essential to an adequate justice system in a liberal democratic society and is a need which is currently in critical deficit in Australia.<sup>55</sup>

3.77 The NLA's New National Policy set out poverty, or civil law matters, as its second priority area, and costed the restoration of a national civil law legal aid program at \$110,560,447. This included cost components for both legal advice and litigation, and involved an extrapolation to the national level of the NSW civil law legal advice program, and use of litigation data from comparative jurisdictions (England, Wales and Ontario).<sup>56</sup>

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52 National Legal Aid, *A New National Policy for Legal Aid in Australia*, p. 17.

53 NSW Legal Aid, Annual Report 2007-08, p. 16.

54 National Legal Aid, *A New National Policy for Legal Aid in Australia*, p. 3.

55 Australian Lawyers for Human Rights, *Submission 43*, p. 8.

56 National Legal Aid, *A New National Policy for Legal Aid in Australia*, November 2007, p. 16; and Law Council of Australia, *Submission 12*, p. 16.

3.78 The Law Council supported the proposal to restore a nationwide civil law legal aid program. It argued that the lack of legal aid in this area comprises a substantial barrier to access to justice, and suggested that a grant of civil law legal aid should be made if an application demonstrates certain criteria.<sup>57</sup>

3.79 At a Senate Estimates Hearing, the department advised that funding for civil law matters was being considered by the Australian Government's Access to Justice Taskforce. However, its report, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, does not specifically discuss or recommend the restoration of civil law legal aid funding.<sup>58</sup> According to the department, Australian Government funding for civil law matters is being 'looked at' by the Attorney-General.<sup>59</sup>

3.80 The committee acknowledges that there are arguments against restoration of a national civil law legal aid program.<sup>60</sup> However, the inquiry requires the committee to consider access to justice, and the committee cannot see how this is properly achieved if legal aid funding does not provide for high need areas which intimately affect the lives of disadvantaged Australians.

## **Recommendation 8**

**3.81 The committee recommends that the federal, state and territory governments, in conjunction with relevant stakeholders, jointly develop and implement a national civil law program in identified high need areas.**

### ***Funding proposals***

3.82 As noted in Chapter 2, LACs are the primary source of legal assistance for disadvantaged people and accordingly their best chance of accessing justice. However, submissions questioned whether LACs are adequately funded and resourced to achieve their chartered aims.

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57 Law Council of Australia, *Submission 12*, pp 14-15; National Pro Bono Resource Centre, *Submission 49*, p. 12; and PILCH, *Submission 33*, p. 33.

58 Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, September 2009; and Attorney-General's Department, Estimates Answer to Question on Notice No. 132 (27 May 2009).

59 Dr Albin Smrdel, Assistant Secretary, AGD, *Committee Hansard*, Canberra, 27 October 2009, p. 45.

60 Dr Andrew Cannon, *Submission 15*, p. 4; and Mr Maxwell Walker, *Submission 18*



3.83 The Law Institute of Victoria (LIV), for example, submitted:

Cuts over recent years have resulted in a reduction of legal aid services in Victoria and an increasing restriction on access guidelines so that legal aid is becoming assistance of last resort and not the robust safety net that we feel it should be.<sup>61</sup>

3.84 Submissions briefly touched on Australia's per capita legal aid funding. In essence, these submissions argued that, comparatively, Australia's legal aid funding is 'grossly' inadequate.

3.85 The National Pro Bono Resource Centre (NPBRC), for example, stated that in 2008 Australia spent \$22 per person, as compared to \$91 per person in England and Wales, \$73 per person in Scotland, and \$52 per person in the Netherlands.<sup>62</sup> The Law Institute of Victoria (LIV) referred instead to national variance:

Remembering that Victoria receives \$6.22 per head: ACT \$12, New South Wales \$7.23, Northern Territory \$17.77, Queensland \$8.21, South Australia \$8.82, Tasmania \$10.49 and Western Australia \$7.22.<sup>63</sup>

3.86 The department has rejected such comparisons previously on the grounds that Australian Government legal aid funding is not distributed on a per capita basis but according to the Rush-Walker funding model.<sup>64</sup>

3.87 In late 2007, NLA published its proposal for a new Commonwealth approach to legal aid in Australia. The policy document, *A New National Policy for Legal Aid in Australia* (New National Policy), set out six priority areas designed to deliver comprehensive access to justice to disadvantaged people. It also contained costings for each policy area, amounting to \$404,391,747.<sup>65</sup>

3.88 NLA representatives continued to endorse its policy proposal, arguing that a further \$165.5 million (approximately) must be injected into the Australian legal aid system in order for it to operate efficiently.<sup>66</sup> This sum does not allow for changes to the costings over the past two years.

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61 Mr Robert Stary, Executive Committee, Criminal Law Section, LIV, *Committee Hansard*, Melbourne, 15 July 2009, p. 69; Women's Legal Centre (ACT and Region), *Submission 51*, p. 3; and PIAC, *Submission 50*

62 National Pro Bono Resource Centre, *Submission 49*, p. 11.

63 Mr Robert Stary, Executive Committee, Criminal Law Section, LIV, *Committee Hansard*, Melbourne, 15 July 2009, p. 70; and Mr Mark Woods, Law Council of Australia, *Committee Hansard*, Canberra, 27 October 2009, p. 24.

64 Department of Parliamentary Services, Parliamentary Library, Client Memorandum, 27 May 2009, p. 7.

65 National Legal Aid, *A New National Policy for Legal Aid in Australia*, November 2007

66 Mr Norman Reaburn, Chair, National Legal Aid, *Committee Hansard*, Melbourne, 15 July 2009, p. 57.

3.89 Other evidence raised the issue of who most appropriately funds the legal aid system and to what extent. Submissions supported both joint Commonwealth/state responsibility and funding sufficient to meet the legal needs of disadvantaged people, for example:

Severe budget restrictions over the years have reduced the efficacy of legal aid in providing legal assistance to those who do not have the financial capacity to afford private representation. This situation should not be allowed to continue. The preponderance of self-represented people clogging the courts, creating delays and increasing costs (both to the courts and other parties) is a classic symptom of this parlous condition. There should be an acceptance by Governments, both State and Federal, that additional funding is urgently required for legal aid.<sup>67</sup>

3.90 Precisely how responsibility is apportioned between the Australian, state and territory governments was however a matter of some conjecture. Submissions expressed concern with Australian Government legal aid funding levels but were not able to inform the committee how much funding the Australian Government should be contributing, except to say that it ought to be more or that it ought to be determined according to appropriate principles.<sup>68</sup>

3.91 On the evidence before the committee, LACs do not and cannot adequately cover the legal needs of disadvantaged Australians. There is much confusion regarding precisely what is that need and how best to address it.

3.92 While the commitment of further financial resources must almost certainly play a part in resolving identified issues, the committee considers a system-wide approach necessary. In the first instance, this requires federal, state and territory agreement as to responsibility for the provision and adequate resourcing of the legal aid system.

### **The Commonwealth/state funding divide**

3.93 The Guidelines and Priorities' requirement for LACs to only use Commonwealth funds for grants of legal aid in Commonwealth law matters is known as the Commonwealth/state funding divide.

3.94 In 2003-04, the committee found the Commonwealth/state funding divide to be arbitrary as many legal matters do not fall neatly into either a Commonwealth or state/territory category. The committee considered that the arbitrary distinction: inhibited the effective servicing of legal needs; created unnecessary administration

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67 Law Society of NSW, *Submission 41*, p. 2.

68 For example, Liberty Victoria, *Submission 25*, p. 2; and NSW Young Lawyers, Human Rights Committee, *Submission 28*, p. 9.

costs; and resulted, in some instances, in a 'surplus' of funds which could not otherwise be allocated or used.<sup>69</sup>

3.95 Accordingly, the committee recommended that:

The current purchaser/provider funding arrangement be abolished, and that Commonwealth funding be provided in the same 'co-operative' manner as existed prior to 1997.

[and]

If the current purchaser/provider funding arrangement is retained, the committee recommends that the Commonwealth Government amend the funding agreements to allow the legal aid commissions to use 10 per cent of Commonwealth funding at their own discretion.<sup>70</sup>

3.96 Neither recommendation was accepted by the Australian Government, which responded that: the purchaser/provider funding policy was well founded and ensures that disadvantaged Australians with legal problems arising under Commonwealth law have access to assistance; state/territory governments are responsible for ensuring adequate funding for matters arising under their own laws; and then current legal aid agreements allow LACs to determine the most appropriate mix of assistance to provide to clients seeking assistance for Commonwealth law matters.<sup>71</sup>

3.97 During the inquiry, submitters and witnesses continued to express doubts regarding the purchaser/provider funding policy, with reiterations of the concerns identified in the 2004 Report. The Australian Legal Assistance Forum, for example, submitted:

Family breakdown can involve both Commonwealth law and State law such as child protection and domestic violence. If a case involves both Commonwealth and State laws, two separate grants of aid are required to be made because of the administrative and financial requirements which result from the Commonwealth/State funding divide.

Commonwealth funding should be available to provide grants of aid to address legal needs arising from family relationship breakdown regardless of whether the specific legal need arises under Commonwealth or State legislation. ALAF believes that a better way to prioritise the Commonwealth legal aid program is to base it on defined legal need and that this approach is more consistent with social inclusion principles.<sup>72</sup>

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69 Senate Legal and Constitutional References Committee, *Legal Aid and Access to Justice*, June 2004, p. 33.

70 Senate Legal and Constitutional References Committee, *Legal Aid and Access to Justice*, June 2004, Recommendations 9-10, p. xxiv.

71 Government Response, *Senate Hansard*, 7 February 2006, p. 65.

72 Australian Legal Assistance Forum, *Submission 24*, p. 3; National Legal Aid, *Submission 34*, pp 23-24; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission 42*, p. 3; and National Legal Aid, *Policy and Position Statement*, July 2008, pp 1-2.

3.98 The LIV was equally blunt:

The rule that Commonwealth funds may only be applied to Commonwealth matters is illogical and arbitrary in its operation. It is this rule that has resulted in the legal aid system failing so abjectly to meet the needs of the very people it is supposed to serve.<sup>73</sup>

3.99 The Law Council told the committee that the current funding arrangements: dislocate funding responsibility for closely related matters; produce inconsistent expectations of state/territory funding in respect of action taken by Commonwealth authorities pursuant to state/territory law; and restrict available funding for several areas of Commonwealth legislation.<sup>74</sup>

3.100 The Law Council supported the committee's 2003-04 Recommendation 9:

The Commonwealth [should] develop and adopt a mechanism to begin to break down the Commonwealth/State funding divide. This will allow the ability to transfer Commonwealth funds to priority areas of disadvantage rather than depending upon a requirement that the relevant law be enacted by a Commonwealth or State parliament.<sup>75</sup>

3.101 In any event, the Law Council took the view that:

The Commonwealth is the greatest gatherer of tax revenue and that it follows therefore that it ought to provide the majority of the funding for the legal services that are provided by legal aid.<sup>76</sup>

3.102 Due to the contemporaneous events referred to below, the committee makes no recommendations regarding the Commonwealth/state funding divide however the committee notes its predisposition toward revision of the current Australian Government policy and therefore its in principle agreement with Recommendation 9 of its 2004 Report.

### **Funding in the Federal Financial Relations framework**

3.103 In the 2009-10 Budget, the Australian Government announced that in future the majority of legal aid funding will be paid under the Federal Financial Relations framework, with specific purpose payments paid through the Treasury, as well as funding administered by the department.

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73 Law Institute of Victoria, *Submission 11*; PILCH, *Submission 33*, pp 48-49; and Australian Lawyers for Human Rights, *Submission 43*, p. 5.

74 Law Council of Australia, *Submission 12*, pp 11-12.

75 Law Council of Australia, *Submission 12*, pp 11-12; and Ms Julia Hall, NACLC, *Committee Hansard*, Sydney, 11 September 2009, pp 31 & 37.

76 Mr Mark Woods, Law Council of Australia, *Committee Hansard*, Canberra, 27 October 2009, p. 25.

3.104 National Partnership agreements for legal aid funding will shortly be negotiated by the federal, state and territory attorneys-general for implementation on 1 January 2010.<sup>77</sup> According, to the department:

The Government will settle its position on the Commonwealth/State funding divide as part of that process.<sup>78</sup>

3.105 Submissions to the inquiry universally acknowledged that, in the short-term, it would be difficult to provide an immediate solution rectifying all identified problems within the legal aid system. In spite of this cautious approach, evidence continued to call for urgent legal aid funding.

3.106 The Law Council, for example, emphasised the Australian Government's contribution to the current legal aid funding crisis and its concomitant responsibility to develop and implement a solution:

While it is not expected that the current government will be able to alleviate the financial crisis presently facing the legal assistance sector, created by years of under-funding, in one budget, it is imperative that some substantial increase be made in the next Commonwealth budget if this important sector of our justice system is not to be plunged further into crisis. While it is recognised that funding of legal aid is the responsibility of all Governments, the Commonwealth Government has much ground to make up due to the massive cuts to Commonwealth funding from 1997.<sup>79</sup>

3.107 Figures compiled by the Western Australian Government indicate that, in that state alone, the Australian Government share of total legal aid funding declined from 64 per cent in 1996-97 to 45 per cent in 2006-07. Roughly translated, if the Australian Government were to restore the balance of legal aid funding to pre-1996 levels, extra funding of \$177 million would be required for Western Australia alone.<sup>80</sup>

3.108 Again, the committee acknowledges the apparent ramifications that reduced legal aid funding has had on the legal aid system. As economic pragmatists, the committee must also acknowledge that the Australian Government cannot instantly locate and allocate massive and additional amounts of funding for LACs and other legal assistance service providers.

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77 Attorney-General's Department, *Submission 54*, p. 2; and Mr Matt Minogue, Assistant Secretary, and Dr Albin Smrdel, Assistant Secretary, AGD, *Committee Hansard*, Canberra, 27 October 2009, p. 41.

78 Attorney-General's Department, Estimates Answer to Question on Notice No. 128 (27 May 2009)

79 Law Council of Australia, *Submission 12*, p. 10; and National Legal Aid, *Submission 34*, p. 23.

80 Law Council of Australia, *Submission 12*, p. 10.

3.109 However, the totality of evidence convinces the committee that further funding must be injected into the legal aid system, commencing with the primary service provider. Accordingly, the committee makes the following Recommendation 9.

### **Recommendation 9**

**3.110 The committee recommends that the Australian Government increase the level of funding for the Legal Aid Program with a view to sufficiently resourcing the legal aid system to meet the legal needs of the Australian people, including specific funding for community education programs and telephone advice schemes.**

### **The Legal Aid Priorities and Guidelines**

3.111 In the past, the Australian Government entered into a four-year Agreement for the Provision of Legal Assistance Services (funding agreement) with each state/territory. These agreements incorporate the Priorities and Guidelines, and are due to expire on 30 June 2012.

3.112 The Priorities outline family, criminal and civil law priorities, as well as other matters which are taken to be priorities.<sup>81</sup> The 'Guidelines' specify the various bases upon which a LAC may make a grant of legal aid. These overarching criteria are set out in Part 1 of the Guidelines, and family, criminal and civil law specific criteria are set out in Parts 2, 3 and 4 of the Guidelines, respectively.<sup>82</sup>

#### ***The means test***

3.113 Part 1 Guideline 3 specifies that a means test must be applied by each LAC. This test assesses an applicant's assessable income and assets. An applicant must satisfy both components of the test, but if either is exceeded, a grant may be made if an applicant contributes toward the legal costs.

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

3.115 The Simplified Legal Aid Means Test uses a formula, which takes into account the number of dependent persons in the applicant's household, as well as the employment status of the applicant and his/her partner, if any. The National Legal Aid Means Test allows each state/territory to set monetary limits on items allowed under the test. The rationale for this discretion is to cater for economic factors particular to each jurisdiction, and different regions within a jurisdiction.

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81 Clauses 6.4-6.7 of the Commonwealth Legal Aid Priorities

82 Schedule 3 of the Commonwealth Legal Aid Guidelines

3.116 The Australian Government has always preferred the Simplified Legal Aid Means Test on the basis of administrative ease. However, only Queensland and Tasmania use that test. All other states/territories use the National Legal Aid Means Test.

3.117 As noted in Chapter 2, many disadvantaged people cannot afford the services of a private legal practitioner, with a small percentage (12 per cent) turning instead to other legal assistance service providers.<sup>83</sup> The former managing director of Victoria Legal Aid, Tony Parsons observed:

When those one in eight do come to the legal profession – particularly the profession working in the legal aid sector – they find a myriad of different services which are often shrouded by an almost impenetrable fog of stringent funding and case criteria, guidelines, and means and merits tests that have been put in place to manage and prioritise legal aid expenditure because the level of government funding is so hopelessly inadequate, so hopelessly disproportionate to the need.<sup>84</sup>

3.118 While application of the means and merits tests might serve a legitimate purpose, ensuring that limited legal aid funding is granted to only the most disadvantaged people, the committee heard that the tests prevent many other disadvantaged people from receiving a grant of legal aid.

3.119 In 2004, the former Chief Justice of the FCA, the Hon. Justice Alastair Nicholson told the committee that the means test is set at such a level that it prevents too many people from qualifying for legal aid, a lot of whom 'have no hope of being able to pay for legal expenses'.<sup>85</sup> In its submission, NLA acknowledged the accuracy of these comments, adding that those who might be able to afford the costs of private legal representation might not be able to do so without experiencing undue hardship.<sup>86</sup>

3.120 Submissions agreed with this testimony, remarking that this can be the case for persons who are employed part- or full-time, and also for persons who have to make a contribution toward their legal aid:

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83 PILCH, *Submission 33*, p. 24; and Law Institute of Victoria, *Submission 11*, p. 5.

84 <http://www.legalaid.vic.gov.au/xfw/364.htm> (accessed 28 October 2009)

85 Justice Alastair Nicholson, Chief Justice, Family Court of Australia, *Committee Hansard*, 10 March 2004, Canberra, p. 5; Mr Julian Burnside QC, *Access to Justice*, Presentation to Access to Justice and Pro Bono Conference, 10-11 August 2006; and Women's Legal Service Victoria, *Submission 71*, p. 9.

86 National Legal Aid, *Submission 34*, p.16; NSW Young Lawyers, Human Rights Committee, *Submission 28*, p. 6; and Australian Environmental Defender's Office, *Submission 29*, p. 7.

Research has shown a significant income difference between those who met the means test and those who were able to afford private representation. Those eligible for legal aid earned less than \$25,000.00 p.a. after tax, yet people are only able to afford private representation once they earned over \$45,000.00 per annum after tax.<sup>87</sup>

3.121 The Women's Legal Centre (ACT and Region) told the committee that the means test restrictions significantly affect access to justice for the most disadvantaged people in Australian society:

Australians who are financially disadvantaged but do not qualify for Legal Aid and cannot afford a lawyer, often go without legal assistance. Such individuals have little or no meaningful access to our legal system. Australians in this situation are often not aware of their rights and entitlements, and have extremely limited capacity when it comes to enforcing them. The effect of this access-to-justice barrier is particularly significant because Australians who are unable to afford to pay for legal services are often Australia's most disadvantaged citizens – Indigenous people, poor migrants and refugees, women – particularly after relationship breakdown, mentally ill people and disabled people.<sup>88</sup>

3.122 To combat the problem, the Law Council suggested that, unless justified by regional economic conditions, there should be a single means test income and assets level throughout Australia, and one which allows the maximum number of disadvantaged people to access the justice system.<sup>89</sup>

3.123 Due to the imminent changes to the legal aid funding structure, it is not clear whether the Priorities and Guidelines will be incorporated into National Partnership agreements. However, there is no reason to believe that a control measure similar to the means test will not be applied in future to applications for grants of legal aid.

3.124 In 2003-04, the committee examined the means test in greater depth, ultimately recommending that:

The state and territory legal aid commissions conduct an assessment of current applications, to ascertain what increase in successful applications would occur if the following changes were made to the merits [sic] test:

extend eligibility to those earning less than \$30,000 after tax; and

in criminal matters, where a person passes the income test, disregard home equity.<sup>90</sup>

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87 Women's Legal Service (SA) Inc., *Submission 56*, pp 6-7; Ms Deanne de Leeuw, *Submission 19*, pp 9-10; and Russo Lawyers, *Submission 58*, pp 2-3.

88 Women's Legal Centre (ACT and Region), *Submission 51*, p. 4.

89 Law Council of Australia, *Submission 12*, pp 13-14; Pilch, *Submission 33*, pp 24-25; and Russo Lawyers, *Submission 58*, p. 3.

90 Senate Legal and Constitutional References Committee, *Legal Aid and Access to Justice*, June 2004, Recommendation 3, p. xxiii.



3.125 The committee is not aware whether LACs in each state and territory have actioned this recommendation. On the evidence before the committee, there remains a need for the means test income and assets levels to accurately and realistically reflect the needs of disadvantaged Australians. Accordingly, the committee sees merit in such levels being both revised and nationally consistent. Accordingly, the committee makes the following Recommendation 10.

**Recommendation 10**

**3.126 The committee recommends that the Australian, state and territory governments jointly develop and implement realistic and consistent national means test income and assets levels with an in-built mechanism for ensuring that the levels do not stagnate over time.**



# CHAPTER 4

## The Cost of Delivering Justice

4.1 Term of reference (c) addresses the cost of delivering justice. In general, submissions and evidence adopted a litigant's perspective of costs or a lawyer's perspective of legal aid remuneration scales. This chapter discusses the following topics examined by the committee:

- the Commonwealth's annual court costs;
- the cost of disbursements;
- exposure to adverse costs orders; and
- the cost of legal representation.

### The Commonwealth's annual court costs

4.2 The Attorney-General's Department (department) estimated that the total cost of the federal court system would be \$314,047,542.86 for the financial year ending 30 June 2009:

**Table 4.1 – Federal court system costs: 2008-09**

Item	Amount
Total Court Appropriations 2008-09	\$291,140,000.00
Cost of Pensions (as at 20 April 2009)	\$19,301,542.86
Appropriation for High Court Remuneration & Allowances	\$3,050,000.00
Additional Funding to Family Court of Western Australia	\$556,000.00
<b>Total</b>	<b>\$314,047,542.86</b>

*Source: Attorney-General's Department, Submission 54, p. 3.*

*(Note: This sum did not include one-off additional funding for the Family Court of Western Australia to appoint an acting family law magistrate and associated support staff for 12 months).*

4.3 According to the 2009-10 Budget, this cost will increase to \$355.828 million in the current financial year, an increase of approximately 22 per cent.<sup>1</sup>

4.4 The committee notes that some federal courts have recently considered, or are considering, costs savings measures.

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1 Attorney-General's Portfolio, Portfolio Budget Statements 2009-10, pp 320, 338, 352, 366.

4.5 The Federal Court of Australia (Federal Court), for example, investigated a new model for the provision of Federal Court services, whereby all small registries would report to the Deputy Registrar of a larger 'parent' registry.<sup>2</sup>

4.6 At the Canberra hearing, the Law Society of Tasmania opposed such a move both on principle and due to the potential reduction in court users' ability to access the judicial system:

The Tasmanian District Registry ought to have a resident, legally qualified registrar. Leading from that, to say that the level of service of the court will not be adversely affected if there is not a registrar present and on the ground on a full-time basis is, quite frankly, illogical. The submission that we have made is that the service as it stood at the time of the submission to this committee was able to provide a timely, convenient and personal service.<sup>3</sup>

4.7 Tasmanian senators, the Hon. Eric Abetz, Guy Barnett and Bob Brown, together with Tasmanian member, the Hon. Duncan Kerr SC have also profiled the issue since the proposal was first raised, illustrating the importance of this matter for the people of Tasmania and the lack of clarity concerning the proposal.<sup>4</sup>

4.8 In evidence, the Law Society of Tasmania acknowledged that these concerns would be moot if Parliament were to pass the Senate's Access to Justice (Civil Litigation Reforms) Amendment Bill 2009, Amendment 5937 Revised 2.<sup>5</sup> However, the Australian Government elected instead to propose its own amendment, that:

The Registrar must ensure that at least one Registry in each State is staffed appropriately to discharge the functions of a District Registry, with the staff to include a District Registrar in that State.<sup>6</sup>

4.9 The Attorney-General, the Hon. Robert McClelland MP told the Parliament that this amendment would ensure that each state/territory would have an appropriately staffed federal registry while maintaining the flexibility of the court to manage its affairs. The government amendment passed both houses of parliament and is currently awaiting Royal Assent.<sup>7</sup>

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2 Federal Court of Australia, Small Registry Review – Consultation Paper [12 April 2009]

3 Mr Luke Rheinberger, Law Society of Tasmania, *Committee Hansard*, Canberra, 27 October 2009, p. 19.

4 For example, Senate Legal and Constitutional Affairs Committee, *Estimates Hansard*, 19 October 2009, pp 51- 59.

5 Mr Luke Rheinberger, Law Society of Tasmania, *Committee Hansard*, Canberra, 27 October 2009, p. 18; and Senate Journal No. 94, 27 October 2009, pp 2634-2635.

6 Government Amendment No. 1, Proposed Subsection 34(3) of the *Federal Court of Australia Act 1976*

7 The Hon. Robert McClelland MP, Attorney-General, *House Hansard*, 18 November 2009, pp 94-95.

4.10 The committee nonetheless considers that each state and territory should be permanently staffed by a locally-based and legally trained Registrar, and accordingly, makes the following recommendation.

### **Recommendation 11**

**4.11 The committee recommends that each state and territory registry of the Federal Court of Australia be permanently staffed by a locally-based and legally trained registrar.**

4.12 The cost of delivering justice is not however limited to the annual costs of the federal court system.<sup>8</sup> There are also the annual costs of the state/territory court systems, as well as financial and non-financial costs to court users. Due to the evidence received by the committee, this chapter focuses solely on the financial costs, beginning with the cost of disbursements.

### **The cost of disbursements**

4.13 The Public Interest Law Clearing House (PILCH) provided the following summary of how litigation costs, including the cost of disbursements affects access to justice:

The cost of delivering and achieving justice is becoming increasingly high and beyond the reach of many sections of the community, particularly disadvantaged and marginalised individuals and groups. For many, litigation costs are so prohibitive that they act as a barrier to accessing the legal system and to having disputes resolved and rights upheld. These costs include: the cost of legal representation; the costs of disbursements, including court fees; and the [sic] exposure to adverse costs orders.<sup>9</sup>

4.14 The committee heard that the cost of disbursements is already high, increasing and effectively preventing people from accessing justice. This argument was especially raised in relation to pro bono matters.

4.15 DLA Phillips Fox, for example, submitted that a lack of disbursement funding acts as a substantial barrier to justice as few pro bono clients or pro bono law firms have the capacity to pay these expenses.<sup>10</sup> Consequently, pro bono clients and pro bono lawyers might be loathe to commence or continue proceedings, thereby denying these clients access to justice.

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8 For example, see Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, September 2009, pp 34-40.

9 PILCH, *Submission 33*, p. 11; and NSW Young Lawyers, Human Rights Committee, *Submission 28*, p. 9.

10 DLA Phillips Fox, *Submission 32*, p. 27; Australian Lawyers Alliance, *Submission 27*, p. 13; Australian Lawyers for Human Rights, *Submission 46*, p. 4; PILCH, *Submission 33*, p. 12; and National Pro Bono Resource Centre, *Submission 49*, pp 12-13.

4.16 The committee considers that this barrier to access to justice can be easily eliminated, and in such a way as to assist the private legal profession to undertake pro bono work. The committee proposes the creation of a disbursements fund for pro bono matters which is accessible to all law firms and/or legal practitioners who provide in excess of 10 hours per legal matter. In setting this threshold, the committee notes that the fund should be most accessible to pro bono matters undertaken in rural, regional and remote (RRR) areas.

### **Recommendation 12**

**4.17 The committee recommends that the federal, state and territory governments create and fund a specific disbursement fund for pro bono matters, with eligibility criteria designed to promote the provision of pro bono legal services by the private legal profession.**

4.18 In relation to continued proceedings, some submissions focussed on the position of people involved in but unable to extricate themselves from the proceedings. Russo Lawyers cited the example of criminal matters in which psychological and/or psychiatric reports are required but unaffordable, and without which inappropriate sentencing occurs.<sup>11</sup>

### *Assistance with the cost of disbursements*

4.19 In some jurisdictions, various schemes assist litigants with civil law disbursement costs. Each scheme has its own terms and conditions, leading submissions to remark on their 'unattractiveness' due to:

- the limited availability of funding;
- the requirement to apply only after the disbursement cost has been incurred;
- the application of fees, means and merits tests; and
- the limitation of assistance to cases likely to recover damages.<sup>12</sup>

4.20 By way of example, Law Aid, the Victorian disbursement scheme, applies the last mentioned criterion, which stymies applications for disbursement relief in public interest litigation where test case outcomes are largely uncertain.<sup>13</sup>

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11 Russo Lawyers, *Submission 58*, p. 5.

12 DLA Phillips Fox, *Submission 32*, p. 28; Gilbert & Tobin, *Submission 45*, p. 6; National Pro Bono Resource Centre, *Submission 49*, p. 13; and PILCH, *Submission 33*, p. 11.

13 PILCHConnect, *Submission 20*, p. 8; and Mr Mathew Tinkler, PILCH (Vic), *Committee Hansard*, Melbourne, 15 July 2009, p. 43.

4.21 PILCH submitted that disbursement funding should be available nationwide in all areas of law,<sup>14</sup> and DLA Phillips Fox suggested that disbursement funding in RRR matters would greatly encourage the provision of pro bono services in those high need areas:

There is a high level of willingness in the legal profession to deliver services to isolated communities, but this capacity is constrained by the high costs associated with the deployment of resources...If a fund for disbursements in pro bono matters was [sic] introduced, it could be used to divert pro bono capacity to areas where high levels of legal need have been identified. This could be achieved by restricting availability of disbursement funding to specific types of matters, classes of clients, or clients' geographic location.<sup>15</sup>

4.22 The committee considers that more should be done to contain the cost of disbursements and increase access to justice for the Australian community. In this regard, the committee supports the establishment of a disbursement fund with uniform criteria, and which eases the cost of justice for disadvantaged Australians.

### **Recommendation 13**

**4.23 The committee recommends that the federal, state and territory governments develop and implement uniform general disbursement funds throughout Australia to be accessed according to defined criteria with a view to easing the cost of justice for disadvantaged Australians.**

### **Exposure to adverse costs orders**

4.24 In Australia, legal costs are usually concerned with solicitor/client costs (the fees which a client pays for his/her solicitor's services) and party/party costs (the amount an unsuccessful litigant is required to pay his/her opponent to cover their solicitor/client costs).

### ***Civil law proceedings***

4.25 In civil law proceedings, the general rule is that costs follow the event, meaning that a successful litigant can expect a party/party costs order in his/her favour. In general, submissions focussed upon such orders, arguing that the risk of an adverse costs order dissuades potential litigants from engaging with the justice system, thereby affecting their and others' access to justice.

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14 Pilch, *Submission 33*, p. 13.

15 DLA Phillips Fox, *Submission 32*, pp 29-30.

4.26 Gilbert & Tobin illustrated the problem with reference to discrimination matters which originate in a 'no costs' forum but proceed to the Federal Court of Australia (FCA) and Federal Magistrates Court (FMC) costs jurisdictions. At that time, clients do not pursue proceedings but seek alternative and less costly settlement options:

We have pursued a number of discrimination matters to conciliation level against the same few respondents in respect of the same or very similar issues. Resources are often wasted obtaining outcomes for individuals, or even small groups, in each case that discrimination arises if the parties are forced to accept a conciliated outcome rather than a precedent setting Court determination for fear of suffering an adverse costs order.<sup>16</sup>

4.27 An alternate view posed by the Law Council of Australia (Law Council) focussed on costs incurred by the courts and expenditure of their limited resources. It opposed the notion of charging litigants court fees which reflect the true cost of running and administering the court, warning that a 'user pays' approach is 'philosophically problematic' and inhibits access to justice:

If a cost recovery system were introduced there would also need to be stringent concessions and exemptions applied to ensure that only large litigators were targeted by the scheme, and that the increased fees did not inhibit individuals and corporations from accessing the justice system.<sup>17</sup>

4.28 The committee acknowledges that the risk of an adverse costs order cost can affect the conduct of litigation, and notes that the Standing Committee of Attorneys-General (SCAG) is currently exploring options for targeted costs recovery in civil law proceedings with particular reference to mega-litigation.<sup>18</sup>

### ***Public interest litigation***

4.29 For public interest matters, legal costs are a significant deterrent to litigation, particularly party/party costs and the risk of an adverse costs order in civil law proceedings. In many cases, public interest litigants are required to demonstrate at the outset that they will be able to pay the other party's costs if they are not successful in the proceedings (security for costs).<sup>19</sup>

4.30 According to PILCH, nine times out of ten the risk of an adverse costs order results in meritorious public interest matters not being pursued:

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16 Gilbert & Tobin, *Submission 45*, p. 5.

17 Law Council of Australia, *Submission 12*, p. 28; and Attorney-General's Department, *Submission 54*, p. 4.

18 [http://www.scag.gov.au/lawlink/SCAG/ll\\_scag.nsf/pages/scag\\_meetingoutcomes](http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/pages/scag_meetingoutcomes) (accessed 20 October 2009); and Attorney-General's Department, *Submission 54*, p. 4.

19 DLA Phillips Fox, *Submission 32*, pp 31-32; PILCHConnect, *Submission 20*, p. 9; National Pro Bono Resource Centre, *Submission 49*, p. 14; Australian Environmental Defender's Office, *Submission 29*, pp 8-9; and PIAC, *Submission 50*, p. 21.



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This is especially the case where the matter involves an unresolved area of law, in the nature of a test case, such that legal advisors are not able to advise with any degree of certainty the likely outcome of the litigation. Such uncertainty increases the risk of an adverse costs order and therefore reduces the likelihood that a disadvantaged or marginalised applicant will pursue the important test case.<sup>20</sup>

4.31 In general, submissions expressed the view that public interest litigants with meritorious claims should be relieved of the risk of an adverse costs order and/or security for costs orders.<sup>21</sup>

4.32 DLA Phillips Fox, for example, suggested that the general rule in relation to costs should be altered by providing an exemption for public interest litigants:

It would be more appropriate to implement a policy in which costs are not ordered against unsuccessful public interest litigants than make these decision on a case by case basis. Litigants ought to be able to secure declaration as to the public interest nature of the matter, and the protective cost consequences early in any proceedings, and before the other party to the proceeding has incurred substantial costs.<sup>22</sup>

4.33 Some Australian courts already have provision for the type of protective costs orders advocated by DLA Phillips Fox. However, the power is generic and discretionary, for example, subsection 43(2) of the *Federal Court of Australia Act 1976* which grants the FCA the power to award costs.

4.34 In 2001, the Full Court of the FCA considered pro bono legal representation as a relevant factor in the making of a costs order, but affirmed that there is no general principle that public interest litigation should not attract the usual costs orders.<sup>23</sup> This decision was upheld by the High Court of Australia in the 2001 Tampa litigation.<sup>24</sup>

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20 PILCH, *Submission 33*, p. 14; National Pro Bono Resource Centre, *Submission 49*, p. 14; and DLA Phillips Fox, *Submission 32*, pp 32-33.

21 For example, Liberty Victoria, *Submission 25*, p. 2; and Australian Environmental Defender's Office, *Submission 29*, pp 7-8 & 13.

22 DLA Phillips Fox, *Submission 32*, p. 33.

23 *Oshlack v Richmond River Council* (1998) 193 CLR 72

24 *Ruddock v Vadarlis (No. 2)* 115 FCR 229

4.35 While protective costs orders are not common, and there is a paucity of relevant case law, the committee does not consider that there is any need for clarification of the legislation.<sup>25</sup> The committee is confident that the current provisions for determining each matter on a case by case basis function adequately, and there is no need to guide or fetter the court's discretion.

### ***Indemnity principle***

4.36 At present, the nature of costs as an indemnity means that if a successful pro bono practitioner is awarded costs, and the other party challenges that award, the unsuccessful party might succeed because there is nothing to indemnify.

4.37 PILCH suggested that the indemnity principle be abrogated to allow parties to recover their costs in successful pro bono matters.<sup>26</sup> Although this would also require state/territory support, the committee considers that such a move would encourage private legal practitioners to provide pro bono legal services, thus increasing access to justice.

### **Recommendation 14**

**4.38 The committee recommends that the federal, state and territory governments enact legislation to abrogate the indemnity principle, to the extent necessary, to ensure that litigation costs can be awarded and recovered in pro bono matters.**

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

#### ***Private legal representation***

4.39 Chapter 2 identified the cost of legal representation as one factor affecting people's ability to access justice. This difficulty arises at the outset as in most cases lawyers require their clients to deposit adequate funds into their trust account or provide evidence of financial means prior to the commencement of a matter. A client unable to meet either requirement is not likely to secure legal representation.

4.40 There may be some situations where a lawyer will agree to a contingency fee arrangement (where billing is deferred until conclusion of a matter), but this option is increasingly not available.<sup>27</sup>

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25 PILCH, *Submission 33*, pp 14 & 16; National Pro Bono Resource Centre, *Submission 49*, p. 14; PILCHConnect, *Submission 20*, p. 9; Australian Environmental Defender's Office, *Submission 29*, pp 9-12; and Mr Mark Blumer, Australian Lawyers Alliance, *Committee Hansard*, Sydney, 11 September 2009, p. 13.

26 Mr Mathew Tinkler, PILCH (Vic), *Committee Hansard*, Melbourne, 15 July 2009, pp 38-39.

27 NSW Young Lawyers, Human Rights Committee, *Submission 28*, p. 10; and Women's Legal Centre (ACT and Region), *Submission 51*, p. 6.

4.41 For clients who secure legal representation, the cost of that representation continues throughout the life of a matter. In some cases, particularly those involving litigation, this cost can be substantial. In evidence, the FCA expressed anxiety about the amounts paid to legal representatives in family law proceedings:

In many cases there is no proportionality, unfortunately, or little proportionality between what people are fighting over and the costs they are paying.<sup>28</sup>

4.42 His Honour Chief Federal Magistrate John Pascoe concurred, adding that there are additional costs involved in family law (or other) litigation:

One of the difficulties people often raise is taking time off work and the difficulties of dealing with children during court proceedings. We often start early, for example, at nine o'clock, or try and facilitate people being able to deal with other aspects of their lives. There are costs at a whole range of levels.<sup>29</sup>

4.43 In its submission, Gilbert & Tobin remarked on the number of meritorious claims abandoned due to clients being unable to afford or continue to afford legal representation, for example, matters involving property settlements:

Our experience has been that there is a significant demand for assistance amongst people whose property is limited. The value of their property would not warrant the payment of legal fees either upfront or on a contingency or delayed fee basis. These are generally the most financially vulnerable of clients so to lose the little that would be entitled to them impacts more than it might in other socio-economic brackets.<sup>30</sup>

4.44 For many Australians, the cost of private legal representation inhibits their ability to obtain justice, hence the *raison d'être* of the publicly funded legal aid sector. However, submissions and evidence revealed, and not for the first time, that the sector has limited ability to bridge the legal needs gap.

4.45 Under this term of reference (d), the committee received evidence directed toward the legal profession's cost of delivering justice under the Legal Aid Program (LAP).

### ***The private legal profession's participation in legal aid work***

4.46 In late 2006, the department published results of its *Study of the Participation of Private Legal Practitioners in the Provision of Legal Aid Services in Australia*

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28 Chief Justice Diana Bryant, Family Court of Australia, *Committee Hansard*, Melbourne, 15 July 2009, p. 8.

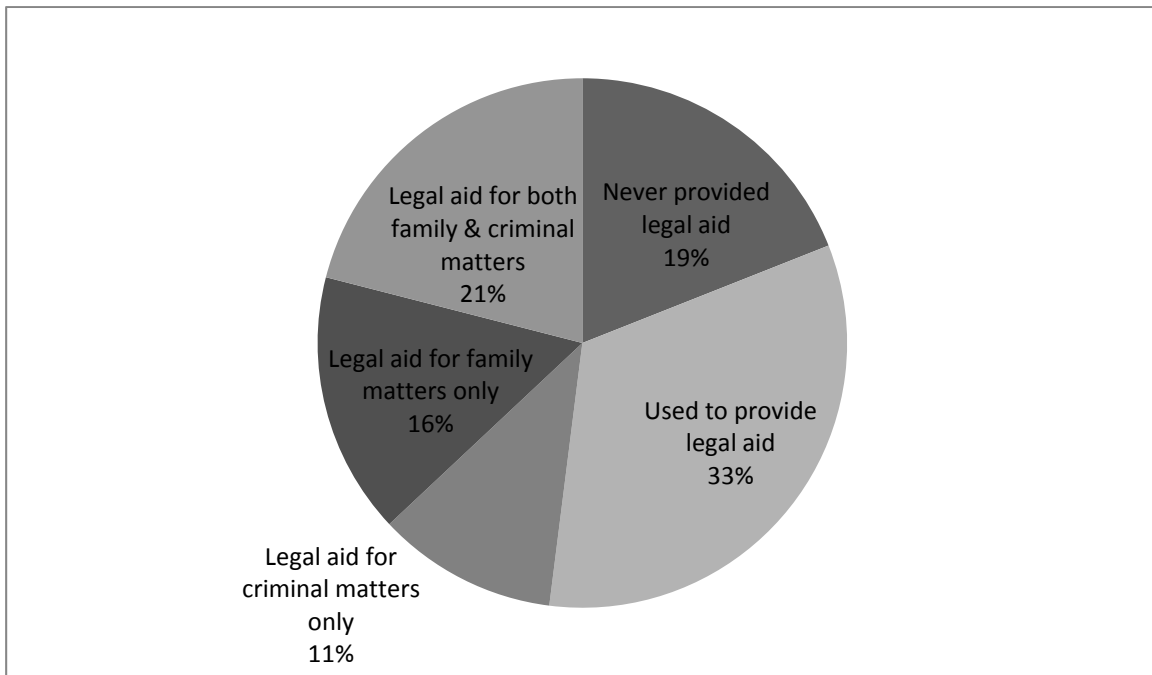
29 Chief Federal Magistrate John Pascoe, Federal Magistrates Court, *Committee Hansard*, Melbourne, 15 July 2009, p. 8.

30 Gilbert & Tobin, *Submission 45*, p. 4; Women's Legal Service (SA) Inc., *Submission 56*, p. 9; and Women's Legal Service Victoria, *Submission 71*, p. 9.

(TNS study), a study whose primary purpose was to understand current and future trends in the supply and composition of the private labour market for legal aid.<sup>31</sup>

4.47 Figure 4.1 below shows that, in 2006: 48 per cent of family and criminal law firms undertook legal aid work in those areas; 33 per cent used to undertake referrals from LACs but no longer do; and 19 per cent have never participated in the legal aid system.

**Figure 4.1 – Supply of legal aid by the private profession**



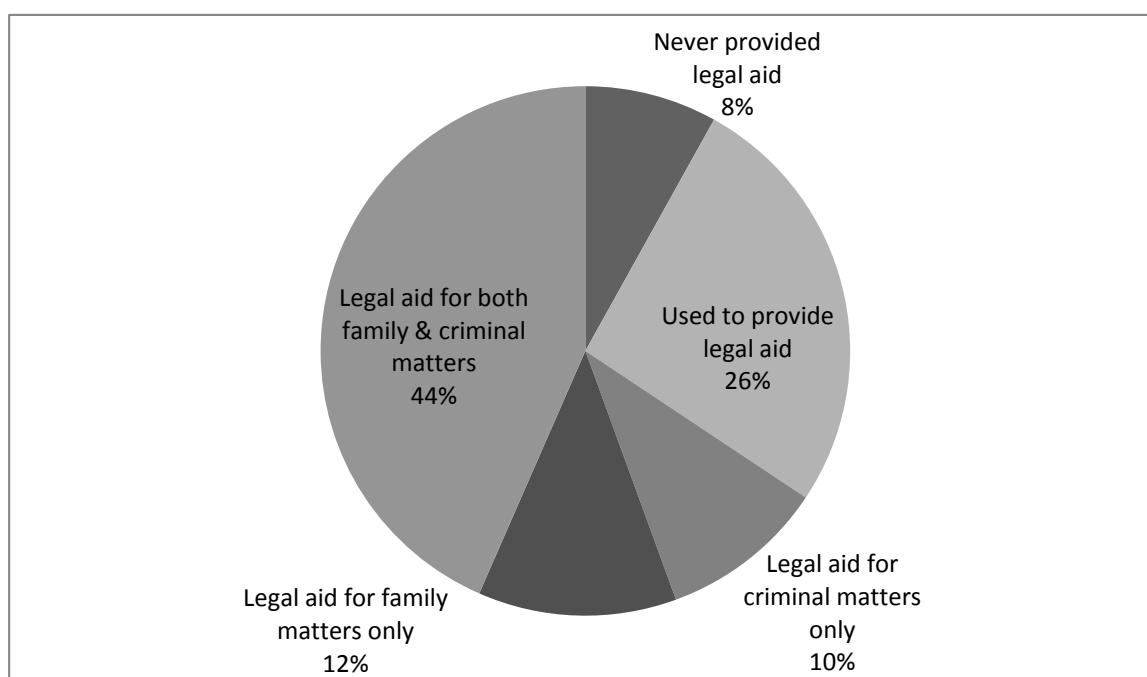
*Source: TNS Social Research, Study of the Participation of Private Legal Practitioners in the Provision of Legal Aid Services in Australia, December 2006, p. 13.*

4.48 In RRR areas, the TNS Study found: 65 per cent of regional and remote law firms assisted LACs with the provision of legal services; a further 26 per cent used to but no longer did so; and eight per cent have never undertaken legal aid work.

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31 TNS Social Research, *Study of the Participation of Private Legal Practitioners in the Provision of Legal Aid Services in Australia*, December 2006, p. v.

**Figure 4.2 – Supply of legal aid by the private profession in regional and remote areas**



*Source: TNS Social Research, Study of the Participation of Private Legal Practitioners in the Provision of Legal Aid Services in Australia, December 2006, p. 40.*

4.49 The TNS Study remarked upon a strong sense of moral obligation as the key motivator for the private legal profession's acceptance of LAC work. However, the study also commented on law firms' disengagement with the legal aid system:

Remuneration matters including the low hourly rate, and issues with the number of hours allocated under the stage of matter payment structure were the key reasons for disengagement from legal aid among all firms. Red tape associated with processing a grant of legal aid was also seen as a key reason for disengagement. This was particularly evident among firms that used to provide legal aid but now do not.<sup>32</sup>

4.50 The TNS Study revealed that approximately one in three family and/or criminal law firms have moved away from the provision of legal aid (33 per cent). In RRR areas the proportion was one in four family and/or criminal law firms. However, the relative shortage of legal practitioners in RRR areas (three per 10 000 residents), as compared with legal practitioners in capital cities (10.7 per 10 000 residents) suggests that:

32 TNS Social Research, *Study of the Participation of Private Legal Practitioners in the Provision of Legal Aid Services in Australia*, December 2006, pp vi-vii.

Providers of legal aid in regional and remote areas are 'keeping the system going' with a small number of lawyers providing significant amounts of legal aid.<sup>33</sup>

4.51 The TNS Study found that while most law firms currently undertaking legal aid work were likely to continue with their current pattern of provision, if nothing were done in terms of making legal aid more attractive to private legal practitioners, these firms' revenues would decrease in the next five years, and this would have a 'deleterious' impact, particularly in RRR areas.<sup>34</sup>

### ***Legal aid remuneration scales***

4.52 The Australian Legal Aid Office was created in 1974, at which time it paid 100 per cent of normal fees on matters referred to private practitioners. Two years later, it paid 90 per cent of scale fees, and in 1978, after Legal Aid Commissions (LACs) were established, the LACs paid 80 per cent of scale fees.

4.53 In the early 1980s, Part V of the *Family Law Regulations 1984* instituted a legal aid scale, and each LAC then paid fees in accordance with that specific scale. The regulations did not provide for indexation or inflation, and over time, the scale fees fell well below the 80 per cent of scale fees previously paid by LACs.

4.54 In the early 1990s, LACs were given power to negotiate their own scales. However, no commission was able to make up for the loss of value caused by the omission of an inflator during the 1980s, and the eventual provision of an inflator saw a (further) reduction in the real value of LAC funding.

4.55 As discussed in Chapter 3, from 1 July 1997 the Australian Government introduced major changes to legal aid funding. This led to an immediate reduction in actual expenditure of over \$33 million each year for the following three years, and a real reduction in long-term funding. In 2003-04, for example, the Commonwealth's contribution to legal aid funding was \$130 million, compared to its contribution of \$159 million in 1996-97.<sup>35</sup>

4.56 In addition to reduced scale fees, legal aid fees are subject to lump sum 'stage of matter' funding and capping. According to submissions, this has created a problem in that the fees paid to private practitioners who accept referrals from LACs are neither competitive nor attractive.

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33 TNS Social Research, Study of the Participation of Private Legal Practitioners in the Provision of Legal Aid Services in Australia, December 2006, p. viii.

34 TNS Social Research, Study of the Participation of Private Legal Practitioners in the Provision of Legal Aid Services in Australia, December 2006, p. vii-ix.

35 Law Council of Australia, *Erosion of Legal Representation in the Australian Justice System*, February 2004, p. 24.

4.57 The Law Council reported that the cost per solicitor chargeable hour varies across firms: approximately \$140 per hour in a major regional city; approximately \$153 per hour in a suburban practice; and approximately \$132 per hour in a remote country region. At the same time, legal assistance rates are below \$130 per hour, commonly ranging from \$88 to \$105 per hour. On average, regional, suburban and country law firms do not therefore recover the true cost of employing a practitioner to undertake legal aid. The Law Council concluded that:

Legal aid is a losing proposition even if the solicitor doing the work is paid a very low salary. As a result “juniorisation” occurs of those private practitioners who undertake legal work. Law firms cannot afford to have their high charging fee earners undertaking significant volumes of legal aid work. The opportunity costs of undertaking legal aid work as against a lower volume of higher paid work means that it makes little sense for experienced practitioners to decline full fee-paying clients in favour of legal aid clients.<sup>36</sup>

4.58 The Law Institute of Victoria (LIV) told the committee that the current levels of criminal law (and family law) legal aid funding in Victoria are 'vastly inadequate and undermines citizens' access to justice'.<sup>37</sup> In 2008, the LIV surveyed criminal law practices in Victoria to determine an average private rate for a range of different types of criminal matters.

4.59 Table 4.2 below shows, inclusive of GST, the average fee charged to private clients in various criminal matters, compared with Victoria Legal Aid's payment for the same matter. Victoria Legal Aid's fees are less than 50 per cent of average private fees, well short of the 80 per cent figure that was traditionally considered a fair proportion.<sup>38</sup>

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36 Law Council of Australia, *Submission 12*, pp 18-19; and Law Institute of Victoria, *Submission 11*, p. 5.

37 Law Institute of Victoria, *Submission 11*, p. 4.

38 Law Institute of Victoria, *Submission 11*, p. 5.

**Table 4.2 – Private legal fees and legal assistance fees in criminal law matters (Victoria)**

Matter type	VLA rate payable	Range of fees (private client)	VLA rate as a percent of the range of private fees	Average fees for private client	VLA rate as a percentage of average private fees	80% of average private fees
Magistrates' Court plea	\$602	\$110-\$3850	16-54%	\$2370	25%	\$1896
Magistrates' Court contest	\$721	\$2000-\$8450	9-36%	\$3884	18%	\$3107
Bail application (Magistrates Court)	\$444	\$1100-\$4400	10-40%	\$2821	15%	\$2256
Committal – 1 day – solicitor/client costs only	\$914	\$2000-\$9350	10-45%	\$4600	20%	\$3680
County Court plea	\$2720	\$3000-\$10756	25-91%	\$6145	44%	\$4916
County Court – 5 day trial – solicitor/client costs only	\$5077	\$6500-\$19500	26-78%	\$11290	45%	\$9032

Source: Law Institute of Victoria, *Submission 11*, p. 4.

4.60 The LIV highlighted the critical role of private practitioners in the legal aid system, stating that Victoria Legal Aid's in-house criminal lawyers would otherwise not be able to meet existing demand for criminal law casework:

Without the services of private practitioners the legal aid system would collapse, and yet legal aid fees have declined in real terms over recent years and have not kept pace with the increase in the complexity and seriousness of legally aided matters being conducted by private practitioners.<sup>39</sup>



4.61 In 2008, the Victorian Bar Association also examined the fees paid to criminal law barristers in Victoria. The *Review of Fees Paid by Victoria Legal Aid to Barristers in Criminal Cases* report found that Victoria Legal Aid fee increases have failed to keep pace with both:

- the primary measure of inflation, the Consumer Price Index; and
- the more specific cost index established by tracking the increases in expenses that barristers face in running their practices.<sup>40</sup>

**Table 4.3 – Victoria Legal Aid fees paid to criminal barristers**

Court jurisdiction	Period	Change in VLA fees	Change in CPI	Change in barristers' costs
Magistrates	1993-2007	16%	44%	56%
County	1993-2007	22%	44%	56%
Supreme	1993-2007	31%	44%	56%

Source: PricewaterhouseCoopers, *Review of Fees Paid by Victoria Legal Aid to Barristers in Criminal Cases*, April 2008, p. 2.

4.62 The report concluded that the income received by barristers handling Victoria Legal Aid cases declined in real terms from 1993 and by as much as 20-32 per cent, while the income of other legal professionals has increased 15 per cent during the same period.

**Table 4.4 – Comparison of legal professionals' income: 2008**

Career level	VLA criminal barrister	Public prosecutor	Solicitors at law firm	In-house counsel
Junior	\$36,383	\$87,200	\$85,000	\$97,500
Mid-career	\$91,478	\$196,200	\$177,500	\$197,500
Senior	\$110,241	\$287,021	\$210,000	\$325,000

Source: PricewaterhouseCoopers, *Review of Fees Paid by Victoria Legal Aid to Barristers in Criminal Cases*, April 2008, p. 3.

4.63 As indicated in Chapters 3, 7 and 8, lawyers employed by legal aid service providers earn substantially less than they would in private employment. According to the Victorian Bar Council, this emphasises the remuneration disparity experienced by criminal law barristers undertaking Victoria Legal Aid work:

40 PricewaterhouseCoopers, *Review of Fees Paid by Victoria Legal Aid to Barristers in Criminal Cases*, April 2008, p. 2.

We would expect, that those VLA lawyers being paid between 47½ thousand dollars and \$103,000 are themselves working in the legal community for significantly lower remuneration than the general set of solicitors undertaking similar work...barristers working in that area are getting paid even less than the VLA salaried persons...the VLA salaried [persons]...are also getting superannuation, leave loadings, sick leave and things of that nature.<sup>41</sup>

4.64 The *Review of Fees Paid by Victoria Legal Aid to Barristers in Criminal Cases* report notes that some barristers can cross-subsidise their income with private or civil work, but ultimately, this means that they are bearing the cost of providing a public good, a position which is unsustainable:

Barristers, as rational economic actors cannot be expected to continue this practice and will eventually preference away from the lower paid work.<sup>42</sup>

4.65 The Victorian Bar Council added that, effectively, there is a substantial amount of pro bono work being undertaken in the criminal practice area (and no doubt other areas of law).<sup>43</sup>

4.66 The Law Council advised that, in Victoria, the number of junior barristers who practise 90 per cent or more criminal work (more than 50 per cent of which is legal aid work) has declined by 59 per cent over the last three years and 26 per cent for criminal barristers overall in the same period.

4.67 The Law Council cautioned that, 'to maintain the viability of a fair justice system, it is essential that the under-funding of legal aid barristers be addressed',<sup>44</sup> and the LIV concurred with particular reference to criminal law barristers in Victoria:

The withdrawal of criminal lawyers from legally aided matters will have a grave impact on Victorians' access to justice. It will lead to a situation where there are two tiers of defendants – those able to access quality, experienced representation by funding their own matters and those who receive limited legal aid or are left to represent themselves.

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41 Mr Geoffrey Digby QC, Victorian Bar Council, *Committee Hansard*, 15 July 2009, Melbourne, p. 32.

42 PricewaterhouseCoopers, *Review of Fees Paid by Victoria Legal Aid to Barristers in Criminal Cases*, April 2008, p. 2.

43 Mr Geoffrey Digby QC, Victorian Bar Council, *Committee Hansard*, 15 July 2009, Melbourne, pp 29-30.

44 Law Council of Australia, *Submission 12*, p. 21; and Mr Geoffrey Digby QC, Victorian Bar Council, *Committee Hansard*, Melbourne 15 July 2009, p. 29.

It is anticipated that inadequate legal aid funding will have negative consequences for the courts as more mistakes will be made by inexperienced practitioners because senior criminal lawyers are increasingly withdrawing from legally aided work. Cases before the courts will be subject to increased delay and there is a greater possibility that errors will be made that will give rise to more appeals.<sup>45</sup>

4.68 The Victorian Bar Council added:

The economic benefits when one looks at the very substantial cost of running this component of the administration of justice bring about a situation where it is cost effective to properly fund legal aid to prevent the sorts of additional costs in the overall administration of justice that we have referred to.<sup>46</sup>

4.69 National Legal Aid (NLA) is aware of the debate regarding legal aid remuneration fees, but told the committee that the Australian Government contributed to the problem:

A few years ago Attorney-General Ruddock instituted a process whereby, on the Commonwealth side of legal aid funding, there was a floor of \$120 an hour. In other words, there was no-one in legal aid in Australia paying fees that were less than \$120 an hour, or the fee was calculated on the basis of \$120 an hour...It depends on whether the commission has a policy of maintaining the same level of fee no matter the work, which some commissions do, or having different fees for different areas of work, which some commissions do. What you find as a consequence of that is that, for example, in some parts of the country the fees for criminal work, because they are supported by state funds, are lower than the fees for family law work, because those are supported by Commonwealth funds and subject to Commonwealth insistence that there should be a floor on the level of the fee.<sup>47</sup>

### ***Modernising the legal aid remuneration scales***

4.70 In response to the findings of the *Study of the Participation of Private Legal Practitioners in the Provision of Legal Aid Services in Australia* report, the department reviewed remuneration arrangements for private practitioners providing family law legal aid services. The review found that:

- remuneration must be increased to ensure the sustainability of the legal aid system;

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45 Law Institute of Victoria, *Submission 11*, p. 5.

46 Mr Geoffrey Digby QC, Victorian Bar Council, *Committee Hansard*, 15 July 2009, Melbourne, p. 28.

47 Mr Norman Reaburn, Chair, National Legal Aid, *Committee Hansard*, Melbourne, 15 July 2009, p. 58.

- high volume providers are struggling to maintain sustainable legal practices with the fees received from legally aided matters; and
- high volume providers would agree to an increase in fees to \$190 - \$200 (GST inclusive) to match court scales.<sup>48</sup>

4.71 The Law Council informed the committee that these findings are consistent with similar studies conducted by the private legal profession, the department, legal aid service providers, and other interested stakeholders.

4.72 The Law Council affirmed that private practitioners are prepared to undertake publicly funded legal aid work for less remuneration than would be payable by a private client.<sup>49</sup> However, submissions and evidence from the legal profession asserted that:

Practitioners should be paid fairly for the work they do to facilitate access to quality legal representation.<sup>50</sup>

4.73 The Law Council urged that funds be injected into the legal aid system to enable LACs to fully implement their charter, including a component for increased legal aid fees, predicting that an injection will:

- encourage private practitioners to undertake legal aid work;
- encourage experienced practitioners to resume legal aid work;
- reduce the number of self-represented litigants; and
- optimize the delivery of legal aid to the Australian community.<sup>51</sup>

4.74 In its submission, NLA acknowledged private practitioners' important role in the delivery of legal aid, particularly in RRR areas and where conflicts of interest prevent LACs from handling matters in-house. NLA endorsed calls for an increase in both legal aid funding and legal aid fees:

Those private practitioners who are prepared to do legal aid work are remunerated at levels well below the market rate. NLA policy is that fees paid to private practitioners currently prepared to work at reduced rates should be increased so as to retain those practitioners in the legal aid market place. Even if fees across the country moved over the next few years to a minimum of \$165 per hour, the above would still be correct. At present Commissions do not have the funds to provide this increase and do not

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48 Law Council of Australia, *Submission 12*, pp 20-21.

49 Law Council of Australia, *Submission 12*, p. 21.

50 Australian Lawyers Alliance, *Submission 27*, p. 15; and Law Council of Australia, *Submission 12*, p. 22.

51 Law Council of Australia, *Submission 12*, p. 22.

believe that fees should be increased to private practitioners at the expense of the number of grants of aid that can be made available.<sup>52</sup>

4.75 The committee acknowledges the variety of fee scales which have developed nationwide as a result of funding policies, and is concerned that, in some instances, these scales are so low as to discourage private legal practitioners from accepting LAC referrals. Private legal practitioners are a vital component of the legal aid system, assisting publicly funded legal aid service providers to provide access to justice to disadvantaged Australians. Accordingly, the committee makes the following Recommendation 15.

#### **Recommendation 15**

**4.76 The committee recommends that the federal, state and territory governments, in conjunction with affected stakeholders, review and modernise existing legal aid fee scales including an inflator to promote participation of the private legal profession in legal aid service delivery.**

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52 National Legal Aid, *Submission 34*, p. 27.



## CHAPTER 5

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

5.1 Submissions and evidence addressing term of reference (d) universally agreed that reducing the length and complexity of litigation and improving efficiency within the judicial system would increase access to justice. Submissions and evidence therefore endorsed measures aimed at accomplishing these objectives.

5.2 In particular, this chapter discusses measures relating to:

- civil law litigation;
- family law litigation; and
- self-represented litigants.

5.3 The committee acknowledges the important role of extra-judicial measures to reduce the length and complexity of litigation and improve judicial efficiency. These measures are discussed in Chapter 6.

#### **Measures in civil law litigation**

5.4 Litigation can involve considerable time and expense, factors well illustrated by the recent phenomenon of mega-litigation. However, people with limited financial resources cannot afford lengthy, complex and inefficient litigation. For this reason, some targeted measures have been considered or introduced in civil law litigation, for example, litigation funding and case management.

#### ***Litigation funding***

5.5 In its report *Costs Shifting: Who pays for litigation?*, the Australian Law Reform Commission stated:

Cost is a critical element in access to justice. It is a fundamental barrier to those wishing to pursue litigation. For people caught up in the legal system it can become an intolerable burden.<sup>1</sup>

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1 Australian Law Reform Commission, *Costs Shifting: Who pays for litigation?*, Report No. 75

5.6 Litigation funding is one means of reducing the cost of civil litigation, and a potential means of improving access to justice for some members of the Australian community.<sup>2</sup> The Law Council of Australia (Law Council) submitted that civil litigation funding has been endorsed for this purpose in certain circumstances. It argued:

There is public interest in a robust litigation funding market where sufficient capital is available to underwrite the risks associated with large group claims. These benefits could extend, for example, to people injured in major industrial accidents or mass latent injury claims against corporations or other entities, where there is evidence of negligence or recklessness as to employee or community safety.<sup>3</sup>

5.7 However, the committee received no further evidence regarding civil litigation funding and is therefore not able to draw any conclusions.<sup>4</sup>

### ***Case management***

5.8 Another measure to reduce the length and complexity of civil litigation and improve judicial efficiency is case management. This option is currently being explored and implemented by both the Australian Government and the courts.

5.9 On 18 and 19 November 2009, the Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 (Bill) passed the House of Representatives and Senate, respectively. It is currently awaiting Royal Assent.

5.10 One of the Bill's aims is to strengthen and clarify the case management powers of the Federal Court of Australia (Federal Court), ensuring more efficient and thus less costly civil litigation.<sup>5</sup> This builds on changes to be effected by the Federal Justice System Amendment (Efficiency Measures) Bill (No. 1) 2008. As at the date of writing, this bill is awaiting Royal Assent.

5.11 The Attorney-General's Department (department) told the committee that the *Strategic Framework for Access to Justice in the Federal Civil Justice System* aims to simplify and focus court procedures on the resolution of disputes:

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2 A useful description of litigation funding is provided by the Law Council of Australia: see *Submission 12*.

3 Law Council of Australia, *Submission 12*, pp 27 & 28; and *QPSX v. Ericsson (No. 3)* (2000) 66 IPLR 277 per French J at 289 – 90.

4 The Women's Legal Centre (ACT and Region) also commented on litigation funding in the context of family law but did not endorse its increasing replacement of contingency fee arrangements: see *Submission 51*

5 Access to Justice (Civil Litigation Reforms) Amendment Bill 2009, Explanatory Memorandum, p. 3.



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We know that most matters do not go to final judicial determination as the outcome. One way or another matters drop out. But most of the court rules and procedures pretend you are preparing for a judge to hear the matter. All of those things impose costs, distress, time and expense, so we proposed that as a general issue court procedures should be directed to resolving the issue. We had a big attraction to procedures being directed to alternative dispute resolution, simplifying the issues and making it much more accessible on that front.<sup>6</sup>

5.12 In addition to legislative reform, the Federal Court has independently instituted measures aimed at reducing the cost of proceedings, including: active case management; the allocation of cases to individual dockets; and a comprehensive program of court-annexed mediation and other forms of assisted dispute resolution.<sup>7</sup>

5.13 In particular, the Federal Court has introduced a range of case management initiatives directed toward reducing the length and complexity of litigation. The initiatives focus upon early judicial involvement in the identification of real issues in dispute, and careful management of discovery and other procedural matters.

5.14 By way of example, the Federal Court submission cited two recent initiatives: Practice Note No. 30 – Fast Track Directions; and Practice Note No. 17 – The Use of Technology in the Management of Discovery and the Conduct of Litigation:

- the first provides a framework in which cases may be heard and finalised within five to eight months from the date of filing, and to reduce costs by initiating discovery and avoiding lengthy interlocutory disputes; and
- the second encourages and facilitates the effective use of technology in the conduct of proceedings before the court, and recommends a framework for the electronic management of documents in the discovery process and the conduct of trials.<sup>8</sup>

5.15 Submissions endorsed the Federal Court's existing case management powers and welcomed proposals contained within the Bill.<sup>9</sup>

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6 Mr Matt Minogue, Assistant Secretary, AGD, *Committee Hansard*, Canberra, 27 October 2009, p. 43.

7 Federal Court of Australia, *Submission 57*, p. 2.

8 Federal Court of Australia, *Submission 57*, pp 2-3.

9 Access to Justice (Civil Litigation Reforms) Amendment Bill 2009, Federal Court of Australia, *Submission 4*, p. 1; Law Council of Australia, *Submission 12*, p. 26; and NSW Young Lawyers, Human Rights Committee, *Submission 28*, p. 15.

## Measures in family law litigation

5.16 The Family Court of Australia (FCA) has been at the forefront of measures to reduce the length and complexity of litigation, developing and implementing processes designed to minimise costs to family law litigants. The most significant of these initiatives are contained in the Family Law Rules 2004 (Rules).<sup>10</sup>

5.17 Submissions briefly described some of the FCA's initiatives, including: pre-action procedures and family dispute resolution (FDR); single expert rules; the less adversarial trial; and the docket system.

### *Pre-action procedures and family dispute resolution*

5.18 Rule 1.05 requires each prospective party to family law litigation (with some exceptions) to comply with 'pre-action procedures' prior to commencing an action. These procedures are set out in Schedule 1 of the Rules.<sup>11</sup>

5.19 The Australian Lawyers Alliance submitted that:

In many cases, creating obligations for 'pre-action procedures' has been a positive step that has allowed many matters to resolve without recourse to litigation.<sup>12</sup>

5.20 The 'pre-action procedures' established by the Rules apply to financial disputes, whereas section 60I of the *Family Law Act 1975* requires parties to a parenting dispute to undertake FDR or obtain a court-ordered exemption from that requirement before issuing legal proceedings.<sup>13</sup>

5.21 The Attorney-General recently released the *Family Dispute Resolution Services in Legal Aid Commissions* evaluation report. This report highlighted the cost-effectiveness of FDR services in Legal Aid Commissions, finding that for every \$1 invested, approximately \$1.48 is saved in court time and related costs:

FDR is effective in reducing cost and time to individuals and government by providing an appropriate alternative to litigation. FDR is also effective in achieving other outcomes such as narrowing of issues in dispute, participatory negotiated agreement making for disadvantaged individuals, and ensuring agreements are child focussed.<sup>14</sup>

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10 Family Court of Australia & Federal Magistrates Court, *Submission 31*, pp 9-11.

11 Family Court of Australia and Federal Magistrates Court, *Submission 31*, pp 11-12.

12 Australian Lawyers Alliance, *Submission 27*, p. 15.

13 Family Court of Australia and Federal Magistrates Court, *Submission 31*, p. 12.

14 Attorney-General's Department, *Family Dispute Resolution Services in Legal Aid Commissions: Evaluation Report*, April 2009, pp 77 & 92; and National Legal Aid, *Submission 34*, p. 26.

5.22 The Attorney-General commended the report's findings, stating:

FDR services provide families who would not otherwise be able to afford legal assistance with access to a timely, less adversarial and low cost option for resolving their legal disputes.<sup>15</sup>

5.23 The Women's Legal Centre (ACT and Region) cautioned however that it is imperative for women to have the option of accessing legal advice prior to participating in FDR, as women are then better placed in negotiations for parenting plans or consent orders.<sup>16</sup>

### *Single expert rules*

5.24 Part 15.5 of the FCA Rules concerns the use of expert evidence. According to the family law courts, these rules are highly successful and widely considered to overcome some significant issues that have arisen historically in the consideration of expert evidence, for example: potential partisanship and lack of objectivity; experts exceeding their areas of expertise; lack of clarity in expert evidence; cost and delay.<sup>17</sup>

### *The less adversarial trial*

5.25 The FCA conducts children's cases as Less Adversarial Trials (LAT), an approach which is flexible, comparatively quicker and cheaper, inclusive and less formal than the traditional common law (adversarial) approach.<sup>18</sup>

5.26 The National Alternative Dispute Resolution Advisory Council recognised the benefits of the LAT approach shortly after its introduction:

A formal two-part evaluation was undertaken of the pilot program that led to the Less Adversarial Trial. Those evaluations were supportive of the initiative. The final evaluation found that it resulted in a faster court process, that the parties were generally more satisfied with the process than parties whose dispute were determined using a traditional adversarial approach and that it has the potential to encourage a more cooperative approach between the parties (in this case usually separated or divorced parents).<sup>19</sup>

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15 The Hon. Robert McClelland MP, Attorney-General, 'Family dispute resolution keeps families out of court', Media Release, 2 April 2009

16 Women's Legal Centre (ACT and Region), *Submission 51*, pp 7-8.

17 Family Court of Australia and Federal Magistrates Court, *Submission 31*, p. 12.

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[http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/publications/All+Publications/D+to+M/FCOA\\_br\\_Less\\_Adversarial\\_Trials](http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/publications/All+Publications/D+to+M/FCOA_br_Less_Adversarial_Trials) (accessed 7 August 2009)

19 National Alternative Dispute Resolution Advisory Council quoted in Family Court of Australia and Federal Magistrates Court, *Submission 31*, pp 12-13; and Division 12A Part VII of the *Family Law Act 1975* (Cth)

### ***The docket system***

5.27 The FCA and the Federal Magistrates Court (FMC) allocate and manage cases through a judicial docket, meaning that one judge or federal magistrate handles each case from commencement to disposition. The judicial docket is designed to dispose of cases in the most efficient manner possible by ensuring early judicial intervention and active judicial case management.<sup>20</sup>

5.28 As indicated, the federal courts are currently considering, introducing or expanding, to various degrees, measures to reduce the length, complexity and cost of litigation, and increase judicial efficiency. These measures are intended to enhance access to justice.

5.29 Evidence presented to the committee did not encompass measures at the state/territory level, and the committee cannot draw any conclusions about practice and procedure in those jurisdictions.

5.30 Nonetheless, the committee regards access to justice as an issue which transcends jurisdiction, and encourages all courts to implement measures to reduce the length and complexity of litigation, and improve judicial efficiency. By implementing such measures, more Australians should be better able to afford to access the courts and the justice it metes out. The committee acknowledges that such measures do not act in isolation but in conjunction with a myriad of factors comprising and effecting access to justice.

### **Measures relating to self-represented litigants**

5.31 As indicated in Chapter 2, not everyone is able to access legal representation, with self-represented litigants appearing before the courts for a number of reasons, for example: inability to afford legal representation; a lack of awareness of, or inability to access, publicly funded legal services; geographic considerations; physical or mental disability; and by choice.

5.32 In 2003-04, the committee comprehensively examined the issue of self-represented litigants,<sup>21</sup> and submissions to this inquiry continued to refer to the 'well-documented difficulties and costs associated with the swelling pool of unrepresented litigants.'<sup>22</sup>

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20 Family Court of Australia and Federal Magistrates Court, *Submission 31*, p. 14.

21 Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, Chapter 10

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

### ***The 'swelling pool' of self-represented litigants***

5.33 In 2004, His Honour Justice Murray Wilcox believed the number of self-represented litigants to exceed 50 per cent in some courts,<sup>23</sup> and two years later, Her Honour Chief Justice Diana Bryant wrote:

It is beyond doubt that the numbers of self-represented litigants in the Family Court has markedly increased in the last ten years. Cuts to the legal aid budget for family law, the cost of legal services, the introduction of simplified procedures to reduce complexity and cost, changes to the substantive law in the area of children's cases, the rise of the father's rights movement and the perception that family law is not 'real' law such that the services of a lawyer are not required have all been identified as factors contributing to this increase.<sup>24</sup>

5.34 In 2007, the FCA reported that in 27 per cent of its cases at least one party was self-represented.<sup>25</sup> The most recent statistics from the FMC – 2008-09 – indicate that in 9.8 per cent of its family law cases neither party had legal representation and in 26.7 per cent of cases at least one party was self-represented.<sup>26</sup>

### ***Impact of self-representation on court resources***

5.35 In addition to the high proportion of self-represented litigants, the family law courts testified that family law matters are becoming increasingly complex and lengthier. Her Honour Chief Justice Diana Bryant attributed this to commingled issues, such as: serious abuse allegations; serious conflict; mental health issues; drug addiction issues; and serious family violence.<sup>27</sup>

5.36 The FMC provided the committee with recent data illustrating the length of time taken to finalise family law applications, compared with general law applications for the same period. Most family law applications are finalised within three months of filing, and most general law applications are finalised within three to six months of filing.

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23 Australian Institute of Judicial Administration and the Federal Court of Australia, Forum on Self-Represented Litigants, *Forum on Self-Represented Litigants*, 17 September 2004, p. 1.

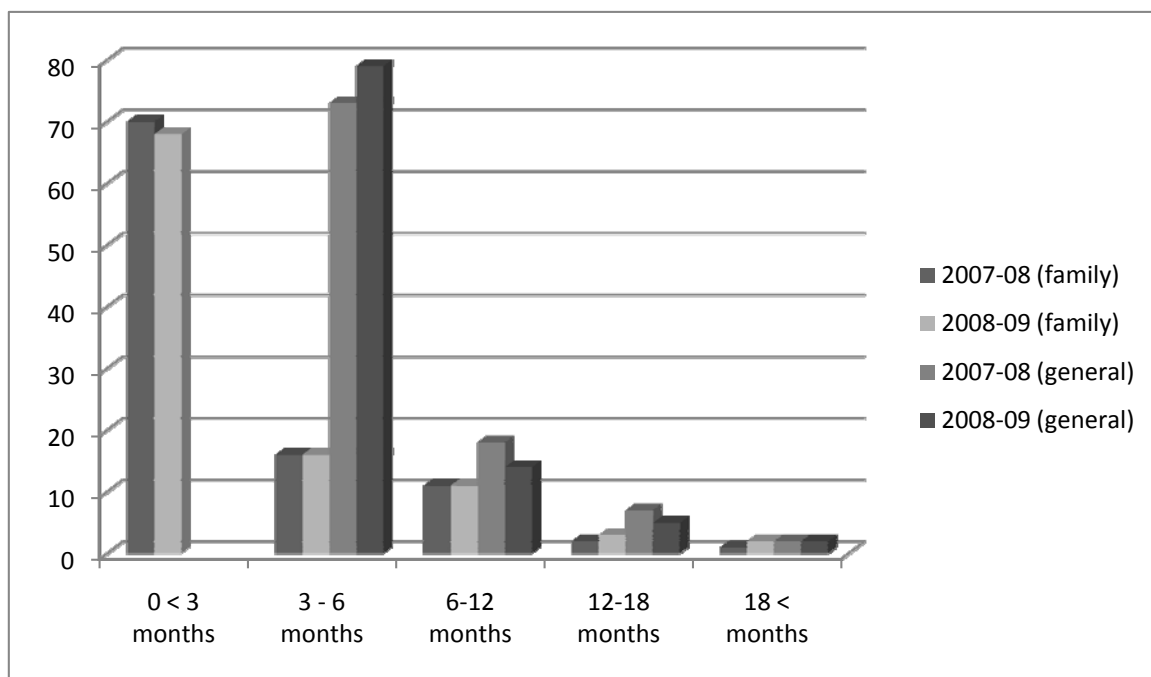
24 Chief Justice Diana Bryant, *Self Represented and Vexatious Litigants in the Family Court of Australia*, 2006, p. 2; and Family Court of Australia and Federal Magistrates Court, *Submission 31*, pp 4-5.

25 Family Court of Australia, Annual Report 2007-08, p. 58.

26 Federal Magistrates Court, Answer to Question on Notice (7 August 2009) p. 1.

27 Chief Justice Diana Bryant, Family Court of Australia, *Committee Hansard*, Melbourne, 15 July 2009, pp 2-3; and Chief Federal Magistrate John Pascoe, Federal Magistrates Court, *Committee Hansard*, Melbourne, 15 July 2009, pp 2 & 4.

**Figure 5.1 – Applications in the Federal Magistrates Court: Finalisation Timelines: 2007-09**



Source: *Federal Magistrates Court, Answer to Question on Notice (7 August 2009) pp 2-3.*

5.37 The committee notes that the FMC and other available data do not specifically identify self-represented litigants within court systems, making it difficult to determine the extent of and trends in self-representation, as well as the impact of self-represented litigants on court users, courts and their resources.

5.38 The committee therefore endorses Recommendations 53 and 54 from its 2004 Report (now labelled Recommendations 16 and 17), noting also Recommendation 56.

### **Recommendation 16**

5.39 The committee recommends that the federal, state and territory governments commission research to quantify the economic effects that self-represented litigants have on the Australian justice system, including court, tribunal, other litigant, legal aid system and social welfare system costs.

### **Recommendation 17**

5.40 The committee recommends that the federal courts and tribunals should report publicly on the numbers of self-represented litigants and their matter types, and urges state and territory courts to do likewise.

### ***Effect of self-representation on access to justice***

5.41 In 1998, the committee's *Inquiry into the Legal Aid System (Third Report)* considered that the percentage of self-represented litigants and changes in this percentage over time can be used as indicators of how well the legal aid system is operating.<sup>28</sup>

5.42 Although there is a lack of empirical data, submissions argued that the legal aid system is under-performing and contributing to the high proportion of self-represented litigants who do not always fare well in legal proceedings.<sup>29</sup>

5.43 In particular, the FCA and FMC argued that legal aid is instrumental to facilitating access to justice.<sup>30</sup> The *Litigants in Person in the Family Court of Australia* report, for example, found that 63 per cent of judges, judicial registrars and registrars interviewed considered an unrepresented party disadvantaged by the lack of legal representation: only 31 per cent of self-represented litigants were considered to have participated competently in the proceedings.<sup>31</sup>

5.44 Liberty Victoria agreed, submitting:

Anecdotally, most lawyers have encountered members of the public who have not been able to afford legal representation, who have not been eligible for legal aid, and whose encounter with the system has left them feeling as though they have not had justice. Often enough, their perception that they did not get a just result is accurate...It is not uncommon to see wrong results achieved when one party is unrepresented.<sup>32</sup>

5.45 The problem identified by the NSW Young Lawyers was that the justice system assumes equality of resources, and an understanding of complex areas of law, practice and procedure. In many instances, individuals, and particularly disadvantaged people, cannot engage with the justice system on a level playing field, requiring:

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28 Legal and Constitutional References Committee, *Inquiry into the Legal Aid System (Third Report)*, June 1998, para 3.22.

29 For example, Law Council of Australia, *Submission 12*, p. 6; and Law Society of NSW, *Submission 41*.

30 Family Court of Australia & Federal Magistrates Court, *Submission 31*, pp 6-7.

31 Prof. John Dewar, Barry Smith & Cate Banks, *Litigants in Person in the Family Court of Australia*, 2000: see [http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/publications/Papers/archived/FCOA\\_pr\\_Litigants\\_in\\_person](http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/publications/Papers/archived/FCOA_pr_Litigants_in_person) (accessed 10 August 2009)

32 Liberty Victoria, *Submission 25*, pp 2-3.

...measures to reduce unnecessary complexities, encouragement of alternative means of resolving disputes, a greater recognition of the imbalance between a litigant against the state or business, more effective case management and better funding of community legal service.<sup>33</sup>

5.46 As noted earlier in this chapter, some of these measures are already being enacted for the benefit of all court users. However, submissions suggested that additional targeted measures should be considered, introduced and expanded for the specific benefit of self-represented litigants whose lack of knowledge and/or experience inhibits their access to justice.

#### *Specific measures to assist self-represented litigants*

5.47 Submissions described some of the measures currently assisting self-represented litigants, and suggested certain reforms, including: expansion of duty solicitor schemes; expansion of the Self-Represented Litigants' Co-ordinator role; development and provision of further written information; and prompt access to legal advice.

#### *Expansion of duty solicitor schemes*

5.48 Throughout Australia, most courts have a duty solicitor scheme where people without having received legal advice or legal representation can seek some basic advice from a solicitor prior to appearing in court.

5.49 Previous reviews have found that the duty solicitor schemes coordinated by courts, legal aid bodies, professional associations and groups of local solicitors are of enormous assistance to self-represented litigants.

5.50 Duty solicitors typically: provide initial advice; identify cases which may be eligible for legal aid; refer matters to another solicitor; explain proceedings; resolve problems with inadequate pleadings and the preparation of evidence; and reduce self-represented litigants stress and anxiety.

5.51 However, duty solicitors rarely have the resources to represent individuals in court, and duty solicitor schemes cannot assist all self-represented litigants. Assistance is often restricted to those individuals who are likely to be imprisoned if convicted (that is, serious criminal matters). The problem is exacerbated in rural, regional and remote (RRR) areas where there are shortages of legal practitioners.

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33 NSW Young Lawyers, Human Rights Committee, *Submission 28*, pp 10 & 13.



5.52 The Public Interest Law Clearing House (PILCH) submitted that duty solicitor schemes should be expanded, arguing that expansion would assist self-represented litigants to access justice and improve the operation of the judicial system.<sup>34</sup> The National Pro Bono Resource Centre agreed but called for public funding of the schemes in areas of identified legal need:

Where there is a real identified need for duty lawyer schemes (an indicator for which would be a large number of unrepresented litigants) the need should be met by publicly funding regular schemes rather than relying on the goodwill, availability and capacity of the private profession to provide the service pro bono.<sup>35</sup>

5.53 In sharp contrast, while acknowledging the valuable function performed by duty solicitor schemes, the NSW Young Lawyers, Human Rights Committee suggested that their role be limited on practical and qualitative grounds:

Duty solicitors are extremely busy, and a five minute advice session in the rushed and stressful surrounds of a bustling court is no substitute for proper, considered legal advice and where appropriate, professional representation from a well-prepared practitioner.<sup>36</sup>

5.54 In view of this evidence, the committee endorses part Recommendation 57 of its 2004 Report (now labelled Recommendation 18) with the proviso that the duty solicitor schemes be established in areas of high need.

### **Recommendation 18**

**5.55 The committee recommends that the federal, state and territory governments jointly fund and establish a comprehensive duty solicitor scheme in identified high need areas throughout Australia with a view to reducing the length of litigation and increasing judicial efficiency in self-represented matters.**

#### *Expansion of the Self-Represented Litigants' Coordinator role*

5.56 In Victoria, various courts have introduced the role of a Self-Represented Litigants' Co-ordinator:

- in the Court of Appeal, the Self-Represented Litigants' Co-ordinator acts as a contact point, explaining procedures and helping manage the expectations of self-represented litigants; and

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34 PILCH, *Submission 33*, pp 39-40; and Australian Lawyers Alliance, *Submission 27*, p. 12.

35 National Pro Bono Resource Centre, *Submission 49*, p. 7.

36 NSW Young Lawyers, Human Rights Committee, *Submission 28*, pp 6-7; and Russo Lawyers, *Submission 58*, p. 3.

- in the Supreme Court, the Self-Represented Litigants' Co-ordinator provides procedural and practical advice, assists with the completion of court forms and documents, liaises with court staff to expedite proceedings, maintains statistics, monitors best practice in other jurisdictions, and refers self-represented litigants to appropriate legal aid service providers.

5.57 PILCH submitted that the Victorian Supreme Court model provides important and necessary assistance to self-represented litigants, as well as ensuring the more efficient administration of justice. It argued that a similar initiative should be funded in Victoria on an on-going basis and implemented in other courts across Australia.<sup>37</sup>

#### *Development and provision of written information*

5.58 In 2000, judges, judicial registrars and registrars reported that self-represented litigants frequently fail to understand the procedures and legal requirements of the court.<sup>38</sup> As a result, self-represented litigants often file wrong or incorrectly completed court documents, and adopt approaches that not only impede the efficient conduct of court proceedings but have the potential to adversely affect the proceedings.

5.59 PILCH submitted that the development of written and online material, including self-help kits is an effective method of assisting self-represented litigants. It recommended:

- the development and implementation of materials aimed at improving self-represented litigants' effective participation in the court system; and
- the exploration of available models and other technological solutions to improve access to services for self represented litigants.<sup>39</sup>

5.60 The committee notes that, in New South Wales at least, there is a wide variety of self-help material available in a variety of formats and across a number of legal areas.<sup>40</sup> However, this material does not appear to address practice and procedural issues.

### **Recommendation 19**

**5.61 The committee recommends that judicial and court officers receive training in relation to assisting self-represented litigants.**

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37 PILCH, *Submission 33*, pp 40-41.

38 Prof. John Dewar, Barry Smith & Cate Banks, *Litigants in Person in the Family Court of Australia*, 2000, p. 47.

39 PILCH, *Submission 33*, pp 42-43; NSW Young Lawyers, Human Rights Committee, *Submission 28*, p. 14; and Mr Ian Chivers, *Submission 63*

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

5.62 The committee agrees in principle with Recommendation 55 of its 2004 Report and urges federal, state and territory courts and tribunals to consider, develop and implement user-friendly practice and procedural guidelines for use within their specific jurisdictions with a view to promoting the efficiency of self-represented litigation.



# CHAPTER 6

## Alternative means of delivering justice

6.1 Term of reference (e) addresses ways in which people can access justice using means other than legal representation and/or the judicial system.

6.2 This chapter discusses the following means raised in the inquiry:

- early intervention and prevention;
- alternative dispute resolution;
- restorative justice;
- justice reinvestment;
- clinical legal education; and
- Indigenous specific issues.

### Early intervention and prevention

6.3 According to National Legal Aid (NLA):

[Early intervention sets] matters on appropriate, efficient, and cost effective pathways through or away from the justice system.<sup>1</sup>

6.4 The Attorney-General's Department (department) acknowledged that such 'triage' could result in costs savings to the Australian justice system, and enhanced access to justice for members of the Australian community. Its evidence referred to in-built 'triage' mechanisms in the *Strategic Framework for Access to Justice in the Federal Civil Justice System*:

What we were trying to get to in the framework and over time hoped to see implemented through the various reforms that government might consider is a concept of triage embedded in the system itself: all players in the system would have a responsibility—and, indeed, the opportunity—to work out the best way to deal with an issue. Rather than accepting instructions to initiate recovery action, we would like to see...a situation where parties and their representatives think, 'What's the best way to resolve this issue?'<sup>2</sup>

6.5 The subject of early intervention and prevention elicited comment in specific areas, including: the benefits of a holistic approach; and the value of community legal education programs.

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<sup>1</sup> National Legal Aid, *Submission 34*, p. 26; and Mr Matt Minogue, Assistant Secretary, AGD, *Committee Hansard*, Canberra, 27 October 2009, p. 39.

<sup>2</sup> Mr Matt Minogue, Assistant Secretary, AGD, *Committee Hansard*, Canberra, 27 October 2009, p. 39.

### ***The benefits of a holistic approach***

6.6 In evidence, the committee heard that the holistic approach, or co-location of legal aid service providers and non-legal aid service providers, would benefit those persons most likely to experience multifaceted and complex problems (for example: the homeless; sole parents; persons suffering chronic illness and disability; and Indigenous peoples).<sup>3</sup> Those submissions also reflected on the deleterious effects of allowing people's legal disputes to escalate.

6.7 The West Heidelberg Community Legal Service, for example, attested to a strong link between anxiety and stress caused by legal problems, and emergent or exacerbated health problems. It argued that the significant impact on a person's health enforces arguments in support of access to legal representation, and a holistic approach to early intervention and prevention.<sup>4</sup>

6.8 Associate Professor Mary Anne Noone and Ms Kate Digney cited national and international research evidencing the benefits of providing client-focussed holistic services. The research revealed that: there is a significant association between a person's experience of a justiciable problem and their health status; most people do not seek or receive legal advice for their justiciable problems; non-legal services are most often the first point of contact; and people rarely seek assistance from more than one source for each legal issue.<sup>5</sup>

6.9 The Women's Legal Service (SA) Inc. also supported addressing the root causes of legal and non-legal problems. Its submission argued that such resolution reduces clients' further involvement with the legal system, thereby promoting costs savings throughout the judicial system, as well as directly benefiting individuals on a personal level.<sup>6</sup>

6.10 Assoc. Prof. Noone & Ms Digney acknowledged the many challenges to developing an integrated service delivery approach, and their submission called for: appropriate support in policy development and resource allocation; a shared purpose, high level of trust, good communication, leadership and mutual responsibility at the organisational level; and integration of professional practices.<sup>7</sup>

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3 For example, Aboriginal Family Violence Prevention & Legal Service Victoria, Answers to Questions on Notice (22 July 2009) pp 3 & 7; and Gilbert & Tobin, *Submission 45*, pp 7-8.

4 West Heidelberg Community Legal Service, *Submission 37*, pp 9-10; and Aboriginal Family Violence Prevention & Legal Service Victoria, *Submission 38*, p. 10.

5 Assoc. Prof. Mary Anne Noone & Ms Kate Digney, *Submission 7*, pp 2-4; and Central Queensland Community Legal Centre Inc., *Submission 47*, p. 3.

6 Women's Legal Service (SA) Inc., *Submission 59*, p. 15.

7 Ms Mary Anne Noone, *Committee Hansard*, Melbourne, 15 July 2009, p. 94.

6.11 Central Queensland Community Legal Centre Inc., one of the holistic models operating in Australia, shared this view, arguing that, in areas of high disadvantage, community services need to employ a collaborative approach to service delivery:

No individual service alone can target the multi-levelled problems that exist for people who live in areas of high disadvantage. A holistic approach between all services, both social and legal, and both Commonwealth and State funded, needs to be established.<sup>8</sup>

6.12 Based on this evidence, the committee concludes that a holistic approach to the provision of legal and related services might well be a sound, long-term approach to helping disadvantaged Australians resolve issues. The committee commends centres such as the West Heidelberg Community Legal Services for their client-focussed endeavours.

6.13 Evidence addressing term of reference (e) supported a holistic approach to early intervention and prevention as a means of obtaining justice.

### ***The value of community legal education programs***

6.14 Another means of obtaining justice without involving the judicial system is community legal education, which aims to inform people of their legal rights, responsibilities and options prior to or at the outset of any legal problem. These programs intend to not only prevent legal disputes but also assist in the early resolution of existing legal disputes.

6.15 Both the Law Council of Australia (Law Council) and the Law Society of NSW supported an inter-related topic, early issues identification, with the latter submitting that this could better inform strategy development in the legal aid system:

A system of legal assistance which includes improved support for those who need a lawyer to assess their matter at an early stage would allow clients to make an informed decision on the merits of proceeding to court or exploring other dispute-resolution avenues. In turn, they would not be taking up valuable court resources on matters which have little chance of successful litigation.<sup>9</sup>

6.16 Legal Aid Commissions (LACs) and Community Legal Centres (CLCs) are at the forefront of providing community legal education programs. Programs are also delivered by legal professional associations and organisations such as the Law and Justice Foundation NSW.

6.17 The West Heidelberg Community Legal Service submitted that community legal education is critical to informing people about how they can better navigate or

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8 Central Queensland Community Legal Centre Inc., *Submission 47*, pp 3-4.

9 Law Society of NSW, *Submission 41*, pp 2-4.

understand a complicated legal system, and should be delivered on an on-going basis and within a community development framework.<sup>10</sup>

6.18 The importance of delivering community legal education and legal resources in an appropriate form (for example, in plain English; a variety of languages; pictorially; etc.) was also drawn to the committee's attention.<sup>11</sup>

### **Alternative dispute resolution**

6.19 In recent years, there has been a shift toward recognising alternatives to litigation, including alternative dispute resolution (ADR) as a means of delivering justice.

6.20 ADR is the resolution of disputes by an impartial third party independent of judicial determination. The main types of ADR are mediation, conciliation, arbitration and expert referral. ADR can occur by way of court order, or encouragement, and by choice, and is delivered through one of three mediums: a private mediator or arbitrator; a court-authorized scheme; or through community-based services.

6.21 Legal professional associations also provide avenues for legal practitioners to deliver or access ADR services. The Law Society of NSW, for example, offers: accreditation through the Law Society Mediation Program; access to experienced commercial arbitrators; nominations to Supreme, District and Local Court arbitration panels; and a low-cost Early Neutral Evaluation Service.

6.22 For some people, ADR is an attractive option for the resolution of legal disputes, and in its submission, the Australian Lawyers Alliance described the benefits of ADR as follows:

- it is more cost effective for parties;
- it provides a more flexible forum for people to express their concerns and grievances;
- parties are able to tailor the resolution of their issue to their individual circumstances;
- alternative dispute resolution proceedings can remain confidential;
- other parties can be present or participate, if required; and
- it can refine issues in dispute.<sup>12</sup>

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10 West Heidelberg Community Legal Service, *Submission 37*, p. 7.

11 Ms Elizabeth Snell, NSW Young Lawyers, Human Rights Committee, *Committee Hansard*, Sydney, 11 September 2009, p. 5.

12 Australian Lawyers Alliance, *Submission 27*, p. 16.



6.23 In Western Australia, the Industrial Relations Commission offers a voluntary, free mediation service for the resolution of employment-related disputes by an Industrial Relations Commissioner. The Employment Law Centre of WA (Inc.) cited this service as an example of a successful ADR scheme which enhances access to justice via an alternative means:

The WAIRC mediation service is ideal because it offers the parties an informal forum to discuss their dispute with the assistance of an independent mediator with specialist skills in mediation as well as legal expertise in employment law. And as there is no charge to the service, it is a service which is accessible to anyone regardless of their financial means.<sup>13</sup>

6.24 There are instances when ADR is not appropriate, for example: in situations where there has been domestic violence and/or family violence; situations in which there is a significant power imbalance between the parties (such as franchising or securities matters); where conflict between parties is entrenched; or where the issues requiring resolution are highly technical and complex.<sup>14</sup>

6.25 For this inquiry, submissions focused on court-facilitated ADR. In Australia, ADR has been used by courts as a case management tool where it plays an important role in reducing the length and complexity of litigation by narrowing the issues in dispute, and improving the efficiency of the courts.<sup>15</sup>

6.26 The Law Council supported the development of court processes which enhance the use of ADR, recommending that ADR options: be presented in a way which maximises their efficient and effective use; be accompanied by clear guidelines outlining the advantages and disadvantages of each option, as well as the types of disputes to which each option is most suited; and identify clearly categories of matters which may not be suitable to ADR.

6.27 However, the Law Council cautioned that courts' referral criteria and methods of referral are 'crucial to the effective provision of ADR services', and at present, require significant development:

The potential exists for the future implementation of streamlined processes, designed to direct disputes through the appropriate 'door' - the most appropriate form of ADR - from the time of filing with the court or earlier.<sup>16</sup>

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13 Employment Law Centre of WA (Inc.), *Submission 26*, p. 4.

14 Women's Legal Service (SA) Inc., *Submission 59*, p. 16; Mr Scott Cooper, *Submission 16*; and Family Court of Australia & Federal Court of Australia, *Submission 31*, p. 2.

15 Federal Court of Australia, *Submission 57*, p. 3; Family Court of Australia & Federal Magistrates Court, *Submission 31*, p. 15; National Legal Aid, *Submission 34*, p. 30; and Australian Lawyers Alliance, *Submission 27*, p. 17.

16 Law Council of Australia, *Submission 12*, p. 32.

6.28 Dr Andrew Cannon, a court officer and legal academic, favoured also a diverse system of ADR, but warned that it should not be an obstacle to accessing the courts and therefore a compulsory precondition to litigation (as is the case in some family law matters):

The control that ADR gives people over their own destiny, its potential to repair damaged relationships and the ability to manage sensitive matters in private all offer incentives and good reasons for using ADR rather than courts, without the necessity of it being compulsory.<sup>17</sup>

6.29 Chapter 5 refers to current legislative proposals to strengthen and clarify the case management powers of the Federal Court of Australia (Federal Court), including granting the court discretion to refer civil matters to ADR and the power to penalise parties who unreasonably refuse to participate in ADR opportunities.<sup>18</sup> The Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 is currently awaiting Royal Assent.

6.30 Some state/territory legal professional associations promote the use of ADR as an alternative means of obtaining justice, requiring their members to advise clients about ADR options.<sup>19</sup> The Law Council submitted that all Australian jurisdictions should consider similar obligations for legal practitioners (both barristers and solicitors).<sup>20</sup>

6.31 In early 2009, the Australian Government publicly recognised that access to justice is an important issue, in which ADR plays a key role.<sup>21</sup> It is currently awaiting results from a National Alternative Dispute Resolution Advisory Council (NADRAC) inquiry, whose terms of reference included:

- whether mandatory ADR should be introduced;
- changes to cost structures to provide incentives to use ADR or remove barriers to the use of ADR;
- changes to civil procedures to provide incentives to use ADR or remove barriers to the use of ADR;
- the provision and quality of ADR services, and whether they should be provided inside or outside the courts or both; and

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17 Dr Andrew Cannon, *Submission 15*, p. 8; and Mr Mark Blumer, Australian Lawyers Alliance, *Committee Hansard*, Sydney, 11 September 2009, p. 14.

18 Proposed section 37N of the Access to Justice (Civil Litigation Reforms) Amendment Bill 2009

19 For example, NSW Bar Association, Rule 17A

20 Law Council of Australia, *Submission 12*, p. 33.

21 The Hon. Robert McClelland MP, Attorney-General, 'Encouraging access to justice through alternative dispute resolution', Media Release, 26 March 2009

- the use of techniques derived from ADR to enhance adjudication in the courts, including judicial dispute resolution.<sup>22</sup>

6.32 NADRAC was due to report on 30 September 2009, and the committee awaits its findings and recommendations with interest.

6.33 In relation to the evidence raised in the inquiry, the committee accepts that ADR is a valuable and alternative means of delivering justice, but reiterates its previous findings that ADR is not an appropriate means of delivering justice in certain matters, including those involving victims of domestic violence.

6.34 The committee understands that ADR is an established process in some court practices and procedures, but is not fully developed in all Australian jurisdictions. The committee encourages all courts to consider, introduce and expand ADR options with clear criteria, guidelines and methods of referral.

6.35 The committee endorses efforts to enhance the use of ADR as an alternative means of delivering justice, but refrains from pre-empting the findings and recommendations of the NADRAC inquiry.

### **Restorative justice**

6.36 Restorative justice refers to a range of justice practices which actively involve offenders, victims and the community in the criminal justice process. The aim of restorative justice programs is to repair the harm caused by crime, divert offenders from the court process, and reduce recidivism.

6.37 Restorative justice programs are available in situations where an accused pleads guilty to a criminal offence and the victim(s) of the crime agrees to participate in the program. It is designed to create a forum for an accused to articulate his/her remorse and, as an alternative to victim impact statements, is a means by which a victim can express the impact that the crime has had on his/her life.<sup>23</sup>

6.38 Submissions which addressed this topic argued that restorative justice programs are an alternative, and more capable, means of delivering justice than the traditional criminal justice system.

6.39 Justice Action testified that restorative justice is 'a winner', enabling matters to be handled within the community and independent of the court process.<sup>24</sup> The Australian Lawyers Alliance agreed that greater consideration must be given to a

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22 Attorney-General's Department, *Submission 54*, p. 5 & Attachment C.

23 Attorney-General's Department, *Submission 54*, p. 6; Australian Lawyers Alliance, *Submission 27*, p. 18; and Dr Andrew Cannon, *Submission 15*, p. 9.

24 Mr Brett Collins, Co-ordinator, Justice Action, *Committee Hansard*, Sydney, 11 September 2009, p. 73.

criminal justice system which focuses on better outcomes for accused, victims and the community: 'Restorative justice is a core feature of any such approach.'<sup>25</sup>

6.40 Witnesses indicated to the committee that restorative justice programs would greatly benefit Indigenous people, who, as mentioned in Chapter 8, are vastly over-represented in the criminal justice system. In Western Australia, for example, 41 per cent of the adult prison population and 75.5 per cent of youth held in custody are Indigenous people.

6.41 At the Perth public hearing, Dr Dorothy Goulding and Dr Brian Steels equated prison to a 'rite of passage' for young Indigenous people, stating that restorative justice programs should be more widely used in Australia. They did not consider restorative justice to be an 'easier' option:

It is much easier for someone to go into court, plead guilty and get it over and done with than it is for them to face the person that they harmed. They cannot then depersonalise their crime...It is much tougher and much more effective to have to make an apology or reparation in front of people who mean something to you and with them you have a sense of belonging. So it is not a soft option but, in fact, a much more effective option.<sup>26</sup>

6.42 The Centre for Restorative Justice agreed that there is a need to examine different and more effective processes for dealing with crime and criminal behaviour. The centre argued that restorative justice, comprising re-integrative shaming (shaming carried out within a continuum of respect and support) and restorative processes (which focus primarily on well being) might be an additional means of delivering justice. Its submission presented what it suggested would be the features of an appropriate and successful restorative justice model:

- programs should run alongside the criminal justice system;
- involvement and referral should be encouraged through victims, offenders, courts, police and other interested agencies;
- involvement should be voluntary and while encouraged, there should be no coercion or plea bargaining;
- involvement would not attract mandatory reductions in sentence etc;
- all 'agreements' reached could be submitted to court where they can be ordered accordingly;
- the state/territory would ensure that follow through as per the 'agreements' is encouraged and supported; and
- all restorative practices should be facilitated by independent neutral personnel.<sup>27</sup>

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25 Australian Lawyers Alliance, *Submission 27*, p. 17.

26 Dr Dorothy Goulding, *Committee Hansard*, Perth, 13 July 2009, p. 62.

27 Centre for Restorative Justice, *Submission 22*, pp 7-8.

6.43 Internationally, some countries have begun applying restorative justice principles to not only juvenile but also adult criminal matters, including in the context of serious crimes. In the United Kingdom, restorative justice programs have been found to: reduce the frequency of re-conviction; save money by lowering the rates of offending; and satisfy parties involved in restorative justice processes. These results have reportedly been mirrored in Canada.<sup>28</sup>

6.44 At present, the Australian Government funds restorative justice programs in the context of juvenile justice, Indigenous justice and family law through the Prevention, Diversion, Rehabilitation and Restorative Justice Program, and through the Aboriginal and Torres Strait Islander Legal Services.<sup>29</sup>

6.45 In light of international experience, the Australian Lawyers Alliance submitted that restorative justice programs should be more widely available in Australia. At the West Heidelberg Community Legal Service, the use of restorative justice approaches to resolve or avert disputes is being considered, but the service agrees that restorative justice principles should be applied generally to: youth crime; issues where criminal consequences are not the only solution; educational issues around exclusion and suspension; and use of public space and housing issues.<sup>30</sup>

6.46 The committee considers that the concept of restorative justice bears closer investigation. If restorative justice programs are as cost-effective and successful as suggested, both in this inquiry and by international experience, then they could form an invaluable and appropriately focussed means of delivering justice.

## **Recommendation 20**

**6.47 The committee recommends that the Australian Government consider funding a number of restorative justice pilot programs in areas where there is an over-representation of minor offenders in the criminal justice system.**

## **Justice reinvestment**

6.48 Justice reinvestment is a new concept in the Australian Justice system. The Australian Human Rights Commission (AHRC) explained the concept and its brief history as follows:

The concept of justice reinvestment originated in the United States. It was initially developed by the Open Society Institute in 2003 but has since been taken up in 10 states in the US (Arizona, Oregon, Connecticut, Kansas, Michigan, Nevada, Pennsylvania, Rhode Island, Texas, Vermont and Wisconsin).

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28 Australian Lawyers Alliance, *Submission 27*, pp 18-19.

29 Attorney-General's Department, *Submission 54*, p. 6.

30 Australian Lawyers Alliance, *Submission 27*, p. 20; and West Heidelberg Community Legal Service, *Submission 37*, p. 8.

Justice reinvestment is a criminal justice policy approach that diverts a portion of the funds spent on imprisonment to the local communities where there is a high concentration of offenders. The money that would have been spent on imprisonment is reinvested in programs and services that address the underlying causes of crime in these communities. It is not just about tinkering around the edges of the justice system – it is about trying to prevent people from getting there in the first place.

Justice reinvestment retains detention as a measure of last resort for dangerous and serious offenders, but actively shifts the culture away from imprisonment.<sup>31</sup>

6.49 Although justice reinvestment has undergone only limited trialling in the United States, the AHRC proposed it as a possible solution to the over-representation of Indigenous people in the Australian criminal justice system. In addition to costs savings elsewhere in the system, the AHRC submitted that the appeal of justice reinvestment lies in its efficacy:

In Kansas where justice reinvestment has been implemented, there has been a 7.5% reduction in their prison population; parole revocation is down by 48%; and the reconviction rate for parolees has dropped by 35%....These changes have prevented Kansas from the need to build a new prison and have saved that state about \$80 million over a five-year period.<sup>32</sup>

6.50 At the Canberra public hearing, the AHRC told the committee:

We need to look to new ways to address longstanding and intransigent problems that we simply have not made any progress on. It is quite clear: Indigenous overrepresentation has been a matter of serious concern for 20 or 30 years and the rates not going down; they are continually increasing or have stabilised and plateaued. We cannot continue to do the same thing and expect we are going to get a different result. We are clearly not going to. This is a completely different take on how you might approach these issues and it is something that could be given priority consideration by the Commonwealth, whether that is working through the Standing Committee of Attorneys-General, whether it is separately through looking at opportunities for priority communities through the Northern Territory intervention, whether it is through other processes that may exist.<sup>33</sup>

6.51 In response to questions from the committee, the AHRC argued that sufficient data exists to consider trialling justice reinvestment in Australia:

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31 Australian Human Rights Commission, *Submission 70*, p. 9.

32 Australian Human Rights Commission, *Submission 70*, pp 9-10; Mr Darren Dick, AHRC, *Committee Hansard*, Canberra, 27 October 2009, p. 10; and Mr Mark Woods, Law Council of Australia, *Committee Hansard*, Canberra, 27 October 2009, pp 25-26.

33 Mr Darren Dick, AHRC, *Committee Hansard*, Canberra, 27 October 2009, p. 13.

Preliminary analysis of information supplied for the Social Justice Report by the state and territory departments responsible for corrections and juvenile justice identifies a number of communities with high concentrations of Indigenous incarceration. These communities are in urban and remote locations and include places like Blacktown, Dubbo, Port Augusta, Broome, Halls Creek, Darwin and Alice Springs. This data is very preliminary but it does suggest that there are Indigenous communities that could benefit from justice reinvestment strategies.<sup>34</sup>

6.52 However, additional mapping would be required, and given that over-representation of Indigenous peoples in the criminal justice system is a federal, state and territory issue, the AHRC called for a collaborative approach between governments:

It is going to be a suite of measures. Once you get into preventative processes and other things, sometimes you are going to slip into programs that are traditionally funded through the federal government as opposed to services provided by the state, but clearly one can impact on the other. It is probably ultimately more of a state responsibility, but it is also probably something where some sort of trialling could be done in a collaborative way.<sup>35</sup>

6.53 The AHRC also suggested that matters could immediately be improved if states/territories were to review policies and laws which have the effect of increasing imprisonment. The AHRC specifically mentioned the new mandatory sentencing laws in Western Australia, and the NSW Law Society commented also on inappropriate sentencing in relation to minor traffic offences:

In NSW a person's licence is often cancelled for fine default. The licence expires and is not renewed and the person is subsequently charged for driving whilst unlicensed. A person convicted for a second offence of driving without a licence is automatically disqualified for a three year mandatory period. Due to the long period of disqualification, this often snowballs into a driving whilst disqualified conviction and can result in a prison term.<sup>36</sup>

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34 Australian Human Rights Commission, *Submission 70*, p. 11; and Mr Darren Dick, AHRC, *Committee Hansard*, Canberra, 27 October 2009, pp11-12.

35 Mr Darren Dick, AHRC, *Committee Hansard*, Canberra, 27 October 2009, p. 12.

36 Law Society of NSW, *Submission 41*, p. 4; and Tom Calma, Commissioner, AHRC, 'Investing in Indigenous youth and communities to prevent crime', (Speech to Indigenous Young People, Crime and Justice Conference, Australian Institute of Criminology, 31 August 2009, pp 8-10.

6.54 In response to questions from the committee, the department indicated its hope that the states/territories would recognise 'the impact of changes in the state criminal law which impact disproportionately on Indigenous people', but stated that it is fundamentally an issue for the states and territories. The department was not aware of any federal intentions regarding justice reinvestment.<sup>37</sup>

6.55 The committee is persuaded that justice reinvestment is worth trialling in the Australian context after completion of further mapping. The committee notes that Recommendation 1 should provide the necessary information to enable a targeted justice reinvestment pilot program.

### **Recommendation 21**

**6.56 In conjunction with Recommendation 1, the committee recommends that the federal, state and territory governments recognise the potential benefits of justice reinvestment, and develop and fund a justice reinvestment pilot program for the criminal justice system.**

6.57 The committee also urges state and territory government to review laws which have the effect of increasing rates of incarceration with a view to ensuring that relatively minor offences do not result in custodial sentences. The committee considers that this would result in decreased need for funding of gaols and those funds could then be applied toward justice reinvestment programs which would, in turn, reduce involvement with the criminal justice system. The committee encourages state and territory governments to recognise this causal link and take steps to ameliorate the problem at its root cause.

### **Clinical legal education**

6.58 Clinical legal education is a legal practice-based method of legal education. It is a form of experiential learning where students are placed, under supervision, in the role of a solicitor in legal practice or a solicitor in a policy environment. Students are thereby provided with the opportunity to link theory with practice, with a key feature being the provision of legal assistance to disadvantaged people within the community.

6.59 Submissions from CLCs described various clinical legal education programs, and highlighted these programs' role in delivering access to justice. The SCALES Community Legal Centre added that clinical legal education imbues students with a sense of social responsibility and a life-long commitment to pro bono and social justice work:

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37 Mr Kym Duggan, Acting First Assistant Secretary, AGD, *Committee Hansard*, Canberra, 27 October 2009, p. 52.



However, these longer term benefits of our clinical program are only possible if it is properly resourced and able to provide support and parallel pedagogical guidance for our students. Clinical programs need the support of both Universities and government to ensure adequate funding and realistic benchmarks, or they fall prey to the demands of casework that can swamp and compromise clinical supervision. They should not be seen as a cheaper form of legal service delivery.<sup>38</sup>

6.60 The short- and long-term objectives of clinical legal education featured also in the submission from the West Heidelberg Community Legal Service, which similarly provides clinical legal education in conjunction with a local law school.<sup>39</sup>

### **Indigenous specific issues**

6.61 As discussed in Chapter 8, Indigenous people are a highly disadvantaged group within the Australian community, with an inclination not to access the mainstream legal system due to previous experiences of racism and discrimination.<sup>40</sup>

6.62 Under term of reference (e), submissions raised family law proceedings as a problematic yet alternative means to accessing justice. These submissions argued that Indigenous people have difficulty accessing the family law courts.

6.63 In 2001, the Family Law Pathways Advisory Group reported that 'Indigenous families encounter particular barriers' that impede their ability 'to access and benefit from the family law system.'<sup>41</sup> Its key recommendations included the expansion of the FCA's existing programs for Indigenous people, and reform of the *Family Law Act 1975* (Cth) to ensure that the court was more able to respond to the needs of Indigenous families.<sup>42</sup>

6.64 The Australian Government responded to these recommendations by:

- amending the *Family Law Act 1975* (Cth) to place a much stronger emphasis on the rights of Indigenous children to be aware of and participate in their culture and heritage; and
- establishing a national network of family relationship centres to provide outreach services to Indigenous communities through the employment of Indigenous advisors.

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38 SCALES Community Legal Centre, *Submission 39*, p. 10.

39 West Heidelberg Community Law Service, *Submission 37*, p. 3.

40 Ms Megan Davis, *Submission 17*, p. 1; and Aboriginal Family Violence Prevention & Legal Service Victoria, *Submission 38*, p. 6.

41 Attorney-General's Department, *Out of the Maze: Pathways to the future for families experiencing separation*, July 2001, pp 4 & 91-92.

42 Family Court of Australia & Federal Magistrates Court, *Submission 31*, p. 17.

6.65 According to the Family Court of Australia (FCA) and Federal Magistrates Court (FMC):

These initiatives effectively provide 'a front door' through which Indigenous families enter the family law system and eventually find their way to the Family Law Courts.<sup>43</sup>

6.66 However, the Aboriginal Family Violence Prevention & Legal Service Victoria continued to express dissatisfaction with Indigenous peoples' entry into the family law system, a view with which the family law courts agreed.<sup>44</sup> The service suggested additional measures to improve access to the family law system, including making Indigenous legal services the entry point.<sup>45</sup>

6.67 Furthermore, the Aboriginal Family Violence Prevention & Legal Service Victoria questioned whether recent changes to the family law system (emphasising family dispute resolution) would create barriers to Indigenous women accessing legal assistance and support.

6.68 In early 2006, NADRAC published a report, *Indigenous Dispute Resolution and Conflict Management*, examining the effectiveness of Indigenous dispute resolution and conflict management services. Among its findings was that evaluation methods and performance indicators must consider the complex and overlapping nature of many Indigenous disputes, and the fact that conventional methods may not provide a reliable or valid picture of effectiveness.<sup>46</sup>

6.69 In response to these findings, the Federal Court, in collaboration with NADRAC and the Australian Institute of Aboriginal and Torres Strait Islander Studies, conducted a scoping study to determine how case study research could be used to identify examples of best practice in Indigenous dispute resolution and conflict management.<sup>47</sup> The department advised that the Case Study Project is currently being considered by NADRAC.<sup>48</sup>

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43 Family Court of Australia & Federal Magistrates Court, *Submission 31*, p. 17.

44 Family Court of Australia & Federal Magistrates Court, *Submission 31*, p. 16.

45 Aboriginal Family Violence Prevention & Legal Service Victoria, *Submission 38*, pp 6-7.

46 National Alternative Dispute Resolution Advisory Council, *Indigenous Dispute Resolution and Conflict Management*, January 2006, p. 1.

47 National Alternative Dispute Resolution Advisory Council, *Indigenous Dispute Resolution and Conflict Management*, January 2006, p. 16.

48 Attorney-General's Department, *Submission 54*, p. 5.

# CHAPTER 7

## The adequacy of funding and resource arrangements for community legal centres

7.1 This chapter discusses evidence received in submissions and at public hearings concerning term of reference (f). In general, submissions reiterated concerns from the 2003-04 inquiry, and in particular, that funding and resource arrangements for community legal centres is inadequate. The specific topics addressed in this chapter are:

- an overview of community legal centres;
- the Community Legal Services Program;
- the adequacy of funding; and
- recruitment and retention issues.

### An overview of community legal centres

7.2 There are more than 200 Community Legal Centres (CLCs) throughout Australia in metropolitan, suburban, regional, rural and remote areas.<sup>1</sup> CLCs are independent, community-managed, non-profit services that provide a range of assistance with legal and related matters to people on low incomes and those with special needs, with a focus on early intervention and prevention.

7.3 Some CLCs offer specialist legal services (for example: child support; credit and debt; environmental law; welfare rights; mental health; disability discrimination; tenancy; immigration; employment; and the arts), and some provide targeted services (for example: to Aboriginal and Torres Strait Islander peoples; children and young people; women; older people; refugees; prisoners; the homeless; and other groups).

7.4 While CLCs assist individuals, they also 'work beyond the individual', undertaking community development, community legal education and law reform projects that are based on client need, that are preventative in outcome, and that strengthen the community they serve.<sup>2</sup>

7.5 In 2006-07, in addition to casework, CLCs provided: more than 222 000 individual legal advices; more than 123 000 information, support and referral services;

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1 For a detailed list of state/territory community legal centres, see the directories at [www.naalc.org.au](http://www.naalc.org.au) (accessed 24 November 2009)

2 <http://www.naalc.org.au/topics/2000.html> (accessed 22 October 2009)

more than 2 000 community legal education projects; and finalised over 580 law reform projects.<sup>3</sup>

7.6 Volunteers are integral to the work of CLCs with thousands of volunteers across the country providing the commercial equivalent of \$23 million of legal assistance services in 2006. This contribution comprised some 300 000 hours, excluding pro bono support from the private legal profession (over 25 000 hours per annum).<sup>4</sup>

7.7 The high rate of volunteerism makes CLCs highly cost effective in the provision of legal services.<sup>5</sup> Their peak body, the National Association of Community Legal Centres (NACLC) notes also their valuable role in limiting judicial system costs:

A study undertaken in 2006 by the Institute of Sustainable Futures on the Economic Value of Community Legal Centres concluded that every dollar spent on legal services at community legal centres (CLCs) can save at least \$100 in avoided costs.<sup>6</sup>

7.8 The committee commends the dedication and commitment of CLC volunteers throughout Australia. Without these efforts, a significant number of Australians would have little to no access to justice. Furthermore, the work of volunteers alleviates pressures elsewhere in the legal aid system, allowing other legal aid service providers to more strategically utilise their limited resources.

7.9 In early 2008, the Attorney-General's Department (department) released its first nationally-focussed review of the Community Legal Services Program (the CLSP Review), the program under which the Australian Government provides CLC funding. The CLSP Review sought to maximise legal outcomes for disadvantaged Australians by improving legal services, and more effectively and appropriately targeting community needs.<sup>7</sup>

7.10 The CLSP Review recognised many positive aspects of CLCs, including: their expertise in areas of law that other providers are not able or not willing to cover; their multi-dimensional approach to service delivery, facilitating assistance to people with

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3 National Association of Community Legal Centres, 'Why Community Legal Services are Good Value', 2008, p. 1.

4 National Association of Community Legal Centres, 'Why Community Legal Services are Good Value', 2008, p. 6.

5 For example, see Employment Law Centre of WA (Inc.), *Submission 26*, pp 3 & 5.

6 National Association of Community Legal Centres, *The Economic Value and Social Benefit of Community Legal Centres – A Summary*, p. 1. Also, see Liberty Victoria, *Submission 25*, p. 2; National Association of Community Legal Centres, *Submission 1*, pp 3-4; and PILCH, *Submission 33*, p. 47.

7 [www.ag.gov.au](http://www.ag.gov.au)

complex needs and multiple disadvantaged; and a client base marked by low income, marginalisation, disadvantage and a lack of social inclusion.<sup>8</sup>

7.11 Submissions to this inquiry endorsed these positive comments. For example, the Family Court of Australia (FCA) and the Federal Magistrates Court (FMC), with whom the department agreed, submitted:

The national network of community legal centres is a vital adjunct to the services provided by legal aid commissions and private legal practitioners. They are a critical source of professional and impartial legal information and advice, particularly for people who are not eligible for legal aid.<sup>9</sup>

### **The Community Legal Services Program**

7.12 At present, 127 CLCs receive Commonwealth funding under the Community Legal Services Program (CLSP); 20 CLCs receive state/territory funding only; and over 50 CLCs receive no funding whatsoever,<sup>10</sup> meaning that approximately 36.5 per cent of CLCs are funded from sources other than the Australian Government.

7.13 Evidence suggests that whether a CLC is funded under the CLSP depends upon when that CLC first entered, or sought to enter, the program, and whether the CLSP Review identified the CLC in question as servicing a legal needs area.<sup>11</sup>

#### ***Application-based grants***

7.14 A significant difference between the CLSP and the Legal Aid Program (LAP) is the method of funding. Whereas the latter is distributed according to a funding model (the Rush-Walker model), the CLSP is an application-based grants program, with funding provided via three-year service agreements. The current agreements expire on 30 June 2010.<sup>12</sup>

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8 Attorney-General's Department, *Review of the Commonwealth Community Legal Services Program*, March 2008, p. 6.

9 Family Court of Australia & Federal Magistrates Court, *Submission 31*, p. 16; and Attorney-General's Department, *Submission 54*, p. 3.

10 National Association of Community Legal Centres, *Submission 1*, p. 7; Care Inc. Financial Counselling Service and Consumer Law Centre of the ACT, *Submission 9*, p. 2; Australian Lawyers for Human Rights, *Submission 43*, p. 8; Ms Vasilyki Eliades, PILCH (Vic), *Committee Hansard*, Melbourne, 15 July 2009, p. 49.

11 Ms Sara Kane, Employment Law Centre of WA (Inc.), *Committee Hansard*, Perth, 13 July 2009, p. 11; Ms Julia Hall, NACLCL, *Committee Hansard*, Sydney, 11 September 2009, p. 27; and Mr Peter Arnaudo, Assistant Secretary, AGD, *Committee Hansard*, Canberra, 27 October 2009, p. 46.

12 Attorney-General's Department, Estimates Answer to Question on Notice No. 127 (27 May 2009); and Ms Julia Hall, NACLCL, *Committee Hansard*, Sydney, 11 September 2009, p. 26.

7.15 The CLSP service agreement defines the obligations of each party, and provides an accountability framework for the expenditure of public funds. It requires each CLC to comply with a range of conditions regarding the use of those funds, and submit various items for approval, including:

- a Community Legal Services Program Plan;
- an annual accrual budget;
- quarterly funding acquittals;
- progress reports against the Community Legal Services Program Plan;
- annual audited financial statements; and
- an annual report.<sup>13</sup>

7.16 These accountability requirements are aligned with those of other Australian programs, but notably, apply only to CLCs funded under the CLSP.

7.17 The committee heard criticisms of the application-based grants program. The Suncoast Legal Community Legal Service Inc., for example, submitted that: there is a lack of transparency and equity in how funding is apportioned in the sector; and existing services should be funded to a sustainable level before more services are established:

That a region with the population of the Sunshine Coast which has had a community legal service in place from the mid-80's onwards only received funding to employ a principal solicitor and full-time coordinator as late as 2007 speaks volumes as to the lack of transparency and equity in how funding is apportioned in the sector...Where there is a functioning CLC in a town or region with a particular population, one would expect that it would be broadly funded to the same level of service as a CLC in another region or town of similar population, with some adjustment for particularly wealthy or particularly disadvantaged demographics. In Queensland and throughout Australia this is clearly not the reality. The tendency to encourage additional under-funded services in new communities rather than properly funding those services that are already running only adds to this problem.<sup>14</sup>

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13 Attorney-General's Department, *Review of the Commonwealth Community Legal Services Program*, March 2008, pp 81-82.

14 Suncoast Community Legal Service Inc., *Submission 46*, p. 5.

7.18 The Suncoast Legal Community Legal Service Inc. also argued that the annual grant process is highly unpredictable, complicating the long-term future of CLC projects.<sup>15</sup> Most CLC submissions reiterated these arguments in relation to one-off funding injections, additionally noting that the injections are for limited purposes only.<sup>16</sup>

7.19 By way of illustration, in South Australia the Women's Legal Service (SA) Inc. applied its one-off funding injection toward employing another solicitor for its Rural Women's Outreach Program, but warned that:

We are restricted by the lack of certainty surrounding one off funding grants, and the lack of funding for undertaking regular and consistent outreach to Coober Pedy, Oodnadatta, Nepabunna and other remote areas.<sup>17</sup>

7.20 The department is aware of criticisms regarding the application-based grants program, with the 2008 CLSP Review recommending that a funding model be adopted for the allocation of any *new* funding under the CLSP. The review set out a proposed funding model, which provided a mechanism for determining: which CLCs are located in areas of greatest demand; which CLCs are in the greatest need of funding; and the relative distribution of new funding based on four primary considerations.<sup>18</sup>

7.21 According to the department, consultations have commenced on some of the CLSP Review's recommendations, including a new CLSP funding model. At the time of writing, a model has not been agreed or implemented.<sup>19</sup>

7.22 The committee notes the on-going criticisms of the grants-based funding, and commends the department for considering, consulting and seeking to implement a new funding model. The committee endorses that process, urging the department to widely consult with interested stakeholders throughout the reform process. The committee considers that all CLCs should be captured by the new funding model to bring uniformity to the funding process.

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15 Suncoast Community Legal Service Inc., *Submission 46*, p. 6.

16 National Association of Community Legal Centres, *Submission 32*, p. 8; and Combined Community Legal Centres' Group NSW (Inc), *Submission 44*, p. 8.

17 Women's Legal Service (SA) Inc., *Submission 59*, p. 19.

18 Attorney-General's Department, *Review of the Commonwealth Community Legal Services Program, March 2008*, pp 60-62.

19 Attorney-General's Department, Annual Report 2007-08, p. 87; and Attorney-General's Department, Estimates Answer to Question on Notice No. 126 (27 May 2009)

## Recommendation 22

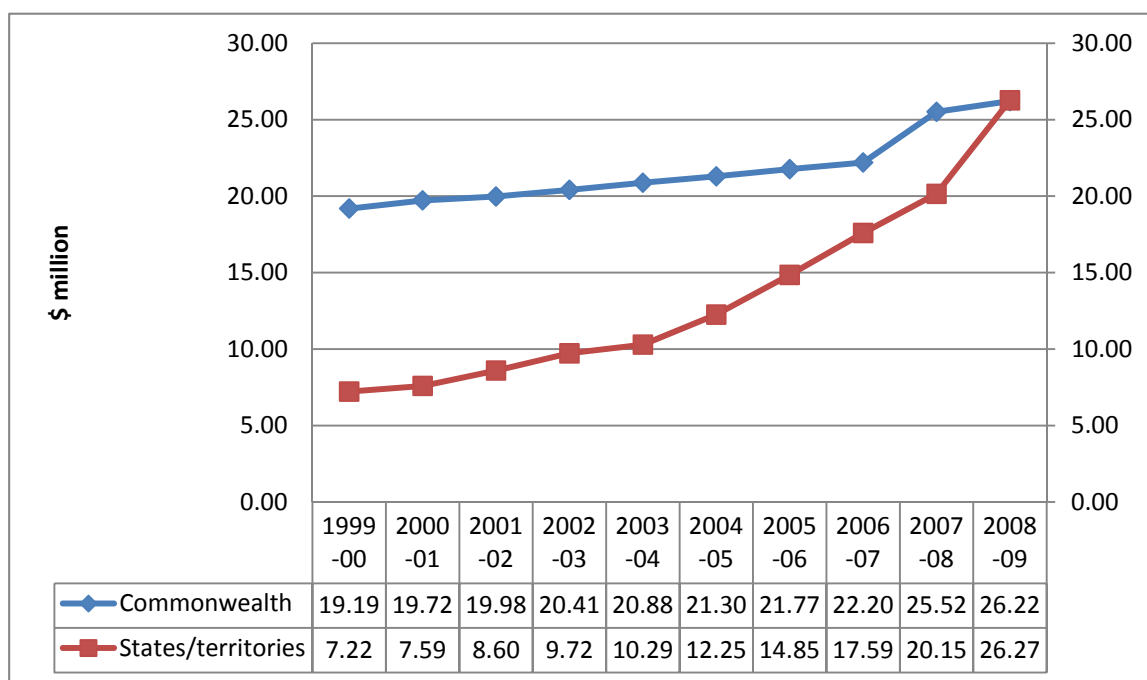
**7.23** The committee recommends that the Attorney-General's Department, in consultation with interested stakeholders, expedite the development of a new funding model for the allocation of Australian Government funding to all community legal centres.

### Core funding

7.24 Term of reference (f) is fundamentally directed toward the issue of whether CLCs have sufficient funds to effectively provide access to justice for disadvantaged Australians.

7.25 Figure 7.1 below shows the Australian Government funding levels for the CLSP for the period 1999-2009, compared with state/territory funding levels. Overall, contributions have increased. Commonwealth funding increased marginally each year, whereas state/territory contributions increased significantly to the point where they are now on par with the Australian Government funding levels.

**Figure 7.1 – Commonwealth, state and territory funding for the Community Legal Services Program: 1999-2009**



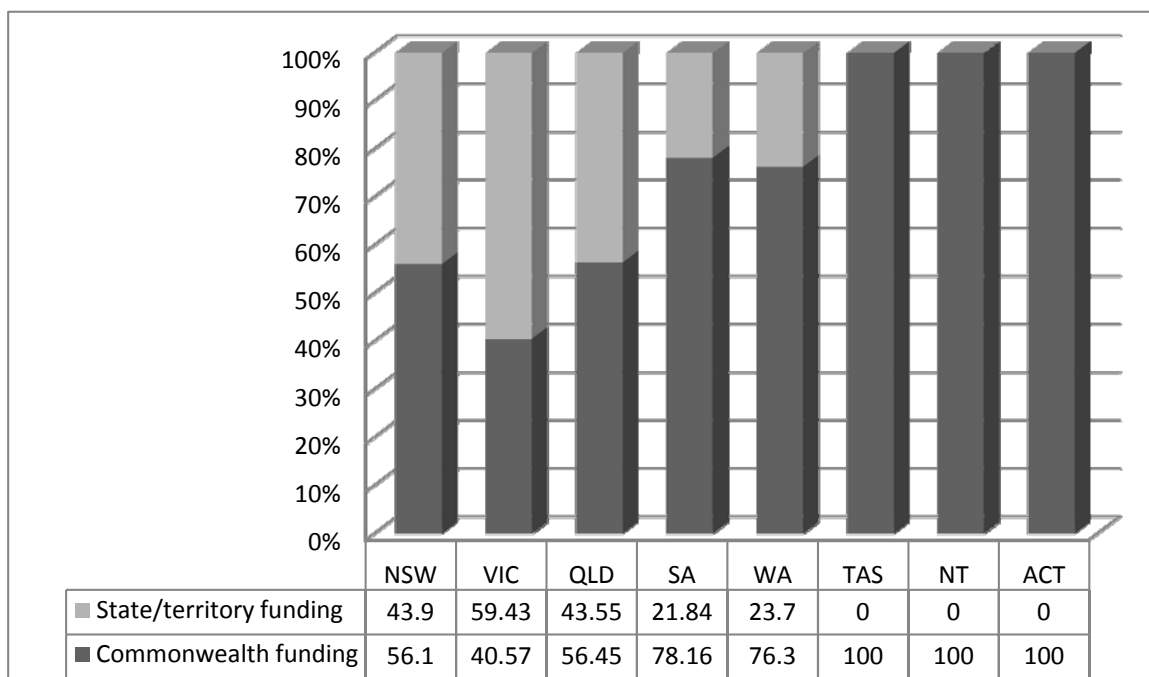
Source: Attorney-General's Department, *Review of the Commonwealth Community Legal Services Program*, March 2008, p. 109; and Attorney-General's Department, *Submission 54*, p. 6.



(Note: There is slight variation in the 2007-2009 figures as reported in Portfolio Budget Statements)<sup>20</sup>

7.26 Figure 7.2 below describes Australian Government funding for CLCs in each state/territory, compared with state/territory government funding for the financial year ending 30 June 2007. In that period, the Australian Government solely funded CLCs in Tasmania and the territories, with significant contributions in South Australia and Western Australia.

**Figure 7.2 – Commonwealth, state and territory funding for Community Legal Centres: 2006-07**



Source: Attorney-General's Department, *Review of the Commonwealth Community Legal Services Program*, March 2008, p. 43.

(Note: The figures include NSW Public Purpose Fund monies, state/territory only funded CLCs and state/territory funding to state/territory based sector federations and associations.)

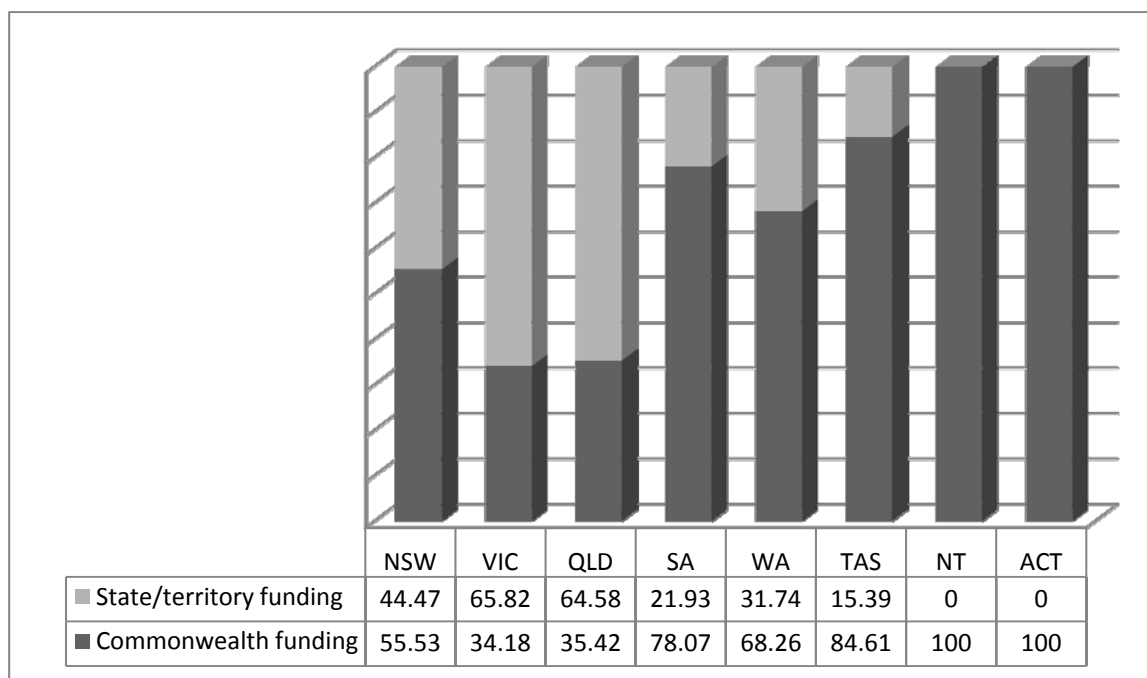
7.27 In the 2009-10 Budget, the Australian Government announced that its current year funding for CLCs would be \$26.085 million (a decrease of \$135 000), with a further \$81.091 million spread out over three years.<sup>21</sup>

20 Attorney-General's Portfolio, Portfolio Budget Statements 2007-09, Budget Related Paper No. 1.2, p. 53; Attorney-General's Portfolio, Portfolio Budget Statements 2008-09, Budget Related Paper No. 1.2, p. 29; and Attorney-General's Portfolio, Portfolio Budget Statements 2008-09, Budget Related Paper No. 1.2, p. 30.

21 Attorney-General's Portfolio, Portfolio Budget Statements 2008-09, Budget Related Paper No. 1.2, p. 30; Attorney-General's Department, *Submission 54*, p. 2; and Attorney-General's Department, Estimates Answer to Question on Notice No. 125 (27 May 2009) (which shows a discrepancy of -\$2.535 million)

7.28 The committee understands that the 2009-10 Australian Government funding will be distributed nationwide as shown in Figure 7.3 below. The statistics show fluctuations in the distribution of Australian Government funding for CLCs, as compared with its 2006-07 funding however the Commonwealth alone continues to fund CLCs in the territories.

**Figure 7.3 – Commonwealth, state and territory funding for Community Legal Centres: 2009-10**



Source: National Association of Community Legal Centres, Answer to Question on Notice (11 September 2009)

### ***One-off funding injections***

7.29 In addition to core funding, the Australian Government has in the past provided one-off funding injections to CLCs covered by the CLSP. From 1999-2009, four such injections were made:

- \$10 million in April 2008 to assist in the management of increased demand for services;<sup>22</sup>
- \$5.8 million in August 2008 to improve access to justice for communities in rural, regional and remote (RRR) areas (as part of the Regional Innovations Program for Legal Services);<sup>23</sup>

22 The Hon. Robert McClelland MP, Attorney-General, 'Boost for Social inclusion Through Better Legal Services', Media Release, 18 April 2008

23 The Hon. Robert McClelland MP, Attorney-General, 'Rudd Government Boosts Legal Services for Regional, Rural and Remote Communities', Media Release, 18 June 2008

- \$4 million in May 2009 to 47 CLCs, focussing on areas such as consumer protection, mortgage and tenancy issues, welfare rights, family, and homelessness issues;<sup>24</sup> and
- \$1.5 million in June 2009 to CLCs, focussing on older Australians, family law and family violence matters, the establishment of a trial legal clinic for homeless persons in the ACT and Victoria, and development of clinical legal education projects in the area of family law.<sup>25</sup>

7.30 The CLSP Review immediately preceded the one-off funding injections, which submissions and evidence universally welcomed. However, both the CLSP Review and submissions stated that CLCs remain under-funded.

### **The adequacy of funding**

Community legal centres face [challenges] in delivering services on current funding levels – the average amount of funding provided under the Commonwealth Community Legal Services Program in 2006-07 is approximately \$173,000.<sup>26</sup>

7.31 This finding from the CLSP Review articulated what the NACLC described as 'a funding crisis' affecting CLCs, and one which National Legal Aid (NLA) submitted has been developing for at least the past 10 years.<sup>27</sup>

7.32 Submissions to the inquiry overwhelmingly supported the NACLC and NLA's assertions and called for more adequate funding for the sector.<sup>28</sup> An illustration of how funding inadequacies affect CLCs' facilitation of access to justice was provided to the committee at its Perth (and other) hearings.

7.33 The Employment Law Centre of WA described its precarious position following the cessation of Australian Government funding in November 2006. Since then, the centre operates on short-term funding from the state government and the WA Public Purposes Trust Fund. The centre expressed concern for its 4000 odd clients and

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24 The Hon. Robert McClelland MP, Attorney-General, 'Funding for Legal Assistance Services', Media Release, 9 May 2009

25 The Hon. Robert McClelland MP, Attorney-General, 'Additional \$6 million for Legal Assistance Services', Media Release, 30 June 2009

26 Attorney-General's Department, *Review of the Commonwealth Community Legal Services Program*, March 2008, pp 6 & 49.

27 National Legal Aid, *Submission 34*, p. 31; and Ms Julia Hall, NACLC, *Committee Hansard*, Sydney, 11 September 2009, p. 22.

28 For example, Family Court of Australia & Federal Magistrates Court, *Submission 31*, p. 16; Suncoast Community Legal Service Inc., *Submission 46*, p. 6; Australian Lawyers Alliance, *Submission 27*, p. 21; Australian Environmental Defender's Office, *Submission 29*, p. 14; Combined Community Legal Centres' Group NSW (Inc.), *Submission 44*, p. 6; Australian Lawyers for Human Rights, *Submission 43*, p. 9; and Women's Legal Service (SA) Inc., *Submission 56*, p. 4; and PILCH, *Submission 33*, p. 49.

also the approximately 6000 prospective clients who the centre is not adequately resourced to assist:

For [those] people who are not able to access ELC's services they have no equivalent alternative to the ELC to turn to. These clients are then left with the unsatisfactory option of either abandoning their claim for lawful entitlements or pursuing their claim without assistance, often against their legally represented employers.<sup>29</sup>

7.34 In response to questions, the Employment Law Centre of WA advised that it nonetheless tries to help prospective clients by 'arming' them to self-represent (one to five each week, equating to a couple hundred each year). Its success is not statistically measurable, but it believed this achieves better outcomes for both the individual and the judicial system.

7.35 Ultimately, the Employment Law Centre of WA maintained the need for additional CLC funding, a view supported by other submitters and witnesses to the inquiry, including the Hunter Community Centre Inc. who clarified that what CLCs really need is core funding:

One-off or ad hoc funding is welcomed but it is not the way to fund community legal centres on a long-term basis. At the moment we have a significant number of projects at our community legal centre which, as I have mentioned, are under threat of not being continued simply because they are one-off grants which enable us to do something for six months or 12 months. It is very difficult to employ people in that situation when you cannot guarantee them employment for longer than 12 months.<sup>30</sup>

7.36 In evidence, the department acknowledged that one-off funding injections are not a long-term solution to the needs of CLCs (and other legal service providers). The department told the committee that 'the government is going to consider [the issue] in the context of the budget, developing budgets and future plans like that', but:

The attorney is definitely very conscious of the calls, particularly in the community and the Indigenous legal sector, not only in terms of the increasing demand for their services but also the particular challenges that some of those services face in the rural, regional and remote areas.<sup>31</sup>

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29 Employment Law Centre of WA (Inc), *Submission 26*, pp 3-4.

30 Ms Liz Pinnock, Hunter Community Legal Centre Inc., *Committee Hansard*, Canberra, 27 October 2009, p. 8; Australian Environmental Defender's Office, *Submission 29*, pp 14-15; Refugee Advice + Casework Service, *Submission 64*, p. 1; West Heidelberg Community Legal Service, *Submission 37*, pp 3-4; Care Inc. Financial Counselling Services and Consumer Law Centre of the ACT, *Submission 9*, p. 4; and Mr Mathew Tinkler, PILCH (Vic), *Committee Hansard*, Melbourne, 15 July 2009, p. 53.

31 Mr Peter Arnaudo, Assistant Secretary, AGD, *Committee Hansard*, Canberra, 27 October 2009, p. 42.

7.37 Another proponent of this view was the NACLCLC, which regularly formulates and presents governments with updated position statements and funding proposals on behalf of the CLC sector.

### ***Funding proposals***

7.38 In January 2008, the NACLCLC published a funding proposal, which opened with the following statement:

CLC funding has not kept pace with increased costs. CLCs have experienced an 18% reduction in funding over the last 10 years in real terms. This impacts on outcomes for clients, placing unsustainable stress on the organisations' ability to deliver service. CLCs have had to cut back on staff, service hours and other expenses that support innovation and growth of services.<sup>32</sup>

7.39 To remedy the problem, the NACLCLC submitted that it would be necessary to invest a further \$39.155 million in CLCs:

- \$10.3 million immediately (to account for inflation and increase baseline funding);
- \$13.7 million in the 2008-09 Budget (to provide specialist services and better support RRR areas); and
- \$15 million in the 2009-10 Budget (for allocation to CLCs which do not receive baseline funding).<sup>33</sup>

7.40 The Law Council of Australia (Law Council) supported this proposal, stating that the extra funding would allow CLCs to continue to act as an essential tool of social inclusion.<sup>34</sup> SCALES Community Legal Centre agreed:

It is essential that CLCs be funded in a sustainable and reliable manner, allowing them to achieve their goals. One of the main strategies of CLCs is to provide people with information on the law and teach them through workshops and other programs to use that information for their own and their communities use in the future or to prevent them from falling into a position of disadvantage within the legal system. Through the use of these strategies, CLCs are combating social exclusion. They are promoting social inclusion for communities by providing them with information on the law and how to navigate themselves around the legal institutions. CLCs deliver more than the individual benefit but also a broader public benefit, every time CLCs prevent clients from interacting with the judicial system or

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32 National Association of Community Legal Centres, *Community Legal Centres Across Australia – An Investment worth protecting, Funding Submission to the Commonwealth Government 2007-2010*, p. 1.

33 Letter National Association of Community Legal Centres to the Attorney-General, 11 January 2008, p. 2.

34 Law Council of Australia, *Submission 12*, p. 24.

having to resort to governmental institutions for their problems, costs for the government in those bodies were decreased.<sup>35</sup>

### ***Baseline funding***

7.41 Each CLC has an effective baseline funding requirement. In September 2007, the NACLC estimated that amount at around \$500 000, a figure based on highly reduced legal rates (due to CLCs' high rates of volunteerism), and exclusive of costs specific to RRR area service delivery (for which, it argued, there should be a loading).<sup>36</sup>

7.42 This estimate is now two years out of date, and in spite of the CLSP Review's acknowledged baseline funding (\$173 000), evidence to the committee suggests that the baseline funding amount has not been substantially increased.

7.43 Furthermore, the department conceded that neither the current consultations regarding a new funding model for the CLSP, nor the model itself, include productivity outcomes for funding at any specified amount. The department added that there is quite a large range in annual funding amounts, and what might be appropriate for some CLCs would not necessarily be appropriate for others.<sup>37</sup>

7.44 The discrepancy between actual funding and estimated effective, or required, funding is depicted by the NACLC for the period 1996 to 2007 as follows.

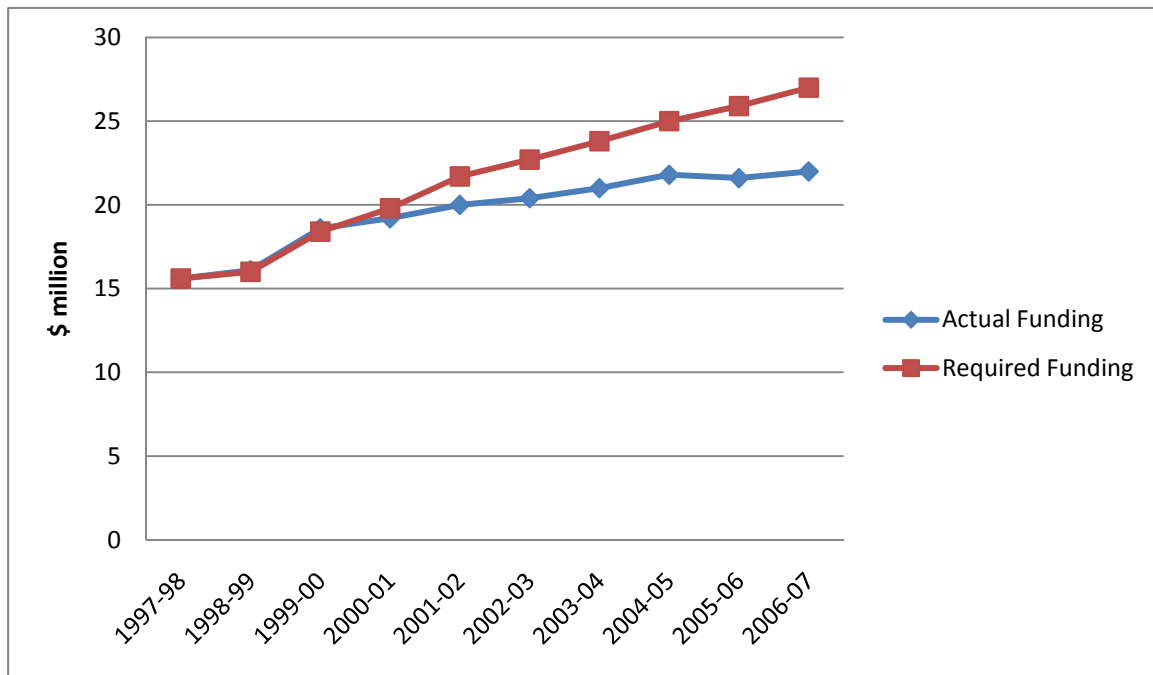
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35 SCALES Community Legal Centre, *Submission 39*, pp 4-5.

36 Letter National Association of Community Legal Centres to the Attorney-General, 11 January 2008, p. 2; Mr Gregor Husper, PILCH (Vic), *Committee Hansard*, Melbourne, 15 July 2009, p. 44; and Ms Julia Hall, NACLC, *Committee Hansard*, Sydney, 11 September 2009, p. 24.

37 Attorney-General's Department, Estimates Answer to Question on Notice No. 126 (27 May 2009); and Mr Peter Arnaudo, Assistant Secretary, AGD, *Committee Hansard*, Canberra, 27 October 2009, pp 46-47.

**Figure 7.4 – Actual and estimated community legal centre funding: 1996-2007**



Source: National Association of Community Legal Centres, *Community Legal Centres across Australia – An investment worth protecting*, Attachment, p. 2.

### ***Funding impacts on service delivery***

7.45 Evidence from CLCs confirmed that their funding is not sufficient to enable them to comprehensively deliver legal assistance to their clients. In 2007, the Australian Council of Social Services estimated that up to 72 per cent of people seeking assistance from not-for-profit community and welfare services are turned away 'because services are operating at maximum capacity and have to ration access in some way.'<sup>38</sup> Submitters and witnesses agreed that inadequate funding is affecting both the quantity, or extent, of services, and their quality.

7.46 The Hunter Community Legal Centre Inc., for example, told the committee that, as with all CLCs, it does not have sufficient funding to purchase a precedent data base, which would enable its legal practitioners to: expedite service delivery; more easily provide service in a wide-range of legal matters; and achieve output consistency among CLCs.<sup>39</sup>

38 Australian Council of Social Services Australian Community Sector, Survey Report 2007, p. 2.

39 Ms Liz Pinnock & Ms Margot McAlary, Hunter Community Legal Centre Inc., *Committee Hansard*, Canberra, 27 October 2009, pp 4-5.

7.47 Aside from legislation, regulations and case law, the Law Council noted that the current providers of set forms and draft documents are commercial operators, 'corporations who are generally legal publishers who are in this to make money':

The issue therefore of whether a licence could be obtained—because a lot of these services are online—by the national or state bodies for CLCs would be a matter that the Law Council would certainly support, no question about that. We would be happy to act in a liaison role, to see whether or not those publishers are prepared to provide those sorts of banks of precedents in a timely fashion and in a fashion where they can afford it.<sup>40</sup>

7.48 Licensing in the public interest was not explored in the department's evidence. Instead, the department suggested that representative CLC bodies use their purchasing power to negotiate software licensing for CLCs. It was not keen to undertake that role, nor did it envisage any easy way to provide suitable software for the entire range of highly diverse CLCs under the CLSP.<sup>41</sup>

7.49 The Refugee Advice + Casework Service told the committee that it has an extraordinary impact on the lives of people fleeing from persecution, but it operates on an annual budget of less than \$500 000. The service estimated that it requires an additional \$100 000 per year to cover core expenditure and continue processing asylum claims.<sup>42</sup>

7.50 Another example from the Suncoast Community Legal Service Inc. detailed a problem common to CLCs with large catchment areas:

Initially, the provision of community legal advice by the Service has been centralised in the business area of Maroochydore. Phone-out services were offered to those unable to attend in person for reasons of disability, child care or for those living in more remote areas. However, there are a number of recurrent criticisms of the phone out service including the effectiveness of the phone advice being given, accuracy and quality of advice given when lawyers are trying to assist with documents they do not have in front of them and professional indemnity insurance issues.<sup>43</sup>

7.51 In response to these difficulties, the Suncoast Community Legal Service Inc. established an outreach service in the Noosa/Tewantin area using core funding. It hypothesised that the subsequent client increase comprised people using the local and readily accessible outreach service who would 'previously have foregone seeking legal

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

41 Mr Matt Minogue, Assistant Secretary, AGD, *Committee Hansard*, Canberra, 27 October 2009, p. 44.

42 Refugee Advice + Casework Service, *Submission 64*, p. 1.

43 Suncoast Community Legal Service Inc., *Submission 46*, p. 2.



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advice, put off by the inconvenience of an hour round trip by car or more time if using public transport.<sup>44</sup>

7.52 In spite of this success, and further expansion of the outreach service, the Suncoast Community Legal Service Inc. submitted that 'real' access to justice would require more funding for employed solicitors to provide outreach services equivalent to the Maroochydhore services (longer appointments and limited casework):

It seems terribly unfair that those in more remote regions who have private transport are able to access the Maroochydhore service yet those that can't afford transport or are at some other disadvantage, miss out on these services, when they are often the ones that need it most...

The demand for services going beyond mere advice and referral has become increasingly obvious. While many clients benefit from simply being told what to do next, there is a large group for whom writing a letter, drafting a document or making approaches to another party for example, are actions quite beyond their capacity. Provision of more intensive legal services such as these are generally beyond what can be expected of volunteer lawyers and realistically require attention from a solicitor employed by the Service...It is clear that in order to provide any substantial such service to people who fall into the gap between Legal Aid funding and the private profession, dedicated case-work lawyers and additional administrative support for those positions are required.<sup>45</sup>

7.53 The 2003 Federal Justice System Strategy Paper acknowledged that:

A number of services have reduced the range of services delivered and hours of operation as a consequence of their financial difficulties. Reduction in services is often preferred by CLCs to closure. Accordingly, the number of closures is not indicative of the true financial difficulties being experienced in the sector. The loss or reduction in services provided by CLCs, particularly in regional and rural locations, may have a substantial impact on the people who are in need of those services. In many instances, the CLCs will be the only source of low cost legal services available in the area.<sup>46</sup>

7.54 At that time, the department recommended giving consideration to increasing the minimum level for the core operating funding of CLCs and bringing the least well

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44 Suncoast Community Legal Service Inc., *Submission 46*, pp 2-3; and Ms Liz Pinnock, Hunter Community Legal Centre Inc., *Committee Hansard*, Canberra, 27 October 2009, p. 6.

45 Suncoast Community Legal Service Inc., *Submission 46*, pp 4-5; National Pro Bono Resource Centre, *Submission 49*, p. 15; and Women's Legal Service (SA) Inc., *Submission 59*, p. 18.

46 Attorney-General's Department, 'Federal Civil Justice System Strategy Paper', December 2003, p. 106; and National Pro Bono Resource Centre, *Submission 49*, p. 15; SCALES Community Legal Centre, *Submission 39*, p. 8; and DLA Phillips Fox, *Submission 32*, pp 9-10.

resourced centres, mainly in regional areas, to the minimum base.<sup>47</sup> This recommendation does not appear to have been implemented.

7.55 On behalf of the sector, the NACLC summarised the general view that a lack of adequate funding (core or maintenance) curtails the efficient operation of CLCs and their ability to contribute to access to justice. It particularly identified the following adverse effects:

- loss, or compromised continuity of services available to socially and economically disadvantaged people;
- an increase in self-represented litigants before courts without the benefit of any advice;
- increased pressure on other parts of the legal system such as the courts and transfer of costs to other under resourced parts of the justice system already struggling to meet demand (Legal Aid, ALS and pro bono assistance from the private profession);
- transfer of costs to other social service providers as clients are forced to seek assistance from other agencies who are also unlikely to be able to assist clients with legal problems;
- likely reduction in support from volunteers and pro bono lawyers who are sensitive to changes in government policy, and generally support CLCs' charters of independence;
- a particular impact on clients in RRR areas as CLCs' outreach services risk becoming untenable on limited funds;
- personal costs and hardship to the individuals unable to receive assistance;
- reduced ability of CLCs to work as effectively or efficiently on collaborations with other service providers in the justice sector; and
- undermining of the community's confidence in the ability of the government to provide equitable access to the justice system generally.<sup>48</sup>

7.56 In its 2004 Report, the committee recommended that the Australian, state and territory governments provide additional funding to enable CLCs to overcome existing operational difficulties, such as inadequate premises, facilities and resources, and enable them to better plan for such requirements in the future.<sup>49</sup>

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47 Attorney-General's Department, 'Federal Civil Justice System Strategy Paper', December 2003, Recommendation 12, p. 106

48 National Association of Community Legal Centres, *Response to the internal review of the CLSP by the Commonwealth Attorney-General*, March 2007, p. 13; and SCALES Community Legal Centre, *Submission 39*, p. 8.

49 Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, Recommendation 62, p. xxxii.

7.57 This recommendation was not accepted by the Australian Government on the basis that its contribution to CLCs is indexed each year and 'the Government does not expect them to operate at a level outside their funding.'<sup>50</sup>

7.58 Evidence to the inquiry, together with evidence from the 2003-04 inquiry, overwhelmingly suggests however that CLCs need greater funding to provide minimum levels of access to justice.

7.59 The committee acknowledges this evidence, but notes that if CLCs are to receive increased funding, then their accountability and transparency requirements must be commensurately higher. The committee suggests, for example, that all publicly funded CLCs should report annually on measurable key performance indicators and benchmarks, and the department should investigate additional measures in its on-going consultation and review. Subject to this suggestion, the committee endorses Recommendation 62 of its 2004 Report (now labelled Recommendation 23).

### **Recommendation 23**

**7.60 Subject to increased accountability and transparency requirements, including measurable key performance indicators and benchmarks, the committee recommends that the federal, state and territory governments increase the level of funding for community legal centres with a view to sufficiently resourcing this sector of the legal aid system to meet the needs of the Australian people.**

7.61 The committee also acknowledges recent funding proposals from the NACLC, and its recent baseline funding calculations. The committee cannot say whether these estimates are reasonable given the lack of data regarding legal needs and the diverse range of CLCs throughout Australia.<sup>51</sup>

7.62 The committee accepts however that individual CLCs have particular resource needs. In view of Recommendations 2 and 3, the committee agrees in principle only with Recommendation 59 of its 2004 Report. The committee considers 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.

### **Recommendation 24**

**7.63 In conjunction with Recommendation 22, the committee recommends that the Australian Government reconsider the eligibility criteria of the Community Legal Services Program with a view to allowing for the admission of suitable community legal centres throughout Australia.**

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50 Government Response, *Senate Hansard*, 7 February 2006, p. 83.

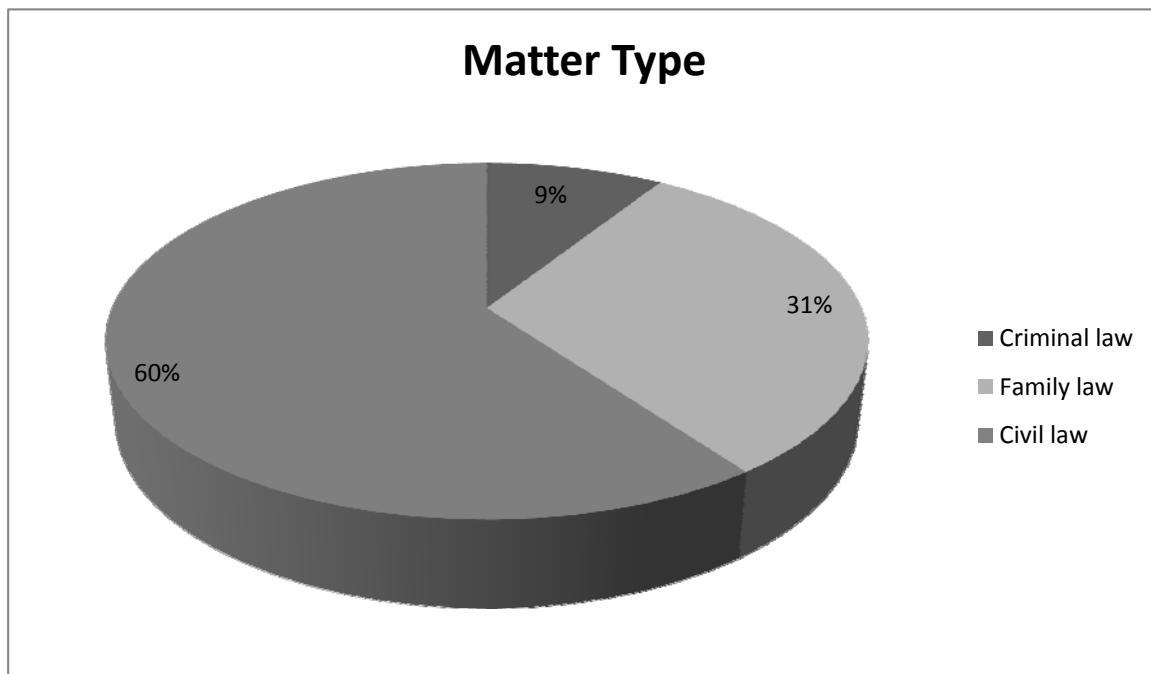
51 Mr Mathew Tinkler, Pilch (Vic), *Committee Hansard*, Melbourne, 15 July 2009, p. 38.

**Civil law matters**

7.64 In addition to general concerns, submissions and evidence highlighted the need for extra funding in particular areas (such as: community legal education; advocacy; and law reform projects).<sup>52</sup> Civil law matters also elicited particular comment, with submissions and evidence calling for more funding in this high needs area not covered by Legal Aid Commissions (LACs).

7.65 Graphs 7.1 and 7.2 below show the proportionate areas of legal need experienced by CLC clients in 2007-08 and 2008-09, respectively. Allowing for minor fluctuations over this period, civil law matters comprise a significant proportion of the legal work undertaken by CLCs.

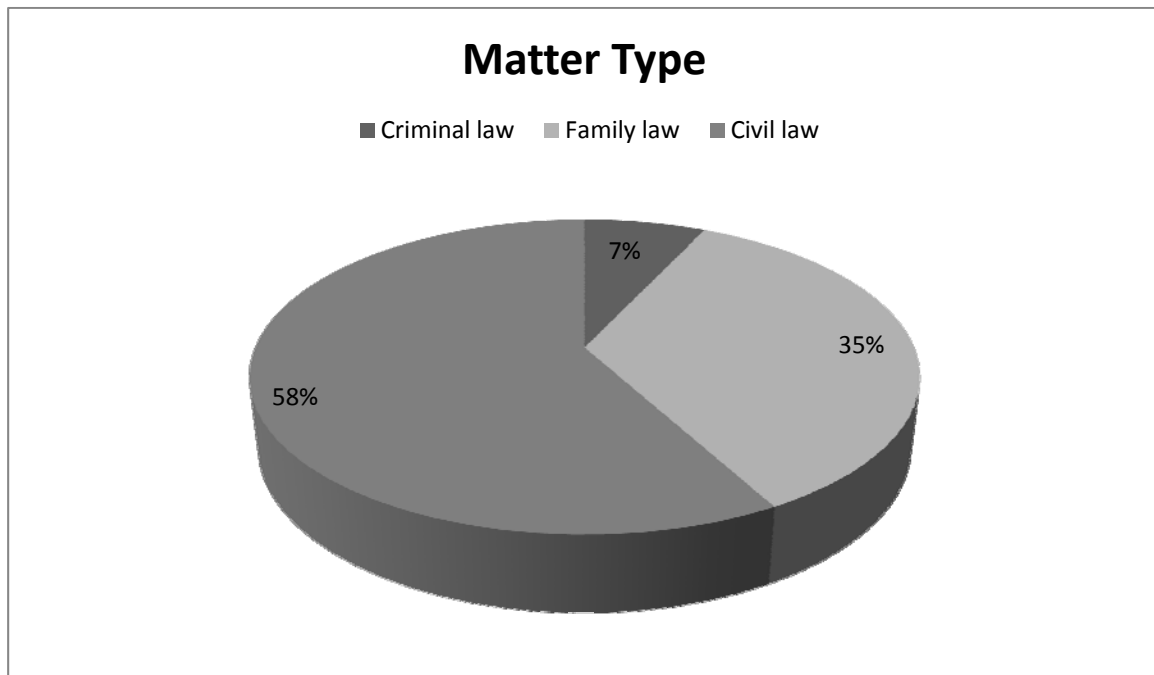
**Graph 7.1 – Community legal centre legal needs: 2007-2008**



Source: National Association of Community Legal Centres, Annual Report 2007-08, p. 11.

52 PILCH, *Submission 33*, p. 53; PIAC, *Submission 50*, p. 4; and Australian Lawyers for Human Rights, *Submission 43*, p. 9.

## Graph 7.2 – Community legal centre client needs: 2008-2009



Source: National Association of Community Legal Centres, Answer to Question on Notice (11 September 2009)

7.66 The Public Interest Law Clearing House (PILCH) told the committee:

Civil law...constitutes the greatest area of unmet need in legal aid funding, and similarly CLC service delivery capacity. Inadequate support for civil law matters removes access to justice for many people facing issues as diverse as Mental Health Review Board meetings, personal injuries, tenancy, contract law, social security and motor vehicle accidents.<sup>53</sup>

7.67 In 2003-04, the committee considered it important for CLCs to be properly funded, enabling them to provide services responsive to community need, and the committee continues to agree with this view. Civil law matters appear to be one such area of need however the committee questions whether CLCs are being adequately funded to meet this need, particularly in light of the global financial crisis and a lack of coverage by LACs.

7.68 In its 2004 Report, the committee warned:

It is imperative that the Commonwealth and state/territory governments acknowledge existing shortfalls in funding and accept that a continuing deterioration in circumstances will inevitably lead to a severe crisis for CLCs.<sup>54</sup>

53 PILCH, *Submission 33*, p. 51.

54 Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, p. 217.

7.69 The committee made a number of targeted recommendations, including that:

The Commonwealth Government should take a lead role in recognising and overcoming the diminishing capacity of community legal centres by, for example, providing increased levels of funding to enable community legal centres to better perform their core functions, and establishing new community legal centres to ease some of the burden on existing community legal centres and to address unmet legal need.<sup>55</sup>

7.70 This recommendation was not accepted by the Australian Government, which responded as it did to Recommendation 62 (CLC funding is annually indexed and CLCs are to operate within budget).<sup>56</sup> To some extent, Recommendations 60 and 62 of the 2004 Report overlap. For that reason, the committee does not reiterate the former recommendation, instead encouraging the Australian Government to take a lead role in recognising and meaningfully responding to the diminishing capacity of community legal centres to meet the needs of the Australian people.

7.71 Five years ago, the committee did not make any recommendations regarding a CLC civil law program. While evidence to the inquiry suggested a strong need for a national civil law program, the committee considers that providing such a program within the legal aid sector might account for this need in the CLC sector of the legal aid system. In view of Recommendation 8, the committee therefore declines to make any further recommendations in this regard.

### **Recruitment and retention issues**

7.72 Chapter 2 identified access to legal representation as a problem affecting disadvantaged people with legal needs, particularly those people living in RRR areas. For the 44 CLCs located in RRR areas, recruitment and retention of legal practitioners hinders their ability to facilitate access to justice, a situation experienced by all legal service providers in such areas.

7.73 Submissions and evidence to the inquiry expounded on CLCs' recruitment and retention difficulties, with most explaining the difficulty and its consequent solution as a funding issue.

7.74 DLA Phillips Fox explained that almost all CLC funding is used to employ staff, and funding reductions therefore affect either staffing levels or salary levels. In practice, management committees almost universally sacrifice salary levels to maintain services.<sup>57</sup>

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55 Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, Recommendation 60, p. xxxi.

56 Government Response, *Senate Hansard*, 7 February 2009, p. 83.

57 DLA Phillips Fox, *Submission 32*, p. 11.

7.75 According to Gilbert & Tobin, the result of this sacrifice is that:

Community Legal Centres' salaries have not kept pace with salary growth within the Legal Aid Commission or the private legal sector. While there are notable exceptions of dedicated and experienced legal centre staff who have worked in the sector long term, generally there is high turnover and difficulty in attracting new staff and retaining that staff on the salaries offered.<sup>58</sup>

7.76 The Women's Legal Service (SA) Inc. agreed with this assessment:

Many CLCs such as WLSSA are unable to pay remuneration that is commensurate with Legal Aid practitioners, ATSILS practitioners, or government legal officers. In the 2004 to 2007 period the average wage for CLC employed principal solicitors with more than five years experience was less than \$50,000.00.<sup>59</sup>

7.77 The Refugee Advice + Casework Service testified that its:

...small team of dedicated caseworkers/lawyers receive very low wages given their qualifications, even for the already low-paid CLC sector. Working with clients who have often experienced trauma is stressful enough, yet RACS employees must take on very high (and unsustainable) case loads to fund core operating costs. The result is more pressure on low-paid and over-worked employees.<sup>60</sup>

7.78 The committee heard that one-off funding injections have been used to alleviate the problem, but note that this is a short-term solution only. The Women's Legal Centre (ACT and Region) Inc. provided the following illustration:

For the 2008-2009 financial year, the Centre was able to offer staff bonus monthly payments, so that their overall remuneration packages were level with salaries paid by the ACT Government...The reason that the Centre was able to (in effect) raise staff salaries (by way of a fortnightly bonus payment over the course of the 2008-2009 financial year) was because of to [sic] the Federal Government's one off funding payment to Community Legal Centres made in April 2008. Unless appropriate ongoing funding is forthcoming, the Centre will have to revert to its existing base salaries for staff. These salaries are becoming increasingly unworkable and unfair.<sup>61</sup>

7.79 As with pro bono legal assistance, submissions evinced strong disapproval for the long-term maintenance of survival strategies which rely on legal practitioners' goodwill, and governments' apparent unwillingness to provide adequate CLC funding.

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58 Gilbert & Tobin, *Submission 45*, p. 8.

59 Women's Legal Service (SA) Inc., *Submission 59*, p. 18.

60 Refugee Advice + Casework Service, *Submission 64*, p. 1.

61 Women's Legal Centre (ACT and Region), *Submission 51*, p. 14; and Ms Liz Pinnock, Hunter Community Legal Centre Inc., *Committee Hansard*, Canberra, 27 October 2009, p. 8.

7.80 The NACLC, for example, submitted:

It is not appropriate for the Australian or State Governments to rely on the self sacrifice of community sector workers to achieve the outcomes the Australian Government asserts are essential to its social inclusion program and a fair and just society. In any event...the degree of disparity in remuneration has become so severe in some areas that recruitment and retention have become impossible or very difficult, severely adversely affecting service delivery.<sup>62</sup>

7.81 Taking up this theme, DLA Phillips Fox elaborated on how low salary levels directly impact on staff turnover, and in turn, impact on CLCs and their ability to achieve and maintain service levels:

The calibre of staff that legal centres can attract is perhaps the most obvious risk associated with the payment of low salaries. With salary levels for legal staff slipping to 70% of equivalent APS salaries, it is impossible to ignore the impact of low salaries on the ongoing ability of the sector to attract and retain qualified, experienced staff.

With the salaries of Principal Solicitors and Managers at CLCs at about 50% of salaries paid at the equivalent level in comparable positions, the Community Legal Sector's ongoing ability to recruit capable, competent individuals to effectively manage CLCs must also be seriously compromised.<sup>63</sup>

7.82 Similarly, Gilbert & Tobin submitted:

Centres with high staff turnover are forced to dedicate increased time to recruitment, file handover and staff training on induction at the cost of service delivery. "Organisational knowledge" is lost and so are client relationships. As a consequence staff can be limited in their capacity to run cases particularly test and public interest cases.<sup>64</sup>

7.83 PILCH submitted that, in addition to remuneration, CLC employment conditions lag behind those of their public and private counterparts, 'deficiencies' which fail to reward the service offered by CLC staff and which are a structural risk to the sector:

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62 National Association of Community Legal Centres, *Submission 1*, p. 7; Combined Community Legal Centres' Group NSW (Inc), *Submission 44*, pp 7-8; DLA Phillips Fox, *Submission 32*, p. 12; and National Pro Bono Resource Centre, *Submission 49*, p. 15.

63 DLA Phillips Fox, *Submission 32*, pp 11-12.

64 Gilbert & Tobin, *Submission 45*, p. 6.



PILCH recommends an independent review of the salaries and conditions for CLC workers, with a comparative study of those in comparable international regimes, and looking at retention rates, career paths, flexible secondment arrangements across government, the private legal sector and CLCs.<sup>65</sup>

7.84 In 2006, Mercer Human Resource Consulting reviewed a selection of CLC positions on behalf of the NACLC (Mercer Report). The Mercer Report found that CLC award-based remuneration levels did not compare favourably with equivalent salary scales in the federal and NSW public sectors (being 29-38 per cent lower). It considered competitive a range of plus or minus 15 per cent around the target marker.<sup>66</sup>

7.85 Two years earlier, the committee had considered the issue of CLC remuneration, recommending that:

The Commonwealth Government and state/territory governments should provide additional funding to enable community legal centres to recruit, train and retain staff, through adequate remuneration, skill development programs and improved employment conditions.<sup>67</sup>

7.86 The committee notes that this recommendation is supported by the evidence received during this inquiry. However, it overlaps with Recommendation 23, and accordingly, while the committee agrees in principle with Recommendation 61, there is no need for its reiteration.

7.87 As noted in Chapter 2, and mentioned above, CLCs' recruitment and retention difficulties are partially due also to RRR issues. The Federation of Community Legal Centres advised the committee that it proposes to create a CLC graduate program whereby law graduates are temporarily sponsored to practise in RRR areas.<sup>68</sup> The committee considers such a program to be a valuable extension of the clinical legal education programs discussed in Chapter 6, and a program which could encourage law graduates to more favourably view practise in non-urban areas.

## **Recommendation 25**

**7.88 The committee recommends that the Australian Government provide the Federation of Community Legal Centres with some funding support for its proposed Community Legal Centre Graduate program and that future Community Legal Centre graduate schemes be similarly supported.**

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65 PILCH, *Submission 33*, p. 50; and Also, see Australian Network of Environmental Defender's Offices, *Submission 29*, p. 14.

66 National Association of Community Legal Centres, *Submission 1*, p. 7 and Attachment 8, p. 14.

67 Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, Recommendation 61, p. xxxi-xxxii.

68 Federation of Community Legal Centres, Additional Information, 21 August 2009, p. 1.



# CHAPTER 8

## The ability of Indigenous people to access justice

8.1 This chapter discusses evidence presented to the inquiry regarding term of reference (f), the ability of Indigenous peoples to access justice. In general, submitters and witnesses argued that Indigenous legal services do not appropriately and adequately cater to the needs of Indigenous people, particularly women. The topics covered in this chapter include:

- an appropriate legal assistance service;
- Indigenous legal services;
- the Legal Aid for Indigenous Australians program funding;
- the adequacy of funding;
- the Family Violence Prevention Legal Services program; and
- the Indigenous Law and Justice Framework.

### An appropriate legal assistance service

8.2 Indigenous peoples remain the most socially and economically disadvantaged members of the Australian community. Submissions and testimony highlighted broad and numerous legal needs which, they argued, could only be addressed by access to appropriate legal advice and representation, that is, a high quality and culturally sensitive legal assistance service.<sup>1</sup>

8.3 The National Pro Bono Resource Centre (NPBRC) told the committee:

Research indicates that Indigenous Australians rely on [Indigenous legal offices] and are relatively less likely to seek help from mainstream providers due to a distrust of the legal system, language barriers and a perceived lack of cultural awareness among mainstream legal service providers.<sup>2</sup>

8.4 In 2009, it is widely acknowledged that a specialist Indigenous legal service is the preferred and most culturally appropriate means of providing legal assistance to Indigenous people.<sup>3</sup>

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1 Aboriginal Legal Service (NSW/ACT) Limited, *Submission 21*, p. 1; National Legal Aid, *Submission 34*, p. 32; Law Institute of Victoria, *Submission 11*, p. 8; and Prof. Chris Cunneen and Melanie Schwartz, *Submission 69*

2 National Pro Bono Resource Centre, *Submission 49*, p. 15; and Women's Legal Centre (ACT and Region), *Submission 51*, p. 9.

3 Law Council of Australia, *Submission 12*, p. 24.

## Indigenous legal services

8.5 At the federal level, the Attorney-General's Department (department) is responsible for delivering the specialist Indigenous legal service. This presently comprises four Indigenous law and justice programs:

- a national program of legal assistance for Indigenous people, the Legal Aid for Indigenous Australians (LEGA) program;
- the Law and Justice Advocacy Development Program;
- the Prevention, Diversion and Rehabilitation and Restorative Justice Program; and
- the Family Violence Prevention Legal Services (FVPLS) program, the first and last of which are discussed in this report.

8.6 Since July 2005, legal assistance services under the LEGA program have been contracted via a competitive tendering process. There is a network of eight service providers throughout the states/territories, the Aboriginal Torres Strait Islanders Legal Services (ATSILS), delivering legal assistance services to over 84 permanent sites, court circuits and outreach locations in urban, and rural, regional and remote (RRR), areas of Australia.

8.7 The department has contracted until 30 June 2011 the following ATSILS to deliver legal assistance services to Indigenous people in their state/zones:

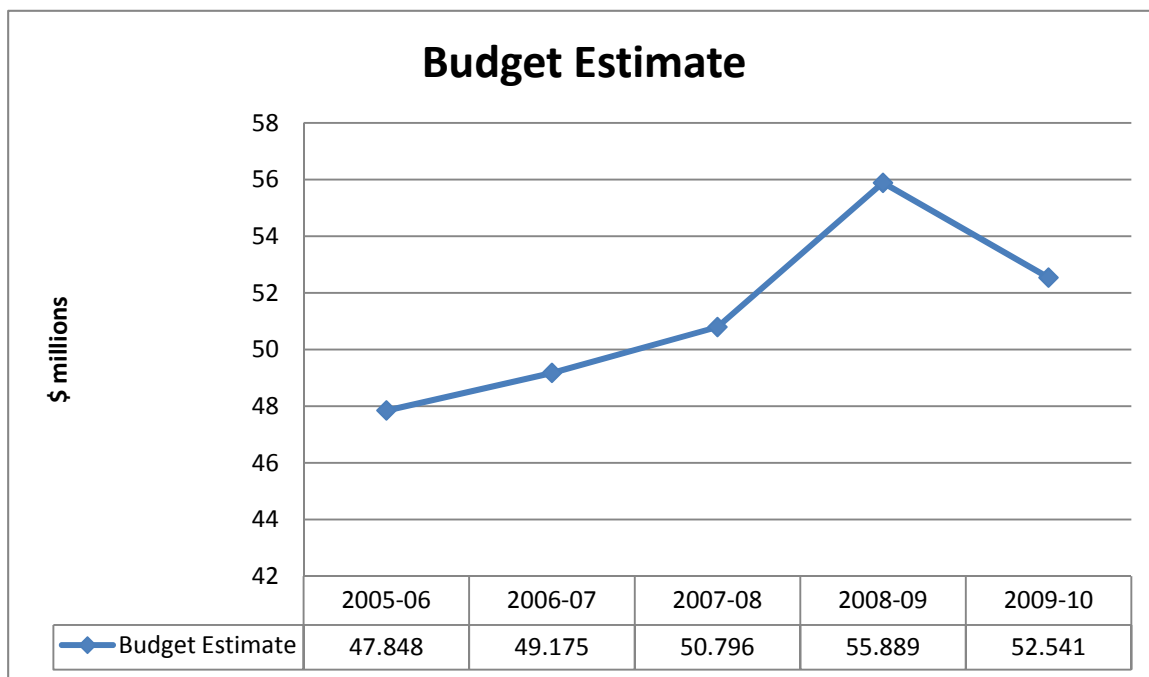
- New South Wales (including the Australian Capital Territory and Jervis Bay Territory) – Aboriginal Legal Service (NSW/ACT) Limited
- Victoria – Victorian Aboriginal Legal Service Co-operative Limited
- Queensland North and South Zone – Aboriginal and Torres Strait Islander Legal Services (Qld) Limited
- Western Australia – Aboriginal Legal Service of Western Australia Incorporated
- South Australia – Aboriginal Legal Rights Movement Incorporated
- Tasmania – Tasmanian Aboriginal Centre Incorporated
- Northern Territory North Zone – North Australian Aboriginal Justice Agency Limited
- Northern Territory South Zone – Central Australian Aboriginal Legal Aid Service Incorporated<sup>4</sup>

8.8 In 2003-04, the committee received much evidence concerning the LEGA program competitive tendering process.<sup>5</sup> Those concerns were not repeated to this inquiry. Instead, submissions and evidence focussed upon other issues, such as: funding for the LEGA program; and funding impacts on ATSILS' service levels.

### The Legal Aid for Indigenous Australians program funding

8.9 Figure 8.1 below shows Australian Government funding for the LEGA program from 2005 to 2010. In general, the funding increased over the past five years, except for an approximate 6 per cent decrease in funding for the current financial year. The Budget 2009-10 foreshadows decreased funding for the next three financial years.<sup>6</sup>

**Figure 8.1 – Legal Aid for Indigenous Australians program funding: 2005-2010**



Source: Attorney-General's Department, *Portfolio Budget Statements, 2005-10*

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

6 Attorney-General's Department, *Portfolio Budget Statement 2009-10*, p. 30.

8.10 In addition to core funding for the LEGA program, the Australian Government made a number of one-off funding injections for Indigenous legal services in 2007-09. In 2007-08, for example, a one-off injection of \$13.215 million was made to address the increasing need of Indigenous peoples for criminal, civil and family law legal assistance services.<sup>7</sup>

### **The adequacy of funding**

8.11 As discussed in Chapters 3 and 7, the ability of legal aid commissions (LACs) and community legal centres (CLCs) to effectively provide core services is constrained by funding considerations. Indigenous legal service providers fared no better, with submissions and testimony reiterating the concerns of their mainstream counterparts.

### ***Real funding***

8.12 In essence, evidence to the inquiry stated that Australian Government funding under the LEGA program has declined since the introduction of the Commonwealth Legal Aid Priorities and Guidelines. According to submitters and witnesses, this has, in turn, adversely affected the ability of Indigenous people to access justice, with ATSILS experiencing significant funding difficulties.

8.13 According to the Public Interest Advocacy Centre (PIAC),  
ATSILS struggle to adequately meet the demands for their service as a consequence of inadequate funding arrangements.<sup>8</sup>

8.14 The Aboriginal Legal Service of Western Australia concurred, telling the committee:

ATSILS made submissions to [the 2003-04 inquiry] and the main issue being lack of funding has not changed. In our view the funding provided is now even more inadequate due to the increase in the demand for Indigenous legal services. The funding has not increased to meet ALSWA's additional operational expenses of running existing services or to meet the increase in demand for services. The need for additional funding for ATSILS is critical and should be one of the highest priorities for the Australian Government.<sup>9</sup>

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7 Attorney-General's Department, Annual Report 2007-08, p. 85; Attorney-General's Department, *Submission 54*, p. 7; The Hon. Robert McClelland MP, Attorney-General, 'Additional funding for Aboriginal legal services', Media Release, 18 April 2008; The Hon. Robert McClelland MP, Attorney-General, 'Funding for Legal Assistance Services', Media Release, 9 May 2009; and The Hon. Robert McClelland MP, Attorney-General, 'Additional \$6 million for legal assistance services', Media Release, 30 June 2009

8 PIAC, *Submission 50*, p. 13.

9 Aboriginal Legal Service of Western Australia, *Submission 62*, p. 3; and Australian Human Rights Commission, *Submission 70*, p. 7.

8.15 In South Australia, the Aboriginal Legal Rights Movement Inc. advised its frustration with the 'gross under-funding' of Indigenous legal services:

Since 1996 ALRM's legal aid funding for advice and representation has been static. Here it is in 2009 and I continue to operate on 1996 dollars. This is in excess of a 40% reduction in funding in real terms for that period, and when compared to mainstream legal aid in SA which has increased in actual dollars by over 120%.<sup>10</sup>

8.16 In the Northern Territory, the North Australian Aboriginal Justice Agency (NAAJA) receives no funding from the territory government on the basis that Indigenous people are a Commonwealth responsibility. No allowance is made for criminal law matters arising under territory law, despite such matters constituting 95 per cent of NAAJA's criminal work:

The Northern Territory government would see their providing us with any funding as the thin edge of the wedge, so to speak – that the Commonwealth would reduce their [sic] funding accordingly.<sup>11</sup>

8.17 The department acknowledged that this situation does occur, but due to inter-related responsibilities, the Australian Government is exploring a more collaborative approach to funding (and other) issues:

States and territories make very little contribution, if any, to [Indigenous legal aid]. A large proportion of the work provided by Indigenous legal aid services is in the criminal law area, particularly state and territory crime. Issues such as more court circuits or changes in criminal law policies or procedures have a direct impact on the supply and the demand for those legal services as well. That is something we are exploring with the states and territories as well, in seeking further funding for those services.<sup>12</sup>

8.18 NAAJA's submission provided a useful examination of its contractual funding arrangements with the Australian Government. The contract contains the following increases in budget allocations over and above the base 2007-08 allocation:

- 2008-09 1.08 per cent
- 2009-10 1.09 per cent
- 2010-11 3.40 per cent<sup>13</sup>

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10 Aboriginal Legal Rights Movement Inc., *Submission 61*, p. 1.

11 Mr Julian Johnson & Ms Priscilla Collins, North Australian Aboriginal Justice Agency, *Committee Hansard*, Perth, 13 July 2009, pp 29 & 32.

12 Mr Peter Arnaudo, Assistant Secretary, AGD, *Committee Hansard*, Canberra, 27 October 2009, p. 51.

13 North Australian Aboriginal Justice Agency, *Submission 6*, pp 3-4.

8.19 NAAJA told the committee that these allocations do not incorporate basic CPI increases (3 per cent), and consequently, its 2008-11 budget has the following shortfalls in real funding: \$239 517 in 2008-09; \$369 390 in 2009-10; and \$391 735 in 2010-11:

Despite some funding increases which are welcome...our core funding which gives us the basics to get out there and, certainly on the criminal side, deal with an ever increasing raft of charges against our clients, is not increasing and it is getting harder and harder to do the work.<sup>14</sup>

8.20 In Western Australia, the Australian Government exclusively funds the Aboriginal Legal Service of WA however at the Perth public hearing, the committee heard that that funding has limited capacity to provide access to justice:

We do not receive one cent from the state government. That means that our capacity to provide legal assistance to the Aboriginal community, especially in regional and remote areas, in non-criminal areas, in areas such as Centrelink, employment law, discrimination, guardianship, probate and family law, is very limited indeed simply because we are not provided with enough money to be able to provide those services.<sup>15</sup>

8.21 The Aboriginal Legal Service of WA, like most ATSILS, necessarily prioritises criminal law matters, which comprise approximately 80 to 90 per cent of its work load. It indicated that its workload is just manageable due to: informal agreements between legal assistance service providers in RRR areas regarding who will handle which circuits; and the use of Indigenous court officers.

8.22 Indigenous court officers appear in court as advocates on behalf of Indigenous clients. According to the Aboriginal Legal Service of Western Australia, this service provides accessible legal representation to Indigenous people, and is a strategy which could be more highly utilised to ensure greater access to justice:

We love our court officers; they are a tremendous addition to our service. And we are the only state or territory which has court officers who can actually do representation. But, as an Aboriginal man, I kind of feel, 'Are our people really getting a good deal here when we have got paraprofessionals doing some very serious matters?' There could be a rationalisation.<sup>16</sup>

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14 Mr Glen Dooley, North Australian Aboriginal Justice Agency, *Committee Hansard*, Perth, 13 July 2009, p. 29.

15 Mr Peter Collins, Aboriginal Legal Services of WA, *Committee Hansard*, Perth, 13 July 2009, p. 36.

16 Mr Dennis Eggington, Aboriginal Legal Services of WA, *Committee Hansard*, Perth, 13 July 2009, pp 38 & 48; and Aboriginal Legal Service of Western Australia, *Submission 62*, pp 3-4.



8.23 In its submission, the Aboriginal Legal Service (NSW/ACT) also questioned whether Indigenous people are being provided with a second-rate service due to inadequate funding of the ATSILS. In its view, the under-funding has an ulterior agenda – to force Indigenous people to use mainstream legal assistance services:

The ALS (NSW/ACT) is perplexed by repeated assurances that it is not the Attorney-General Department's intention either to impair the ALS's continuing capability to provide a high quality and culturally sensitive legal service or to force Aboriginal people into relying on mainstream-less culturally appropriate legal services.

Yet each will be the result of what has been, effectively, a reduction in funding levels, together with a consequent loss of confidence by Aboriginal people in the commitment of the Australian government to improve access to justice for Aboriginal communities.<sup>17</sup>

8.24 The preponderance of evidence to the committee indicates that, for whatever reason, ATSILS across the country are not fully funded. The committee is concerned that, as a result, Indigenous peoples' access to justice might be impaired.

8.25 The committee notes that, to date, the Australian Government solely funds ATSILS, and that funding under the LEGA program is currently declining. The committee is concerned with the decline in funding, particularly in view of the increased Indigenous population, the average age of the Indigenous population, and the increasing rates of incarceration for Indigenous people.

8.26 Furthermore, given that Indigenous peoples' legal needs arise under federal, state and territory law, the committee considers that all governments should be financially contributing to the provision of Indigenous legal services.

### **Recommendation 26**

**8.27 The committee recommends that the federal, state and territory governments inquire into and report on joint funding for the Legal Aid for Indigenous Australians program and related services with a view to more equitably apportioning financial responsibility for Indigenous legal services funding.**

### ***Comparisons with mainstream funding***

8.28 As discussed in Chapter 7, submissions and testimony argued that one-off funding injections are no substitute for the provision of adequate core funding, and evidence under term of reference (g) echoed these arguments in relation to ATSILS.<sup>18</sup>

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17 Aboriginal Legal Service (NSW/ACT) Limited, *Submission 21*, p. 2.

18 For example, Aboriginal Legal Service of Western Australia, *Submission 62*, p. 6; Aboriginal Legal Service (NSW/ACT) Limited, *Submission 21*, p. 2; North Australian Aboriginal Justice Agency, *Submission 6*, p. 4; Aboriginal Family Violence Prevention & Legal Service Victoria, *Submission 38*, p. 11; and PIAC, *Submission 50*, p. 11.

However, submitters and witnesses expressed more concern with the apparent disparity between mainstream and ATSILS funding.

8.29 Table 8.1 below compares 2006-07 Australian Government funding levels for LACs, CLCs, ATSILS and FVPLS. In general, most funding was provided under the Legal Aid Program (LAP) (60.42 per cent), followed by the LEGA program (19.66 per cent), then the Community Legal Services Program (CLSP) (9.04 per cent), and finally, the FVPLS program (4.61 per cent).

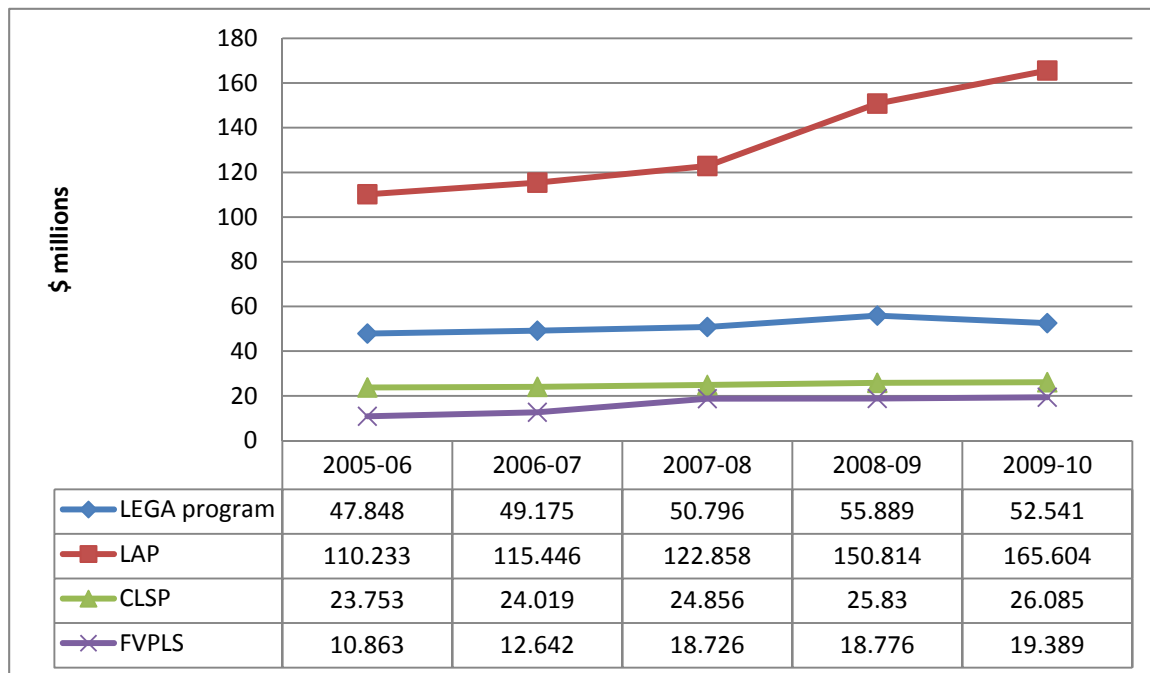
**Table 8.1 – Comparative funding levels (in '000 dollars rounded) across comparable Attorney-General's Department programs 2006-07**

State	CLSP	% of total funding	LAP	% of total funding	LEGA	% of total funding	FVPLS	% of total funding	Total funding
NSW	5 320	7.59%	45 802	65.41%	12 664	18.08%	2 201	3.14%	70 026
VIC	4 713	10.26%	30 616	66.68%	2 809	6.12%	873	1.90%	45 916
QLD	3 362	6.40%	32 071	61.06%	12 325	23.47%	2 169	4.13%	52 522
WA	3 302	12%	13 862	46.58%	8 811	29.61%	2 755	9.26%	29 758
SA	2 910	13.43%	13 360	61.64%	3 627	16.74%	963	4.44%	21 673
TAS	1 034	13.91%	4 999	67.26%	1 399	18.82%	Nil	Nil	7 432
ACT	519	11.78%	3 887	88.24%	Nil	Nil	Nil	Nil	4 405
NT	987	7.43%	3 428	25.81%	6 536	49.22%	2 330	17.55%	13 280
Total	22 149	9.04%	148 025	60.42%	48 181	19.66%	11 291	4.61%	245 012

*Source: Attorney-General's Department, Review of the Commonwealth Community Legal Services Program, March 2008, p. 44.*

8.30 Figure 8.2 below depicts how Australian Government funding levels for LACs, CLCs, ATSILS and FVPLS have changed from 2005 to 2010.

**Figure 8.2 – Comparative funding levels for comparable Attorney-General's Department programs: 2005-2010**



Source: Attorney-General's Department, *Portfolio Budget Statements, 2005-10*

8.31 Figure 8.2 shows that: LAP funding increased by approximately 50.23 per cent over the past five years; CLSP funding increased by approximately 9.81 per cent over the past five years; and LEGA program funding for the same period also increased by approximately 9.81 per cent.

8.32 The Law Council of Australia (Law Council) told the committee that ATSILS are the most under-funded sector of all legal assistance service providers, with a 40 per cent decrease in real funding since 1997. That figure does not take into account unmet and increased need. In 2003, the Australian Human Rights Commission (AHRC) understood the shortfall in ATSILS funding to be approximately \$25.6 million per year.<sup>19</sup>

8.33 In addition, submissions highlighted additional factors which complicate the delivery of legal services to Indigenous peoples, and must be taken into consideration in funding proposals and allocations. NAAJA, for example, submitted that:

The provision of legal advice, education and advocacy “to communities organised according to traditional customs can be complex and far more time consuming than comparable work in non-Indigenous communities”. In our experience, this is eminently the case. Many NAAJA clients live in communities with strong adherence to traditional law and customs. For the majority of our clients, the operation of the mainstream legal system is

<sup>19</sup> Law Council of Australia, *Submission 12*, pp 24-25; and Mr Darren Dick, AHRC, *Committee Hansard*, Canberra, 27 October 2009, p. 15.

totally foreign and fundamental legal concepts such as “guilty” and “not guilty” are poorly understood.<sup>20</sup>

8.34 In its submission, NAAJA provided a useful, practical comparison of a few of its budgeted expenses for 2007-08, as compared with those of the Northern Territory LAC:

- brief out budgets: \$85 000 for criminal matters and \$30 000 for civil/family matters (cf. \$1 593 043 for the Northern Territory LAC, including external disbursements); and
- client expenses: \$128 421 (cf. \$646 520 for the Northern Territory LAC, including in-house disbursements).<sup>21</sup>

8.35 Professor Chris Cunneen and Melanie Schwartz also provided detailed budget comparisons:

The authors were provided with data from the North Australian Aboriginal Justice Agency (NAAJA) comparing funding between that organisation and the Northern Territory Legal Aid Commission (NTLAC). A comparison between figures for the NTLAC 2005-6 and NAAJA 2006-7 show that the NTLAC budget is \$7,665,489 compared to the NAAJA budget of \$4,822,612. **Thus NTLAC has a 59% greater budget than NAAJA.**<sup>22</sup>

8.36 The AHRC noted that this was:

...despite NAAJA undertaking three times as many criminal matters, as well as a greater total number of criminal, civil and family law matters combined.<sup>23</sup>

8.37 Broadly speaking, the Aboriginal Legal Service of Western Australia gave evidence that the disparity between ATSILS' and LACs' resources is an 'obvious and shameful disparity that must be urgently addressed by the Commonwealth if it is genuinely committed to ensuring access to legal services to Indigenous people.'<sup>24</sup>

8.38 The Law Council called for a funding injection to enable ATSILS to provide a high quality and professional level of legal representation for Indigenous peoples:

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20 North Australian Aboriginal Justice Agency, *Submission 6*, pp 4 & 10; and Aboriginal Legal Service of Western Australia, *Submission 62*, p. 8.

21 North Australian Aboriginal Justice Agency, *Submission 6*, pp 6-7.

22 Prof. Chris Cunneen and Melanie Schwartz, *Submission 69*, p. 13.

23 Australian Human Rights Commission, *Submission 70*, p. 7.

24 Aboriginal Legal Service of Western Australia, *Submission 62*, p. 8; Australian Human Rights Commission, *Submission 70*, p. 3; and PIAC, *Submission 50*, p. 14.

The justice system will continue to fail Indigenous peoples unless the most likely and effective means by which Indigenous Australians are able to receive legal services are adequately funded.<sup>25</sup>

8.39 In the 2003-04 inquiry, the committee expressed grave concern at the evidence it received regarding overwhelming deficiencies in Indigenous legal services, particularly in RRR areas. The committee made Recommendation 27, that:

The Commonwealth Government should urgently increase the level of funding to Indigenous legal services in order to promote access to justice for Indigenous people. In doing so, the Government must factor issues of language, culture, literacy, remoteness and incarceration rates into the cost of service delivery.<sup>26</sup>

8.40 In 2006, the Australian Government responded that its new funding allocation model would allocate funds on the basis of 'relative need'. The response also cited increased funding for the FVPLS program as evidence of the government's commitment to improving Indigenous peoples' access to justice.<sup>27</sup>

8.41 Evidence to the committee clearly states that Indigenous legal services remain significantly under-funded, a view which the committee accepts, and with respect, the government's 2006 response entirely overlooks the substance of the committee's earlier recommendation.

8.42 The committee continues to agree that Indigenous legal services are not adequately funded, impacting on Indigenous people's access to justice. The committee therefore reiterates *with emphasis* Recommendation 27 of its 2004 Report (now also re-labelled Recommendation 27).

### **Recommendation 27**

**8.43 The committee recommends that the Australian Government increase the level of funding for Indigenous legal services with a view to sufficiently resourcing this sector of the legal aid system to meet the needs of Indigenous peoples, including appropriate loadings for extra service delivery costs.**

### ***Family and civil law matters***

8.44 As discussed in Chapters 3 and 7, family and civil law matters are two areas of law which contributors to the inquiry argued are not sufficiently covered by the LAP or the CLSP. Submissions and testimony in relation to ATSILS echoed these concerns.

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25 Law Council of Australia, *Submission 12*, p. 25; National Legal Aid, *Submission 34*, p. 2; and Law Institute of Victoria, *Submission 11*, p. 8.

26 Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, Recommendation 27, pp xxvi-xxvii.

27 Government Response, *Senate Hansard*, 7 February 2006, p. 73.

8.45 National Legal Aid (NLA), for example, submitted that Indigenous legal services have never been sufficiently funded to establish a family or civil law practice, meaning that these needs must either be met by mainstream legal assistance services, are otherwise neglected; or result in self-representation in the court system.

8.46 NLA told the committee that none of these options is satisfactory due to:

- inadequate funding of mainstream legal assistance providers;
- the appropriateness of the Indigenous legal services; and
- conflicts of interest, particularly in family law and family violence matters, and also due to the paucity of legal practitioners in RRR areas.<sup>28</sup>

8.47 NLA contended that:

Given the chronic disadvantage experienced by Aboriginal and Torres Strait Islander peoples, and the responsibility of the Commonwealth for Indigenous people as “Commonwealth persons”, the Commonwealth Government should provide sufficient funding to Indigenous legal services so that they can provide effective and appropriate services to Aboriginal and Torres Strait Islander peoples and their communities, not only in criminal matters, but in family and civil law matters as well.<sup>29</sup>

8.48 An additional concern, raised by the Victorian Aboriginal Legal Service Cooperative Ltd, is that the lack of civil law practices in ATSILS results in an inability to identify and refer Indigenous peoples to pro bono legal assistance service providers.<sup>30</sup>

8.49 In 2008, the NPBRC released *The Aboriginal Legal Service Pro Bono Guide*, the aim of which was to 'provide information to...the Aboriginal Legal Service...in order to facilitate the delivery of effective and sustainable pro bono assistance to the ALS'.<sup>31</sup> Two large pro bono law firms indicated to the committee however that the publication has had minimal, if any, effect.<sup>32</sup>

8.50 Elsewhere, this report refers to the difficulties experienced by ATSILS in the delivery of legal services to Indigenous peoples, particularly in RRR areas. This chapter briefly discusses language barriers, geographic considerations, and recruitment and retention issues.

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28 National Legal Aid, *Submission 34*, pp 32-33; North Australian Aboriginal Justice Agency, *Submission 6*, pp 1-2; and Employment Law Centre of WA (Inc), *Submission 26*, pp 5-6.

29 National Legal Aid, *Submission 34*, p. 33; and PIAC, *Submission 50*, p. 14.

30 Aboriginal Legal Service of Western Australia, *Submission 62*, p. 5.

31 <http://www.nationalprobono.org.au/probonomanual/> (accessed 2 November 2009)

32 DLA Phillips Fox, *Submission 32*, p. 15; and Gilbert & Tobin, *Submission 45*, p. 7.

### *Language barriers*

8.51 In 2003-04, the committee heard that a common barrier to accessing legal assistance is language as many Indigenous peoples speak English as a second, third or fourth language, if at all. Evidence to the inquiry maintained the argument, with the Australian Lawyers Alliance telling the committee:

There are over 200 Aboriginal languages still spoken in Australia; many Aboriginal people use their native language every day and may speak and understand English only at a limited level. Some attempts have been made to address these issues, including the joint Commonwealth and Northern Territory Funding of the Aboriginal Interpreters Service (AIS), which operates to assist in interpreting in up to 105 Aboriginal languages.<sup>33</sup>

8.52 The AHRC added that, in addition to English not being the first language in some Indigenous communities, the nuances of Aboriginal English can also lead to misunderstandings between clients and their lawyers (and the justice system).<sup>34</sup>

8.53 Nationwide, there is a variety of language services provided by the states/territories. For example, the Northern Territory has (limited) interpreter services, whereas Western Australia has no state-wide, publicly-funded, accredited and resourced interpreter service for Indigenous speaking people. The Aboriginal Legal Service of WA considered the lack of such a service 'a miscarriage of justice':

Our people are going to court and they should not be going to court, because they cannot understand half the things that are going on around them, let alone read back the statement that they are supposed to have made to the police. It is just unbelievable.<sup>35</sup>

8.54 The United Nations Human Rights Committee considers access to interpreter services as an effective measure to ensuring access to justice, a need recognised and endorsed by the High Court of Australia over ten years ago.<sup>36</sup>

8.55 In general, evidence argued that access to interpreters, and the right to understand both charges and proceedings, is a fundamental right, a right neither adequately recognised,<sup>37</sup> nor for which practical measures are properly resourced.

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33 Australian Lawyers Alliance, *Submission 27*, pp 22-23; Mr Dennis Eggington, Aboriginal Legal Services of WA, *Committee Hansard*, Perth, 13 July 2009, pp 45-46; and Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, p. 103.

34 Australian Human Rights Commission, *Submission 70*, p. 6.

35 Mr Dennis Eggington, Aboriginal Legal Services of WA, *Committee Hansard*, Perth, 13 July 2009, p. 44; Aboriginal Legal Service of Western Australia, *Submission 62*, p. 4; Mr Danny Barlow, President, LIV, *Committee Hansard*, Melbourne, 15 July 2009, pp 82-83; and Attorney-General's Department, Estimates Answer to Question on Notice No. 129 (27 May 2009) p. 3.

36 *Ebatarinja v Deland* [1998] 194 CLR 444 per Gaudron, McHugh, Gummow, Hayne and Callinan JJ at 26; and National Pro Bono Resource Centre, *Submission 49*, p. 12.

8.56 The NPBRC, for example, submitted that no courts have available, properly accredited interpreting services, and the Women's Legal Service (SA) Inc. told the committee that, 'more often than not matters proceed through court in the absence of interpreters contrary to all notions of justice.'<sup>38</sup>

8.57 At the Melbourne public hearing, Her Honour Chief Justice Diana Bryant told the committee that the Family Court of Australia (FCA), at least, provides free interpretation services to anyone requesting such assistance. However, Her Honour acknowledged that there are difficulties with that service:

The best interpreter services for the parties are not always available. I am hearing that sometimes the person who comes will be good and other times they will be less than optimal.<sup>39</sup>

8.58 In addition, the committee heard that the high cost of interpreters and translators prevents their engagement by some, if not all, resource poor legal assistance service providers.<sup>40</sup>

8.59 The committee accepts that language (and cultural) barriers inhibit Indigenous peoples' access to justice, and that the lack of comprehensive interpreter services causes disaffection amongst Indigenous peoples.

8.60 The committee notes that the root problem appears to go beyond a financial 'solution', and until non-financial contributory factors are identified and proposals for reform are developed, any financial solution proposed by the committee will have only limited effect. Nonetheless, the committee promotes increasing access to justice, and if this goal can be partially attained with enhanced interpreter services, then the committee recommends accordingly.

## **Recommendation 28**

**8.61 The committee recommends that:**

- **the federal, state and territory governments provide additional funding to court-based interpreter services in each state and territory with a view to expanding that service in high need areas; and**
- **the Australian Government commence a process of consultation to seek solutions to the translating difficulties associated with some Indigenous languages, with a view to reducing language barriers to access to justice.**

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37 For example, Law Institute of Victoria, *Submission 11*, p. 12.

38 Women's Legal Service (SA) Inc., *Submission 59*, pp 11 & 21; National Pro Bono Resource Centre, *Submission 49*, pp 12-13; North Australian Aboriginal Justice Agency, *Submission 6*, p. 10; and Australian Lawyers Alliance, *Submission 27*, p. 23.

39 Chief Justice Diana Bryant, Family Court of Australia, *Committee Hansard*, Melbourne, 15 July 2009, p. 6; and Chief Federal Magistrate John Pascoe, Federal Magistrates Court, *Committee Hansard*, Melbourne, 15 July 2009, p. 7.

40 National Pro Bono Resource Centre, *Submission 49*, p. 12.



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### ***Geographic considerations***

8.62 Evidence to the inquiry stated that geographic considerations affect legal practitioners' ability to provide legal services and access to justice. This was markedly so for Indigenous peoples living in RRR areas, with submitters and witnesses referring to how limited funding impacts practitioners' ability to deliver access to justice.

8.63 NAAJA, for example, told the committee:

Limited funding...means that wherever possible, NAAJA staff drive to attend bush courts while court staff and prosecution services generally fly. This requires NAAJA staff to travel long distances, generally on poor quality roads, often after court has finished for the afternoon. For some bush courts, (for example Kalkarindji and Lajamanu) where there is no accommodation available in the community, NAAJA staff travel 1.5 – 2.5 hours each way every day to attend court.<sup>41</sup>

8.64 Leaving the direct impact on legal practitioners aside, the need to travel great distances affects the amount of time practitioners are able to spend taking instructions from their clients. NAAJA described this situation as follows:

Our solicitors have only one day prior to court in the community to prepare, in turn meaning that many clients cannot be seen beforehand. With the long court lists in many communities, this leads to limited time being available for each client.

These problems extend to limited preparation time for complex hearings, as the standard practice is to collect the brief material upon the solicitor's arrival to the bush court even where the client is in custody and will only be flown to the community on the day of the hearing. This often makes it impossible to get effective instructions, in circumstances where there will be pressure on the solicitor to proceed quickly because of the expense incurred in flying the client in custody to the community and the fact that other witnesses may have been called.<sup>42</sup>

8.65 Legal assistance service providers necessarily incur additional costs in delivering services to RRR areas, and these expenses cannot always be predicted when a provider is preparing budgets and lodging funding submission.

8.66 The committee heard that if legal service providers did not bear the brunt of such expenses, then the expense would either fall to clients or discourage clients from obtaining legal assistance. Already, Indigenous peoples need to travel great distances and at great expense to interact with the justice system, including coronial inquests:

The large distances and costs also mean that many clients are reluctant to adjourn matters or set them for hearing as this means they will have to make the trip again. This results in clients pleading guilty at the first

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41 North Australian Aboriginal Justice Agency, *Submission 6*, p. 11.

42 North Australian Aboriginal Justice Agency, *Submission 6*, pp 10-11.

instance and not having the benefit of alternative resolutions being negotiated with police....The capacity for the family of a deceased person's family to be able to participate, and be represented, in the Inquest into the death is a fundamental right which goes to the very core of access to justice.<sup>43</sup>

### ***Recruitment and retention***

8.67 In general, ATSILS gave evidence that funding under the LEGA program is not sufficient to attract legal practitioners to ATSILS employment, particularly in RRR areas. Evidence acknowledged that remuneration issues are exacerbated by comparative work levels and the complex needs of Indigenous peoples.

8.68 The AHRC, for example, told the committee that:

The disparities between Legal Aid and ATSILS are exacerbated by the complex needs of Indigenous clients in accessing legal services such as relating to language, cross-cultural issues and social exclusion as well as through lower levels of educational attainment and higher levels of hearing loss, disability, mental health issues and so on. Given the sheer burden of numbers, many Aboriginal and Torres Strait Islander Legal Services are under considerable strain to meet the needs of the community.<sup>44</sup>

8.69 NAAJA provided the following comparison of its workload with that of the Northern Territory LAC:

Over the 2007/2008 period of comparison, each NAAJA solicitor attended to approximately 144 new casework matters in addition to casework matters that continued from the previous financial years. In total, in 2007/2008, NAAJA solicitors handled 3,529 criminal matters and 515 family/civil matters. This does not include the additional 1,523 duty files which were also handled by NAAJA solicitors.

By comparison, NTLAC staff only handled 1,367 criminal matters and 307 family/civil matters over the same period. This means that each NTLAC solicitor attended to approximately 76 matters per year (we presume this is, likewise, in addition to matters that continued from previous financial years).

Such disparity has "severe ramifications" for NAAJA's capacity and, therefore, the adequacy of legal services available to Indigenous clients.<sup>45</sup>

8.70 In addition to the demanding workload, submitters and witnesses referred to ATSILS solicitors' salary levels as a great disincentive for working for Indigenous legal services. Again, NAAJA told the committee:

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43 North Australian Aboriginal Justice Agency, *Submission 6*, pp 6-12; Law Society of NSW, *Submission 41*, p. 5; and Australian Lawyers for Human Rights, *Submission 43*, p. 11.

44 Mr Darren Dick, AHRC, *Committee Hansard*, Canberra, 27 October 2009, p. 9.

45 North Australian Aboriginal Justice Agency, *Submission 6*, pp 5-6.

In 2007/2008, NAAJA employed 6 additional staff than NTLAC yet NTLAC paid an additional \$897,000 on staffing salaries than NAAJA. This means that the average salary for NTLAC is \$73,489 as compared with \$52,251 for NAAJA.

As with other ATSILS, NAAJA unfortunately suffers from high staff turn over, partly as a result of lower salaries and higher workloads than other legal aid organisations (such as NTLAC). In 2006/2007, NAAJA's staff turn over was 21% and in 2007/2008, this has increased to 26%. Currently, the average length of employment for a solicitor is 12 months.

This high staff turn over affects productivity across the organisation and ultimately, the quality of outcomes for our clients.<sup>46</sup>

8.71 The NPBRC likewise submitted:

One of the biggest issues facing ILOs nationally relates to the salaries of solicitors. As result of inadequate funding, salaries offered to solicitors at ILOs are so far below those offered by legal aid and the private profession that it is very difficult for them to recruit and retain experienced staff, particularly in regional, rural and remote areas.<sup>47</sup>

8.72 The Law Council demonstrated the point by contrasting the salary of a Level 1/2 solicitor at the Aboriginal Legal Rights Movement Inc. (\$41 000-\$47 000) with the salary paid to an equivalent solicitor at a LAC (\$50 000-\$65 000).<sup>48</sup>

8.73 The Australian Legal Assistance Forum has similarly determined that, on average, ATSILS solicitors receive 20-25 per cent less than LAC solicitors for conducting the same type of work, and notes that, in some instances, the difference is as high as 48.22 per cent.<sup>49</sup>

8.74 NLA suggesting to the committee that recruitment and retention difficulties could be partially addressed with: funding increases to enable pay parity; and portability of all forms of leave entitlements across legal assistance service providers:

Pay parity and portability of leave entitlements are features of the Western Australia "Country Lawyers Program" which was established to address recruitment and retention issues in country Western Australia. It is suggested that this program demonstrates the benefits of such an approach having increased service delivery to people in regional and remote areas of Western Australia.<sup>50</sup>

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46 North Australian Aboriginal Justice Agency, *Submission 6*, p. 7.

47 National Pro Bono Resource Centre, *Submission 49*, p. 16.

48 Law Council of Australia, *Submission on Legal Aid and Access to Justice Funding for the 2009-10 Federal Budget*, 9 January 2009, p. 6.

49 Anticipated research findings quoted in National Association of Community Legal Centres, *Submission 1*, p. 7.

50 National Legal Aid, *Submission 34*, pp 4 & 33; and Law Council of Australia, *Submission 12*, p. 25.

8.75 The committee agrees that ATSILS' recruitment and retention difficulties must be addressed to provide Indigenous peoples with a consistent and high quality legal service. Portability of entitlements is a simple and effective way of immediately improving the terms and conditions under which ATSILS' solicitors are currently employed, and the committee encourages state/territory governments, in conjunction with concerned stakeholders, to explore ways of implementing such measures.

8.76 The committee also considers it odd for publicly funded legal assistance service providers to employ legal practitioners at substantially different rates, particularly when the work is in many respects similar.

### **Recommendation 29**

**8.77 The committee recommends that the federal, state and territory governments jointly, and in conjunction with affected stakeholders, review current salary levels across legal aid commissions and Aboriginal and Torres Strait Islander legal services, and propose salary level reforms for this sector of the legal aid system with a view to eliminating wage disparity.**

### **Recommendation 30**

**8.78 The committee recommends the introduction of portable leave entitlements across legal aid service providers in Australia with a view to enhancing the retention of staff in these sectors.**

### *Impact of funding on service levels*

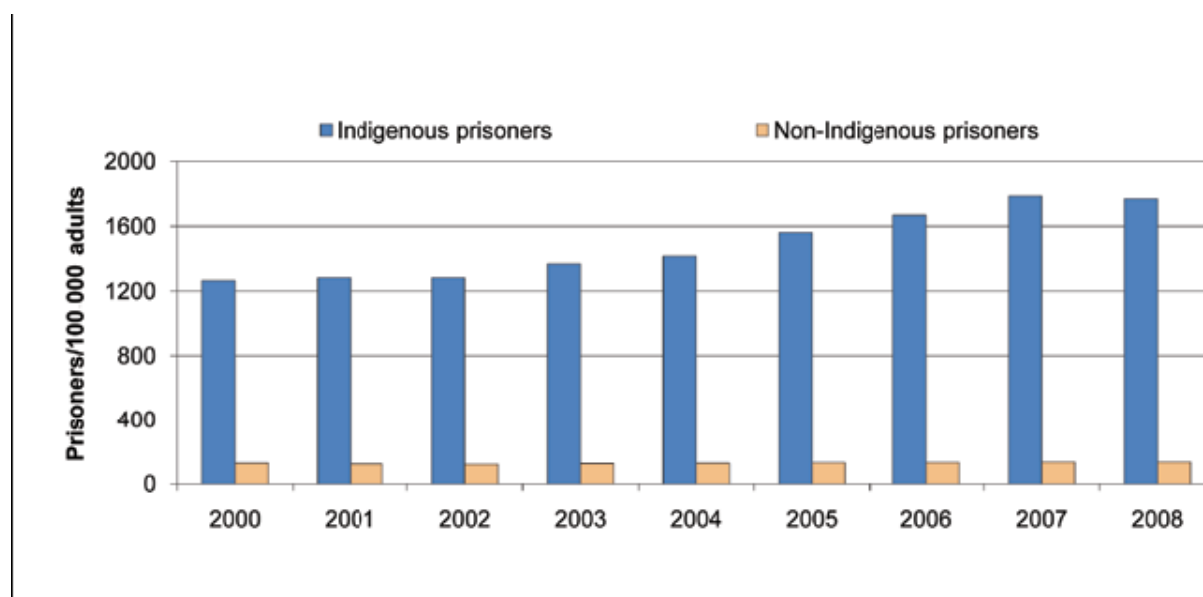
8.79 During the inquiry, the Productivity Commission released its report *Overcoming Indigenous Disadvantage: Key Indicators 2009*. This report showed that Indigenous peoples continue to be over-represented in the criminal justice system, both as young people and as adults:

- after adjusting for age difference, Indigenous people were 13 times as likely as non-Indigenous people to be imprisoned in 2008;
- the imprisonment rate increased by 46 per cent for Indigenous women and by 27 per cent for Indigenous men between 2000 and 2008; and
- Indigenous juveniles were 28 times as likely to be detained as non-Indigenous juveniles at 30 June 2007. The Indigenous juvenile detention rate increased by 27 per cent between 2001 and 2007.<sup>51</sup>

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51 Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2009*, pp 288-296.

**Table 8.2 – Indigenous and non-Indigenous prisoners (comparative): 2000-08**



Source: Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2009*, p. 289.

(Note: Further statistical breakdowns are available at pp 288-293 of the report.)

8.80 Findings similar to those of the Productivity Commission also appeared in evidence to the committee,<sup>52</sup> and measures by which the over-representation could be corrected are discussed in Chapter 6.

8.81 In general, submissions and evidence under this term of reference remarked that real funding decreases under the LEGA program have reduced both the number and range of services that ATSILS can offer Indigenous peoples, including in the priority area of criminal law.<sup>53</sup>

8.82 NAAJA, for example, attended to 7 500 matters in 2007-08, approximately 53 per cent of which involved criminal defence representation. NAAJA told the committee that the Northern Territory Emergency Intervention subsequently increased: the rate of charging; the number of matters going to court; and the number of Indigenous peoples in need of legal assistance by approximately 25 per cent:

52 For example, North Australian Aboriginal Justice Agency, *Submission 6*, pp 1-2; PIAC, *Submission 50*, pp 12-13; and Australian Human Rights Commission, *Submission 70*, pp 4-5.

53 For example, Aboriginal Legal Service (NSW/ACT) Limited, *Submission 21*, p. 2.

For example, at Galiwinku, which formerly did not have a police station and now has one, the court list is starting to grow. It is not growing with people charged with violent offending; it is growing with people charged with traffic offences, relatively minor breaches of domestic violence and offences involving police themselves. What really causes a lot of trouble for our clients is what we would term over policing. There are so many police per capita now in remote Territory areas that the charges just start to flow.<sup>54</sup>

8.83 In spite of this increase in demand, NAAJA testified that it remains inadequately funded to cope with the criminal law needs of Indigenous clients. Evidence noted that, in essence, this means Indigenous men, although the number of Indigenous women charged with criminal offences is increasing.<sup>55</sup>

### **The Family Violence Prevention Legal Services program**

8.84 In 1993, the Australian Law Reform Commission (ALRC) inquired into the discriminatory effects of Commonwealth law on women. Its findings aimed to ensure women's full equality before the law, and in relation to Indigenous women, the ALRC found that:

Aboriginal and Torres Strait Islander Legal Services do not currently benefit women and men equally. First, most services implement a policy of not acting for either party in a matter between two Indigenous clients. Second, most legal services give priority to defending criminal cases over other matters. On the face these practices appear gender neutral but their effect is to indirectly discriminate against Indigenous women. Like most groups of women, Indigenous women often need legal assistance in relation to matters of family violence and family law. For most Indigenous women such disputes are with other indigenous people. The outcome of precluding women from receiving assistance for such matters is that Indigenous women are disadvantaged compared to Indigenous men and compared to other women.<sup>56</sup>

8.85 The ALRC recommended the establishment of Indigenous women's legal services in areas where consultation with local Indigenous women indicated a demand for such a service, and taking into account:

- that the services, where possible, should be staffed and managed by Indigenous women, and the type of legal service provided should be determined by the women of the communities to be served;

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54 Mr Glen Dooley & Ms Priscilla Collins, North Australian Aboriginal Justice Agency, *Committee Hansard*, Perth, 13 July 2009, pp 29-30.

55 Mr Darren Dick, AHRC, *Committee Hansard*, Canberra, 27 October 2009, p. 14.

56 Australian Law Reform Commission, *Equality before the law: Justice for Women*, Report No. 69, 1994, para 5.31

- that the services are to be targeted toward regions of greatest need, having particular regard to remoteness and existing services in the region; and
- the existence of community networks which are demanding such a service and which will use and support the service.<sup>57</sup>

8.86 Following publication of the *Equality before the law: Justice for Women* report, the special needs of Indigenous women have been increasingly recognised, consistent with Article 22(2) of the United Nations Declaration on the Rights of Indigenous Peoples, which states:

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.<sup>58</sup>

8.87 Despite this recognition, the committee has previously heard, and continues to hear, that Indigenous women (and children) remain chronically disadvantaged in terms of their access to justice. Evidence to the inquiry particularly focussed on situations of family/domestic violence and sexual assault.<sup>59</sup>

### ***Funding for the program***

8.88 At present, the Australian Government funds the FVPLS program, which assists Indigenous people who are either victims of family violence, including sexual abuse, or who are at immediate risk of family violence.<sup>60</sup>

8.89 Figure 8.1 above shows that, in 2008-09, the Australian Government allocated \$18.776 million in funding to the FVPLS program, with steady increases over the next four years: \$19.389 million in 2009-10; \$19.577 million in 2010-11; \$19.949 million in 2011-12; and \$20.308 million in 2012-13, a total of \$79.223 million over the next four years.<sup>61</sup>

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57 Australian Law Reform Commission, 'Equality before the law: Justice for Women', Report No. 69, 1994, Recommendation 5.2.

58 [http://www.hreoc.gov.au/social\\_justice/declaration/assembly.html](http://www.hreoc.gov.au/social_justice/declaration/assembly.html) (accessed 2 November 2009)

59 For example, Aboriginal Family Violence Prevention & Legal Service Victoria, *Submission 38*; and Women's Legal Centre (ACT and Region), *Submission 51*

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[http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle\\_Indigenouslawprograms\\_Familyviolencepreventionlegalservices](http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Indigenouslawprograms_Familyviolencepreventionlegalservices) (accessed 2 November 2009)

61 Attorney-General's Department, *Submission 54*, pp 2 & 7; and Attorney-General's Department, Portfolio Budget Statements, 2009-10, p. 30.

8.90 In addition to FVPLS program funding, the department administers Indigenous women specific funding through mainstream legal services, for example, nationwide Indigenous Women's Projects (IWP) through the CLSP. The IWPs assist Indigenous women across a wide range of legal issues, including: family law; tenancy; domestic and sexual violence; and consumer rights law.<sup>62</sup>

8.91 In spite of consistent funding, the committee heard that the FVPLS program is not adequately funded, with funding arrangements in a never-ending state of turmoil:

Funding arrangements for family violence prevention and legal services are entirely inadequate. FVPLS Victoria is still negotiating today, 15 July, its 2009-10 budget with the Commonwealth Attorney-General's Department. All family violence prevention and legal services are on a 12-month funding cycle, which does not allow organisations to engage in long term planning. It creates uncertainty for the organisation and affects stability. There is widespread acknowledgement that the complex and intractable nature of Indigenous disadvantage requires long-term funding commitments for Indigenous programs. There can be no doubt that programs dealing with family violence and disadvantage for Indigenous women require this level of commitment.<sup>63</sup>

8.92 Given the totality of evidence to the inquiry, the committee accepts that the FVPLS program experiences funding difficulties, and that as a result, Indigenous women are not necessarily being provided with legal services that meet their needs in this area. In view of Recommendation 20, the committee agrees in principle with Recommendation 31 of its 2004 Report but does not need to reiterate that recommendation.

### *Auspice arrangements*

8.93 Evidence regarding the FVPLS program tended to focus on its auspice arrangements, rather than its funding levels. Submitters and witnesses told the committee that auspice arrangements in Western Australia are seriously flawed, with the Aboriginal Legal Service of WA auspicing FVPLS units.

8.94 As previously indicated, ATSILS prioritise criminal law matters. In cases of family/domestic violence, this usually means the perpetrators of such violence, that is, Indigenous men. The Aboriginal Family Violence Prevention Legal Service Victoria submitted that:

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62 Attorney-General's Department, *Submission 54*, p. 7.

63 Ms Antoinette Braybrook, Aboriginal Family Violence Prevention & Legal Service Victoria, *Committee Hansard*, Melbourne, 15 July 2009, p. 19.



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The Aboriginal legal services are not the appropriate services to support victim survivors, due to actual and perceived conflicts of interest and their significant work with offenders.<sup>64</sup>

8.95 In its submission, the Aboriginal Family Violence Prevention Legal Service Victoria emphasised the independence of victim/survivor support services, including legal services. It argued that this independence is instrumental to Indigenous women accessing a service:

Issues of safety, confidentiality, perceived and actual conflict of interest and lack of holistic support services (as are available through the FVPLS program) mean that the ATSILS are not the most appropriate organisations to be the primary providers or auspices of services to Indigenous victims/survivors...Indigenous women experiencing family violence or sexual assault must be assured of the right to access culturally sensitive, safe and confidential legal assistance regardless of their location and independent of the service which the perpetrator, their family or friends might access.<sup>65</sup>

8.96 The Women's Legal Services Australia and Women's Law Centre WA agreed that Indigenous women hold 'very deep concerns' about the Western Australia auspice body and the consequent, broader impact on Indigenous women's ability to access legal assistance services:

If women are involved in a dispute or are the victims of an offence, it is more than likely that the offender, usually male, will have accessed [WA Legal Aid or the Aboriginal Legal Services of WA]. So, if women, say, on another matter, want to access some support, get some legal advice and so on, because of the conflict of interest issue they cannot go to Legal Aid or to the ALS.<sup>66</sup>

8.97 In response to questions from the committee, NAAJA rejected that Indigenous women would not be able to access its services. In its view, professional 'Chinese walls' appropriately insulate its family, civil and criminal law practice areas.<sup>67</sup> The Aboriginal Legal Service of WA acknowledged however a probable community perception of a conflict of interest in spite of its efforts to dispel the perception, for example: by representing female accused; and employing female legal practitioners).<sup>68</sup>

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64 Ms Antoinette Braybrook, Aboriginal Family Violence Prevention & Legal Service Victoria, *Committee Hansard*, Melbourne, 15 July 2009, p. 18; Ms Rowena Puertollano, *Submission 8*, p. 1; and Ms Megan Davis, *Submission 17*, p. 3.

65 Aboriginal Family Violence Prevention & Legal Service Victoria, *Submission 38*, p. 9.

66 Mrs Victoria Hovane, Women's Legal Services Australia and Women's Law Centre WA, *Committee Hansard*, Perth, 13 July 2009, p. 17.

67 Mr Julian Johnson, North Australian Aboriginal Justice Agency, *Committee Hansard*, Perth, 13 July 2009, p. 31.

68 Mr Peter Collins, Aboriginal Legal Service of WA, *Committee Hansard*, Perth, 13 July 2009, pp 39 & 42.

8.98 On this note, the absence of female legal practitioners in FVPLS units was highlighted as a concern. Ms Hannah McGlade submitted that this discourages Indigenous women from accessing the service:

This is highly problematic in view of the traditional Aboriginal culture and separation of genders, and particularly the notion of 'shame' that is strongly associated with sexual abuse. Overwhelmingly the victims of family violence are women and girls and a lack of women lawyers can mean that the services are inaccessible to victims. Similarly, the increasing employment of Aboriginal men in the service co-ordinator role also raises issues of gender and accessibility.<sup>69</sup>

***Rural, regional and remote coverage only***

8.99 In 2006-07, there were 31 FVPLS units in RRR identified high need areas of Australia.<sup>70</sup> Submissions and testimony argued that Indigenous victims/survivors in metropolitan areas experience the same legal need, and consequently:

It remains critical that increased funding be allocated to the [FVPLS] program to better resource existing units and to further expand geographic coverage including urban areas.<sup>71</sup>

8.100 The Aboriginal Family Violence Prevention Legal Service Victoria, for example, provided state-wide services until 2007-08 when financial considerations reduced services to the Barwon-South West and Gippsland regions only. As a result, the urban client base (approximately 48 per cent of Victoria's Indigenous community) is neither funded for nor serviced by the FVPLS program.<sup>72</sup>

8.101 Submitters acknowledged the policy reasons for restricting FVPLS units to RRR areas only, but essentially argued that there is a disconnect between policy, legal need and the appropriateness of legal services. The Aboriginal Family Violence Prevention Legal Service Victoria, for example, stated:

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69 Ms Hannah McGlade, *Submission 4*, p. 3.

70 Attorney-General's Department, *Report of the Family Violence Prevention Legal Services Conference*, 25-26 October 2007, p. 3.

71 Aboriginal Family Violence Prevention & Legal Service Victoria, *Submission 38*, pp 2 & 8-9.

72 Ms Antoinette Braybrook, Aboriginal Family Violence Prevention & Legal Service Victoria, *Committee Hansard*, Melbourne, 15 July 2009, p. 17.

We understand the policy of not funding FVPLS services in urban areas to be based upon the premise that Indigenous victims/survivors in urban areas have access to a broader range of mainstream services and that funding priorities rest with rural/remote locations. However, restricting funding to limited rural/remote geographic areas significantly weakens the FVPLS program as a whole and discriminates against Indigenous women and children in urban areas who are impacted by family violence and sexual assault...To ensure equality before the law and optimum legal services for Indigenous women in Australia, the FVPLS program must be extended.<sup>73</sup>

8.102 Similarly, Ms Megan Davis submitted that the policy rationale fails to appreciate the hidden difficulties that Indigenous women face in accessing mainstream legal assistance services or culturally appropriate services. Ms Davis intimated that the data on which the rationale is based be re-examined:

The decision to only fund rural and remote services is supposedly evidence based. However I do not know on what methodological basis this decision is formulated but I would ask the Committee to investigate this further given the majority of Aboriginal people live in urban areas and given the evidence based reality of violence against Aboriginal women in urban areas.<sup>74</sup>

8.103 Evidence to the inquiry also highlighted broader cultural and social considerations supporting the establishment of metropolitan FVPLS units. Ms Rowena Puertollano, for example, explained the importance of extended familial relationships within the Indigenous community. Ms Puertollano argued that the lack of metropolitan-based services prevents victims/survivors in RRR areas from relocating to metropolitan areas, and using extended family and support networks:

The lack of culturally appropriate Aboriginal Women's Legal services not being available in the 'city' will see, Aboriginal women, children, victims/survivors being forced to accept' the surroundings and environment they live in and the 'perpetrator's families subjecting them to more abuse because they want better for their families. This situation also denies women, families and victims and survivors, the right and opportunity to strengthen themselves and live a violence free life.<sup>75</sup>

8.104 In 2005, the Joint Committee of Public Accounts and Audit examined the placement of FVPLS units throughout Australia. Its report *Access of Indigenous Australians to Law and Justice Services* found that:

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73 Aboriginal Family Violence Prevention & Legal Service Victoria, *Submission 38*, p. 9.

74 Ms Megan Davis, *Submission 17*, p. 2; and Ms Hannah McGlade, *Submission 4*, pp 1-2.

75 Ms Rowena Puertollano, *Submission 8*, p. 2; and of Department of Families, Housing, Community Services and Indigenous Affairs, 'Time for Action to Reduce Violence Against Women', April 2009

If FVPLSs are to be considered as major Indigenous specific providers of family violence prevention, family and civil law services, these services should not be confined to regional and remote Australia but rather, like ATSILSs, be located in all areas of significant need.<sup>76</sup>

8.105 The report contained a recommendation for the department to acknowledge urban Indigenous communities' need for family/domestic violence, family and civil law services, and locate FVPLS units accordingly.<sup>77</sup>

8.106 The Australian Government responded that FVPLS units are established in high need identified areas, and with reference to a multitude of additional considerations:

The Government will continue to give priority assistance to those areas with the most acute requirements for service. The FVPLS units themselves will also make similar determinations with regards to their own allocation of resources...In determining the locations of their service outlets, units must also have regard to the locations of related services, courts and prisons within the geographic area being serviced. Indigenous communities based in major urban centres have greater access (than do those in remote or regional areas) to other legal service providers such as community legal centres, legal aid commission offices, Indigenous legal aid offices or ATSILS, other Indigenous support and referral services, solicitors undertaking pro bono work and Indigenous women's legal service units.<sup>78</sup>

### ***Review of the FVPLS program***

8.107 At the Perth and Melbourne public hearings, evidence to the committee suggested that the FVPLS program should now be reviewed.<sup>79</sup> While there are a number of options, submitters and witnesses briefly suggested extension and strengthening of the existing program,<sup>80</sup> and a new Indigenous women's legal service (see below).

8.108 The Aboriginal Legal Service of WA, for example, told the committee that the model currently operating in Western Australia was 'flawed in its genesis', with auspiced FVPLS units having next to no chance of long-term sustainability:

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76 Joint Committee of Public Accounts and Audit, *Report No. 403 Access of Indigenous Australians to Law and Justice Services*, June 2005, p. 38.

77 Joint Committee of Public Accounts and Audit, *Report No. 403 Access of Indigenous Australians to Law and Justice Services*, June 2005, Recommendation 4, p. xviii.

78 Government Response, pp 3-4.

79 For example, Mr Norman Reaburn, Chair, National Legal Aid, *Committee Hansard*, Melbourne, 15 July 2009, p. 56.

80 Ms Antoinette Braybrook, Aboriginal Family Violence Prevention & Legal Service Victoria, *Committee Hansard*, Melbourne, 15 July 2009, p. 18; and Ms Shelley Burchfield, Aboriginal Family Violence Prevention & Legal Service Victoria, *Committee Hansard*, Melbourne, 15 July 2009, p. 22.

What happened was that attempts were made to set up a standalone legal service, agencies and family violence prevention legal services in remote areas, which did not have the faintest possibility of being sustainable entities. It is impossible to set up a family violence prevention legal service in Fitzroy Crossing on its own unless it is incredibly well resourced. You cannot pay a lawyer \$60,000 to live in a place like Fitzroy Crossing as the only lawyer in town, when the nearest professional support is 600 kilometres away in Broome. It is not going to work....They needed to have appropriate infrastructure and governance, managerial and administrative supports.<sup>81</sup>

8.109 The Aboriginal Legal Service of Western Australia added:

If the FVPLS model is reviewed...consideration should be given to ensuring that principles and strategies are identified to ensure that Indigenous women are able to access justice from a range of culturally appropriate legal service providers covering a range of areas of law...Indigenous women may be reluctant to access a particular service provider because of the sensitive nature of their issues and concerns about confidentiality in their communities.<sup>82</sup>

8.110 In 2003-04, the committee expressed concern regarding Indigenous women's lack of access to justice, including in relation to family/domestic violence matters, and by evidence indicating that Indigenous women face significant impediments from within their own communities in attempting to exercise their rights and seek access to justice.<sup>83</sup>

8.111 The committee made three recommendations aimed at addressing the specific legal needs of Indigenous women. In addition to its earlier Recommendation 31, these were that:

The Commonwealth Government commission a comprehensive national study to determine accurately the legal needs of Indigenous women.

The Commonwealth Government and state/territory governments address the needs of Indigenous women as a matter of urgency by improving, developing and promoting appropriate legal and community services, community education programs, domestic violence support networks and funding models to ensure that the experience of Indigenous women within the justice system is fair and equitable. In implementing this recommendation, the Commonwealth Government, state/territory governments, legal aid commissions and other key stakeholders should

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81 Mr Peter Collins, Aboriginal Legal Service of WA, *Committee Hansard*, Perth, 13 July 2009, p. 40.

82 Aboriginal Legal Service of Western Australia, *Submission 62*, p. 9.

83 Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, pp 108-109.

consult widely with Indigenous women, so that the impetus for change comes from Indigenous women themselves.<sup>84</sup>

8.112 In 2006, these three recommendations were under consideration by the Australian Government. The government agreed that:

- information on the legal needs of Indigenous women was limited, and there was merit in examining issues surrounding perceived gender bias relating to Indigenous women's access to legal services; and
- improving legal and related services to Indigenous women was a priority area of need.<sup>85</sup>

8.113 All these issues were to be considered in the context of the (then) new Council of Australian Governments' National Framework of Principles for Government Service Delivery to Indigenous Australians. The committee is not aware whether, and if so, how, its recommendations were addressed under that framework.

8.114 In this inquiry, the committee heard that there continues to be a lack of awareness amongst all stakeholders involved in the criminal justice system regarding the needs, conditions and pressures facing Aboriginal women and children.<sup>86</sup>

8.115 In view of Recommendations 1 and 2, the committee agrees in principle with Recommendation 29 of its 2004 Report, but does not need to reiterate that recommendation.

### ***Strategic approach to women's legal services***

8.116 In 2005, the Joint Committee of Public Accounts and Audit commented on the 'myriad of programs and services that provide legal services to Indigenous women', recommending that:

The Attorney-General's Department rationalise funding of Indigenous legal services by incorporating Indigenous Women's Projects, that are currently administered through mainstream Community Legal Centres, into the Family Violence Prevention Legal Services program.<sup>87</sup>

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84 Senate Legal and Constitutional References Committee, *Legal aid and access to justice*, June 2004, Recommendations 29-30, p. xxvii.

85 Government Response, *Senate Hansard*, 7 February 2006, pp 73-73.

86 Women's Legal Service (SA) Inc., *Submission 59*, pp 23-24.

87 Joint Committee of Public Accounts and Audit, *Report No. 403 Access of Indigenous Australians to Law and Justice Services*, June 2005, Recommendation 13, p. xx.

8.117 In rejecting this recommendation, the Australian Government stated that:

The Indigenous Women's Projects were established to provide broadly based legal aid and community support to women in need. FVPLSs were established with very specific guidelines and goals. There is no obvious advantage to be had by subsuming one program within the other, apart from the administrative synergies that have already been achieved [by the creation of the department's Indigenous Justice and Legal Assistance Division].<sup>88</sup>

8.118 However, evidence to the committee stated that the non-rationalisation of Indigenous women's legal services deprives Indigenous women of access to justice, and more needs to be done to strategically address the needs of Indigenous women. The Aboriginal Family Violence Prevention and Legal Service Victoria, for example, told the committee that:

Strategic development of Indigenous women's legal services across Australia which recognizes state and territory Indigenous diversity has been lacking but is required. The role of the FVPLS program, the Aboriginal and Torres Strait Islander Legal Services (ATSILS) and the Indigenous Women's Project funding should be clarified and refined to ensure optimum outcomes for Indigenous women.<sup>89</sup>

8.119 In this regard, and with broader application, the Aboriginal Family Violence Prevention and Legal Service Victoria told the committee that a collaborative approach by governments would greatly improve Indigenous women's law and justice outcomes.<sup>90</sup>

### **The Indigenous Law and Justice Framework**

8.120 In 2007, the department released a draft National Indigenous Law and Justice Strategy. In relation to Indigenous women, the draft strategy remarked:

Over 10 years ago Indigenous women were found to be the most legally disadvantaged group in Australia...Despite many improvements, such as the introduction of specific legal services for Indigenous women, significant disadvantages still exist. The focus of recommendations of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) related to improving justice outcomes for men, who comprise the overwhelming majority of Indigenous detainees, offenders and prisoners...Services to

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88 Government Response, p. 9.

89 Aboriginal Family Violence Prevention & Legal Service Victoria, *Submission 38*, p. 7; and Mr John Burke, Aboriginal Family Violence Prevention & Legal Service Victoria, *Committee Hansard*, Melbourne, 15 July 2009, pp 25-26.

90 Aboriginal Family Violence Prevention & Legal Service Victoria, *Submission 38*, p. 11.

Indigenous women need to be targeted, culturally sensitive and more work needs to be done on assessing unmet needs.<sup>91</sup>

8.121 At its August 2009 meeting, the Standing Committee of Attorneys-General (SCAG) endorsed the principles of the draft framework as a national policy approach, and will work toward finalising the draft framework by 30 September 2009.<sup>92</sup> This includes establishment of the National Indigenous Law and Justice Advisory Body, which will provide expert high level policy advice on Indigenous law and justice issues.<sup>93</sup>

8.122 In general, submitters and witnesses supported the establishment of the National Indigenous Law and Justice Advisory Body, with evidence emphasising the importance of increased capacity for Indigenous people to engage in law and policy making processes and outcomes.<sup>94</sup>

8.123 However, concern remained for the special needs of Indigenous women, with submissions arguing that, once again, there is no strong focus on an Indigenous women's law and justice strategy. The Aboriginal Family Violence Prevention & Legal Service Victoria, for example, told the committee:

The National Indigenous Law and Justice Framework recently released by the Commonwealth AGD for comment does not include the strong focus on Indigenous women's law and justice as was contained in the 2007 draft National Law and Justice Strategy from which the framework was developed.<sup>95</sup>

8.124 At present, there is no national Indigenous women's legal service, with most, but not all, states/territories having their own Indigenous women's legal service program or an Indigenous women's program administered by a women's legal service.

8.125 As indicated earlier in this chapter, some evidence presented to the committee suggested that a better approach to Indigenous women's law and justice might be to create a national Indigenous women's legal service.

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[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(756EDFD270AD704EF00C15CF396D6111\)~Consultative+draft+National+Indigenous+Law+and+Justice+Strategy.pdf/\\$file/Consultative+draft+National+Indigenous+Law+and+Justice+Strategy.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(756EDFD270AD704EF00C15CF396D6111)~Consultative+draft+National+Indigenous+Law+and+Justice+Strategy.pdf/$file/Consultative+draft+National+Indigenous+Law+and+Justice+Strategy.pdf) (accessed 30 July 2009)

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

93 Attorney-General's Department, *Submission 54*, p. 7; and Mr Kym Duggan, Acting First Assistant Secretary, AGD, *Committee Hansard*, Canberra, 27 October 2009, p. 50.

94 For example, Law Institute of Victoria, *Submission 11*

95 Aboriginal Family Violence Prevention & Legal Service Victoria, *Answers to Questions on Notice*, 22 July 2009, p. 9



8.126 The Aboriginal Family Violence Prevention & Legal Service Victoria expressed the common view that such a service must be independent, including financially independent of both ATSILS and mainstream women's legal services:

FVPLS Victoria therefore strongly supports the funding of Indigenous women's legal services across Australia...Funding for Indigenous women's legal services should not be attached to mainstream Women's Legal Services. It is critical that Aboriginal women have ownership of and drive future initiatives to advance law and justice outcomes. This is the key to successful government engagement and will lead to real on the ground change... The Indigenous Women's Legal Services would of course provide assistance in a broader range of legal matters than the areas currently stipulated within the FVPLS program. This would strengthen law and justice services to Aboriginal women significantly, would provide far greater flexibility and integration in service provision and vastly improve law and justice outcomes.<sup>96</sup>

8.127 Women's Legal Services Australia and the Women's Law Centre WA agreed, elaborating on the importance of Indigenous women in developing and providing a service effective in the provision of access to justice:

It is not that Aboriginal women are excluded from the services currently provided by Women's Legal Services; it is that the need is so great in providing direct services to Aboriginal women and also that providing services to Aboriginal women requires community connection and cultural appropriateness. All of those things are best achieved by having a service that is developed and managed by Aboriginal women...People talk about providing a culturally appropriate service and say they do this and that for Aboriginal women, but when we look at the actual practice and processes that are being engaged in we have to say as Aboriginal women that it has not been appropriate for us. The net effect has been to, if you like, silence the Aboriginal women's voice and to undermine us and undermine our position...When we talk about cultural appropriateness it is not just being appropriate for men; it is for our women and making sure that proper processes are engaged in to make sure that women are not being marginalised further.<sup>97</sup>

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96 Aboriginal Family Violence Prevention & Legal Service Victoria, Answer to Question on Notice, 22 July 2009, pp 4, 6-7; Women's Legal Service (SA) Inc., *Submission 59*, p. 20; Women's Legal Centre (ACT and Region), *Submission 51*, p. 11; Mrs Victoria Hovane, Women's Legal Services Australia and Women's Law Centre WA, *Committee Hansard*, Perth, 13 July 2009, p. 17; Ms Fabienne Balsamo, AHRC, *Committee Hansard*, Canberra, 27 October 2009, p. 15; and Ms Shelley Burchfield, Aboriginal Family Violence Prevention & Legal Service Victoria, *Committee Hansard*, Melbourne, 15 July 2009, p. 25.

97 Ms Kate Davis & Mrs Victoria Hovane, Women's Legal Services Australia and Women's Law Centre WA, *Committee Hansard*, Perth, 13 July 2009, pp 21-22; and Ms Antoinette Braybrook, Aboriginal Family Violence Prevention & Legal Service Victoria, *Committee Hansard*, Melbourne, 15 July 2009, p. 22.

8.128 The committee heard that the FVPLS program could be subsumed within a national Indigenous women's legal service program, with appropriate funding, re-badging, and referral of Indigenous male clients to alternate legal service providers.

8.129 For this inquiry, the committee received limited evidence regarding Indigenous women's legal needs. This is undoubtedly part of a larger problem, being an overall lack of empirical data on Australian legal needs. However, the wealth of material available to the committee indicates that Indigenous women are not getting adequate legal assistance to afford them access to justice.

8.130 The committee notes that a dedicated Indigenous women's legal service might better provide for that need, as well as relieve pressures on other legal assistance service providers and the Australian justice system.

8.131 The committee cannot say what effect the National Indigenous Law and Justice Strategy or National Indigenous Law and Justice Advisory Body will have on Indigenous women's access to justice. The committee hopes that Indigenous women are properly represented on the latter, and that in that capacity, Indigenous women are able to have a greater impact on Indigenous women's law and social justice policies, including the development of a strategic approach to such issues.

8.132 In the meantime, the committee notes the Australian Government for its initiatives to improve the lives of Indigenous people, including their access to justice. However, the committee observes that, on evidence to the inquiry alone, it is clear that the issue of Indigenous peoples' access to justice requires far more attention.

8.133 In an effort to address this and other issues raised throughout the inquiry, the committee makes the following final recommendation.

### **Recommendation 31**

**8.134 The committee recommends that the Australian Government respond to this report no later than March 2010.**

**Senator Guy Barnett**  
**Chair**

# **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**

# **APPENDIX 1**

## **SUBMISSIONS RECEIVED**

<b>Submission Number</b>	<b>Submitter</b>
1	National Association of Community Legal Centres
2	Mr Ray Borradale
3	Associate Professor Simon Rice, Associate Professor Molly Townes O'Brien
4	Ms Hannah McGlade
5	Mr Pat Coleman
6	North Australian Aboriginal Justice Agency (NAAJA)
7	Associate Professor Mary Anne Noone
8	Ms Rowena Puertollano
9	Care Inc Financial Counselling Service and the Consumer Law Centre of the ACT
10	Confidential
11	Law Institute of Victoria
12	Law Council of Australia
13	La Trobe University
14	Confidential
15	Dr Andrew Cannon
16	Mr Scott Cooper
17	Ms Megan Davis
18	Mr Maxwell Walker
19	Ms Deanne de Leeuw
20	Public Interest Law Clearing House (PILCH)
21	Aboriginal Legal Service NSWACT Limited

- 22 Centre for Restorative Justice
- 23 Australasian Legal Information Institute (AustLII)
- 24 Australian Legal Assistance Forum
- 25 Liberty Victoria
- 26 Employment Law Centre of WA
- 27 Australian Lawyers Alliance
- 28 NSW Young Lawyers Human Rights Committee
- 29 Australian Network of Environmental Defender's Offices
- 30 Name Withheld
- 31 Family Court of Australia and the Federal Magistrates Court of Australia
- 32 DLA Phillips Fox
- 33 Public Interest Law Clearing House (Vic) Inc.
- 34 National Legal Aid
- 35 Name Withheld
- 36 Mr David Matthews
- 37 West Heidelberg Community Legal Service
- 38 Aboriginal Family Violence Prevention and Legal Service Victoria
- 39 Anna Copeland
- 40 The Hon Bob Such MP
- 41 NSW Law Society
- 42 Victorian Aboriginal Legal Service Co-operative Ltd.
- 43 Australian Lawyers for Human Rights
- 44 Combined Community Legal Centres' Group (NSW) Inc
- 45 Gilbert + Tobin
- 46 Suncoast Community Legal Service Inc
- 47 Central Queensland Community Legal Centre Inc.



48 Hunter Community Legal Centre Inc.  
49 National Pro Bono Resource Centre  
50 Public Interest Advocacy Centre  
51 Women's Legal Centre (ACT Region) Inc.  
52 Confidential  
53 Name Withheld  
54 Attorney-General's Department  
55 National Children's and Youth Law Centre  
56 Women's Legal Services Australia  
57 Federal Court of Australia  
58 Russo Lawyers  
59 Women's Legal Service SA  
60 Disability Advocacy NSW Inc.  
61 Aboriginal Legal Rights Movement Inc  
62 Aboriginal Legal Service of Western Australia Inc  
63 Mr Ian Chivers  
64 Refugee Advice and Casework Service (RACS)  
65 Mr John Geremin  
66 Confidential  
67 The Law Society of Tasmania  
68 Justice Action  
69 Chris Cunneen and Melanie Schwartz  
70 Australian Human Rights Commission  
71 Women's Legal Service Victoria

**Submissions addressing both of the committee's inquiries ie: inquiry into Australia's Judicial System and the Role of Judges; and the inquiry into Access to Justice**

<b>Submission Number</b>	<b>Submitter</b>
j1	Human Rights Law Resource Centre
j2	International Commission of Jurists VIC
j3	The Chief Justice of the Supreme Court
j4	Flinders University Judicial Research Project
j5	Mr Charles H Griffith

**ADDITIONAL INFORMATION RECEIVED**

1. Report "Ensuring Justice and Enhancing Human Rights" - Provided by the West Heidelberg Community Legal Service Friday 24 April 2009
2. Report "Making the System More Responsive to Community" - Provided by the West Heidelberg Community Legal Service Friday 24 April 2009
3. "An Effective System for Investigating Complaints Against Police" - Provided by Tamar Hopkins on behalf of Flemington & Kensington Community Legal Centre Inc. on Sunday 26 April 2009
4. Koori Complaints Project 2006-2008 Final Report - Provided by Tamar Hopkins on behalf of Flemington & Kensington Community Legal Centre Inc on Sunday 26 April 2009
5. "Women, Safety and the Law" by Hannah McGlade - Provided Wednesday 29 April 2009
6. "Indigenous family violence and sexual abuse: Considering pathways forward" - Provided by Hannah McGlade on Monday 11 May 2009
7. ADR Blueprint Discussion Paper and Trial Efficiency Working Group – Provided by the New South Wales Attorney-General, Monday 18 May 2009
8. One page summary of key findings of the April 2008 PriceWaterhouse Coopers Review - Provided by The Victorian Bar Tuesday 14 July 2009
9. PriceWaterhouse Coopers April 2008 full review - Provided by The Victorian Bar Tuesday 14 July 2009

10. Presentation package - Provided by Dr Brian Steels and Dr Dorothy Goulding Monday 13 July 2009
11. Answer to question on notice - Provided by Chief Justice Bryant on Tuesday 4 August 2009
12. Answer to question on notice - Provided by the Family Court of Australia (Chief Justice Bryant) on Tuesday 4 August 2009
13. Answers to Questions on Notice - Provided by the Federal Magistrates Court of Australia, Friday 7 August 2009
14. Answers to Questions on Notice - Provided by the Victorian Bar, Monday 10 August 2009
15. A proposal to establish a Victorian CLC Law Graduate Scheme - Provided by the Federation of Community Legal Centres (Vic) Inc on Friday 21 August 2009
16. Rationalisation of services - Provided by the Federation of Community Legal Centres (Vic) Inc on Friday 21 August 2009
17. Answers to Questions on Notice and other information – Provided by National Legal Aid, Tuesday 1 September 2009
18. Answers to Questions on Notice - Provided by the National Association of Community Legal Centres (NACLC) Tuesday 29 September 2009
19. Answers to Questions on Notice - Provided by the NSW Young Lawyers Human Rights Committee Tuesday 29 September 2009
20. Answers to Questions on Notice - Provided by the Commonwealth Treasury Tuesday 17 November 2009
21. Answers to Questions on Notice - Provided by the Attorney-General's Department on Thursday 26 November 2009

#### **TABLED DOCUMENTS**

1. Aboriginal Family Violence Prevention & Legal Service Victoria Annual Report 2007/08 – Tabled at public hearing in Melbourne on Wednesday 15 July 2009
2. Evaluation of the Sisters' day out program of the FVPLS Victoria – Tabled at public hearing in Melbourne on Wednesday 15 July 2009
3. "A New National Policy for Legal Aid in Australia" – Tabled by National Legal Aid at public hearing in Melbourne on Wednesday 15 July 2009

4. West Heidelberg Community Legal Service Annual Report 2006/07 – Tabled by Dr Liz Curran at public hearing in Melbourne on Wednesday 15 July 2009
5. West Heidelberg Community Legal Service Annual Report 2007/08 – Tabled by Dr Liz Curran at public hearing in Melbourne on Wednesday 15 July 2009
6. Update on submission – Tabled by National Association of Community Legal Centres at public hearing in Sydney on Friday 11 September 2009
7. Common Membership Rules for CLC Associations, NACLC Accreditation Criteria for Community Legal Centres and NACLC Certification Trade Mark Rules – An Overview – Tabled by National Association of Community Legal Centres at public hearing in Sydney on Friday 11 September 2009
8. Pro bono incentive schemes – a comparison of the Victorian and Commonwealth Schemes – Tabled by National Pro Bono Resource Centre at public hearing in Sydney on Friday 11 September 2009
9. Migration Act – Tabled by National Pro Bono Resource Centre at public hearing in Sydney on Friday 11 September 2009
10. Federal Election Special edition of 'Just Us' – Tabled by JusticeAction at public hearing in Sydney on Friday 11 September 2009
11. Breakout Design Print Web – Tabled by JusticeAction at public hearing in Sydney on Friday 11 September 2009

## **APPENDIX 2**

### **WITNESSES WHO APPEARED BEFORE THE COMMITTEE**

ARNAUDO, Mr Peter, Assistant Secretary, Indigenous and Community Legal Services Branch  
Attorney-General's Department

BALSAMO, Ms Fabienne, Acting Director – Strategic Policy Team  
Australian Human Rights Consultation

BARLOW, Mr Danny, President  
Law Institute of Victoria

BLUMER, Mr Mark, President  
Australian Lawyers Alliance

BOKELUND, Mr Hans, Chair, Indigenous Issues and Aboriginal Reconciliation Committee  
Law Institute of Victoria

BRAYBROOK, Ms Antoinette, Chief Executive Officer  
Aboriginal Family Violence Prevention & Legal Service Victoria

BRYANT, Chief Justice Diana  
Family Court of Australia

BURCHFIELD, Ms Shelley, Policy Development\  
Aboriginal Family Violence Prevention & Legal Service Victoria

BURKE, Mr John, Member, Planning Reference Group  
Aboriginal Family Violence Prevention & Legal Service Victoria

COLLINS, Dr Rebecca, Genesis Coordinator  
Genesis Legal Clinic

COLLINS, Mr Brett, Coordinator  
Justice Action

COLLINS, Mr Peter, Director Legal Services  
Aboriginal Legal Service of Western Australia Inc.

COLLINS, Ms Priscilla, Chief Executive Officer  
North Australian Aboriginal Justice Agency

COPELAND, Ms Anna, Director  
Southern Communities Advocacy Legal and Education Service

CORKER, Mr John, President  
National Pro Bono Resource Centre

CURRAN, Dr Liz, Director  
West Heidelberg Community Legal Service

DAVIS, Ms Kate, Managing Solicitor  
Women's Legal Services Australia

DICK, Mr Darren, Director – Policy and Programs  
Australian Human Rights Consultation

DIGBY, Mr John, Chairman  
Victorian Bar Association

DIGNEY, Ms Kate, Senior Research Assistant, School of Law  
La Trobe University

DOOLEY, Mr Glen, Principal Lawyer  
North Australian Aboriginal Justice Agency

DUGGAN, Mr Kym, Acting First Assistant Secretary, Social Inclusion Division  
Attorney-General's Department

EDWARDS, Mr Peter, Policy Lawyer  
Law Council of Australia

EGGINGTON, Mr Denis, Chief Executive Officer  
Aboriginal Legal Service of Western Australia Inc.

ELIADES, Ms Vasilyki, Manager  
Public Interest Law Clearing House, Connect

EMMANUEL, Ms Toni, Principal Solicitor  
Employment Law Centre of WA

FOX, Ms Dorothy, Board Member  
North Australian Aboriginal Justice Agency

GOULDING, Dr Dorothy, Director, Faculty of Law, Restorative Justice Unit  
Murdoch University

HALL, Ms Julia, Executive Director  
National Association of Community Legal Centres

HOVANE, Mrs Victoria, Board Member  
Women's Legal Services Australia

HUSPER, Mr Gregor, Co-Manager, Public Interest Law Scheme  
Public Interest Law Clearing House

JOHNSON, Mr Julian, Managing Solicitor  
North Australian Aboriginal Justice Agency

KANE, Ms Sara, Manager  
Employment Law Centre of WA

KISS, Ms Katie, Acting Director – Aboriginal and Torres Strait Islander Social Justice  
Unit  
Australian Human Rights Consultation

MCALARY, Ms Margot, Solicitor  
Hunter Community Legal Centre Inc.

MINOGUE, Mr Matt, Assistant Secretary, Justice Improvement Branch  
Attorney-General's Department

MULVANY, Mr Tim, Executive Committee Member, Family Law Section  
Law Institute of Victoria

NINYETTE, Ms Robyn, Managing Solicitor – Law and Advocacy Unit  
Aboriginal Legal Service of Western Australia Inc.

NOONE, Associate Professor Mary Anne, School of Law  
La Trobe University

PASCOE, Chief Federal Magistrate John  
Federal Magistrates Court

PATRICK, Mr Nicolas, Partner  
DLA Phillips Fox

PINNOCK, Ms Elizabeth, Principal Solicitor  
Hunter Community Legal Centre Inc.

POVEY, Mr Chris, Homeless Persons Legal Clinic Lawyer  
Public Interest Law Clearing House

POYNDER, Mr Michael, Coordinator  
Justice Action

REABURN, Mr Norman, Chairperson  
National Legal Aid

RHEINBERGER, Mr Luke, Spokesman, Immediate Past President  
Law Society of Tasmania

ROSE, Ms Skye, Project Manager  
National Pro Bono Resource Centre

SMITH, Ms Louise, Executive Officer  
National Legal Aid

SMRDEL, Dr Albin, Assistant Secretary, Legal Assistance Branch  
Attorney-General's Department

SNELL, Ms Elizabeth, Member  
NSW Young Lawyers Human Rights Committee

STARY, Mr Robert, Executive Committee Member, Criminal Law Section  
Law Institute of Victoria

STEELS, Dr Brian, Senior Research Fellow, Faculty of Law, Restorative Justice Unit  
Murdoch University

TINKLER, Mr Mat, Acting Executive Director  
Public Interest Law Clearing House



WEBSTER, Mr Tony, Senior Adviser Federal Finances, Commonwealth-State  
Relations Division  
Department of the Treasury

WOODS, Mr Mark, Chair, Access to Justice Committee  
Law Council of Australia

