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SENATE

LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE

Reference: Legal aid and access to justice

MONDAY, 9 FEBRUARY 2004

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SENATE

LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE

Monday, 9 February 2004

Members: Senator Bolkus *(Chair)*, Senator Payne *(Deputy Chair)*, Senators Greig, Kirk, Ludwig and Scullion

Participating members: Senators Abetz, Bishop, Brandis, Brown, Buckland, Carr, Chapman, Crossin, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Harradine, Harris, Humphries, Knowles, Lees, Lightfoot, Ludwig, Mackay, Mason, McGauran, Murphy, Nettle, Sherry, Stott Despoja, Tchen, Tierney and Watson

Senators in attendance: Senators Bolkus, Kirk, Ludwig, Payne and Scullion

Terms of reference for the inquiry:

To inquire into and report on:

The capacity of current legal aid and access to justice arrangements to meet the community need for legal assistance, including:

a) The performance of current arrangements in achieving national equity and uniform access to justice across Australia, including in outer-metropolitan, regional, rural and remote areas;

b) The implications of current arrangements in particular types of matters, including criminal law matters, family law matters and civil law matters; and

c) The impact of current arrangements on the wider community, including community legal services, pro bono legal services, court and tribunal services and levels of self-representation.

WITNESSES

Committee met at 4.02 p.m.

CONNELLAN, Mr Greg, President, Victorian Council for Civil Liberties

CHAIR—I declare open the fourth public hearing of the Senate Legal and Constitutional References Committee's inquiry into legal aid and access to justice. The inquiry was referred to the committee by the Senate on 17 June 2003, and we are to report by 3 March 2004. The committee's terms of reference, copies of which are available from the secretariat, focus on:

The capacity of current legal aid and access to justice arrangements to meet the community need for legal assistance, including:

(a) uniform access to justice across Australia ...

(b) the implications ... in particular types of matters, including ... family law ... and civil law matters; and

(c) the impact of current arrangements on ... community ... pro bono legal services, court and tribunal services and levels of self-representation.

The committee have received 100 submissions to this inquiry, all of which have been authorised for publication and are available on the committee's web site. Witnesses are reminded of the notes they have received relating to parliamentary privilege and the protection of official witnesses. Further copies are available from the secretariat. Witnesses are also reminded that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. The committee prefers all evidence to be given in public, but under the Senate's resolutions witnesses do have the right to request to be heard in private. It is important that witnesses give the committee notice if they intend to ask to give such evidence in camera.

I welcome by videoconference Mr Greg Connellan from the Victorian Council for Civil Liberties, or Liberty Victoria. You have lodged submission No. 29 with the committee. Do you wish to make any amendments or alterations to that submission?

Mr Connellan—No.

CHAIR—Would you like to start off with an opening statement?

Mr Connellan—The main matter on which I wish to address the Senate committee relates to the question of forensics procedure and DNA evidence, which is covered in a discrete part of our submission to the committee. Principally, the experience of Liberty Victoria, which is another name for the Victorian Council for Civil Liberties, is that accused persons in the present system are very significantly disadvantaged when it comes to forensic evidence of all sorts, particularly in relation to DNA evidence, which is a growing area of reliance by prosecution authorities and an area of growing concern for Liberty Victoria. Our principal concern is that the field is heavily weighted against accused persons because they simply do not have access to either the scientific or legal resources to enable them to be, in a sense, playing on an even field. It is Liberty's submission that, very rapidly, steps need to be taken to correct this situation.

Liberty Victoria submits that it is necessary for a discrete institute to be established for the use of accused persons and that, being a scientific institute, it should have resources somewhat equivalent to those now available to the prosecution authorities. At the present time, if accused persons wish to challenge the scientific evidence relied upon by the prosecution, they have to go looking in appeal to see if they can find qualified experts who are not associated with the prosecution. That is very difficult. As DNA evidence in particular becomes increasingly relied upon by the prosecution, that is going to become an even more significant problem for accused persons.

It is also Liberty's view that over time, in order for there to be proper accountability of prosecution forensic services, it will be necessary for there to be a dedicated institute that not only monitors but, in a sense, is in a position to test the evidence of the forensic scientists for the prosecution in court. That in fact requires a build-up of expertise available to accused persons to look at the methodology used by prosecution scientists and investigators so as to be able to properly test that in a court setting. It is our submission that there do need to be discrete services available for accused persons in order for there to be some realistic prospect of them testing that evidence. Because the number of cases in which accused persons would want to test the evidence will be relatively small compared with the number of cases that come forward where evidence is relied on by the prosecution, it probably makes more sense for there to be a single national institute rather than individual institutes in each state. We propose that a national scientific institute dealing with forensic evidence be established for the use of accused persons.

At this point the position faced by accused persons is, as I say, that they have to try to find scientists in the community who might have some of the relative expertise. Often they may be left trying to use prosecution scientists from interstate to provide them with advice on the matters they want to challenge. In our view that is totally unsatisfactory. That is the main thrust of what I wanted to put to the committee on behalf of Liberty Victoria. In our view this matter is becoming increasingly pressing. The situation at the moment is that, in many instances, accused persons do not even get to first base in terms of challenging this evidence, and that is not a desirable outcome for the integrity of the justice system. That introduction gives the major thrust of the matters we wish to raise with the senators.

CHAIR—Thank you very much. I will start off with a question that flows from that. Why do you see this as seemingly the most important issue for you to raise at the moment in this inquiry? Is it something that you think is frequently happening in courts?

Mr Connellan—It is not necessarily something that we see frequently happening in courts at this point in time, although we do see it happening in courts on some occasions. But if you look at the development of the DNA databases, the nationalising of that process and the sorts of offences for which DNA samples are able to be collected now—in Victoria, it goes down to the level of burglaries—what we will see in the near future is an increasing reliance by the prosecution on DNA evidence in more and more cases. So whilst the problem has not got out of hand completely at this stage we perceive that, as the reliance by the prosecution on DNA evidence increases—and, of course, the wider the database becomes the easier it is or the more tempting it might be to use DNA evidence, if you like, corruptly or to salt a crime scene—then the pressures increase. So whilst at this point in time it is not a huge issue, although it is a significant issue for those people who are affected by it, it is certainly an issue of growing concern as the reliance on that evidence increases.

CHAIR—You foreshadow this forensic institute having not only a scientific role but also a capacity to appear in court as, I suppose, an amicus curiae. How do you imagine that would work?

Mr Connellan—I would not perceive that it would appear as an amicus curiae; it would appear as a witness for the defence. The way I perceive it would work is that, where accused persons were indicating a plea of not guilty and they wished, amongst other things, to challenge the forensic evidence that the prosecution was relying on, the accused persons and their legal advisers would be able to go to the institute to have the institute advise them on the procedures used by the prosecution forensic scientist, to conduct independent tests if necessary and then to present the results of that work in court as evidence to counter the forensic evidence called by the prosecution. It would be very much a means by which the defence would, first of all, get access to scientific evidence that might enable them to check, test and challenge the prosecution evidence, but also their legal advisers would get access to that scientific information to assist and develop their case.

CHAIR—Are you talking about the core problem here being a growing number of self-represented clients in the courts who do not have the capacity to draw their own evidence? Is that the problem we should be looking at as well or is the institute a stand-alone type solution to a particular problem?

Mr Connellan—It may affect unrepresented defendants and so on, but our principal concern is that, in situations where people are represented, they are not able to gain access to the relevant scientific expertise either through legal aid or through private means and their legal advisers are not able to get access to the relevant scientific expertise. The simple fact of the matter is that there are not a great number of scientists around with accumulated experience in this area and those who are around work for the prosecution. In essence, you have a one-sided game. It is our concern that in order to address that you need to develop an institution which accumulates knowledge and experience in the same way as the prosecution authorities are doing it. When there are flaws in the scientific approach by the prosecution, there should be equivalent scientists around who understand that and are able to highlight those flaws.

Senator LUDWIG—I was just looking at your submission on page 5, in the first paragraph, under 'Term of Reference B', where you say:

It is Liberty Victoria's submission that there is an urgent need for a dedicated independent forensic institute ...

Are there any examples of that idea already in place overseas? I am wondering where the germ of that idea has come from. Has it been born by the research work you have undertaken?

Mr Connellan—To my knowledge, there is nothing in place overseas, but our knowledge is not perfect by any means. It is an idea that has grown from our own experience or from members of the committee of Liberty Victoria who are experienced in the area of criminal practice. It is an idea that has come from us thinking about it. In essence, it is looking at the sort of experience that we have had in cases in Australia, whether it is the Chamberlain case or other cases, where we have had problems with the forensic scientific evidence and accused persons have not been able to access or readily access scientists who can give them advice and explain to their lawyers how to go about testing the evidence in court. It occurs to us that, just as prosecution forensic

scientists accumulate their knowledge and experience as they go, in order to hold them accountable in court if there is a real issue on foot you need to have a corresponding institute where experience is accumulating on how to look at the flaws and the faults in that system. That is where the germ of the idea comes from.

Senator LUDWIG—That is helpful. However, point 7 goes on to say:

This situation could be addressed by the creation of an independent institute dedicated to the interests of accused persons with power to attend major crime scenes ...

Have you seen any problems with that? Some of the issues that come to mind are that they may not have an accused at that point and that it would be resource-intensive to attend all major crime scenes. If they were limited in the number of crimes they could attend because of resources, which ones would they choose to attend? Some could be more readily apparent than others. In others, as in some cases you have mentioned, it comes to light significantly after the event that more work should have been but was not done. It could also be the case that the independent institute did not go to that one either, so it would end up still falling between the cracks. Could you help me out with that one a little bit more?

Mr Connellan—I understand what you are saying. I agree with you that to expect an institute like this to attend every crime scene is not appropriate, so you are really looking at major crimes and perhaps at experience over time defining which ones are most likely to require attendance. The reason for putting that in was, first of all, the very first matter that you identified—that is, often the accused person is not known at that time, so there is no ability to look objectively at how the prosecution went about investigating the crime scene other than by reference to still photography, video photography or the statement of the investigators themselves as to what they did.

We picked up on that from looking at some of the things that took place in a case in England, which I will come to in a moment, and the O.J. Simpson case in America. In particular in the O.J. Simpson case it became apparent after his trial that there was significant contamination of some of the exhibits relied upon and that significant contamination took place at the crime scene. In the latter case it was revealed only because there happened to be media present at the crime scene and they showed the police walking through the crime scene and contaminating it. In England there was a similar case, where a young Indian man was charged with the murder of a West Indian man. Ultimately, the defence lawyers, by going back and examining the scene, were able to find blood spatter marks behind a cupboard and so on which were not detected by the investigators and which gave a totally different outlook on the way the offence had taken place that was consistent with the accused person's case of self-defence.

I understand they are exceptional cases, but when we looked at those and compared our system with the system in France, for example, where you have a supervising magistrate who controls the way investigations are conducted, it seemed to us that there needed to be a balance struck between having a system where the investigation is totally controlled by the investigating authorities—as is the case here in Australia—and the system in France, where you have a completely independent magistrate overseeing all investigations of major crimes. One way of striking a balance between those two, if you have a separate scientific forensic institute, is to give them the power to go and look at crime scenes, albeit in the context that the investigating

authorities have control of the crime scene and they have to work as much as possible within the limits allowed to them by the investigators but have the ability to record things as they occur. It would only be in major or serious crimes, such as murders or major terrorist events. They would need to be defined in some way, but those are the ones where the existence of forensic evidence is likely to be most critical in any event. Is that of assistance?

Senator LUDWIG—It is. On a different matter, in paragraph 13 you talk about the 'increasing dependency on pro bono work'. Is that anecdotal evidence based on the experience of Liberty Victoria? Is there some way of quantifying that data? From my recollection, we have put that question to other parties and they do not seem to be able to bear it out. They say that pro bono work is an adjunct, that it is not designed to replace legal aid and that it is not a substitute. They all say exactly what you are saying, in the sense that everyone agrees that legal aid is not a substitute. That still does not dispel the question of whether pro bono work is increasingly being depended on as a substitute and it is just that no-one is game to say it. Is there any data that shows that occurring?

Mr Connellan—I do not know whether there is data that I can point to that shows it occurring, but there have been developments that I think bear it out. One in particular that has occurred in Victoria is what we call the Public Interest Law Clearing House, which I helped to establish. That is now jointly run by the Victorian bar and the Law Institute of Victoria and is funded by membership from private law firms. That did not exist until about 1995, from memory. I have done a number of cases for that organisation, and the volume of work and the calls for their services certainly appear to indicate that there is a growing reliance on pro bono work.

They have a filter system that knocks out cases that are not within the public interest. So, even in the Public Interest Law Clearing House, there is a very stringent system of getting rid of a lot of applications for pro bono services, because if they do not have what is defined as a public interest component they do not go forward. That is certainly one area where we can see that the anecdotal experience of people is supported by developments in practice.

I think I would have to concede that it is an area in which you cannot say one way or the other that the anecdotal experience is borne out by data, because the data is not kept. Ultimately, it does come back to anecdotal experience, but I think there is strong anecdotal experience to support what we say.

Senator SCULLION—Mr Connellan, again my question is a supplementary to the questions that have been asked. With regard to the anecdotal evidence that points to substantive flaws, either in the experimental part of the process or in the delivery part of the process, the first part of the process is the collection of the evidence—it may be in the circumstances in England that you described. The other part of the process is the physical analysis in a laboratory. As I understand it, there are very important clinical processes for blood—for instance, the anticoagulant has to be of a certain age, it has to be of a certain type and there is a stamp that goes with it. These have been pretty well documented, and I would submit that we are unlikely to confuse foetal blood with car glue at this stage. Whilst many of these have changed, I still have to get an indication from you as to whether it is actually that procedure or the anecdotal evidence that you have a concern with. In other words, is it that the actual scientific procedure in the laboratory varies significantly or is simply substandard, or is it the actual collecting of the

forensic evidence? In what particular aspect has this anecdotal evidence indicated the flaws may be?

Mr Connellan—I think it exists in both areas and it is not anecdotal evidence—at least in some areas in recent cases in Victoria. Take, for example, the recent case of Jaidyn Leskie. It is on the record that in fact there has been an error somewhere. It has been very difficult to pin down exactly where the error took place. That is one of the problems that perhaps will never go away. Nevertheless, it is not simply anecdotal.

There are a number of issues that arise. At this point in time, for example, it is not possible to date DNA. We take a sample from a piece of clothing that will tell us, perhaps, the probability of it being or not being associated with a particular person, but it will not tell us when it actually got onto that item of clothing. There might be a whole lot of other circumstantial evidence which will point to a cut-off point, one way or the other, as to when that got on the clothing, so the circumstances in which the item is first found and logged et cetera and the process of the continuity of the evidence chain throughout that system become very important. I have had a case where I was a person working in a public place where the victim was known to have gone. It was said my DNA was on their clothing but we had a break in the chain of evidence as to when the DNA got onto the clothing, because there was not a complete history of where the clothing had been. That is just one example of a problem up the line before the testing takes place. In that case, we were able to look to the holes in the line of evidence, if you like, and were able to perhaps test it along the way. But that is only one part of the problem.

The next part of the problem is that there are multiple pieces of clothing coming into the laboratory, along with multiple samples coming into the laboratory. They are all checked in, as you have indicated fairly carefully. There are checks in place to ensure that contamination does not take place but, unfortunately, we know that it does take place. That is another area of testing that needs to be conducted. We say that, in order to ensure higher levels of accountability in that system, if you had an institute which was looking at things continually from the point of view of accused persons, you would quickly start to highlight flaws in the system of prevention that is put in place to prevent contamination and other problems. That is just another level in the chain. Then, of course, there is the interpretation of the results themselves. At the end of the day we are dealing with probability and, again, questions of databases et cetera become relevant. Firstly, it is not just anecdotal. We have seen real evidence of it occurring. Secondly, it occurs at all different points along the chain, and that is ultimately why we say that an institute dedicated in this way is the best way of approaching it.

Senator SCULLION—I have a supplementary question in two parts. This does not come directly from your submission, but it would appear to me from evidence you have given today that there has to be a substantive research component to this. It really has nothing to do with a court case or evidence; it is about actually developing how we collect and analyse material for forensic evidence. I guess I do not understand the wider benefit. It would appear then that the prosecution would have access to the normal range of forensic facilities available to government. There would then be another alternative which would have equally wonderful rocket scientists working within it. I assume two separate samples of evidence would go to each one, but because it is cutting-edge science—as you said, we still do not know how to time DNA—I still do not understand how that would necessarily benefit the court case, apart from basically throwing

doubt on any of the evidence gathered in that manner because both bodies may have a slightly different view of it. Would you need perhaps a third body? Where would it end?

Mr Connellan—The third body is the court. The third body is the jury. At the present time the prosecution has access to all of the wonderful whizzbang things that you are talking about and the accused person does not. In many cases the accused person is pleading guilty and it does not really matter. But, where an accused person is pleading guilty, there is only one third tribunal—and that is the jury. At the moment the accused is totally disadvantaged and cannot even get to a starting point. That is why it is so important. We do not advocate that there should be a third party other than the court. That is the one our system is set up for, and it is the appropriate one in our view.

Senator SCULLION—I have one last question. The real issue is that there are not enough people in the community who have these skills. You have indicated that industry probably does not quite have that number of skills. They are centred on the government institutions. So, if this new institution is started, where are we going to get the skills from? They clearly do not exist in the community at the moment. Where are we going to source those skills from, if not from government?

Mr Connellan—We try to steal some from the prosecution! I was being funny but, seriously, what has happened with the prosecution forensic services is that, first of all, they have specifically, presumably, trained people and attracted trained people both from here and from overseas, and then they have accumulated and developed their experience and knowledge as they have gone along. Unfortunately, the institute we are talking about would have to follow the same process. Quite seriously, you would want to try to steal some of the people from the forensic science services that the prosecution relies on, because they have already accumulated significant effort. But, at the moment, if an accused person is forced to go back to a prosecuting authority to try to get alternative evidence, not only does the accused person have concerns about how objective or independent that service might be but also that is a problem in terms of the perception within the community.

Senator PAYNE—I have a question in relation to Liberty Victoria's statements under term of reference A, where, in paragraph 5, you make a reference to the funding of legal aid as, to use your words, 'politically expedient'. That is to say: you are concerned about what you refer to as a lack of empirical evidence about need and unmet need. I understand the point that you make in the latter half of that paragraph. But, on any assessment, with the Commonwealth and state funded legal services around Australia, of which I think there are more than 30 scattered across your state of Victoria, it would be drawing a very long bow, I think, to describe their location overwhelmingly as politically expedient. So, in the first instance, I am wondering what brings you specifically to make that point. Secondly, I ask you where there are gaps in Victoria that you think need to be addressed in terms of the location of such services.

Mr Connellan—Certainly, in Victoria, the preponderance of the services that you are referring to, which is a combination of community legal centres, I take it, and legal aid offices—

Senator PAYNE—Yes.

Mr Connellan—The preponderance of those is in the metropolitan area. That is not to say that they are exclusively in the metropolitan area of Melbourne, but they are predominantly there. For example, I was last year—not in my Liberty Victoria capacity but in a separate capacity—looking at access to legal services in the eastern part of Victoria: the Latrobe Valley out to the New South Wales border. There was a community legal centre there, based at Morwell, servicing pretty much from Phillip Island right across to the New South Wales border. It is a huge area of Gippsland that they were servicing. They had, effectively, a staff of three. They tried to employ three lawyers to do that. They were down on resources and they were trying to run outreach projects right across that large area. So that is one example of an area of Victoria where there is a great need for further services. I think that if you looked at the western side of Victoria, out towards the South Australian border, you would find a similar sort of experience. There is a community legal centre in Warrnambool and there is one in Ballarat, but they cover a huge area. That is not to say that there are not legal aid services in those areas—there are—but they do not always correspond completely; they do not always cover the same areas of work. But also there are situations, say, in family law with child protection stuff, where you have the legal interests of parents—perhaps more than one parent—and sometimes of grandparents and of children to be addressed, so you need multiple services to be able to address all those without conflict.

Senator PAYNE—I understand the points you have made there in the latter half of your response but, surely, the location of services is more a question of resourcing than political expediency.

Mr Connellan—One has to wonder, though, why it is that services have happened to end up in those areas. We just say that it is an issue that has been raised for a long time, and it does not seem as though there is enough political pressure to ensure that services are placed in those needy areas. I guess that is why we put it in terms of political expediency.

Senator PAYNE—We might have to beg to differ on that point, then.

Mr Connellan—Fair enough.

CHAIR—Thank you very much, Mr Connellan, for your submission and your evidence.

Mr Connellan—Thank you very much, senators.

[4.35 p.m.]

LYNCH, Ms Philippa, First Assistant Secretary, Family Law and Legal Assistance Division, Attorney-General's Department

PIDGEON, Ms Sue, Assistant Secretary, Family Pathways Branch, Family Law and Legal Assistance Division, Attorney-General's Department

CHAIR—Welcome. You have lodged submission No. 78 with the committee, together with 78B. Do you wish to make any further amendments or alterations?

Ms Lynch—This morning we also provided the committee with another letter to correct some figures in relation to expensive criminal cases. I do not know whether you have that.

CHAIR—That is the one that I referred to as 78B.

Ms Lynch—We provided you with a letter and a submission in October. We then made a correction to that in early December to take account of the funding for veterans' matters that is provided to the ACT Legal Aid Commission. So we have in fact put in two addendums.

CHAIR—That first letter is part of the overall submission. We have 78 and 78A. Are there any other amendments or alterations you would like to make?

Ms Lynch—No. We apologise for the inconvenience of having to correct the figures.

CHAIR—Thank you. Would you like to start off with an opening statement?

Ms Lynch—We do not have an opening statement, but you have our submission plus the two addendums.

CHAIR—We will move straight onto questions. Let me start off by referring to the submission from the Victorian Department of Justice. It was, to say the least, very critical of the funding distribution formula. It raised a number of points, one of which was that it had found several errors—for instance, the population of women and the population of people of non-English-speaking background were inadequately covered. Have you had a chance to look at that funding model and at the evidence of the department? Do you agree that there were errors in the funding model?

Ms Lynch—We have been reviewing the funding model in conjunction with National Legal Aid for some time now. That review has taken into account comments, suggestions and views that have been expressed by National Legal Aid and by individual legal aid commissions for some time, which I am happy to talk to you about further. Victoria have suggested in their submission and in their evidence that there was a problem with the population statistics that we used. We would agree from looking at the data that was used in the model that is on our web site—in the report of the consultant—that the figures do suggest that there were more males than females at the relevant time. We would not necessarily agree with some of the comments that Victoria made. I think there was a suggestion that we had only used males in the model, and we do not think that is correct. Also, we probably disagree with their comments about the counting

of the non-English-speaking background population but we are aware of those comments. We would not necessarily agree with their suggestion that the model did not take account of female and male populations.

CHAIR—You have said you have been reviewing the model on the basis of criticisms raised. When did that process start?

Ms Lynch—It probably formally commenced in March 2001 when the department circulated a discussion paper which dealt with some issues relating to the Walker model, which had been used for distribution funding under the year 2000 agreements. So the process probably formally started in March 2001.

CHAIR—Where is it up to now?

Ms Lynch—We have had a number of discussions with National Legal Aid. We have provided various models to them for discussion purposes, and we are now in the process of writing a final report of that review for the government.

CHAIR—When will that report be completed?

Ms Lynch—I would not want to give you a specific date but it is near completion.

CHAIR—There are possibly two ways we can go about this. One is to go through every particular complaint raised by Victoria and others and get your response to them here. Otherwise, you might be able to produce a written document responding to the concerns raised by the Victorian government and other concerns as to the model itself.

Ms Lynch—I am happy to try and discuss some of the issues that have arisen during the course of that, but I am conscious that the final report would be one for government and I would not want to pre-empt a final report to government in that discussion. I am happy to go through the issues that have been raised to the extent that I can.

CHAIR—Obviously we have a role here in terms of accountability.

Ms Lynch—I am conscious that I might not be able to tell you what the ultimate outcome would be in relation to some of the issues that have been raised in the development of the new model.

CHAIR—Do you want us to go through each complaint raised by the Victorian Department of Justice? Have you had a chance to look at those complaints?

Ms Lynch—I have looked at them. I am happy to do it either way. They raised a number of comments about the suppression factor and the average cost per case factor in particular. Did you want to discuss those?

CHAIR—Would you like to respond to those two concerns for a start?

Ms Lynch—The suppression factor and the average cost per case factor were included in the model following stage 2 of the legal aid needs analysis that was done by Mr Walker and Rush Social Research. Stage 2 of that process—the report of that is on the department's web site—involved a qualitative analysis of key stakeholders in the legal aid sector. The suppression factor was added in as a result of that consultation, where it was felt that there was a suppression factor operating in a number of jurisdictions.

CHAIR—What do you mean by 'suppression factor'?

Ms Lynch—I think it could be described this way: due to publicity about levels of legal aid, people may not have been making applications for legal aid in anticipation that they would not be successful. A suppression factor was built into the model to increase anticipated demand. It was added in so you could anticipate that without that suppression factor more applications would have been coming in in some jurisdictions.

CHAIR—And the average cost per case factor?

Ms Lynch—The average cost per case factor was added in after stage 2 of the review. It is commented on in the report of the model on the department's web site. I am happy to give you a copy of that. The cost per case factor was included because it was felt at the time that it reflected a significant inverse statistical correlation of the cost per case with demand for legal aid and as costs go up, depending on the cost per case, a legal aid commission would be able to meet less demand and that would have an ongoing impact on demand. The rationale for it is set out in the report of the model.

CHAIR—Going back a couple of steps, I think you accept that there might have been some mistakes in the funding model such as with NESB people.

Ms Lynch—I accept Victoria's comment that the figures in the data in the model suggest that there were more males than females, which may not in fact have been the case. Originally when it was raised with us—and I think this is noted in their submission—Victoria thought that might have been a problem caused by the interpolation of the data from the ABS statistics, which are based on five-year age groups, into the different age groups for identifying legal aid recipients. As I have said, I think Victoria at one stage may have been suggesting that the figures had been swapped between male and female or that only male figures had been used. We have looked at the original 1999-2000 model and that does not appear to be the case but we are left with the fact that the data does suggest what they suggest, which is that there are more males than females. According to the report of the model, those figures were taken from an ABS database at the time.

CHAIR—What about people from a non-English-speaking background?

Ms Lynch—I think the issue there is that the model used is a Commonwealth Grants Commission definition of 'non-English-speaking background' because the methodology used to develop the model paralleled that used by the Commonwealth Grants Commission in determining its general revenue grants relativities. I also understand that, at the time the model was introduced, issues about the NESB data were raised, and Mr Walker checked the data and advised that he thought the figures used were correct in relation to NESBs. I am happy to take that on notice and look further into it for you.

CHAIR—Yes, if you could do that. Going back to the department's submission, there were some pretty holistic complaints about the model—how it was operating and how it had come together. What other concerns have you had in respect of the model and its implementation?

Ms Lynch—In addition to the cost per case factor and the suppression factor there were issues discussed in the course of the review about whether the model should use actual rather than projected population statistics. There were issues raised about whether it was a demand driven model or a need driven model. There were also issues raised about the use of Commonwealth Grants Commission factors and indices, which I understand have since been changed. I think there were comments made about the risk factors that were used in the model at the time. There were also what might be described as technical criticisms of the methodology that was used, on a more econometric basis.

CHAIR—Have you made an assessment of those concerns?

Ms Lynch—Yes, we have been discussing those concerns with the Commonwealth Grants Commission staff in the course of the review and we have put a number of reworked models back to the commissions for comment along the way.

CHAIR—The Grants Commission has developed a model as well?

Ms Lynch—The Grants Commission has been assisting us in the review of the model and has been looking at the criticisms that we have received along the way. On at least one occasion, the commission has had a telephone hook-up with National Legal Aid to discuss issues in developing the model.

CHAIR—So we should go to the Grants Commission for advice as to what their concerns are with the existing model?

Ms Lynch—I am conscious that they are assisting us with the review rather than conducting the review for us but, yes, certainly the staff of the Commonwealth Grants Commission have been involved along the way in discussing the model.

Senator PAYNE—Ms Lynch, our understanding from Victorian Legal Aid is that they indicated to us that NLA commissioned the Commonwealth Grants Commission themselves to prepare a model about 18 months ago. If we were to pursue matters with the Grants Commission I expect that is what we might be interested in looking at. It would be of interest to the committee to know whether you have seen the Grants Commission model and whether there is a response to that.

Ms Lynch—I think what happened was that the commissions asked for the Commonwealth Grants Commission to do some modelling, which we facilitated. I do not think it was the case that the commissions or NLA independently commissioned the Commonwealth Grants Commission to do the work. It might help if I run you through the histories of the development of the models along the way. In February 2002, the Commonwealth asked the Grants Commission to develop a model that would be independent of commission specific data. That was then discussed in face-to-face discussions with NLA and the Grants Commission in August 2002 and that reworked model was presented to NLA in August 2002. NLA then asked to see a

new version of that model, updated with 2001 census data. I do not know whether that is what Victoria were referring to when they said they commissioned work, but they had asked for some more work to be done on one particular model. We provided various updated models to them in February 2003, May 2003 and most recently in October 2003.

Senator PAYNE—That is definitely what it says.

CHAIR—As Senator Payne says, definitely the advice that we have is that National Legal Aid did in fact commission the Grants Commission to produce a model. We can pursue that with them.

Ms Lynch—Apart from the work that I have listed there, I am not aware of any separate work that the Grants Commission has done for NLA. I do not know whether it is just a semantic distinction between who commissioned it and who actually directed it.

Senator PAYNE—I am sure you have been examining the *Hansard* with forensic application, as we all do.

Ms Lynch—I noticed that he did say 'commissioned a report'. Certainly we have had the Grants Commission prepare some work.

Senator PAYNE—In fact it says 'develop a simple model'.

Ms Lynch—That is the one I am talking about: the one that did that; it was independent of the commission specific data.

Senator PAYNE—We may be in semantic exchange.

CHAIR—We will check it out. We believe that you will be preparing a response in the next few weeks.

Ms Lynch—We are preparing a report of the review. I think the commissions have said to you in the course of the hearing that commissions will not be in a position to agree on a final model. They would be expecting the Commonwealth to make that decision. We are finalising a report to the Attorney on the review that we have undertaken of the model.

CHAIR—So we should expect the model to be changed?

Ms Lynch—That is finally a decision for government.

CHAIR—Where are you in respect of the next round of funding?

Ms Lynch—The National Legal Aid representatives were advised in November that funding for the next round of legal aid agreements would be considered in the budget process. However, we are hopeful that we will shortly be starting negotiations with them on issues that will arise in the new agreements, apart from the funding issues.

Senator LUDWIG—When you say that it will be dealt with in the budget—

Ms Lynch—The budget process.

Senator LUDWIG—When will they know? The budget will be handed down on 11 May. When is the funding due to finish?

Ms Lynch—The funding is in the forward estimates, with the wage cost indexation. The current figures are in the forward estimates, and the agreements with the commissions have the capacity to roll on if a new agreement is not reached.

Senator LUDWIG—Can you explain how that works? You said that there is a capacity to roll it over.

Ms Lynch—Yes. The agreements provide that, if a new agreement is not reached, the existing agreements run on, with the parties being able to give 12 months notice of termination. So the agreements do not necessarily end on the 30 June and there is also funding in the forward estimates, based on this year's figures, plus wage cost indexation.

Senator LUDWIG—How many years out is that?

Ms Lynch—It is ongoing.

Senator LUDWIG—At this point in time there is no agreement. That is right, isn't it?

Ms Lynch—There are existing agreements in place.

Senator LUDWIG—Yes, but there is no agreement on the current round.

Ms Lynch—There is no new agreement in place.

Senator LUDWIG—That is right.

Ms Lynch—There is an existing agreement; but we have not started formal negotiations on a replacement or a new agreement.

Senator LUDWIG—A review has been commissioned, and you have said that that will be reported on soon.

Ms Lynch—That is the review of the funding model, the distribution model.

Senator LUDWIG—Have the negotiations themselves commenced?

Ms Lynch—Formal negotiations have not commenced. I think I have mentioned in estimates in the past that there are internal government processes that need to be completed. Negotiations have not commenced but there have been discussions going on. The former Attorney wrote to his counterparts, I think in May of last year, and we have now had extensive discussions with and submissions from legal aid commissions about what they would like to see in the new

agreements and what their issues are. So it is not a case that we have not been discussing the new agreements with the commissions for a while.

Senator LUDWIG—When are the discussions formally due to commence?

Ms Lynch—They will commence when our internal government processes are finalised. I anticipate that the Attorney would write again to his counterparts and say that we are in a position to commence formal processes.

Senator LUDWIG—Is there an expected date for that?

Ms Lynch—I hope we would be doing that quite soon.

Senator LUDWIG—So it will be post the review of the model?

Ms Lynch—Not necessarily, because there are issues that could be usefully progressed in discussions about the agreement that do not relate to funding. There are issues, for instance, about reporting requirements and those sorts of things that might usefully be progressed and that would not be dependent on funding figures being available.

Senator LUDWIG—How long is it envisaged that the negotiations will take, given past practice? How long did they take last time?

Ms Lynch—I think that it varied a bit between commissions. I was not involved in those discussions last time. I am happy to take that on notice.

Senator LUDWIG—Given that we have not started formal negotiations, in your words, and given that you have said the current agreements will continue if new ones are not reached, I am just trying to get a sense of how long the formal negotiations will take. Will they have built into them an increase or some factor to ensure an increase, given that costs may have risen during the period?

Ms Lynch—The money in the forward estimates is indexed. The agreements themselves do not have this year's funding figure in them. My recollection is that that is not indexed under the agreements, but there is indexation in the forward estimates, if you understand what I am getting at. The agreement is fixed for each year.

Senator LUDWIG—Yes, I do understand. In effect—and this is the point I was trying to get to—although that is indexed in the sense that the forward estimates are indexed, the agreements are fixed. They can only expect the same amount they have received in the last 12 months to be rolled over, and no additional funding is provided. I am happy to be corrected, but that is what I thought.

Ms Lynch—That would be the bottom line. If the agreements in their current form rolled over, the base figure would be what is in the current agreements. There would be issues about what we would do with indexation. They would be matters for government.

Senator LUDWIG—That is what I was trying to get to: at the moment you expect that they will be rolled over because you do not expect to conclude by 30 June. That was my sense of it.

Ms Lynch—I thought you were asking me what the figures will be if we roll over and what the payments will be that they get. What I am saying is that there is indexation in the forward estimates but the agreements themselves would roll over on the figures that are in this year's agreement. The agreements list for each year the payments from the Commonwealth to the commission.

Senator LUDWIG—Yes. So there is no increase until they conclude?

Ms Lynch—Senator Ludwig, I think that would be pre-empting government decisions.

Senator LUDWIG—There is no allowance for one currently, so it is not a pre-emption.

Ms Lynch—No, there is no allowance in current agreements for the indexation to flow on.

Senator LUDWIG—So there is no allowance, should you fail to negotiate and conclude an agreement by 30 June, and the agreements therefore have to be rolled over? There is no allowance, that is, for an increase?

Ms Lynch—There is no automatic indexation under the agreements.

Senator LUDWIG—So you do not know when you will finish the negotiation?

Ms Lynch—No. I guess that depends on—

Senator LUDWIG—On whether you can beat them into submission, I guess—my words.

Ms Lynch—I was going to say the position taken by the states—

Senator LUDWIG—So you do not know when you will start and you do not know when you will finish. There is a problem there, I suspect, but I will leave that to the chair.

CHAIR—Thanks!

Ms Lynch—Just to finalise that, the length of time negotiations take will depend on both sides in the negotiation. That is the point I was trying to make. I cannot pre-empt when states might sign up.

Senator LUDWIG—I will move to a different area. Is Family Law Online still up and running?

Ms Lynch—Yes.

Senator LUDWIG—Will that be taken into consideration for the funding model, or is it separate from it?

Ms Lynch—That is a separate appropriation from—

Senator LUDWIG—Yes, I have always known it to be, but can it be incorporated? Is there any discussion that is part of this?

Ms Lynch—I am not aware that the issue has been raised of rolling Family Law Online into the ongoing Legal Aid agreements. Is that what you are asking?

Senator LUDWIG—A denial is fine, as long as it is not included.

Ms Lynch—I was just making sure I am denying the right thing! But if you are asking whether we are rolling the Family Law Online money into the Legal Aid negotiations—

Senator LUDWIG—It is not a trick question—not yet, anyway!

Ms Lynch—no, we are not.

Senator LUDWIG—Let us go to the Family Law Hotline. Rather than dealing with them individually and although estimates is next week, one of the questions I tend to ask is about where we are at in relation to those three, particularly the Regional Law Hotline. What is the number of phone calls? When do the agreements run out? How much funding is there currently? They have been rolled over for a bit longer, as I understand it.

Ms Lynch—I do not have them now but for next Monday I will have updated figures on Regional Law Hotline usage. Ms Pidgeon may want to update you on the other aspects you were asking about on Regional Law Hotline.

Ms Pidgeon—At the last couple of estimates hearings I think we said that the Attorney was considering how to progress in the future with the Regional Law Hotline arrangements, and the Attorney-General has now made a decision that we want to expand the coverage of Regional Law Hotline. It has up to now been in 14 designated regions, and we want to fill in the gaps and make sure that all regional areas of Australia are covered. To do that we are expanding the role of the legal aid commissions in providing the legal advice component of the Regional Law Hotline and phasing out the involvement of the community legal services. They will continue to be involved until 30 June this year but after that the legal aid commissions we are talking to about taking over the full role will be providing the legal advice component. Up until now it has been a mixture of commissions and community legal services. That will enable us to expand the coverage of the service, and we will be able to do more work in making sure there is community awareness of the service availability.

Senator LUDWIG—Is there a press release on that?

Ms Pidgeon—I do not believe there is a press release at this stage. I think there will be a press release once all the agreements are reached with the legal aid commissions on exactly when we will be launching the wider service in each state.

Ms Lynch—The current arrangements go on until 30 June.

Ms Pidgeon—Yes. The legal aid commissions and the affected community legal services have been written to about the changed arrangements. As I said, once we know when we are going to be launching the expanded service in each regional area there will be media releases.

Senator LUDWIG—Let me understand this. We can use one from memory: I think the community centre at Roma gets $50,000 for Regional Law Hotline. That is going to terminate on 30 June?

Ms Pidgeon—That is correct.

Senator LUDWIG—Potentially, Legal Aid Queensland will then receive some funding. Do we know how much? Do we know whether it is the equivalent amount or an increased amount?

Ms Pidgeon—It is still being discussed with the legal aid commissions, so I cannot really comment on the arrangements that have been made. There is a willingness to discuss and reach agreement. If we do not reach agreement with any commission we will need to look at another statewide provider for the legal advice. We cannot continue to do it just with community legal services because their coverage is not wide enough to cover a whole state.

Senator LUDWIG—You do expect, though, to reach agreement with—for argument's sake—Legal Aid Queensland?

Ms Pidgeon—I would hope so—

Senator LUDWIG—All of these things are in the balance.

Ms Pidgeon—but, as Ms Lynch said, it takes two to reach agreement.

Senator LUDWIG—I am not so sure about that in relation to the legal aid funding.

Ms Lynch—I think it is fair to say we have had indications from most legal aid commissions that they are interested in pursuing it.

Ms Pidgeon—It has been quite positive.

Senator LUDWIG—As I understand it, Legal Aid Queensland already provided an excellent telephone advisory service. Did you envisage piggybacking on that system or otherwise utilising it?

Ms Pidgeon—The commission were already providing some services in taking some overflow calls and other calls that could not be taken by the community legal centres.

Senator LUDWIG—They were a referral service to the Regional Law Hotline, as I understood it, anyway.

Ms Pidgeon—The legal advice providers under the Regional Law Hotline—which were a mixture of the community legal services and most commissions—were being referred from a call centre. That will continue but there will not be a mixture of providers; there will be only one

provider of the legal advice in each state. Queensland had been taking calls from that call centre and that will expand. Yes, they provide an excellent service.

Senator LUDWIG—How do you envisage it will work? Will the legal aid service have a hotline that people will ring to receive information?

Ms Pidgeon—The hotline infrastructure will not change: it will continue to go to the same two regionally based call centres that are used for both the Family Law Hotline and the Regional Law Hotline. That will enable us to have national consistency for waiting times, and basic information about family law can be provided by the hotline service providers who first answer the call. It is when people need information about other areas of law or legal advice itself that they are referred to a legal advice provider. That is the role that some of the community legal centres have been playing. That will now be just the legal aid commissions. So the initial call will still go to the same central call centres and they will still get the same standard of quality.

Senator LUDWIG—So we will still be able to get the data on that?

Ms Pidgeon—Yes.

Senator LUDWIG—And we will be able to get the referrals, and then legal aid will pick up at that end and we can get some statistics as to what the issues are and where they are going.

Ms Pidgeon—Yes, I would expect so.

Senator LUDWIG—I foreshadow that as a question I might be asking at estimates at some future point.

Ms Pidgeon—The data will, of course, depend on what the commissions agree to.

Senator LUDWIG—Is increased funding available for that, or is it the same amount of money?

Ms Pidgeon—It is the same funding but a more efficient use of the funding, because we are not spreading it around to the community legal services, which had quite limited geographical coverage when compared with the legal aid commissions.

Senator LUDWIG—So they turned out to be a bit of a failure, didn't they?

Ms Pidgeon—No, not at all.

Senator LUDWIG—It sounds like it.

Ms Pidgeon—Not for the 14 regions. We were not capable of extending it beyond that with that level of funding unless we went to the legal aid commissions entirely taking over that role.

Ms Lynch—The change extends the reach of the regional hotline to more than the 14 regions that were serviced by it initially. This extends the service to regional centres Australia wide.

Senator LUDWIG—Have any of the community centres complained about the removal of the funding?

Ms Pidgeon—I am not aware that we have received any complaints. They were well aware for some time that this was a real possibility.

Senator LUDWIG—Why is that? Were they aware that it was not working?

Ms Pidgeon—They were aware that it was under consideration and that different arrangements could be made. They have been aware since at least early last year, and I think even earlier than that, that we were looking at options.

Senator LUDWIG—Has a report or a review been done? If you were looking at options, did someone write a paper about it?

Ms Pidgeon—We had an internal review to look at data, and we sought feedback from stakeholders. That internal review did not result in a report as such; it was put together just in our department. I think it got into some sort of draft stage, but was never finalised as a formal report. Basically, that review was into more than the regional hotline; it was looking at Australian Law Online as such, and it did identify that the regional hotline was not being used as much as we had hoped.

Senator LUDWIG—Is that review available?

Ms Pidgeon—It is not a public report, but it might be able to made available.

Senator LUDWIG—Perhaps you could take that question on notice. There must have been some submission, suggestion or paper that went from here to the minister for the department to make a decision to change.

Ms Pidgeon—All that went to the Attorney-General was a submission, not a report. We only did this review at the departmental level; it was not one that went on to the Attorney. But we did refer to the findings of our internal review. We did tell the Attorney-General what we thought was the situation as a result of that internal review.

Senator LUDWIG—What was that? Was it that the regional hotline was a failure or was not meeting needs and that it needed to be changed?

Ms Pidgeon—No. It was that it was not being used as much as we thought and that we needed to have a look at options to get better usage, which included, for example, extending its coverage.

Senator LUDWIG—So it was not being used much?

Ms Pidgeon—As you know from estimates, Senator, the call rates are relatively low compared with, for example, the Family Law Hotline, and we would have liked to have seen higher call centre figures.

Senator LUDWIG—It suggests a failure to me: the system did not work, and you have now changed it.

Ms Pidgeon—I do not think it was a failure; I think it was not used as we wanted it be, and so we are expanding it. You do not expand failures.

Senator LUDWIG—No, but you significantly change them. Has that been audited in any sense—before the change, and then what the level of use was? We have asked in estimates how many were being used.

Ms Pidgeon—We monitor the usage figures—we receive them, with some small delay, from the call centre provider—and they are the figures that we provide to you. Of course, we monitor those as we receive them. The usage has gone up. We tried some increased public awareness promotion as a trial last year, and it did have an impact on the numbers of calls.

Senator LUDWIG—We might leave it at that point. Perhaps you can provide the level of use again, or an updated version.

Ms Pidgeon—We certainly will.

Senator LUDWIG—I am sure that you are preparing that in any event. Thank you.

Senator SCULLION—You will be aware of the submission from the Aboriginal and Torres Strait Islander Commission and the statistics provided in that submission. As well, evidence provided to the committee directly in Port Augusta touched on many of the aspects of what I could probably call 'cultural cloaking' of the unserviced need of Indigenous people, particularly women. There seem to be very low numbers of people—particularly women—working in the Aboriginal legal aid system who have an Indigenous cultural background or Indigenous language skills. This was certainly the evidence given at Port Augusta. They indicated, for example, that when a particular individual was in the area that unserviced need was uncloaked—and it was a huge need. Without those people with an Aboriginal background or Aboriginal language skills being there—with whom the women, in particular, felt comfortable with—it was as if that need was not there at all. I suspect that that is probably an Australia-wide issue. Is there any proposal to have some sort of cooperative approach between the Aboriginal and Torres Strait Islander Commission, the Commonwealth and the legal aid services in trying to establish what is actually an unserviced or perhaps culturally cloaked need?

Ms Lynch—I am aware that a number of legal aid commissions and ATSIS have a fair amount of liaison. We liaise closely with ATSIS ourselves. We have an MOU with ATSIS, given the similarity of the work that we fund under some of our programs and that which they fund under theirs. I am not aware that there are any plans at this stage for a program for the sort of assessment that you are talking about. That is something that you might want to raise with ATSIS, who are coming after us. But I am not aware of a proposal to undertake that sort of study at the moment.

Senator PAYNE—There are a couple of questions I want to ask that have come to the committee's attention from previous hearings, most of which will be familiar from the *Hansard*s. I want to go first to the matter I was discussing with Mr Connellan: the location of things like

community legal centres and legal aid services. I am not suggesting that the Commonwealth specifically locates legal aid centres, but certainly we have some role in CLCs and the ones that we fund. Obviously, I am much more familiar with the geography of New South Wales than I am with that of Victoria. I turn to the list that I think you provided as attachment D to your submission. It is a comprehensive list of over 100 different services. In New South Wales, for example, there does not seem to be any service between Nowra and the Victorian border, which is a considerable portion of the state of New South Wales. My question goes to how decisions on location are made and, therefore, also to the issue of unmet need, which has been pursued by a number of submitters to the inquiry, insofar as it is difficult to assess the effectiveness of service delivery if we cannot make an accurate assessment of unmet need. What efforts does the department make to examine those issues?

Ms Lynch—The department, together with the relevant state government and legal aid commissions, has undertaken a series of reviews on a state-by-state basis in relation to community legal centres. The New South Wales review is about to get under way. Those sorts of issues of location of new centres are ones that have been dealt with in those reviews on a state-by-state basis.

Senator PAYNE—Is this a public process?

Ms Lynch—Ms Pidgeon knows the details.

Ms Pidgeon—Essentially, the review has Commonwealth and state representatives and community legal service representatives. In some cases it also has what we would see as a public interest representative. I think New South Wales has got that—I will have to find that in a moment. The review looks at a range of issues, including demographics, and tries to identify areas of need in that way but also takes submissions and is a public process from the point of view of taking submissions.

Senator PAYNE—From whom?

Ms Pidgeon—From interested parties: community legal services themselves and community organisations.

Senator PAYNE—Regional law societies?

Ms Pidgeon—Certainly they could make submissions. We would expect law societies to make submissions.

Senator PAYNE—Members and senators?

Ms Pidgeon—Yes, certainly. I think it is an open process. They advertise for submissions.

Senator PAYNE—When you say it is about to get under way, what is the time frame?

Ms Pidgeon—There needs to be some final agreement on the chair. It has been informally agreed; it just needs ticking off. I think we are waiting for a response from the New South Wales Attorney General, essentially.

Ms Lynch—I recall that we may have given you the terms of reference for the New South Wales review at earlier estimates, but we can certainly provide those. They have now been settled, haven't they?

Ms Pidgeon—They were settled, yes.

Ms Lynch—So we could provide you with the terms of reference for the New South Wales inquiry.

Ms Pidgeon—Everyone is pretty well raring to go, but there are just the formalities with attorneys needing to tick things off.

CHAIR—New South Wales is raring to go; what about the other states?

Senator PAYNE—What is the status of the others?

Ms Pidgeon—Western Australia has just finished and I believe the report was released fairly late last year—I think it was in September or October.

Ms Lynch—There have been reviews in Queensland, Victoria and South Australia.

Ms Pidgeon—Yes, Queensland, Victoria and South Australia are also finished.

Senator PAYNE—Have those reports been released?

Ms Pidgeon—Victoria had findings released. There were no recommendations in Victoria because there was not final agreement in the steering committee about recommendations, but there were findings released. Reports were released in the other states.

CHAIR—Can we get those reports?

Ms Lynch—Yes, we can take that on notice.

Ms Pidgeon—Yes, we can provide those.

CHAIR—Just on that, I notice, looking at South Australia, that there is only one service that has a coverage outside the city of Adelaide, and that is Port Pirie's Westside Community Lawyers. I am sorry, there is Mount Gambier and Berri, but most parts of the state are not covered.

Ms Pidgeon—Keeping in mind the demographics of South Australia, we are also talking about population being mainly in metropolitan Adelaide. But the main result of the review there was to identify that the resources within metropolitan Adelaide were not any longer in the places of main need and that resources were in fact moved to better cover the areas of need within the metropolitan area. There was no new funding at that time to have any new centres outside Adelaide but, in fact, as part of the other initiatives of the Commonwealth to introduce more regional centres that new centre was set up in Port Pirie.

CHAIR—You are saying that there has been extra funding allocated to South Australia for country services?

Ms Pidgeon—No, around Australia the government has, over the last few years, been putting some new centres into regional areas, and that included South Australia, but that was not a result of the review. The review identified problems with the allocation of services around metropolitan Adelaide.

CHAIR—You gave the impression that there was extra funding provided for that country service.

Ms Pidgeon—Yes, not as a result of the review but as part of a general government initiative to put more regional community legal services in place, and that included South Australia and other states. Can I make a correction: as I understand it, the Victorian findings were not publicly released. That would have been because of the lack of agreement on the recommendations.

Senator PAYNE—What happens to it from then if that is the case?

Ms Pidgeon—Victoria?

Senator PAYNE—Yes, as a case in point.

Ms Pidgeon—It meant that there could not be any immediate outcome, but the findings can still be used by the state and the Commonwealth when we are considering any new funding that comes up. We still have the information about where there are areas of need. I think the problems arise when you think about the possibility of moving money, and that just will not happen in Victoria as a result of the review. What will happen is that the findings will still be useful. When, as you say, we do have some new funding, they will give us an insight into where to recommend that that be provided. There is one other correction: the release of the WA report was actually in November, not October. I was a bit ahead of myself.

Senator PAYNE—The chair has just prompted me to pursue the second part of my question adequately. On the question of the assessment of unmet need: this is part of that process, I assume—this review process.

Ms Pidgeon—That is right. That is an important part of it.

Senator PAYNE—Does the department do any other assessment of unmet need?

Ms Pidgeon—The reviews have been the mechanism in the last few years, although I think there is also a general concern about regional areas. I think the committee has expressed similar concerns today. So overarching the specific state-by-state reviews, which of course happen at different times, there is an overall concern to look at where there needs to be perhaps more regional support for community legal services.

Senator PAYNE—Over and above that geographic and demographic assessment, there are still those who are commented upon in submissions who do not meet the means and merits

test—who are perhaps right on the margins—and are still unable to afford representation. Does the Commonwealth make any effort at assessing that sort of unmet need or the level of that?

Ms Lynch—That is more of a legal aid question than a community legal centres question.

Senator PAYNE—Yes, I know.

Ms Lynch—We meet regularly with legal aid commissions under the terms of the agreements and with National Legal Aid. We do try to get a handle in those meetings on applications that are coming in, the nature of the applications and those sorts of things. Also, as I mentioned earlier, when the Walker model was developed in 1999-2000 there was an element included in it of trying to deal with unmet needs through the suppression factor and the results of stakeholder consultation to try to determine the element of need that might be built into the system. So, yes, we do try to get a feel through those discussions for the sort of applications that are coming into legal aid commissions.

Senator PAYNE—What do you do with that?

Ms Lynch—Senator, we feed it into our processes relating to funding.

Senator PAYNE—Our negotiations?

Ms Lynch—Yes, and also generally in the issue of trying to determine levels of service that legal aid commissions are providing. I suppose, for example, what I am acknowledging is that there may be a certain filtering of applications that come into commissions where they are put in by lawyers as opposed to applicants personally. There may be an element of filtering that goes on because solicitors put in applications that they know are more likely to be successful and that sort of thing. Those are the sorts of issues I am referring to there.

CHAIR—I will just interpose there for a moment. Getting a feel for something is hardly a good reflection of unmet need in the area.

Ms Lynch—We talk regularly to commissions and, as I said, the model itself tried to build in some factors for need as well as demand.

CHAIR—Is any consideration being given to a somewhat more empirical study of the need?

Ms Lynch—A more broad-ranging empirical study of unmet need would be a matter for government.

CHAIR—The decision would be, but what about the department: are you making any assessment as to what would be a better way to go—for instance, an empirical study on unmet need?

Ms Lynch—No, Senator. We have been concentrating on looking at the redevelopment of the funding model which includes elements for those segments of the population which are most likely to need legal aid. There were factors built into the funding model in 2000 relating to low income and long-term unemployment, for example.

CHAIR—In that context, are you looking, for instance, at the increasing levels of self-represented litigants and how you handle that issue?

Ms Lynch—The issue of self-represented litigants is one that the department has been looking at. You may be aware that the Attorney has recently referred to the fact that the department has prepared a discussion paper on the federal justice system, which the Attorney will be releasing shortly. One of the matters considered in that paper is the issue of self-represented litigants in the courts.

Senator PAYNE—When is 'shortly'?

Ms Lynch—That is a matter for the Attorney-General.

Senator PAYNE—I will ask him.

Ms Lynch—But he has indicated in a press release that it is a paper to be released.

CHAIR—How is he looking at it? How do we intend to look into this?

Ms Lynch—I am conscious that it would not be appropriate for me to pre-empt what is in the paper before the Attorney releases it.

Senator PAYNE—Does the department look at the cost to the legal system—the literal cost to the Federal Court, the FMS, the Family Court and the High Court—of litigants in person?

Ms Lynch—Can I take that on notice? Those issues are probably better dealt with by another part of the department in terms of the impact on court functions.

Senator PAYNE—I understand that. As you know—because you are lucky enough to be in the audience for hours on end—it is a matter that we discuss with the courts when they appear before us in estimates. But getting a comprehensive view of the cost to the system is not so easy. It is not something to which the department's submission refers in its discussion of litigants in person, as far as I can see.

Ms Lynch—If you are looking at costs to the court system, as opposed to—

Senator PAYNE—Yes.

Ms Lynch—We can take that on notice.

Senator PAYNE—Thank you. I take up with you an issue about primary dispute resolution which has been brought to our attention by a number of submissions—by some of them, I think, most articulately—and particularly the use of PDR in family law and domestic violence matters. I know that you refer to this in your submission on page 6, but not in terms of this particular issue; that is, some of the difficulties associated with its use. Some of the legal aid commissions have talked about their practices trying to screen cases, particularly those which involve domestic violence, from PDR services. Has the department had a look at the effectiveness of those practices?

Ms Lynch—A review of PDR and legal aid commissions is due. It is coming up. There is funding in the forward estimates—the $1 million per year for PDR is in the forward estimates—and the review would be necessary because it is—

Senator PAYNE—It is a funding enhancement for PDR of $1 million?

Ms Lynch—Yes. It is $1 million for PDR—

Senator PAYNE—For increased PDR?

Ms Lynch—For increased PDR in legal aid commissions, and that funding requires a review. We have not yet set a date with the commissions in relation to reviewing the use of that money in PDR.

Senator PAYNE—We have been talking for about 12 minutes, and so far I count maybe five reviews. In terms of getting a result, we try to seek answers as to the results of reviews. We are told that some are—

Ms Lynch—The reviews in the CLC, for example, are held and those findings are then used to distribute funding when it becomes available or when, for example, new funding is put in.

Senator PAYNE—I understand that.

Ms Lynch—They are reviews that do not, of themselves, have a result.

Senator PAYNE—Particularly if they are not published. We have the review of the federal justice system, we have the review on—

Ms Lynch—That is a discussion paper that will come out inviting comment.

Senator PAYNE—We wouldn't be in semantics again, would we, Ms Lynch?

Ms Lynch—I am so sorry, Senator; I do not mean to be facetious. The federal justice system paper is a discussion paper, on which the Commonwealth will be inviting comments and input, but the final decisions would still be matters for government in relation to that. So if I referred to that as a review that was inappropriate.

Senator PAYNE—To go back to the question of PDR: the committee is very interested in—and has had concerns about it raised consistently in previous hearings—the use of PDR in domestic violence matters.

Ms Lynch—We have also funded training and the development of a manual in relation to screening of PDR in legal aid commissions. Also, some work was done some time ago. If you are asking if reviews have been done, there was a report by Professor Hunter in November 2002 that looked at PDR in legal aid commissions.

Ms Pidgeon—I think it was earlier than that.

Ms Lynch—I am sorry—it was completed in November 2000 and, as a result, that training was put in place.

Senator PAYNE—I guess this question is predicated on the broader issue of support for Indigenous Australians in accessing justice and legal aid in relation to domestic violence issues. The NT legal office have indicated that, in their view, the Commonwealth-state—or in their case, territory—funding divide creates some inconsistencies for them. They indicate that the family violence centres in the Territory receive Commonwealth funding that can be used for domestic violence matters related to NT laws, but the Northern Territory Legal Aid Commission is unable to use Commonwealth funds for those matters, and they find that a difficult issue in relation to management and consistency.

Ms Lynch—I am advised that the family violence units are funded through ATSIS rather than through the department. But it is correct to say that, under the legal aid agreements, Commonwealth money is spent on Commonwealth matters. There is the potential for cases that involve family violence to involve both state and federal matters, to involve a Family Court issue plus an issue in the state court related to AVOs. I am aware of that issue and the fact that Commonwealth funding is intended to cover the family law matter and that the state funding will cover the other. That is under the legal aid program. A slightly different arrangement may exist for the ATSIS program but, under the Commonwealth legal aid program, money is provided for the Commonwealth family law aspect of that matter. I know that states have raised with you the fact that they fund the domestic violence state law aspects of the same family dispute.

Senator PAYNE—It is certainly not easy for the victim in that process.

Ms Lynch—No.

Senator PAYNE—Nor for the practitioner, it would seem.

Ms Lynch—From our perspective it is an issue of how you divide up the cost. I know that some commissions have raised this with you, but I do not know that there is much further I can add at this stage.

Senator PAYNE—I think it is a matter that the committee may choose to pursue.

CHAIR—Can you tell us how many lawyers have been assessed under your national security guideline?

Ms Lynch—I would have to take that on notice. I would not necessarily know at this stage who would have applied or not. I would not have any direct involvement in that process.

CHAIR—Will you take on notice to provide us with the number who have been cleared, the number who have been assessed and the resources, personnel and otherwise, allocated to the function of assessing and clearing lawyers under that guideline. Finally, the department's preference would be for all commissions to use the simplified means test, as opposed to the national legal aid means test. Would you tell us what the motivating difference is there?

Ms Lynch—I think we might have referred to that in our submission.

CHAIR—You did, at page 5.

Ms Lynch—The simplified means test is easier to apply and therefore is likely to reduce the administrative costs of assessing applications for the means test element.

CHAIR—So is it just a matter of what detail is required?

Ms Lynch—It might be easier if I take that question on notice so that I can give you some more details of the differences between the two tests.

CHAIR—Thank you.

Senator LUDWIG—You mention the proceeds of crime legislation on page 8. I am trying to understand the last sentence just above 'national security guideline', where you say that the net result of the POCA's legal assistance scheme is that 'restrained assets can still be used indirectly to pay legal costs'. How much? Can that be quantified?

Ms Lynch—I would have to take that on notice. I do not have the figures on the use of that guideline.

Senator LUDWIG—When you say the net result, is there a positive or a negative connotation implied in that? I am trying to understand whether that is simply a statement of fact?

Ms Lynch—The way the new proceeds of crime legislation operates is that the legal aid commission are able to recoup their costs initially—as I understand it—against assets that have been restrained from a particular person.

Senator LUDWIG—I understand how it works.

Ms Lynch—If they are not able to get it against that particular person's assets they would then have access to the broader fund.

Senator LUDWIG—One of the original concerns, which predated the proceeds of crime legislation, was that assets were being consumed in defending a person's legal rights so people could exhaust their assets in defending their legal rights and therefore have no assets left. The proceeds of crime legislation was obviously designed to assist in ensuring that there was fairness in the system. I was trying to get a sense of whether that still cannot happen because it can only be that assistance which legal aid provides. Do I understand that correctly?

Ms Lynch—Can I take that on notice?

Senator LUDWIG—You can see that you could read that last part in a number of ways.

Ms Lynch—I can see where you are coming from.

Senator LUDWIG—Is it still a concern that assets are being exhausted through the process and therefore the legislation is not meeting its need? In other words, is there still a need to

address that piece of legislation or is it now more equitable? Is it a statement of fact rather than anything else? If that is the case, how much is being expended?

Ms Lynch—Can I take that on notice and perhaps give you a more considered response?

Senator LUDWIG—Yes, thank you. In relation to the Magellan Project—and you might need to take this question on notice, given the time we have—your submission says that the Commonwealth has agreed to temporary changes: what changes were agreed to?

Ms Lynch—We agreed to waiving the caps on funding.

Senator LUDWIG—So is it only the caps that were waived or were other changes implemented?

Ms Lynch—Yes, only the caps were waived.

Senator LUDWIG—Have the caps been waived in the sense of raised or waived in the sense of now there is a limited fund available?

Ms Lynch—Waived in the sense of a limited—

Senator LUDWIG—How often has that been accessed? Do you have to apply for the waiver?

Ms Lynch—Are you talking generally or in relation to Magellan?

Senator LUDWIG—I am talking in relation to the Magellan Project.

Ms Lynch—I do not have the figures on hand in relation to how many Magellan cases since 1 July in a waiver of the caps—

Senator LUDWIG—In the sense of accessing the waiver, is it a blanket waiver—in other words, how long is a piece of string—or is it a request for a waiver?

Ms Lynch—You do not have to request a waiver. The cap is waived; you do not have to request a waiver separately. There is not a sort of initial application that needs to be put in to have the waiver. I do not have figures for you on that, but I will see if I can obtain some.

Senator LUDWIG—That has been up to 30 June 2004. So it is only those in the Magellan Project for which there is a waiver?

Ms Lynch—Yes. The waiver relates to cases that are put onto the Magellan Project through the Family Court processes.

Senator LUDWIG—How much has that expanded by? How many more cases are being put under that process?

Ms Lynch—The figure I have is that there were about 50 cases involved in the pilot as at 31 December. They are the figures I have for cases that have got onto the Magellan Project.

Senator LUDWIG—So there has not been an expansion in that sense; there are 50 cases that are being trialled. Is that other than in Victoria or just in Victoria?

Ms Lynch—They are my figures for across those jurisdictions that are involved. Magellan has not been rolled out in all states at present. I can try and update those figures. My figures for 31 December were that there were about 50 cases on the system.

Senator LUDWIG—And that is in Victoria?

Ms Lynch—No, that is across the jurisdictions that have rolled out Magellan.

Senator LUDWIG—Perhaps you could break that down and give us a sense of where it is at.

Ms Lynch—I think I can probably do that at the moment with the figures I have got.

Senator LUDWIG—I am happy for you to take that on notice.

Ms Lynch—I have got those figures in here, but I will take it on notice.

Senator LUDWIG—I accept that.

CHAIR—Thank you, Ms Lynch and Ms Pidgeon.

[5.40 p.m.]

DILLON, Mr Rodney, Commissioner, Tasmania Zone and Chairperson, Board Committee for Culture, Rights and Justice, Aboriginal and Torres Strait Islander Commission

FARMER, Mr Darren, Commissioner, Western Australia (South-East) Zone and Member, Board Committee for Culture, Rights and Justice, Aboriginal and Torres Strait Islander Commission

FOLEY, Mr Cliff, Commissioner, New South Wales (Metropolitan) Zone and Member, Board Committee for Culture, Rights and Justice, Aboriginal and Torres Strait Islander Commission

QUARTERMAINE, Mr Lionel, Acting Chairman, Board of Commissioners, Aboriginal and Torres Strait Islander Commission

TURNER, Mr Les, Group Manager, Culture, Rights and Justice, Aboriginal and Torres Strait Islander Services

YATES, Mr Bernie, Acting Chief Executive Officer, Aboriginal and Torres Strait Islander Services

CHAIR—I welcome representatives of ATSIC and ATSIS. You have lodged a submission, No. 98, with the committee. Is there any need for amendments or alterations to it?

Mr Quartermaine—No, not as far as I know.

CHAIR—Who would like to make an opening statement?

Mr Quartermaine—I will. First of all, let me take this opportunity to say thank you for inviting us to address your inquiry into legal services. We at ATSIC strongly believe that with cooperation through partnerships, our role in advocacy of initiatives and also funding—the magic word—it is possible to address some of the issues confronting Indigenous people with regard to access to legal services, legal aid and justice throughout Australia. In looking at the vastly reduced access of Aboriginal and Torres Strait Islander people to legal services we have to take into consideration the range of social and economic crises in Indigenous communities and family lives. In some areas Indigenous Australians have English as a second language and in some parts of Australia they have no access to legal services whatsoever. Some of the resources for Indigenous legal aid are far less than those provided to mainstream legal aid. Individual Indigenous people also face challenges due to factors such as living in remote and rural areas, not speaking English and the high rate of literacy and numeracy issues confronting Aboriginal and Torres Strait Islander people in Australia.

We also believe that, with cooperation between the state attorneys-general, ATSIC and state legal aid commissions through partnerships, it is possible to redress the fundamental issues that Aboriginal people face. Unless we work together in addressing these issues, these issues will be here for another 20 years. I have a few commissioners here with me today—Commissioner Dillon, Commissioner Farmer and Commissioner Foley—who can speak on certain issues.

Commissioner Farmer comes from the Western Desert, where a number of people have English as a second language. As I said, some people out there do not even see legal services.

CHAIR—Thank you. Does ATSIS want to say something at this stage?

Mr Yates—No, thank you.

CHAIR—Mr Quartermaine, one of the major issues mooted before this committee is the level of services reaching Indigenous women. For the record, are there any women in senior positions in your organisation in this area?

Mr Quartermaine—Bernie will answer that.

Mr Yates—We are obviously trying to ensure that we have a balance of representation in our organisation, both of Indigenous people and a gender balance as well.

CHAIR—It does not show this afternoon, does it?

Mr Yates—Not in this particular area of expertise. Certainly one of our group managers who is in charge of social and physical wellbeing—which is a key factor linked to the issue of legal aid and contact with the justice system—is a female Indigenous person.

CHAIR—All the areas are linked, but in terms of this particular area your submission states that 89 per cent of ATSILS's legal services are allocated to criminal matters, with two per cent going to family matters and two per cent going to violence protection matters. Are there any steps being taken to try to assess the unmet needs of Indigenous women and how they can be best serviced?

Mr Quartermaine—At the moment we are doing a reform of our legal services. We are part way through that.

CHAIR—We are talking about the tendering out process—

Mr Quartermaine—But we are also addressing the reform within the organisation as well.

CHAIR—What do you mean by 'reform'? What are you doing?

Mr Quartermaine—The legal services are going through a reform, identifying the ways to address family violence.

CHAIR—So who is doing that review, that reform?

Mr Quartermaine—The legal services themselves. They are trying to find the best way to address domestic violence and service the portion of Indigenous females. There is an issue that has to be raised. It is looking at how we can address that. Do we set up an Indigenous legal aid service for females or do we go with the option of outsourcing those representatives?

CHAIR—Is there a formal process of reviewing this or is it something that is just perennially on the agenda? Who is actually doing the review?

Mr Quartermaine—We have two section 13s. We have a section 13 for females going to the Culture, Rights and Justice Committee, possibly when the committee meets again.

CHAIR—Can you tell us what section 13s are?

Mr Quartermaine—Section 13 is made up of a body, a group or a committee that gives advice to ATSIC. Because of the number of Aboriginal females on the commission the commission decided to establish a section 13 to give advice regarding Indigenous females. That covers education, health and domestic violence.

CHAIR—Mr Quartermaine, we have gone from one to another to another. You firstly mentioned reform, a review. Can you tell us who is actually doing that?

Mr Quartermaine—The reform is coming through a number of ways. Some other legal services are taking it upon themselves. We have a section 13 through Alison Anderson, the commissioner. She will be giving us advice. The Culture, Rights and Justice Committee are also now going to be looking at whether section 13 is appropriate and the reforms that need to be taken further. So those are the reforms we are looking at.

CHAIR—Both your submission and the submission of the National Network of Indigenous Women's Legal Services have called for a national review of the needs of Indigenous women for legal aid and access to justice. You are talking about a national review; you are not talking about ongoing assessment, an in-house review or whatever. Are you taking your own submission seriously? Is that review going to take place? Who is going to do it? Who is going to conduct this review?

Mr Yates—I think our submission was actually calling for that kind of review to be initiated because we do not have a comprehensive national database of unmet need, particularly as it relates to female Indigenous people. It is an important gap. We are between a rock and a hard place with our legal services. As you pointed out, almost 90 per cent of its business is focusing on criminal matters. We have been progressively trying to address the situation of women in the system with the establishment of family violence prevention legal services.

CHAIR—But that is a separate funding allocation. In terms of your major funding allocation, what is actually happening there to try to focus on this issue? The family violence prevention legal services I gather is something separate to the ongoing legal services you provide.

Mr Yates—It is a separate program but it is an integral part of the total picture of how you try to meet some of the needs in this area.

CHAIR—I am sure other members have questions about this. I will just go into one thing that you mentioned, Mr Quartermaine, and that is the decision to tender for legal services. We have heard some criticisms of that decision. Can you explain to us what that decision entails, what services you intend to put out to tender and, in that context, how do you expect this may help Indigenous women?

Mr Quartermaine—The way the system is now has failed Indigenous people regarding justice. The services provided for Indigenous people just were not sufficient. We had to take into consideration that the best way to deliver a service was to actually go to tender, with real outcomes.

CHAIR—To put what out to tender?

Mr Quartermaine—The legal service.

CHAIR—The whole legal service?

Mr Quartermaine—The whole legal service.

CHAIR—In a situation like South Australia, for instance, you are getting a very cost-effective, high-quality service. Why would you put that out to tender?

Mr Quartermaine—You cannot really put one legal service out to tender, say, in Victoria and not put everyone else out to tender. We need to do it altogether, regardless, to ensure a better outcome for the people.

CHAIR—So you have decided that it would be more cost effective and a better quality of service to tender out from the existing services into the private sector?

Mr Quartermaine—This has nothing to do with cost; it is about outcomes.

CHAIR—You must have made the decision on some basis?

Mr Dillon—This is not necessarily going to go to private services. We would like to think that Aboriginal services will quote for these and get these services—not private services. We are thinking along the lines of rules that they will have to understand Indigenous communities, and the majority of the people that understand communities will be the Aboriginals services now.

CHAIR—I will go back to the initial question, using South Australia as an example. They have a good service—no-one complains about the quality—and they have a competitive price. They have been assessed as producing a level of service at a much lesser cost than you would get elsewhere. Why would you take a decision to move? Who is driving this and why would you take that decision? Why spend all the money to put them out to tender?

Mr Dillon—As Lionel said before, it is very awkward to split these up and say we are going to contract the services in Victoria and Western Australia and we are not going to contract them in South Australia. Under a national—

CHAIR—On that basis, is there one particular state that is driving this? Is there concern in one state that they need to be tendered out?

Mr Dillon—We have not been able to put any extra funding into this since 1996. If you know anything about lawyers or know lawyers very well, if they do not get a pay rise in eight years you tend not to keep them.

CHAIR—That is the other thing about, for instance, South Australia—their salaries are very low. Are you, in essence, shooting the messenger here? Is the real problem the fact that you have relatively reduced funding and maybe the services are providing good quality service?

Mr Dillon—You may be right. We have been honestly trying to get the best outcome for the money that we have. We have more young people coming through and it is getting harder and harder with the money we have. We are losing good lawyers.

CHAIR—I do not want to dwell on this too long—and I am sure other members have got questions—but on the decision to tender out, when was the decision taken, on what grounds and who took it?

Mr Quartermaine—The decision was made in 2001, I believe, and was followed up in June last year. The thing that faced us and is facing us is the fact that Aboriginal and Torres Strait Islander people make up two per cent of the population yet we make up 20 per cent of those in jail. Somewhere along the line something is failing.

CHAIR—That does not explain to me why the existing Aboriginal legal service in South Australia, for instance, is not producing the outcomes you need?

Mr Quartermaine—Twenty per cent of the people in jail, right across the board, are Aboriginal and Torres Strait Islander people.

CHAIR—Sure, but do you blame the legal service for that?

Mr Quartermaine—Well, someone has got to take the blame.

CHAIR—Why not ATSIC itself?

Mr Quartermaine—We take the blame.

CHAIR—In terms of women in the legal system, do you take the blame for insufficient services allocated to them?

Mr Quartermaine—We will take the blame for everything—anything that is wrong—

CHAIR—That still does not go to the question of the tendering out process.

Senator PAYNE—My questions are in a different area. I want to ask about the use of interpreters in the legal system—which you mention in your submission at page 21, I think. This committee, in another inquiry some time ago, discussed the use of interpreters in the Northern Territory, in particular, and Western Australia. At the time the then Northern Territory government made a commitment to significantly enhance support for the provision of interpreters in the legal environment, and I wondered whether you had a capacity to make any assessment of whether that had made any difference and, if not, where you suggest further changes should be made.

Mr Turner—Was your question about the money provided by the Commonwealth to the Northern Territory government in terms of provision of interpreter services?

Senator PAYNE—I am just talking about interpreters generally, Mr Turner, particularly in the legal system. I know it is an issue in the health system and in the education system, but we are just talking about the legal system.

Mr Turner—In the Northern Territory the money was channelled through the Attorney-General's Department and I do not think any analysis or assessment has been done yet of the impact of that. Most of the field officers that we employ in remote areas have English as a second language and are used as interpreters by the solicitors employed in the legal services. We do not have a specific interpreter program within the legal services. We try to engage interpreters as part of the field officers we engage throughout the country.

Senator PAYNE—I assume, based on your recommendation 16, that you do not encourage those field officers to operate within their own communities? Do you have enough to go around?

Mr Turner—In terms of field officers?

Senator PAYNE—Yes.

Mr Turner—We could do with some more but I think at the moment, with the resources that we have, they do a good job in difficult circumstances.

Senator PAYNE—Do you apply the same policy to them—that they should not operate in their own communities?

Mr Turner—Sometimes in terms of some cultural issues and depending on the crimes, the issues and the criminal matters that they are dealing with, it is not favourable to have them dealing in their particular community.

Senator PAYNE—I would like to ask a question in relation to the evidence the committee has taken previously. We had witnesses in Melbourne from the National Network of Indigenous Women's Legal Services. Are any of you familiar with Ms Winsome Matthews, who is the spokesperson and founding member of that organisation?

Mr Turner—I am from New South Wales and Winsome is from New South Wales.

Senator PAYNE—Have you had any opportunity to look at their submission or any of the comments that they make in relation to this inquiry?

Mr Turner—Just what was on the Internet, and I spoke with Winsome at the recent justice summit with respect to the organisation. We are having discussions about a funding proposal.

Senator PAYNE—I am sure she is very formidable in those discussions.

Mr Turner—She is.

Senator PAYNE—She was fairly critical of the current arrangements in relation to supporting the legal needs of Aboriginal and Torres Strait Islander women, no matter by whom they are implemented. In terms of those specific criticisms, has either ATSIC or ATSIS had an opportunity to look at those and identify your agreement or otherwise?

Mr Quartermaine—No.

Mr Turner—I do not think at this stage we have been able to discuss the matters raised with the group but we will look at the information that has been provided and discuss the matters with them.

Senator PAYNE—I think it is fair to say that the committee would be interested to know your various organisations' responses to their submission and also what ongoing engagement is possible between the national network and your organisations. For example, she makes the observation in *Hansard* that there are Aboriginal women who are qualified as lawyers but 'the opportunity for them to gain employment in legal services does not exist'. That goes back to the question Senator Bolkus began with, about the level of representation of women—and, of course, Indigenous women—in your respective organisations. They are issues to which the committee has had our attention drawn regularly and which I suspect we would intend to pursue.

Mr Dillon—As for what you are talking about, Senator, is that through the ATSIC board or ATSIS?

Senator PAYNE—Ms Matthews's view?

Mr Dillon—Yes.

Senator PAYNE—I think that is Ms Matthews's view, broadly speaking.

Mr Dillon—I say that because the ATSIC board is elected by the whole community, not just by the men in the community.

Senator PAYNE—I understand that. In fact, I do not think that she is talking about the ATSIC board. I think she is talking about service delivery to women in her community which is not delivered by women in enough situations to be of assistance.

Mr Quartermaine—We agree with you on that one. There should be more opportunity then.

Senator PAYNE—So does ATSIC have in mind any reforms to address that?

Mr Quartermaine—Yes, hopefully through the tendering process.

Senator PAYNE—Did you intend to have conditions attached to it about the inclusion of women or Indigenous lawyers, or both?

Mr Quartermaine—That will certainly be on the list.

Senator PAYNE—It will?

Mr Quartermaine—Certainly. The tendering process has not been made up as yet, but that will definitely be highlighted now.

Senator PAYNE—It is interesting, Mr Quartermaine, that you would suggest that it be highlighted now, because in fact it is quite clear from your own submissions that this is an ongoing issue and that the real level of fundamental and primary need is with women in your community.

Mr Quartermaine—Are we talking about the tendering process?

Senator PAYNE—No, I am talking about the need in general.

Mr Quartermaine—My understanding of the context that comment was in is that it was about the tendering process. You asked if it was in the tendering process. I said it will be highlighted, and if it was not it was because we have not gone through the tendering terms of reference yet. You have raised it, and it will certainly be an issue now.

Senator PAYNE—What is your time frame for the tendering process?

Mr Quartermaine—That is out of the elected arm and is now in the administration arm.

Senator PAYNE—Perhaps the administration arm could tell me.

Mr Yates—We are finalising an exposure draft for the tender with a view to releasing that within the next couple of weeks. That will be out for about six weeks, during which time we will receive feedback and comments, including ones from ATSIC. Then a final tender will be prepared and issued.

Senator PAYNE—Is that tender process a direction that you have received from the ATSIC board?

Mr Yates—The processes for arranging service delivery reflect the history of the board's support for greater contestability in the arrangements for service delivery of legal services, but since the changes that were introduced from July last year ATSIS, as the funding agency, is responsible for arranging the service delivery. The minister's direction to ATSIS makes it very clear that it wants us to move towards outcomes based approaches to the arrangement of services. In this area, in light of the strong support that the ATSIC board has given historically to using tendering as a way of securing better and more effective outcomes from the resources that we have available, we are moving down that path.

Senator PAYNE—So in fact this tender process is a ministerial direction?

Mr Yates—Ministerial direction encourages us to use modern approaches to arranging service delivery. It is not mandating us to use tendering in the arrangement of services that we purchase, but in the area of legal services we believe that it is the most appropriate way to go to secure the best outcomes.

CHAIR—Can we get a copy of that direction?

Mr Yates—Certainly, Chair.

Senator LUDWIG—So it does not appear to be a ministerial direction. Is it an ATSIS decision? Is it your decision? I am just trying to work this out. There has got to be someone who signed a bit of paper to say, 'We're going to look at competitive tendering for legal services.'

Mr Yates—Yes.

Senator LUDWIG—Who did that?

Mr Yates—That is the responsibility of ATSIS.

Senator LUDWIG—So you have started this process?

Mr Yates—That is correct.

Senator LUDWIG—So there was not a ministerial direction as such?

Mr Yates—Ministerial direction is not prescriptive as to the mode of arranging the delivery of services.

Senator LUDWIG—Was there a direction from the board? Not a historical one but a clear direction to proceed down this path?

Mr Yates—The board has been very supportive—

Senator LUDWIG—That was not my question.

Mr Yates—Our understanding of our obligations under the new separation of powers—

Senator LUDWIG—That is still not my question. Was there a direction?

Mr Yates—The board does not direct how legal services or any other services are to be purchased.

Senator LUDWIG—Have they made any recommendation for that to you?

Mr Yates—In June last year they gave a very strong policy position in favour of tendering for the services.

Senator LUDWIG—What was that policy position? Is that available?

Mr Yates—Yes, that is available.

Senator LUDWIG—Perhaps we could have a look at that as well.

Mr Yates—Certainly. It is reflected in the submission but we can make the policy position available.

Senator LUDWIG—Yes, I can see it in the submission but I was curious as to how it was expressed by the board. Thank you.

CHAIR—Was that a board decision, Mr Quartermaine?

Mr Quartermaine—It was a board decision to go the way of purchasing the services by way of tendering. Since July we have had that separation of powers.

CHAIR—Did that decision cover both professional and secretarial services or did it target some services and not others?

Mr Quartermaine—It just targeted legal services.

CHAIR—You mentioned earlier that the Family Violence Prevention Legal Service had been established. There are 13 of them. You may want to take this on notice but can someone tell us where they have been established and what sort of resourcing is allocated to each one?

Mr Turner—We do not have all the information on hand. I will take it on notice and supply that information to the committee.

CHAIR—Are they all in place?

Mr Turner—Yes.

CHAIR—Will you tell us where they are, and the level of resources in terms of personnel and ongoing funding?

Mr Turner—Yes.

CHAIR—Have any evaluation processes been put in place for those legal services? Do you anticipate them being value added at some stage?

Mr Yates—Within ATSIS we have a dedicated office of evaluation and audit, and the OEA completed an evaluation of ATSIC's legal services relatively recently. It was reported last year. We can make that available to the committee if it wishes. Some of the results are reported in our submission.

CHAIR—Regarding children and the legal service, can you tell us how you are making an assessment as to what their levels of unmet need are?

Mr Turner—We highlighted in our submission to you our undertaking of the study of the unmet needs.

CHAIR—That is your recommendation 7?

Mr Turner—We articulate in our submission that youth are 40 per cent of the Indigenous population. In terms of the demographics the issues that we are faced with require a policy review of how we address this particular need within our Indigenous community.

CHAIR—Whom do you suggest would conduct that review?

Mr Turner—In our submission we ask for a joint arrangement—whether we can negotiate something between the Commonwealth and the state jurisdictions to try to come up with some data and analyse it and put in specific policy objectives to overcome the issues facing Indigenous youth.

CHAIR—In a broader context—I think it is recommendation 2—you suggest that there be a formal national framework of cooperation between ATSIS, and Commonwealth and state justice and legal aid providers. Is that something that is being developed at this moment or is it a new idea that you want us to have a look at?

Mr Turner—We have an agreement—an MOU—with the Attorney-General's Department. We are also looking at the state partnership agreements that are being developed in each of the state jurisdictions. At the moment we have a number of arrangements between Indigenous legal aid service providers and a number of legal aid commissions but it is something that we want to pursue in terms of having in place a partnership agreement with the state justice departments.

CHAIR—Would you anticipate then that the Indigenous youth crime prevention strategy be part of that, or would that be a stand-alone, separate thing?

Mr Turner—I think it will complement it and assist us in developing some objectives in terms of deliverables and outputs.

CHAIR—It would need to be broader than just the A-G's department, wouldn't it?

Mr Turner—That is right, in terms of the state justice departments.

CHAIR—Is the youth crime prevention strategy something that ATSIC is pursuing at the moment?

Mr Quartermaine—Yes. That is part of our policy regarding family violence.

CHAIR—So how are you pursuing it? What resources are you putting into it?

Mr Quartermaine—So far we have encouraged 35 regional councils to develop a plan. We have given them something like $85,000 to $100,000 to work on their plan. It is not much money but it is about as much as we can afford.

CHAIR—That is across the whole lot, is it?

Mr Quartermaine—That is across the whole of Australia. Most of our money is quarantined. There is very little to put towards such programs.

Mr Dillon—Just over the last few years, we have had the biggest population increase in juveniles—in young people. We are looking at addressing that. With regard to law and justice, we have only just started our new committee. We are looking at addressing the youth problem but at the end of the day to get the money we have to take it off the legal service that is already there, which is already underfunded. We are stretched in terms of where we are going to get the money from to do it. It is a problem for us. With regard to the women's legal service, we are going to have to take that money out of the service we have already got, which is already overburdened.

To answer your question fairly and honestly: we know the problem we have got. In the past we have addressed the perpetrator and not the innocent person. The innocent person has usually been covered by the prosecutor, but we know that this system is not good for us and we are trying to address it—it is going to take us time—with the little money we have got. We think that putting things out to contract might be a way we could save some of our money, but we have taken a fair—

CHAIR—What led you to that belief that you could save money by putting it out to tender? Was there any study done?

Mr Dillon—No, there has been no study done.

CHAIR—How much do you reckon you could save by putting it out to tender?

Mr Dillon—We know that there is a problem with putting it out to tender as well. The other part of it is: how do we fight our day-to-day fight if we have not got a legal service? We have used our legal service to fight our day-to-day fights as well. To answer your question, we have not had proof that tendering it will give us a better service. But it will give us a package. We will know how much we are getting for that service. We have not been good at gathering information in the past. We know, you know and everyone knows that we have got a lot more people in jail than everyone else and we have been trying to do different things to try to change it.

CHAIR—The Aboriginal legal rights movement has been very much at the core of some of the great campaigns for Indigenous rights in this country. Are you tendering those out too?

Mr Dillon—I fear that we will lose part of that by tendering it out.

CHAIR—Was that not a major consideration before ATSIC directors?

Mr Dillon—It was a major consideration, but we have very little money. We have had our backs to the wall with the money we have got to try and get a better service. We are going to either have to give up our human rights lawyers just to fight the cases of the people who are in jail now—and those going to jail. It is hard; it is not easy morally for us.

CHAIR—I just think it is a sad day when you look at the history of Indigenous rights in this country. They had to be fought hard for and won in courts. That is the sort of thing that you cannot really tender out.

Mr Quartermaine—Sometimes you have to make those tough choices.

CHAIR—I think generations of Aboriginal leadership would not have made those choices, Mr Quartermaine. Thank you very much for your evidence this afternoon.

[6.16 p.m.]

NORTH, Mr John, Executive Member and Member, Access to Justice Committee, Law Council of Australia

WITHERS, Mr Brian, Chairman, Access to Justice Committee, Law Council of Australia

CHAIR—I welcome you to this inquiry. You have lodged submission No. 62 with the committee. Is there any need for amendments or alterations to it?

Mr Withers—No, there is not.

CHAIR—Who will make the opening statement?

Mr Withers—Perhaps we might both make brief opening statements to give you some idea of our backgrounds. I am the chair of the Law Council's Access to Justice Committee and have been involved with that for many years. I happen, in my state, to be the chair of the legal services commission and the Law Society's contingency litigation assistance fund. I have had a long interest in this topic. Apart from all of that, I am a partner in a practice that has done legal aid for many years and has offices not only in Adelaide but also in country South Australia—in Port Augusta and in the Clare Valley.

The Law Council is the national representative body for all Australian lawyers—not just for lawyers in the private profession, as it is sometimes called, but also for those lawyers employed by legal aid commissions, at schools and such. Our submission, which is before this committee, addresses some matters of principle initially, but from page 10 onwards we address the questions that are the subject of this inquiry. Our executive summary, from page 3 onwards, addresses those particular questions. In addition to all of that, we are happy today to be able to provide to this committee a copy of the Law Council's *Erosion of legal representation in the Australian justice system* report. That report has not yet been publicly released. It is hot off the press as at this morning. It is a research project undertaken by the Law Council in conjunction with the Australian Institute of Judicial Management, National Legal Aid and Aboriginal and Torres Strait Islander legal services.

CHAIR—By doing this you are making it public immediately.

Mr Withers—I understand that. It will be launched in the next day or two.

CHAIR—Thank you. It is being launched right now, in fact.

Mr Withers—It is a document that really looks at the growth of litigants in person in the Australian justice system from 1994 through to the present time, the impact on the system and the likely causes and effects. I guess, because it is a substantial document, if the senators have any questions that they would like to put after they have reviewed this document then the Law Council would be happy to take those on notice and respond as is appropriate.

Mr North—I am here in my role as Treasurer of the Law Council of Australia but, probably more importantly, also as a country practitioner of some 20 years in Dubbo and remoter areas

where I run a practice. I have for my sins served time as a board member of the Legal Aid Commission of New South Wales. At the moment I am a board member of the National Pro Bono Resource Centre. For 20 years I have done a great deal of legal aid work personally within my firm and I have supervised others doing legal aid. I am here today, I hope, to assist you if there are any questions about the effect of legal aid problems on rural and remote areas. I hope that we can give you some insight into how we can, perhaps, redress the problem that I and others see as a growing one for those who live in the bush. With those short words, I hope we can assist you.

CHAIR—Thank you. I will just ask one question and then pass over to other committee members. On your last point, particularly in the opening hearing in Port Augusta, we heard of a dwindling resource base in the bush amongst professions and particularly the legal profession. I would anticipate that you have discussed that in this document. Would you like to elaborate further on the sorts of ideas you would like us to look at?

Mr North—Thank you. It seems to be particularly clear that the lawyers who are operating in the bush are getting older and there are becoming fewer of them. Just as it is with the medical profession and other professions, it is particularly difficult to entice young lawyers out into the country. I think the only way we will be able to do anything about it is to start using people who actually live and grow up in the country and try and get them to become lawyers and to come back into the communities where they are from. When you can get somebody to come to the country, if they stay for a few years, they love it, and you get a lot of very dedicated and experienced lawyers. Our finding is now that, because of the crisis that occurred in legal aid a few years ago when the Commonwealth funding was effectively frozen, large numbers of experienced lawyers, many with more experience than me, are not taking part in legal aid work. This is not just a plea on behalf of the legal profession to increase funding; we really do face a problem of access to justice in rural and remote areas with a lack of lawyers on the ground.

Mr Withers—Can I support that from the South Australia viewpoint, of which I have more knowledge. I noticed the evidence of Peter Duffy before this committee in Port Augusta and his comment that the demographics of the bush are changing quite dramatically—that more disadvantaged people are moving there because of more affordable housing and the ability to live at a better level than they would be able to in the city and, hence, the pool, if you like, of those who would qualify for legal aid is probably increasing. As Mr North has said, it is exceedingly difficult to get lawyers to go to the country and stay there, and I think that applies across Australia.

Senator PAYNE—Not having had a chance to look at your clearly comprehensive document, I assume you will be providing copies to the Attorney-General and the Attorney-General's Department?

Mr Withers—Everybody in sight will be provided with copies.

Senator PAYNE—I will warn them! One of the initiatives that government has pursued in relation to medical practitioners in rural and regional areas is the establishment of rural medical schools—encouraging those from the regions to do their training in the regions and, hopefully, stay in the regions. Is this something the Law Council is advocating we look at in relation to

legal education, and are you taking that up with the universities? This does not actually relate directly to this inquiry, but nevertheless you raised it.

Mr Withers—Yes, it is. One of the recommendations of this litigants in person report—*Erosion of legal representation in the Australian justice system*—on the third page of the executive summary is:

> ... there be innovative scholarship and subsidy schemes to encourage young people from rural and remote regions to become lawyers and that lawyers be encouraged generally to practice in rural and remote regions ...

That is a fairly substantial undertaking. From personal experience, we had a practitioner of 20 years who stayed at Port Augusta. That man had grown up in Port Augusta, came down to Adelaide, worked his way through law school, worked with our firm in Adelaide and then went back to Port Augusta where he stayed, because it was his community and he knew about it. They are the sort of people who are likely to provide the long-term support and commitment that is needed in those remoter areas.

Mr North—Your question is a good one because law schools, unlike medical schools, are not so expensive to set up. I know that they have set up a clinical school in Dubbo for practitioners and it is a very big and very expensive undertaking—and a great thing for the community. There is absolutely no reason why country campuses attached to universities should not be able to offer country people a legally based education. There must not be, when you look at things, this ridiculous situation that is in New South Wales where you need 99.8 or 99.6 in the Higher School Certificate to qualify. It should be on the basis of people being interviewed, having a reasonable score and being assisted to go through these degrees.

Senator PAYNE—Yes, it begs the question whether all of those we know who qualified 20 years ago would still get access to legal schools in this country.

Mr North—I think that is right. I just know that the current University of Sydney arts-law degree requires 99.65, and that does not leave many people in the state who could do law; and probably some of them, if you will pardon me, might not be suitable to practise law, particularly in the bush.

Senator PAYNE—I remember attending a very impressive law students' graduation at the University of Southern Cross last year. It is clearly a country campus based in Lismore with the sorts of students who need encouragement to stay in those regions. Does the Law Council have any interaction with the tertiary institutions, like USC, who are already doing some of those things? I picked New South Wales because it is Mr North's state and it is my state.

Mr North—We have quite close association with the law deans and others. I think this is something that is not specifically mentioned in the senator's point and it is something that can be developed further. I would very much like to take it on board at Law Council level to see if we can develop it because it takes out the problem of having to move the student from the country area to the city and then back again.

Senator PAYNE—Thank you. Let me go on to matters that pertain more directly to the specifics of our inquiry into legal aid funding and broader access to justice matters. Mr North,

perhaps there is some feedback you can give the committee about your specific experiences in western New South Wales as a practitioner, both generally and as one who I know has been involved extensively in legal aid, that will assist us in understanding the situation that you face. We have taken some evidence in previous hearings, particularly from those concerned with difficulties of access to justice for Indigenous Australians; you would have heard our previous discussions about our concerns regarding access for Indigenous women in particular. It seems to me at least that we have a significant level of both unmet need and unmet demand, and that the victims in that process—not the victims as they appear before the court but the people who are victims of the inadequacy—are being sorely done by in terms of access to justice and equality in this system.

Mr North—I think that is right. The thing that we notice, and where we become involved as private practitioners, is Indigenous matters where they have Indigenous people on both sides of a conflict, even for a criminal conflict where people are charged with the same offence, albeit a domestic violence or a family law conflict. We quite often act in that role and have to apply through the normal legal aid channels to do so or, sometimes in our area, if the very stretched Western Aboriginal Legal Service is able to pay a small amount of money, we do it that way. This is a real area of unmet need and it is not solved by merely setting up further Indigenous legal offices or, indeed, legal aid offices because you are always going to have these conflicts where they are devoting most of their resources to defending people who are being locked up at an increasing rate in our community.

So we do very much need to be able to encourage the private profession, which has left in large numbers, to come back in and to fulfil that unmet need. We cannot afford to do it through settled and set up offices because we just do not have the money. But we have to do it and we have to be able to interest lawyers in private practice to do it. To do that you have to consider travelling time and things such as that, which are not understood by those in the city.

Senator PAYNE—Your submission does not talk about that in a great deal of detail but we took evidence from the New South Wales Legal Aid Commission, I think it was—I would have to refresh my memory on the witnesses on the day—about that very issue of travelling great distances, of lawyers declining to appear early in the hearings process, and so on. That is something that obviously affects you as a practitioner.

Mr North—That is right. If I have to go to Bourke from Dubbo it is four hours drive and you would never get accommodation so you have to get up very early and drive and then you have to spend a day in court and you have to dodge the kangaroos on the way back. It is a long day. It is that sort of thing that puts people off appearing for legally aided matters in local courts throughout the area. It is very important that we do have lawyers appearing in the local towns. If you go to a town such as Bourke that has huge law and order issues they like to see lawyers and others dealing with the matters in their towns. It is one of the great problems we have. We just do not have the time, running our own private practices, to do all of that for a legal aid rate and that is a real difficulty. Legal aid in New South Wales has tried to recognise that and bring various things in but that is by no means uniform across the country.

Senator PAYNE—So in fact that is more than the issue you raised in your submission on page 14, I think it was, where you talk about the fee scale. That is a different issue from the fee scale per se; that is an issue about considering the components that go into representation

particularly in rural and regional areas. Obviously I am not ignoring metropolitan areas but using your expertise to canvass this area—

Mr North—I think that is right, Senator. The fee scale has a fundamental problem in that all the surveys we see do say that the fee scale is under the cost of actually doing business as a lawyer in a private profession, and therefore that is always the rub. But a lot of people will continue to do legal aid if they can see that the remuneration includes travel time and so forth that makes it slightly bearable so that they get somewhere near the cost of breaking even. At the moment we are nowhere near that and that is a problem. You may well be able to stretch what is a very stretched dollar at the moment if you look at areas of the state that are underrepresented and make categories of travel and accommodation for those areas rather than doing it blanket fashion across city areas because we cannot afford it.

Senator PAYNE—That is an interesting proposition, one which I do not think we have contemplated before now. The letter which is appended to your submission and marked attachment A from a local Canberra law firm, I gather: is that typical of the response of practitioners currently, that they might find themselves looking at writing off in excess of $20,000 in accounts in a financial year and therefore giving up on the process completely?

Mr Withers—Yes, I would suggest that that is typical. In my own law firm we write off very large amounts of money against legal aid work. In the family law area, which is the Commonwealth area, where the aid is recorded at the local legal aid scale, which is $104 an hour—which is well below our commercial rate—we still have a write-down of almost a third because more hours are required to do the job than are allocated for in the lump sum fees. That work is performed by an accredited specialist in family law and by a more junior practitioner. So there are very substantial write-downs and, as is put in the submission, as a lot of the ordinary people work that has been available to country practitioners—like personal injury work and conveyancing—contracts as a result of changes to law so the capacity of those firms to undertake that loss-making work reduces.

CHAIR—Following on from that, on page 21 of your submission you say that, despite these cost limitations—or maybe because of them—many in the profession prefer to undertake pro bono work ‘than be subjected to the bureaucracy and processes of legal aid’. Would you like to elaborate on that? Could you recommend any reforms to the current system that may make it more attractive?

Mr North—It is a point that one of the great aggravations of doing the work, which is at a very low level of pay anyway for private practitioners, is then dealing with the individual legal aid service. But there is movement in that area with electronic lodging and quicker answers and quicker payments by various commissions. That is by no means uniform across the country. There is an interesting Victorian experiment whereby they are doing away with much of the checking. Take the fact that you have a client who is on some form of Commonwealth benefit: you have to produce all the papers, documents and everything else; it just drives people nuts. But there are ways around that, and one of our recommendations is to try to streamline the bureaucracy of granting legal aid across the country. It should be done in the best possible way, having a look at each of the modes of change that have been put in place by various legal aid services and seeing which is the best one, the one which works properly, and trying to do that

nationally. I think that would save a lot of aggravation across the country for those who do not like the bureaucratic red tape.

Mr Withers—Legal Aid in Victoria has conducted a pilot scheme whereby various nominated practices in the country area have actually had the power to receive the application, assess it, grant the aid and then bill it at the end of the job. It is subject to a random audit. I am told that scheme has worked very well and is well regarded by the more remote practices because it avoids all of the bureaucratic back and forth that goes on, which can be so aggravating.

CHAIR—So Victoria is the leader in this respect?

Mr Withers—Certainly that is the only place that I am aware of where that sort of scheme has been piloted to that extent.

Mr North—Having been on the New South Wales Legal Aid Commission, I know that New South Wales have tried to move towards a much greater use of electronic filing and answers and getting things back more quickly, including payments, which are always fairly important to people. But we really do need to see which is the best possible mode and try to get National Legal Aid to take it on and therefore save what we understand is the limited amount of money that is available.

CHAIR—You mentioned in your submission particular problems with the AAT. You say the no-win, no-fee basis really cannot apply there because costs are not awarded. Are you finding that to be a growing problem? I do not know if it has been mentioned before.

Mr Withers—That is really part of the civil legal aid issue where legal aid is generally not available. Because of the limited resources, it is confined to family law or to crime where the applicant faces a realistic prospect of imprisonment. It is also to a degree excluded by the Commonwealth priorities and guidelines, so there are only certain areas in which legal aid can be granted in the AAT. In the non-cost jurisdictions of the AAT it is a real problem for people because the reality of the matter is that, even if the person wins—and often there is not a huge amount of money involved in the disputes that are very important to the individuals—the costs involved would outweigh the matter that is being pursued.

Mr North—That is right. I think probably up to a third of people are unrepresented in that federal jurisdiction; that is a lot of people. It is important to those people because they are often disputing employment problems or welfare problems and so on.

CHAIR—So how should we handle that? We are obviously talking about Commonwealth matters here.

Mr Withers—That is right. The primary way of addressing it, apart from more funds, is to actually relax the guidelines that apply to the expenditure of Commonwealth legal aid.

CHAIR—In that context your submission not only talks about abandoning the current policy of responsibility for Commonwealth law but also recommends a couple of midway steps towards that: family law matters, domestic violence, activity by children, Indigenous Australians and representation in criminal courts. The priorities would be in that order, I presume?

Mr Withers—The Law Council recognises that the government is not going to change its basic approach to this area or at least the Law Council would be surprised if it did. This does lead to the difficulties which I have heard addressed earlier. A woman who might be the subject of domestic violence receives legal assistance out of one pocket to deal with the family law issues and yet the domestic violence is dealt with in the state jurisdiction and therefore that woman has to qualify under a different set of criteria to get legal assistance for that. It would seem sensible at the very least to provide the commissions with the flexibility of perhaps a limited five per cent or something or other to enable them to use Commonwealth funding to fund matters that are ancillary to an already Commonwealth granted legal aid situation. It is just a matter of centring the support on the client rather than on this artificial thing of which pocket does it come from.

CHAIR—In that context I suppose the matters of criminal law are not adequately recognised federally at the moment. One of your ideas is to provide synchronised responsibility for some criminal cases—for instance, people charged with a criminal offence for the first time and offences where imprisonment might be involved. Have you made an assessment as to what that sort of measure would cost?

Mr Withers—No is the answer to your question. It is an issue of providing in effect a duty solicitor service in all criminal courts in the first instance so that somebody facing the court for the first time does not have to do so without the benefit of legal advice. That advice might simply be to apply for legal aid, to do something else, or to go somewhere else. It is an idea of trying to ensure that people who face the courts for the first time have some guidance before they actually get into court.

Mr North—There could hardly be a more important access to justice issue than that. Day after day when you are in the courts you see so many people go in there not knowing what to do, pleading guilty because it is the easiest thing to do and in that way ruining any chance of joining the police, travelling overseas, or doing any of the things that they might well be able to do. I think that is one of the reasons that it is not costed. It would be expensive. You can look at the New South Wales situation to see how many cases go through the Magistrates Court a year. Of course, not all of them are first offenders but a vast majority of them would be and there are over 100,000 of those. You would not be paying a great deal of money for each of those if you were able to extend the duty solicitor scheme either through legal aid offices or the private profession to cover the courts in which people appear. That should be a fundamental right of Australians in a nation that is meant to be a caring and wealthy nation. We should have that right because a lot of people's lives are ruined just by that one mistake that they might make whereas some timely legal advice could cause a different outcome.

Mr Withers—One of the findings in the erosion report in 5 dot point 1 is that a major impact of litigants in person on the Australian legal system is that they are subject to pressures to plead guilty or to abandon cases due to lack of representation. A major concern is that people are pleading guilty to offences because they just want to get out of the place—and those convictions hang around for a long time, as Mr North said.

Mr North—Quite often even though they might be guilty of something they will plead guilty to whatever the police decide to charge them with, which is a far more serious charge than is warranted by the facts.

CHAIR—You also have that fundamental problem of not really understanding what you have been charged with.

Mr North—That is right. You try to explain simple assault and assault occasioning actual bodily harm and assault occasioning grievous bodily harm to a client and they will say, 'It's all assault.' They are very different matters.

CHAIR—It raises three questions which I would not mind you commenting on. Firstly, do you know of any recent assessments of the level of unmet need in the system? Secondly, I think your erosion report talks about the impact of self-representation not just on the actual individuals involved but on the overall system. I suppose the A-G's department would not call it anecdotal; they would call it qualitative surveys. Do you get any feedback as to what this is doing to people's estimation of the legal system and a just and fair society?

Mr North—On the first point, I think we recognise in our erosion document that we cannot give you the exact unmet need. We make the suggestion—don't we, Brian?—that we need to have a properly funded inquiry into that, because we have been listening here today to some of the earlier evidence and it seems to be a problem across this field that the proper statistics are not available to help us with those matters. Brian, do you want to say something about the impact on the system itself of unmet need?

Mr Withers—I think you will find that the Law and Justice Foundation of New South Wales is undertaking some studies to try to identify unmet need. I am not sure of the extent to which those studies have been completed, but I think they are doing some studies in various pilot areas. The impact on the system of unrepresented litigants is set out in some detail in our erosion document. There are the pressures to plead guilty or abandon cases due to lack of representation. In some cases, private practitioners who have a legal aid assignment which is far from adequate to meet the real needs associated with presenting the case face a serious ethical dilemma of trying to either keep within funding or, alternatively, do all the work that should be done to ensure that that client is given the best representation. I might say that it is usually the latter course that practitioners adopt. It produces delays in court proceedings, prolongs cases, increases non-compliance with the proceedings, increases demands on judges, increases tensions for the whole system and increases costs to the court.

A study that we urge should be done is an appropriate referral to the ALRC to study litigants in person and to find to what degree that is in fact increasing costs to the system overall, because you only have to have slight extensions of the judicial process in terms of time consumed to produce very substantial costs. One of the responses from a survey respondent in this document was that a litigant in person tends not to have the capacity or inclination to settle a case. They are going to court, so they expect a court decision, whereas lawyers are constantly trained to try to resolve matters by agreement—and that was an interesting comment. As I said, it increases the cost not only for the courts but also for the other parties who might be represented on legal aid. It increases frustration and violence, and often the best interests of the child in family matters seem not to be served. They are just a few of the consequences of the increasing number of litigants in person.

CHAIR—In 2000, I think, either you or the Law Reform Commission recommended that there be a number of initiatives in the legal system to gather better information on self-

represented litigants and the conduct of their cases. Some measures have been taken by some courts in the interim. Have you reflected that at all in your erosion document? Is there anything you would like to say about the issues now—for instance, would you recommend that the Federal Court do more than they are doing at this particular time?

Mr Withers—It is fair to say that a number of courts are paying a good deal of attention in this area. The Family Court is clearly one of them because it is one of the primary courts where litigants in person occur. The Federal Court is similarly paying quite a deal of attention, as are other courts to a greater or lesser degree. One of the findings of our inquiry which involved the Australian Institution of Judicial Administration was that there was as yet no consistent recording and analysis of data by courts in relation to litigants in person. One of the documents or matters we refer to in the erosion report is a speech by Justice Robert Nicholson of the Federal Court at Flinders University in South Australia where he addressed how the court was handling litigants in person. A summary of his recommendations is set out within that report. There is as yet no consistent recording. We would urge that there should be—probably not just from the courts themselves, although they would be a primary source, but also from legal aid commissions and to a degree private practitioners who experience litigants in person on the side.

Senator PAYNE—I have a question going to my skim reading of the erosion report and your survey, as it is best described. The questions were sent to practitioners in the criminal and family areas. By whom were the practitioners chosen and how?

Mr Withers—The way the survey was conducted is that the Law Council's Access to Justice Committee consists of 12 representatives from each constituent body that is part of the Law Council. Each of those representatives was given the task to find 10 practitioners who were known to be highly experienced in the particular area, whether it be family law, criminal law or civil law, and then to provide them with this survey document and to take their information and to feed it back. This document does not make any assertion that it is a statistically defensible document—

Senator PAYNE—I understand that.

Mr Withers—That is how they were selected. The criterion for selection was that they be people of recognised experience and knowledge in the particular areas—in other words, the front line warriors, if you like.

Senator PAYNE—Was it 100 in each area of practice or 100 in total?

Mr Withers—It was 100 in total.

Mr North—The only person on the Access to Justice Committee who is actually on the Law Council governing body was me. It is a very national body. It covers each state and territory.

Senator PAYNE—I appreciate that. I just wanted to get an understanding of some of the responses and the breadth of participants.

Mr North—The senator asked what the effect of lack of legal aid or lack of proper representation for people was in general in the system. The feeling is—from just appearing day

after day in the courts—that legal aid is only for a certain small limited number of people or for Indigenous people and the rest of us cannot afford to go into the legal system unless we are at the very top corporate level or very rich people indeed. Legal aid is not even considered by the vast majority of Australians to be available. They think the legal system is very difficult to approach and very difficult to deal with.

CHAIR—Thank you for your submission, your evidence this afternoon and the erosion report.

[7.01 p.m.]

COX, Ms Suzan Jane, Director, Northern Territory Legal Aid Commission

HARDY, Ms Jennifer, Business and Policy Manager, Northern Territory Legal Aid Commission

CHAIR—Welcome. Would you like to amend or alter your submission in any way or would you just like to start with an opening statement?

Ms Cox—We can start with an opening statement; we do not wish to alter or amend. If I sound like I am losing track of a thought, it is because we have a terrible echo here, but I will martyr on. I would like to begin by emphasising the unique conditions in the Northern Territory, which we have set out in our submission and which present particular difficulties for the delivery of legal aid services—in particular, the remoteness of the majority of the population from urban centres, the large Indigenous population and the difficulties of getting to remote communities and the obvious expense.

For example, as I am speaking, we are in the middle of a monsoon—I do not know whether you can hear it or if it is affecting our reception but it is almost impossible to get from one place to another in the Territory at the moment other than by plane. I would also like to emphasise the uniqueness of the Commonwealth criminal matters that we deal with, mainly because of our geographical position—in particular, people-smuggling offences and Indonesian fishermen, which is all to do with being at the top of the country. Can you hear me all right, Senator?

CHAIR—You are not coming through all that well. Is the microphone close to you?

Ms Cox—We have got an echo here which I cannot turn off.

CHAIR—We can hear you a bit better now than we could before.

Ms Cox—Do you want me to start again or to continue?

CHAIR—Could you continue.

Ms Cox—Right. I will begin by saying that we do not wish to amend the submission. We would like to emphasise the unique conditions of the Northern Territory and in particular how those conditions present us with difficulties in the delivery of legal aid services and meeting legal needs in the community. Those conditions include the remoteness of the majority of the population from the urban centres—some of you may be aware of the urban centres; there are really only three and then there are two smaller ones. Other conditions are the large Indigenous population, which is spread out over the Northern Territory and is often in remote and very inaccessible areas, the difficulty in reaching those people and the expense in getting there, especially at this time of year when we can only get there by plane. The other point is the uniqueness of the Commonwealth criminal matters. Because of our geographical location—being on top of the country—we get the people-smuggling cases and we also have a lot of illegal fishing cases, mainly from the Indonesian islands.

Currently there are a number of unmet needs in the Northern Territory. The most ubiquitous is the lack of assistance for Indigenous victims of domestic violence. Those victims are usually women. The Commonwealth, as you are aware, funds ATSILS to provide assistance to defendants in criminal matters under state or territory legislation. A lot of the victims in relation to domestic violence are not able to get that assistance because of the conflicts that exist and the inability of ATSILS to brief out matters because of the lack of resources—that is, the lack of resources to provide alternative representation. We can step into the breach there but, of course, we cannot use Commonwealth moneys to assist those victims of domestic violence. We see that as being inconsistent and it really does not make a lot of sense.

The other obvious need that we identify here is in the area of immigration, again because of our geographical location. There are two points I would like to make in relation to immigration matters. The first is that it is just plain wrong that DIMIA is the funding body for the limited assistance in relation to immigration matters. It does not make sense that they are the ones who are saying who we can assist, how much assistance we can give, who can give it and for how much. The second point is the inadequacy of that funding. We have had, from DIMIA—because that is the only way we can get it—the sum of $14,000 for this financial year. That was depleted in November last year. It is inconsistent that it funds us in the way that it does; also the funding is inadequate. There is an ongoing need here in relation to immigration matters.

With respect to the Northern Territory commission, I would like to emphasise our uniqueness in that, unlike most of the other legal aid organisations in the other states and territory, we provide the majority of our assistance in house. In criminal matters we provide 95 per cent of assistance in house. At present, we are up to 58 per cent in relation to family matters. Although we do not do a great deal in the civil law area in house, we do have another unique way of meeting that need—that is, we give initial small grants to private practitioners to investigate claims. If there are then viable claims, it is up to those solicitors to spec their fees and continue the case. So we get them off the ground and allow them to be investigated.

Another point that I would like to make in our opening statement is that, like other commissions, we are under constant pressure to provide more and more services to our Indigenous clientele. They make up at the moment 14 per cent of Commonwealth-state matters overall but 24 per cent of our client base in relation to NT matters. We have established protocols to assist ATSILS—in particular NAALAS, which is the North Australian Aboriginal Legal Aid Service, to help with their serious indictable matters, and Mijwatj, which is another Indigenous service and is run out of Nhulunbuy and Gove. We have a protocol with them to assist. We cannot do any more than what we are doing. They need more money and we need it if we are going to have a system to fill in the gaps.

The final point that I would like to make is that there is a real need that is not being met, and it breaks my heart that we cannot meet the legal need in areas such as Tennant Creek. We commissioned a report about the legal need in that area. That was in 2002. That report made certain proposals and we have included them in the submission. At this stage we cannot get funding from either the Commonwealth or the Northern Territory government to service that need. The other matters that we set out in the submission I will happily answer questions on.

CHAIR—Thank you very much, Ms Cox. Ms Hardy, do you have anything to say at this stage?

Ms Hardy—I have nothing to say at this stage.

CHAIR—You raise inconsistency in the application of Commonwealth funds in domestic violence areas. It is an inconsistency that has been known for some time. Can you tell us if it has been raised with the Commonwealth Attorney-General's Department and, if so, what the response has been? Can you give us some idea of the level of the need in the community? I imagine the provision of the service through community centres or the Top End Women's Legal Service would go some way towards meeting the demand but probably not all that far.

Ms Cox—In respect of the first question, the Commonwealth have been made aware of it in submissions. At this stage there is no indication that funding will address domestic violence. Funding is provided by the Commonwealth for family law matters and for outsourcing to do NT matters in relation to criminal cases. In respect of the other services, they are assisting, but it is all too much and the funding is just inadequate. They are underfunded to be able to reach all of the different communities. I think there are six communities that have been identified that are not assisted at all.

CHAIR—We have been told that some 13 specialist family violence prevention legal services have been established. Can you tell us how many have been established in the Northern Territory, where they are and to what extent they might accommodate some of the need?

Ms Hardy—As I understand it, there are three or four. There is one attached to the Top End Women's Legal Service in Darwin, one in Katherine, one in Alice Springs and I understand that ATSIC have recently announced that they are going to fund an additional position—I think in one of those in the Northern Territory—so they are really linked with the women's legal services at this stage.

CHAIR—Are they operating at the moment, or is it expected that they will be soon?

Ms Hardy—They are operating at the moment, so I guess in our submission when we talk about the services provided by the women's legal services we are also talking about Indigenous family violence centres as well. They tend to work in conjunction up here.

CHAIR—Despite those four or five, you are still telling us that there are some six centres that do not have any legal services provided?

Ms Hardy—I will correct my evidence there. There are three services: one in Darwin, one in Katherine and one in Alice Springs, and no, they do not have the resources to visit all of the communities that require their services.

Senator PAYNE—On page 6 of your submission you refer to your new specialist services: your domestic violence legal service and your family law conferencing service. I know that they are only recent, but can you give the committee an assessment of how they are going and whether they are addressing some of the gaps that we are concerned about?

Ms Hardy—The domestic violence legal service only started on 1 August last year. We receive a very small amount of funding from the NT government for that purpose—it is approximately $180,000 a year—and on those resources we are unable to provide services

outside the Darwin area, so it is really confined to the very small area of service that we are providing. So in that sense it is making a very limited difference to the huge needs of Indigenous women out in the remote areas. We certainly have no funding in that budget to travel out to those centres. We have really only just started the family law conferencing program, and so far we have only held one conference. Some of you may be aware that what happens in the Territory is that pretty much everybody leaves over the Christmas-New Year break, and no one is here from mid-December to the end of January, so there was a bit of a hitch with that. We have held one conference so far, and that was a success. But, as it was just one conference, it has not made a major difference at this stage.

Senator PAYNE—But you have plans to continue?

Ms Hardy—Yes, we do. The profession are very keen to do it, and we see that there is a real need for it. It should mean that a lot of matters settle and do not need to go on to full litigation in court.

CHAIR—You say in your submission that you are only able to pay private lawyers about $100 an hour. Can you give us some comparisons to the going rate in the Territory? When was your rate last changed?

Ms Hardy—I think the last time we changed the rate in criminal law was in about 1996, so it has been some time. I think the going rate is about $150 an hour, but I am not entirely sure.

CHAIR—The other question I have goes to ATSIC's decision to tender out legal services—competition. Have you made any assessment as to how that might impact on services to Indigenous Australians or how it might impact on your service?

Ms Hardy—Not really. I am not sure what is happening with that proposal in the Northern Territory. I had understood from the Aboriginal legal services recently that that may have been put off until at least next year and possibly indefinitely. I am not sure if it is still going ahead in the Territory. We have not really sat down and discussed with them what the implications of it will be. I guess it will depend on the terms of the tender as to who is likely to tender for it and what the likely effect will be. If, for example, they were to split up the services and make it a tender where you could perhaps put in for providing duty lawyer services in the magistrates court in Darwin there may be a lot of competition for that. But, in terms of providing services to the remote communities, I think it is unlikely that there would be much competition against the Aboriginal legal services for that. The Aboriginal legal services are fairly specialised. They employ Indigenous liaison officers to assist their clients. At this stage I would imagine that they are in the best position to provide them.

Senator PAYNE—I want to ask a couple of quick questions. One of the issues we discussed with ATSIC and ATSIS representatives was the need for interpreters in Indigenous legal matters. How does the NTLAC deal with that?

Ms Cox—We access the Aboriginal Interpreter Service. In the majority of cases, unless it is absolutely clear that a person does not need an interpreter, an interpreter is required. We obtain those services through the Aboriginal Interpreter Service.

Senator PAYNE—Do you find yourself often or at all in a position where your solicitors end up in court without access to interpreters?

Ms Cox—Not since the establishment of the Aboriginal Interpreter Service. It has made a huge difference. But from time to time there are hiccups and there may be different family relationships so you need to go further afield for a particular interpreter. But people here understand those difficulties and we work with them.

Senator PAYNE—Thank you.

CHAIR—My last question goes to the civil law needs of Indigenous Australians. At page 10 of your submission, you refer to the practice of 'book-up'. Can you explain what that really is?

Ms Cox—It is when people go and get food—and often alcohol—from shops and they keep an account there. When they get their social security cheque, it goes there and they get whatever is left of that amount.

CHAIR—How does this apply to civil law?

Ms Cox—There are all sorts of things that go on in relation to it, and I think a lot of people feel that they have been badly done by from time to time in relation to particular shopkeepers and the way that they run their banking. They do not have any access to lawyers for those matters. That often happens out in communities as well.

CHAIR—I suppose it is a symptom of a more general powerlessness that they find themselves in with respect to the people running the stores, though, isn't it?

Ms Cox—It is, but I guess one of the concerns is that often one credit card or keycard for one family is held by the store but then one person may go in and book up alcohol on it and there is no money left to buy food for the rest of the family. There are those sorts of concerns.

CHAIR—Thank you very much. I apologise for the breakdowns in communications. Thank you for raising some quite critical issues in your submission.

Ms Cox—Thank you for your time.

Committee adjourned at 7.23 p.m.