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Committee Secretary  
Senate Standing Committee on Legal and Constitutional Affairs  
Department of the Senate  
PO Box 6100  
Parliament House  
Canberra ACT 2600

19 May 2009

Dear Sir or Madam,

**Re: National Legal Aid Submission - Inquiry into Access to Justice**

National Legal Aid (NLA) represents the Directors of the eight State and Territory legal aid commissions (commissions) in Australia. The commissions are independent statutory authorities established under respective State or Territory enabling legislation. They are funded by State or Territory and Commonwealth governments to provide legal assistance to disadvantaged people.

NLA aims to ensure that the protection or assertion of the legal rights and interests of people are not prejudiced by reason of their inability to:

- Obtain access to independent legal advice;
- Afford the appropriate cost of legal representation;
- Obtain access to the Federal and State and Territory legal systems; or
- Obtain adequate information about access to the law and the legal system.

The commissions work co-operatively with the other main legal aid service providers in Australia to maximise access to justice for people. At a national level this co-operation is facilitated through the Australian Legal Assistance Forum (ALAF) comprising representatives of the Aboriginal and Torres Strait Islander Legal Services, the Community Legal Centres, the Law Council of Australia and NLA. ALAF has also made a submission to this Inquiry. NLA contributed to that submission and supports it.

NLA thanks the Senate Legal and Constitutional Affairs Committee for the opportunity to make this submission.

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## Executive Summary

In order to avoid re-canvassing issues that have already been the subject of extensive research and consultation, this submission refers to the Senate Legal and Constitutional References Committee Inquiry into Legal Aid and Access to Justice, the final report of which was tabled on 8 June 2004 providing further information where changes have occurred, indicating those recommendations which NLA considers are relevant in the current environment, and making further recommendations as appropriate.

The key issues identified by NLA are:

1. Legal aid commissions and other legal aid service providers help the poorest of the poor, those people within our society who are the most plagued by problems and are also often the least equipped to deal with them. Without the assistance of legal aid service providers these people would be far more likely to fall completely out of society.
2. At present legal aid commissions and other legal aid service providers working co-operatively are not catching these people as comprehensively as we could if we had sufficient funding. NLA fears that the situation will only get worse with the Global Financial Crisis.
3. There is a need for governments to adopt evidence-based approaches to the funding, planning, delivery and evaluation of legal aid programs.
4. That there is an urgent need for funding in the following priority areas
  - legal needs of Aboriginal and Torres Strait Islander Peoples
  - civil legal aid - homelessness, social security issues, older people's issues
  - domestic/family violence.
5. That Commissions have a key interest in keeping the cost of delivering justice down and operate on this basis.
6. That Commission family dispute resolution services have been independently evaluated and shown to minimise conflict, address power imbalance and to be cost effective, avoiding court and the costs associated with litigation. That funding provided for the expansion of dispute resolution and prevention and early intervention services in Commissions would be a good investment by governments.
7. Aboriginal and Torres Strait Islander peoples remain the most socially and economically disadvantaged Australians and face enormous legal needs in all areas of the law.
9. Aboriginal and Torres Strait Islander legal services are best placed to provide culturally appropriate services to Aboriginal and Torres Strait Islander peoples. Government funding to Aboriginal and Torres Strait Islander legal services should be increased so that they are adequately funded.

10. Parity of salaries and portability of leave entitlements across legal aid service providers around the country would assist in recruiting and retaining lawyers to work in the challenging legal aid environment.

## **List of recommendations contained in this submission**

### **Identification of legal needs in Australia**

#### **Recommendation 1**

That the Commonwealth Government adopt an evidence-based approach to funding, planning, delivery and evaluation of legal aid services aimed at identifying and meeting legal need in Australia.

#### **Recommendation 2**

That the Commonwealth Government use the Survey of Legal Needs in Australia to develop a legal aid policy that provides an appropriate level of funding and equitable access to justice throughout Australia.

#### **Recommendation 3**

That the Commonwealth Government urgently increase funding to Legal Aid Commissions so as to meet the known demand for legal need throughout Australia.

#### **Recommendation 4**

That the Committee adopt recommendations 11, 15, 25, 26, 29, 30, and 38 of the 2004 Report to the extent that the results of the Survey of Legal Needs in Australia might not meet all the substance of those overlapping recommendations

#### **Recommendation 5**

That the Commonwealth/State/Territory Governments give immediate priority to funding a legal needs study of Aboriginal and Torres Strait Islander peoples living in remote communities who will not have been reached by the Survey of Legal Needs in Australia.

#### **Recommendation 6**

That ALAF be consulted by funders in relation to identifying priorities and appropriate mechanisms for achieving implementation of the other unmet above recommendations (11, 15, 25, 26, 29, 30, and 38) of the 2004 Report into Legal Aid and Access to Justice as appropriate.

### **The ability of people to access legal representation - TOR a.**

#### **Recommendation 7**

That the Commonwealth Government increase funding to legal aid commissions to enable commissions to meet the demand from the greatly increased number of people who will be eligible for aid as a result of the global financial crisis.

### **Recommendation 8**

That the Commonwealth Government's approach to funding, planning, delivery and evaluation of legal aid services recognise the capacity of individual legal aid commissions to be innovative and flexible in their service delivery strategies reflecting the conditions in their own jurisdictions.

### **The adequacy of legal aid - TOR b.**

### **Recommendation 9**

That the Commonwealth Government increase funding to ensure that people who are economically and socially disadvantaged, including those living in rural, regional and remote areas, will be able to access legal services to protect and enforce their legal rights and interest under the future regulatory framework for consumer credit.

### **Recommendation 10**

That the Commonwealth establish consumer tribunals to deal with low-value consumer disputes under the future regulatory framework for consumer credit.

### **Recommendation 11**

That the Commonwealth/State/Territory Governments increase funding to legal aid service providers to enable them to respond to the increasing civil law needs of people and in particular to address the legal needs in the area of housing, social security, and older people's issues.

### **Recommendation 12**

That Access to Justice Impact Statements be prepared by government departments addressing the effect on legal aid programs of any proposed legislation.

### **Recommendation 13**

That consultation with legal aid service providers by government departments occur in preparing Access to Justice Impact Statements.

### **Recommendation 14**

That the Commonwealth Government implement recommendations 14 (increased family law funding to Legal Aid Commissions as a matter of urgency) and 18 (the Commonwealth to fund state family law matters [domestic violence, child abuse] or provide more effective Commonwealth remedies] of the 2004 Report of the Inquiry into Legal Aid and Access to Justice as an immediate priority.

### **Recommendation 15**

That the Commonwealth Government implement recommendation 36 (funding to enable Commissions to open and maintain regional and rural offices in under serviced areas) of the 2004 Report of the Inquiry into Legal Aid and Access to Justice.

### **Recommendation 16**

That the following recommendations (abbreviated by us below) of the 2004 Report of the Inquiry into Legal Aid and Access to Justice in relation to migration assistance be implemented

- review of the Commonwealth Priorities and Guidelines for migration assistance (rec. 41),
- provide the necessary funding (rec. 42),
- avoid conflict of interest in the administration of the IAAAS scheme (rec. 44),
- extend funding periods to allow longer term planning (rec. 45) and
- cooperation to minimise the cost of professional development (rec 46).

### **The cost of delivering justice TOR c.**

#### **Recommendation 17**

That the Commonwealth government provide an increase in funding to legal aid commissions to enable the expansion of commission family dispute resolution services.

#### **Recommendation 18**

That the Commonwealth government provide legal aid commissions with sufficient funding to establish dispute resolution programs for civil law matters.

#### **Recommendation 19**

That the Commonwealth/State/Territory governments provide legal aid commissions with increased funding to expand duty lawyer services to more locations and to provide alternative services where issues of conflict exist.

#### **Recommendation 20**

That legal aid fees paid to private practitioners across the country move over the next few years to a minimum of \$165 per hour before more private practitioners and particularly those in rural and regional areas withdraw from doing legal aid work and that governments fund this move.

#### **Recommendation 21**

That Commonwealth/State/Territory governments increase funding to commissions to enable them to expand their preventative and early intervention programs including community legal education, information, advice, referral and minor assistance programs.

### **Alternative means of delivering justice TOR e.**

#### **Recommendation 17 (as above)**

That the Commonwealth government provide an increase in funding to Legal Aid Commissions to enable the expansion of Commission family dispute resolution services,

#### **Recommendation 18 (as above)**

That the Commonwealth government provide Legal Aid Commissions with sufficient funding to establish dispute resolution programs for civil law matters.

#### **Recommendation 21 (as above)**

That Commonwealth/State/Territory governments increase funding to Commissions to enable them to expand their preventative and early intervention programs including community legal education, information, advice, referral and minor assistance programs.

### **The adequacy of funding and resource arrangements for community legal centres (CLCs) TOR f.**

#### **Recommendation 20**

That the recommendations of the 2004 Report of the Inquiry into Legal Aid and Access in relation to Community Legal Centres be implemented, ie,

- That the Commonwealth Government urgently consult with State/Territory governments, legal aid commissions, and community legal centres to determine the needs of individual community legal centres and develop strategies for addressing these needs. (rec. 59).
- That the Commonwealth Government increase funding to CLCs for core services and for new CLCs (rec. 60).
- That the Commonwealth and State/Territory governments increase funding to recruit, train and retain staff (rec. 61),
- That the Commonwealth and State/Territory governments increase funding enable CLCs to overcome existing operational difficulties and to plan for future operational requirements (rec. 62).

### **The ability of Indigenous people to access justice TOR g.**

#### **Recommendation 21**

That the Commonwealth Government urgently increase funding to Aboriginal and Torres Strait Islander legal services to a level sufficient to enable them to provide effective and appropriate services to indigenous people and their communities, not only in criminal matters, but in family and civil law matters as well.

**Recommendation 22**

That the Commonwealth Government urgently increase funding to Aboriginal and Torres Strait Islander Legal Services to allow their lawyers to be paid at rates equivalent to their legal aid commission counterparts.

**Recommendation 23**

That Commonwealth/State/Territory Governments co-operate to introduce portability of leave entitlements across legal aid employers around the country.

**Recommendation 24**

That the Commonwealth Government's approach to funding, planning, delivery and evaluation of legal aid services recognise the capacity of Indigenous Legal Service Providers and legal aid commissions to develop innovative and flexible service delivery strategies aimed at maximising capacity to respond to the specific legal needs of indigenous Australians.

# 1. Introduction

## ***Terms of reference***

The Senate Legal and Constitutional Affairs Committee (the Committee) is inquiring into Access to Justice, with particular reference to:

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

The reporting date for this inquiry is 17 August 2009.

## ***Scope of this submission***

This submission addresses each of the above terms of reference.

Central to each of the terms of reference is determining and meeting legal need in Australia, which includes not only expressed legal need but unknown and unmet legal need.

This submission therefore commences with a discussion of identification of legal needs in Australia, including recommendations of the report of the Senate Legal and Constitutional References Committee Inquiry into Legal Aid and Access to Justice 2004 (the 2004 Report) and the *Survey of Legal Needs in Australia* commissioned by NLA in 2007.

In order to avoid recanvassing issues that have already been the subject of extensive research and consultation, this submission refers to the recommendations and findings of the 2004 Report providing further information where changes have occurred, indicating those recommendations which NLA considers are relevant in the current environment, and making further recommendations as appropriate.

We note that terms of reference a. (the ability of people to access legal representation) is to a large extent a subset of terms of reference b. (the adequacy of legal aid), f. (the adequacy of funding and resource arrangements for community legal centres) and g. (the ability of Indigenous people to access justice). This submission discusses the overarching issues under term of reference a, including the role of public legal service providers in providing

access to legal representation to people who would not otherwise be able to afford them, and evidence of the more complex issues that impede or prevent access to legal representation for particular disadvantaged groups.

## 2. Identification of legal needs in Australia

### ***Senate Legal and Constitutional References Committee inquiry into Legal aid and access to justice 2004***

Eight of the recommendations of the 2004 Report were aimed at identifying and meeting legal needs in Australia. Recommendations 11, 15, 25, 26, 29, 30, 33 and 38 (at Annexure A) underpinned all other recommendations of the 2004 Report. Some of the recommendations overlapped each other.

Recommendation 11 was the most comprehensive and overarching, stating:

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

This recommendation was not implemented.

Recommendations 15, 25, 26, 29, 30, 33 and 38 (abbreviated as follows by us) were essentially:

- a review of legal aid services to women (rec. 15).
- research to determine needs of women living in RRR areas (rec. 25).
- research on legal services for women in immigration, refugee, human rights, civil and administrative law, and in relation to women prisoners (rec. 26).
- a national study to determine legal needs of Indigenous women (rec. 29).
- consultation with Indigenous women to address their needs (rec. 30).
- a legal needs analysis for Indigenous people (rec. 33).
- research to determine needs and services required by people living in RRR areas (rec. 38).

### ***Survey of Legal Needs in Australia***

In 2007 NLA commissioned the Law and Justice Foundation of NSW (LJF) to conduct a national legal needs survey. The *Survey of Legal Needs in Australia* will be the largest and most comprehensive assessment of legal needs ever conducted across Australia.

The survey will provide empirical data on:

- the incidence of legal events during the 12 months before the survey, including the percentage who experienced events and number of events per participant;

- response to legal events, including percentage who used legal services, used non legal advisers, handled the event alone or did nothing, and the reasons for doing nothing;
- satisfaction with assistance received, including percentage of those who were satisfied or dissatisfied, the nature of the help received and barriers to assistance;
- resolution of legal events; and
- satisfaction with the outcome.

The survey will also provide data on how demographic characteristics and legal event types are related to incidence, response, satisfaction with assistance, resolution and satisfaction with outcome.

The *Survey of Legal Needs in Australia* will be modelled on the surveys conducted in the United Kingdom. This was the model used for the previous smaller study by the LJF which identified unmet legal need in six NSW Local Government areas of cumulative socioeconomic disadvantage, *Justice Made to Measure: NSW Legal Needs Survey (2006)*.

The *Survey of Legal Needs in Australia* will assist in identifying gaps in service availability. Further, its analysis of socio-demographic profiles will assist in identifying the most appropriate mix of services required in a particular area. It will therefore, inform service provision by commissions, and specifically, decisions about the desirable quantity, location and structure of legal services throughout Australia.

The *Survey of Legal Needs in Australia* will also provide evidence that should assist the Commonwealth to develop a legal aid policy that provides an appropriate level of funding and equitable access to justice throughout Australia.

As stated in the 2004 Report, “clearly the unmet need for legal aid cannot be included in the funding model until an assessment of unmet need has been made. Assessing the level of unmet need for legal aid in Australia is clearly a priority if the Commonwealth is to be able to develop a funding model that optimises the level of access to justice for all Australians.”<sup>1</sup>

The *Survey of Legal Needs in Australia* meets the substance of recommendation 11 above, and should also go some way to meeting the remaining recommendations outlined above. For example, while it is noted that the survey will not pick up sufficient samples of some of the most difficult to reach groups (such as people in isolated Aboriginal and Torres Strait Islander communities), the particularly large scale of the survey will allow for analysis and reporting in relation to legal needs of a wide range of the most disadvantaged groups, including Aboriginal and Torres Strait Islander peoples, culturally and linguistically diverse groups, people with disabilities, recipients of government benefits, etc.

It is expected that the final reports of the Survey of Legal Needs in Australia will be progressively released from late 2010. While this will provide important data to inform planning, funding and delivery of legal services in the long term, it is

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<sup>1</sup> p.15 Fourth Report

important that the Commonwealth takes action in the short term to address the significant funding pressures facing legal aid commissions, particularly in light of the global financial crisis.

**Recommendation 1**

That the Commonwealth Government adopt an evidence-based approach to funding, planning, delivery and evaluation of legal aid services aimed at identifying and meeting legal need in Australia.

**Recommendation 2**

That the Commonwealth Government use the Survey of Legal Needs in Australia to develop a legal aid policy that provides an appropriate level of funding and equitable access to justice throughout Australia.

**Recommendation 3**

That the Commonwealth Government urgently increase funding to legal aid commissions so as to meet the known demand for legal need throughout Australia.

**Recommendation 4**

That the Committee adopt recommendations 11, 15, 25, 26, 29, 30, and 38 of the 2004 Report to the extent that the results of the Survey of Legal Needs in Australia might not meet all the substance of those overlapping recommendations.

**Recommendation 5**

That the Commonwealth/State/Territory Governments give immediate priority to funding a legal needs study of Aboriginal and Torres Strait Islander peoples living in remote communities who will not have been reached by the Survey of Legal Needs in Australia.

**Recommendation 6**

That ALAF be consulted by funders in relation to identifying priorities and appropriate mechanisms for achieving implementation of the other unmet above recommendations (11, 15, 25, 26, 29, 30, and 38) of the 2004 Report into Legal Aid and Access to Justice as appropriate.

### **3. The ability of people to access legal representation (TOR a.)**

This term of reference, the ability of people to access legal representation, is also to a large extent a subset of terms of reference b. (the adequacy of legal aid), f. (the adequacy of funding and resource arrangements for community legal centres) and g. (the ability of Indigenous people to access justice).

Under this term of reference, the NLA submission discusses the overarching issues, including the role of public legal service providers in providing legal assistance to people who would not otherwise be able to afford it, and evidence of the more complex issues that impede or prevent access to justice for particular disadvantaged groups.

Legal aid commissions provide assistance to as many people as possible through a range of legal services. Many of these services, such as telephone and face to face legal advice, minor assistance (eg help drafting a letter), duty lawyer assistance at courts, information and referral, including referral to non-legal support services, and community legal education are free of charge, not means tested, and generally available to the community. Other services provided by Commissions include grants of legal assistance, dispute resolution services, and legal representation. Grants of legal assistance for dispute resolution and legal representation usually require an application for assistance and the passing of eligibility tests (means - income and assets, matter type, merit, availability of funds and competing priorities) prescribed in government funding guidelines. (Successful applicants may have to make a contribution to the cost of providing legal assistance.) Legal aid commissions also contribute to policy development and law reform. Matter types in which legal representation services can be provided subject to funding and the passing of the eligibility tests include criminal, family and civil law matters.

#### ***Private legal representation or public legal assistance***

At one level it can be said that the ability of people to access legal representation is dependent upon whether they can afford to pay for private legal representation or alternatively, whether they can receive assistance from a government funded public legal service provider.

Legal aid commissions are the major providers of public legal services throughout Australia, established under respective State and Territory enabling legislation as independent authorities to provide legal aid to economically and socially disadvantaged persons. A primary purpose of legal aid commissions is to provide legal assistance, including legal representation, to people who would not otherwise be able to afford it.

The legal aid means test (which contains different benchmarks in each state and territory, eg in relation to property values) is set at a level that allows only the most poor to be eligible for legal aid. There are significant numbers of people

who will not meet the test. Many people who do not qualify for a grant of legal aid because of the means test are not able to afford to pay for private legal representation, or at least not able to do so without experiencing undue hardship.

Not only is the income test set low, but the assets test is also relatively low. This means that people who have very little income but have some assets will find themselves not qualifying for legal aid. Examples are people receiving social security benefits but who have a small amount of savings (which they may have scraped together for use in an emergency involving their children, for funeral costs etc) and older people who may own their own home but have very little else.

### ***Impact of global financial crisis***

As a consequence of the global financial crisis it is forecast that the rate of unemployment will continue to rise, and therefore, a greater number of people will fall within means test eligibility guidelines. Without increased funding to meet this demand legal aid commissions will have no option but to prioritise applications in some way. This will have the effect of further limiting the proportion of people who are eligible for aid.

In addition, there will be an increasing number of people who, although employed, will find it more difficult to make ends meet, and therefore, will not be able to afford to pay for private legal representation.

#### **Recommendation 7**

That the Commonwealth Government increase funding to legal aid commissions to enable commissions to meet the demand from the greatly increased number of people who will be eligible for aid as a result of the global financial crisis.

### ***Barriers to access to justice***

At another level, however, the ability of people to access legal representation is a more complex issue requiring consideration of why people are not able to, or do not, access legal representation.

The main purpose of the Law and Justice Foundation of New South Wales (LJF) Access to Justice and Legal Needs (A2JLN) research program is provide a rigorous and sustained assessment of the legal needs of the community, especially disadvantaged people, and their ability to access justice.

An important feature of the research program is identifying barriers that impede or prevent access to justice, including by legal representation. LJF quantitative surveys of particular disadvantaged groups, including older people (Ellison, S. et al. 2004), homeless people (Forell, S. et al. 2005) people with a mental illness (Karras, M. 2006), and prisoners (Grunseit, A. et al. 2008) have identified barriers to access to justice which range from economic, social, cultural and psychological, to geographic.

Legal aid commissions are increasingly relying on this evidence to identify priority client groups and to develop innovative and flexible service delivery strategies aimed at maximising commissions' capacity to respond to their legal issues .

The ability of people to access legal assistance including legal representation must be considered by reference to evidence about people who may need legal assistance but do not receive it and the reasons why they do not, eg because they do not recognise the problem as being a legal problem or one that can be solved by recourse to the law.

**Recommendation 8**

That the Commonwealth Government's approach to funding, planning, delivery and evaluation of legal aid services recognise the capacity of individual legal aid commissions to be innovative and flexible in their service delivery strategies reflecting the conditions in their own jurisdictions.

## **4. The adequacy of legal aid (TOR b.)**

Legal aid service providers in Australia work co-operatively to stretch the funding received as far as possible, however the funding received is not adequate to meet demand, let alone need.

The NLA submission in relation to this TOR focuses on the role of commissions in maximising access to justice through the provision of legal assistance, and the challenges currently faced by commissions.

### ***The role of legal aid commissions***

Legal aid commissions deliver legal aid services (described above under TOR a) and particularly representation services using a mixed model of service delivery, that is, a combination of in-house practitioners and private practitioners. This model allows legal aid commissions to provide services to clients in rural, regional and remote areas where legal aid commissions do not have an office.

Legal aid commissions also engage in partnerships with other service providers (both legal and non-legal) to maximise available resources for service delivery both in metropolitan areas, (through legal assistance forums) and in regional rural and remote areas (through regional solicitor programs for example).

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

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

As relevant to this term of reference, NLA will address an area that was not canvassed in the 2004 Report, specifically, credit law and mortgage stress and the challenge of ensuring the adequacy of legal aid upon the transfer of credit legislation to the Commonwealth.

This submission will then highlight recommendations of the 2004 Report that NLA considers remain relevant and appropriate to implement and ask the Committee to adopt those recommendations.

### ***Credit law and mortgage stress***

NLA welcomes the transfer of credit legislation to the Commonwealth, which will implement a single-standard national regulation of consumer credit (Phase 1 is due to commence by mid-2009). The new regulatory environment, will however pose challenges in the provision of legal services in three main areas:

- legal aid policies;
- funding for the provision of legal services in consumer credit matters;
- access to justice in consumer credit disputes.

The number of consumers under financial stress has drastically increased in the past three years. Repossession proceedings in NSW, for example, have dramatically risen, more than doubling in the last two years. Rates of mortgage defaults and repossessions are expected to rise with the expected increase in unemployment, as people with mortgages face sudden cuts in income and a lack of certainty about their ability to find further employment.

The Commonwealth Government recently announced a doubling of funding for the Commonwealth Financial Counselling program to support the employment of an additional 20 financial counsellors in identified areas of high need across Australia.

When informal negotiations with lenders stall or fail, or repossession proceedings commence, financial counsellors need to work in partnership with low cost legal services to prevent inappropriate repossessions. Low cost legal advocacy is required where:

- legal proceedings have commenced against a borrower who is entitled to apply for a hardship variation;
- the lender is claiming considerable arrears and/or enforcement costs; or
- a borrower has a cause of action to vary a loan contract to reduce the outstanding loan and bring repayments within their financial capacity.

These matters may require a court appearance by a solicitor. This is often a necessary step toward pursuing other low cost options, such as external dispute resolution.

The increased availability of financial counsellors through the Commonwealth program is likely to increase the demand for low cost legal services.

As the current financial crisis manifests in higher levels of unemployment, it will be important to ensure that people who are economically and socially disadvantaged, including those living in rural, regional and remote areas, will be able to access legal services to protect and enforce their legal rights and interest under the future regulatory framework for consumer credit.

Without access to these services mortgage delinquency will continue to rise and more people will lose their homes.

### **Current arrangements**

Legal Aid NSW is used as an example in this section, to illustrate some of the implications of the transfer of responsibility for credit regulation from the states and territories to the Commonwealth.

Legal Aid NSW has the largest civil law practice of all legal aid commissions, including an extensive consumer protection practice, with a heavy emphasis on consumer credit law. When the 1996 funding cuts to commissions occurred (those cuts involving the cessation of Commonwealth support for matters arising under State and Territory laws) commissions were required to prioritise spending. Civil law services beyond information, advice, referral, and community legal education therefore suffered significant cut backs in all commissions, with most being forced to abandon their "civil law programs" because of the need to prioritise in the areas of family law where children were involved, family violence, and criminal law where liberty was at risk. The civil law practice in Legal Aid NSW is considered best practice by the other Commissions which by reason of funding and priorities are currently not in a position to emulate it.

In addition to providing information, advice and minor assistance, in the 2007-08, Legal Aid NSW made 303 grants of legal aid for representation in a range of matters under consumer protection legislation, many of which were for consumer credit cases.

The case work of Legal Aid NSW in consumer credit matters includes defending applications for possession in the Supreme Court of NSW, making applications for variation of credit contracts, and negotiating write off or reductions of credit debts.

Legal Aid NSW has also developed a range of community legal education initiatives to complement case work and advice services, including mortgage stress forums, held in locations where there are high rates of mortgage delinquencies and repossessions. In 2009, Legal Aid NSW also released the Mortgage Stress Handbook, and an educational DVD, both of which are designed to assist people facing mortgage stress to become aware of their options. The focus of these resources is on early intervention in order to prevent home repossessions.

Under the current agreements between legal aid commissions and the Commonwealth Government, consumer law is a Commonwealth Legal Aid Priority. Following the transfer of credit legislation to the Commonwealth, the Commonwealth guidelines for the provision of legal aid will apply to all consumer credit matters.

## **Access to justice**

Current Commonwealth funding levels are already inadequate to address matters that would otherwise pass all eligibility tests. There is a further issue in that current Commonwealth policies for legal aid in consumer matters only apply to matters in the Federal Magistrates Court or higher.

The experience of legal aid commissions is that the traditional court system is not an appropriate forum for dealing with low-value consumer disputes.

Specialist State consumer tribunals, such as the NSW Consumer Trader and Tenancy Tribunal, that adopted less formal procedures, were established in recognition of the barriers to accessing justice in traditional courts, including the costs of litigation.

The transfer of consumer credit regulation to the Commonwealth has raised concerns about the availability of such specialist tribunals to resolve consumer credit disputes. If an alternative low-cost tribunal is not established, consumers will have to turn to forums such as the Federal Court or a State Court.

Requiring mandatory membership of an external dispute resolution (EDR) body by all providers of consumer credit and credit-related brokering services is a welcome development.

However, most industry-based EDR schemes are limited by the range of disputes that they have jurisdiction to determine. For example, the Financial Ombudsman Service is not able to determine applications to vary contracts on the grounds of hardship which is an area of increasing importance in the current economic climate.

Further, unlike State consumer tribunals, EDR schemes cannot determine or develop the law and provide guidance for the resolution of future matters.

As access to justice is central to the success of the future regulatory framework for consumer credit, it is vital that a low cost and user friendly consumer tribunal is available for resolution of disputes.

**Recommendation 9**

That the Commonwealth Government increase funding to ensure that people who are economically and socially disadvantaged, including those living in rural, regional and remote areas, will be able to access legal services to protect and enforce their legal rights and interest under the future regulatory framework for consumer credit.

**Recommendation 10**

That the Commonwealth establish consumer tribunals to deal with low-value consumer disputes under the future regulatory framework for consumer credit.

**Recommendation 11**

That the Commonwealth/State/Territory Governments increase funding to legal aid service providers to enable them to respond to the increasing civil law needs of people and in particular to address the legal needs in the area of housing, social security, and older people's issues.

***Recommendations of the 2004 Report***

NLA asks the Committee to specifically consider and adopt in so far as continues to be appropriate a number of recommendations in the 2004 Report (set out in Annexure B) that are particularly relevant to this term of reference, TOR b, the adequacy of legal aid. The relevant recommendations are addressed below:

**Funding model**

Recommendations 1 & 2 of the 2004 Inquiry related to reform of the legal aid commission funding model. NLA remains of the view that the funding model requires wholesale reform. The primary issue is that the model is a mechanism for distribution of a sum which is inadequate to meet the need which exists across the country. It is recommended that any further consideration of the reform of the funding model should take account of the Survey of Legal Needs in Australia, which is a new development since the 2004 Inquiry. It is further recommended that in the meanwhile, an increase in funding is provided to help address the current inability to meet presenting demand.

**Cost impact of new legislation**

Recommendation 7 of the 2004 Report was that governments should provide legal aid impact statements when introducing legislation likely to have an effect on legal aid resources, and & Recommendation 8 that governments should consult with Commissions when introducing legislation that may increase demand for legal aid, with corresponding increases in funding where increased demand is identified.

NLA is aware that Commonwealth departments are now expected to consider impacts on legal aid when preparing policy and legislation. Problems can occur

however when the impact is not perceived, and so consideration is not given and provision not made in funding allocations. There have been numerous examples of a failure to consider and/or make appropriate provision for the effect that new legislation has had on legal aid programs since the 2004 Report. Eg new child protection legislation (largely state based) and the intended Commonwealth takeover of Consumer credit.

NLA believes that any current expectations/requirements on government departments to consider impacts on service providers would be strengthened by a requirement for an Access to Justice Impact Statement which would address inter alia the effect on legal aid programs of any proposed legislation. Consultation with legal aid service providers should occur in relation to preparing the impact statements.

Whilst the cost impact on legal aid resources may not be precisely quantifiable when legislation is proposed, impact statements would help to ensure that likely cost impacts were properly considered and addressed. The impact could then be monitored and more precisely quantified following introduction of legislation.

#### **Recommendation 12**

That Access to Justice Impact Statements be prepared by government departments addressing the effect on legal aid programs of any proposed legislation.

#### **Recommendation 13**

That consultation with legal aid service providers by government departments occur in preparing Access to Justice Impact Statements.

### **Funding agreement**

NLA welcomes the fact that future legal aid agreements are to be structured within the umbrella of national partnerships instead of the current purchaser/provider funding agreements.

### **"Funding divide", Family law, domestic violence, child protection**

Current Commonwealth government policy is that Commonwealth funds can be used to provide grants of legal assistance for Commonwealth law matters only. This Commonwealth policy is generally known as the Commonwealth/State funding divide.

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

Commonwealth funding should be available to provide grants of aid to address legal needs arising from family relationship breakdown regardless of whether the

specific legal need arises under Commonwealth or State legislation. NLA believes that a better way to prioritise the Commonwealth legal aid program is to base it on a defined legal need and that this approach is more consistent with social inclusion principles.

Recommendation 14 of the 2004 Report was that the Commonwealth Government increase as a matter of urgency the level of funding available for family law matters. Recommendation 18 was that the Commonwealth fund state family law matters (domestic violence, child abuse) or provide more effective Commonwealth remedies in relation to these issues.

Since 2004, the situation has worsened with the number of people seeking help from legal aid commissions in relation to family law increasing and the cost of providing the required services also increasing. Funding increases have generally been insufficient to meet even known demand.

#### **Recommendation 14**

That the Commonwealth Government implement recommendations 14 (increased family law funding to legal aid commissions as a matter of urgency) and 18 (the Commonwealth to fund state family law matters [domestic violence, child abuse] or provide more effective Commonwealth remedies) of the 2004 Report of the Inquiry into Legal Aid and Access to Justice as an immediate priority.

#### **RRR – new regional offices**

NLA welcomes the considerable amount of work that the Commonwealth Government has initiated and is undertaking to enhance services to economically and socially disadvantaged people in regional, rural and remote Australia, including the increase in funding to legal aid commissions.

However, NLA notes the significant difficulties that geographical and social isolation present in recruiting and retaining solicitors to work in regional, rural and remote Australia. Ultimately, sustainable service delivery is dependent upon a support base and a support network for solicitors providing those legal services. This is best achieved by a stable and constant presence of a public service legal provider.

NLA, therefore asks the Committee to give particular consideration to recommendation 36 of the 2004 Report: that the Commonwealth Government and state/territory governments allocate additional funding to enable legal aid commissions, at their discretion, to open and maintain new regional and rural offices throughout Australia to provide legal services in those areas which legal aid commissions assess as being under-serviced.

#### **Recommendation 15**

That the Commonwealth Government implement recommendation 36 (funding to enable Commissions to open and maintain regional and rural offices in under serviced areas) of the 2004 Report of the Inquiry into Legal Aid and Access to Justice.

**Migration assistance****Recommendation 16**

That the following recommendations (abbreviated by us below) of the 2004 Report of the Inquiry into Legal Aid and Access to Justice in relation to migration assistance be implemented

- review of the Commonwealth Priorities and Guidelines for migration assistance (rec. 41),
- provide the necessary funding (rec. 42),
- avoid conflict of interest in the administration of the IAAAS scheme (rec. 44),
- extend funding periods to allow longer term planning (rec. 45) and
- cooperation to minimise the cost of professional development (rec 46).

## 5. The cost of delivering justice (TOR c.)

Legal aid commissions keep the cost of delivering justice down by

- diverting people from the court system where it is appropriate to do so, thereby avoiding associated costs
- providing alternative dispute resolution services which are cost efficient
- assisting people through the justice system appropriately and efficiently
- increasing the efficiency with which the justice system and the courts can operate
- enabling legal services to those who cannot afford them at low cost to government funders
- providing an alternative source for legal services - the interaction between Commissions and the private profession is conducive to maximising efficiency

### Prevention

Commissions provide effective community legal education programs informing people of their legal rights, responsibilities, and options. These programs prevent legal issues and the associated costs from occurring or escalating.

### Early intervention

Commissions provide legal information, advice, legal and non-legal referrals, minor assistance such as letter writing, and advocacy services which prevent matters from escalating by setting matters on appropriate, efficient, and cost effective pathways through or away from the justice system.

### Dispute resolution

Commissions provide dispute resolution services in family law matters. These minimise conflict, address power imbalance and avoid court and the costs associated with litigation. A recent evaluation by KPMG for the Attorney-General's Department of family dispute resolution in legal aid commissions found commission services<sup>2</sup>

- focussed on the best outcomes for children
- cost less than litigation (for every \$1 invested by the Australian Government in FDR, approximately \$1.48 is saved in time and related costs).
- Identify cases involving family violence and child protection issues
- Narrow the number of issues in dispute
- Assisted parties to reach agreement outside of court.

### **Duty lawyer**

Commissions provide duty lawyers at as many courts as possible. These services enable an explanation of proceedings to parties who are self-representing, assisting the court to deal with matters more expeditiously (thereby saving significant cost). Importantly these services also minimise the stress experienced by many people who are self-representing.

### **Representation**

Commissions employ lawyers who work co-operatively/collaboratively identifying and resolving issues in dispute at the earliest point in time, thereby saving costs to the legal aid system, and the client and minimising the stress experienced by the client.

### **Assignment of grants of aid**

NLA supports the current system of a mixed service delivery model of legal aid. The private profession play an important role in the delivery of legal aid, particularly in rural areas and where there are conflicts which prevent a commission dealing with matters in-house.

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

### **Partnerships & co-operative relationships**

Commissions partner with other service providers, to eliminate duplication and maximise coverage of services, thereby keeping the costs of delivery justice down.

Commissions are involved as stakeholders in various committees etc established to address issues such as unnecessary delay and adjournments which can occur in court processes and which contribute to increased cost for commissions and the cost of delivering justice (see also TOR d)

### **Policy and law reform**

Commissions contribute to the development of law and policy in relation to the efficiency of the justice system by making submissions informed by "on the ground" experience and mindfulness of the limited nature of public funds.

### **Recommendation 17**

That the Commonwealth government provide an increase in funding to legal aid commissions to enable the expansion of commission family dispute resolution services.

**Recommendation 18**

That the Commonwealth government provide legal aid commissions with sufficient funding to establish dispute resolution programs for civil law matters.

**Recommendation 19**

That the Commonwealth/State/Territory governments provide legal aid commissions with increased funding to expand duty lawyer services to more locations and to provide alternative services where issues of conflict exist.

**Recommendation 20**

That legal aid fees paid to private practitioners across the country move over the next few years to a minimum of \$165 per hour before more private practitioners and particularly those in rural and regional areas withdraw from doing legal aid work and that governments fund this move.

**Recommendation 21**

That Commonwealth/State/Territory governments increase funding to commissions to enable them to expand their preventative and early intervention programs including community legal education, information, advice, referral and minor assistance programs.

## **6. Measures to reduce the length and complexity of litigation and improve efficiency (TOR d.)**

It is in the interests of legal aid programs that, to the extent that litigation is necessary, that its length and complexity is reduced. The measures taken by Commissions in this regard have been canvassed in part at TOR c. and we therefore refer to our comments in response to TOR c.

In summary commissions reduce the length and complexity of those matters for which litigation cannot be avoided by

- Giving or withholding approval for grants of legal aid for various stages of litigation thereby influencing the performance of work which commissions would regard as not essential
- Using lawyers who work co-operatively and in a manner which is mindful of the limited nature of public legal aid funding - all in-house lawyers are required to take a co-operative approach and to understand the funding climate in which they operate
- Providing duty lawyer services to those who would otherwise be unrepresented. Courts often need to spend more time with self-representing litigants because self-representing litigants are often unfamiliar with the law and legal procedures
- Working with other parts of the justice system to initiate, pilot, trial, and implement as appropriate measures aimed at improving procedures for those matters which must go to court. Examples of these sorts of measures are case conferencing and contest mention systems, docket systems etc which are aimed at reducing delay and cost. Commissions work with the Commonwealth Attorney-General's Department, State and Territory Justice Departments, the police, prosecutions, the courts, child protection authorities, the private profession and a range of other stakeholders.
- Making submissions informed by on the ground experience, eg recent review of the Federal Family Law Courts in Australia.

In relation to the Commonwealth takeover of consumer credit, we refer to our submission at TOR b and reiterate the need for a low-cost tribunal for resolution of disputes.

## 7. Alternative means of delivering justice (TOR e.)

NLA strongly supports the rule of law.

In our experience there are people who by reason of the nature of their dispute and/or their personal characteristics will always need someone to make a decision for them. When it is appropriate to undertake dispute resolution and this and other attempts at negotiating or settling a matter have failed, then it is our view that decisions, particularly when they involve children or the liberty of a person are best made by appropriately qualified, properly informed, and accountable decision makers. Courts and tribunals should be resourced to the extent this is necessary.

NLA believes that commission dispute resolution and prevention and early intervention programs deliver justice, and avoid stress, cost, and delay for people, and are cost effective. We therefore refer to our submission above and in particular to our response to TsOR c and d, and repeat those particularly the recommendations at the foot of our response to TOR c being:

### **Recommendation 17 (as above)**

That the Commonwealth government provide an increase in funding to legal aid commissions to enable the expansion of commission family dispute resolution services.

### **Recommendation 18 (as above)**

That the Commonwealth government provide legal aid commissions with sufficient funding to establish dispute resolution programs for civil law matters.

### **Recommendation 21 (as above)**

That Commonwealth/State/Territory governments increase funding to commissions to enable them to expand their preventative and early intervention programs including community legal education, information, advice, referral and minor assistance programs.

## **8. The adequacy of funding and resource arrangements for community legal centres (TOR f.)**

### ***The role of community legal centres***

Community Legal Centres (CLCs) complement legal services provided through formal legal aid structures and the private legal profession, tending to fill gaps of legal need identified in their communities.

Legal aid commissions are responsible for program management of the Commonwealth Community Legal Services Program on behalf of the Commonwealth in each of New South Wales, Victoria, Western Australia, Queensland, and Tasmania.

The Commonwealth Government has provided substantial one-off funding to CLCs nationally for the 2008-09 and 2009-2010 financial years. This funding was vital given that over the previous decade, CLCs had experienced significant erosion of funding in real terms, and were experiencing a funding crisis.

### ***Recommendations of the 2004 Report***

NLA asks the Committee to specifically consider and adopt a number of recommendations in the 2004 Report that are particularly relevant to this term of reference. (The relevant recommendations are set out in full at Annexure C.)

#### **Recommendation 22**

That the recommendations of the 2004 Report of the Inquiry into Legal Aid and Access in relation to Community Legal Centres be implemented, ie,

- That the Commonwealth Government urgently consult with State/Territory governments, legal aid commissions, and community legal centres to determine the needs of individual community legal centres and develop strategies for addressing these needs. (rec. 59).

- That the Commonwealth Government increase funding to CLCs for core services and for new CLCs (rec. 60).

- That the Commonwealth and State/Territory governments increase funding to recruit, train and retain staff (rec. 61),

- That the Commonwealth and State/Territory governments increase funding enable CLCs to overcome existing operational difficulties and to plan for future operational requirements (rec. 62).

## **9. The ability of Indigenous people to access justice (TOR g.)**

### ***Need for separate Aboriginal and Torres Strait Islander Legal Services***

Aboriginal and Torres Strait Islander peoples remain the most socially and economically disadvantaged Australians and face enormous legal needs in all areas of the law.

Government funding to indigenous legal services should be increased so that indigenous services are adequately funded. NLA is committed to working with indigenous organisations to ensure more effective service delivery to indigenous communities.

Aboriginal and Torres Strait Islander peoples are disproportionately represented in prison systems throughout Australia. This underlies the chronic disadvantage of Indigenous people in Australia compared to the general population, and the need for specialist, culturally appropriate legal services.

While indigenous legal services are best placed to provide culturally appropriate services to Aboriginal and Torres Strait Islander peoples, the primary focus is on criminal law. Reasons for this include the disproportionate incarceration rates of Aboriginal and Torres Strait Islander peoples which was the historical reason why Indigenous legal services were established, and funding constraints.

The recent past has seen a significant contraction of Indigenous legal service criminal law practice throughout Australia as funding levels have reduced in real terms. Specifically, Indigenous legal services have had to withdraw services from a number of courts. In turn this has increased the number of Indigenous people who have no option but to rely upon the services of legal aid commissions or appear unrepresented. This has also resulted in cost shifting to legal aid commissions.

Indigenous legal services have never had sufficient funding to establish a family or civil law practice that could meet the needs of Indigenous people. The responsibility for providing legal services to Indigenous people in civil and family law matters falls in part to mainstream public legal service providers.

It is of concern that the need for an increased level of funding for the Indigenous legal services in Australia has become more urgent than in 2004 when the Senate Legal and Constitutional References Committee made the following recommendation:

#### **"Recommendation 2**

The Committee recommends that the Commonwealth Government should urgently increase the level of Indigenous legal services in order to promote access to justice for Indigenous people. In doing so, the Government must factor

issues of language, culture, literacy, remoteness and incarceration rates into the cost of service delivery."

Given the chronic disadvantage experienced by Aboriginal and Torres Strait Islander peoples, and the responsibility of the Commonwealth for Indigenous people as "Commonwealth persons", the Commonwealth Government should provide sufficient funding to Indigenous legal services so that they can provide effective and appropriate services to Aboriginal and Torres Strait Islander peoples and their communities, not only in criminal matters, but in family and civil law matters as well.

A particular ongoing issue for the ATSILS is that poor funding means that recruitment and retention of experienced lawyers who are prepared to undertake the highly demanding work required is very difficult. ATSILS lawyers generally have much lower salaries than their legal aid counterparts. There are high attrition rates with many ATSILS lawyers resigning to take up positions with commissions.

The issue of inability to attract and retain experienced staff could in part be addressed by an increase in funding to enable pay parity. It would also be addressed by the introduction of portability of all forms of leave entitlements across Legal Aid Service Providers around the country. Without the loss of leave entitlements, lawyers would be much more likely to transfer between Legal Aid Service Providers. It would also increase the chances of keeping experienced lawyers within the Legal Aid Sector generally. Pay parity and portability of leave entitlements are features of the Western Australia "Country Lawyers Program" which was established to address recruitment and retention issues in country Western Australia. It is suggested that this program demonstrates the benefits of such an approach having increased service delivery to people in regional and remote areas of Western Australia.

It should be borne in mind, however, that Indigenous legal services are often prevented from acting for an Indigenous person because conflict of interest particular family law and family violence matters. It is therefore important that other public legal service providers in a particular geographical location are also adequately funded to provide services Indigenous people and communities, particular in family law and family violence matters, and civil law matters.

#### **Recommendation 23**

That the Commonwealth Government urgently increase funding to Aboriginal and Torres Strait Islander legal services to a level sufficient to enable them to provide effective and appropriate services to indigenous people and their communities, not only in criminal matters, but in family and civil law matters as well.

#### **Recommendation 24**

That the Commonwealth Government urgently increase funding to Aboriginal and Torres Strait Islander Legal Services to allow their lawyers to be paid at rates equivalent to their legal aid commission counterparts.

#### **Recommendation 25**

That Commonwealth/State/Territory Governments co-operate to introduce portability of leave entitlements across legal aid employers around the country.

## ***Research on the family and civil law needs of Aboriginal people***

### **General**

The 17 year life expectancy gap between Indigenous and non-Indigenous Australian people reflects the wide gaps in social and economic outcomes for Indigenous people in comparison with the general population. Indigenous people experience lower levels of educational attainment, home ownership and income, and higher rates of hospitalisation, unemployment and contact with the criminal justice and child protection systems (SCSI 2008). Access to civil and family law services is essential to ensuring that Indigenous people can exercise economic, social and cultural rights without discrimination, including the right to housing, social security, and income support, health, housing and education.

It has been estimated that 31% of Indigenous Australians require some kind of legal service (JCPAA, 2005).

Indigenous people who come before courts throughout Australia as a result of criminal and child protection proceedings do so because of the coercive intervention of the state, and are able to access the legal services provided at those courts by public legal service providers. By contrast, civil and family law problems have no element of coercion and lack the same proximity to service delivery. Legal assistance must be actively sought.

*Justice Made to Measure: NSW Legal Needs Survey (2006)* found that Indigenous people in NSW are more likely to do nothing to resolve a legal problem than the general population: the odds of seeking help were only about 0.6 times those for non-Indigenous participants. Indigenous participants sought help in response to only 36.8 per cent of their legal issues, while non-Indigenous participants sought help in response to over half the legal issues they faced.

Studies both in Australia and overseas have identified significant economic social, cultural and geographic barriers to Indigenous people accessing legal services, including systemic discrimination, and distrust and difficulty in dealing with the legal system (Chesterman et al, 1997; Walkem, 2007). Research also indicates that Indigenous people may lack awareness that an issue is a legal one or that the issue has a potential legal resolution.

### **Research commissioned by Legal Aid NSW**

In 2008, Legal Aid NSW commissioned Professor Chris Cunneen, University of NSW Law Faculty, to conduct research on the family and civil law needs of Aboriginal people in NSW.

The purpose of this research is to gain a greater understanding of the civil and family law needs of Aboriginal people and to explore how Legal Aid NSW might

improve access to, and effectiveness of, family and civil law services for Aboriginal people.

The research will include qualitative analysis of stakeholder interviews and focus groups comprised of members of Aboriginal communities in eight sites. The sites have been chosen for geographical spread and to represent remote, rural, regional and urban communities.

The research will also include quantitative analysis of Legal Aid NSW data to evaluate the extent of access to civil and family law services by Aboriginal people and the nature of those services.

Preliminary analysis indicates that the areas of highest priority for Aboriginal people across NSW are care and protection, housing, discrimination and credit and debt issues. Areas of 'unrecognised' legal need appear to include stolen wages, victims compensation and wills.

It is anticipated that proposals for improving service delivery to Aboriginal people will include targeted community based promotion of civil and family law services provided by Legal Aid NSW, employing Aboriginal field officers, improving outreach services, skilling and resourcing Aboriginal people working in government agencies on civil and family law, and ongoing aboriginal cultural awareness training for Legal aid NSW staff.

It is expected that the report will be launched in the near future.

This research should also provide evidence that will assist the Commonwealth to develop policy to address the civil and family law needs of Aboriginal people.

#### **Recommendation 26**

That the Commonwealth Government's approach to funding, planning, delivery and evaluation of legal aid services recognise the capacity of Indigenous Legal Service Providers and legal aid commissions to develop innovative and flexible service delivery strategies aimed at maximising capacity to respond to the specific legal needs of indigenous Australians.

## **10. Conclusion**

Legal aid commissions and other legal aid service providers help the poorest of the poor, those people within our society who are the most plagued by problems and are also often the least equipped to deal with them. Without the assistance of legal aid service providers these people would be far more likely to fall completely out of society. At present we are concerned that we are not catching these people as comprehensively as we could if we had sufficient funding. We fear that the situation will only get worse with the Global Financial Crisis.

Thankyou for the opportunity to make this submission.

Yours faithfully,

N. S Reaburn  
Chairperson  
National Legal Aid

## **ANNEXURE A: Recommendations of the 2004 Report: identifying and meeting legal needs in Australia**

### ***Overarching***

#### **National survey of demand and unmet need for legal services**

**Recommendation 11:** The Committee recommends that the Commonwealth government should fund a national survey of demand and unmet need for legal services, to be undertaken in cooperation with state legal aid commissions and community legal centres. The objectives of the survey should be to ascertain the demand and unmet need for legal services across the country and to identify obstacles to the delivery of such services, particularly to the economically and socially disadvantaged.

### ***Women***

#### **Review of legal aid services to women**

**Recommendation 15:** The Committee recommends that the Commonwealth Government and state/territory governments, in conjunction with legal aid commissions, the courts and relevant women's organisations, give priority to an urgent and comprehensive review of legal aid services to women with the aim of formulating more appropriate and wide-reaching services to meet their specific needs. In particular, the Committee considers it imperative that the Commonwealth Government and state/territory governments recognise and address the gender-specific barriers to justice that women face in order to better structure and tailor the legal aid system to meet their particular needs.

#### **Research to determine needs of women living in RRR areas**

**Recommendation 25:** The Committee recommends that the Commonwealth Government commission research to determine the particular needs of women living in rural, regional and remote areas of Australia in recognition of the fact that improved and coordinated services to women living in those areas are urgently required.

#### **Research of legal services for women in immigration, refugee, human rights, civil and administrative law, and in relation to women prisoners**

**Recommendation 26:** The Committee recommends that the Commonwealth Government commission research in relation to the delivery of legal services and community education for women in areas other than family law, such as immigration and refugee law, human rights law, civil law and administrative law, and in relation to women prisoners, with a view to improving the delivery of services and education.

## ***Indigenous women***

### **National study to determine legal needs of Indigenous women**

**Recommendation 29:** The Committee recommends that the Commonwealth Government commission a comprehensive national study to determine accurately the legal needs of Indigenous women.

### **Consultation with Indigenous women to address their needs**

**Recommendation 30:** The Committee recommends that the Commonwealth Government and state/territory governments address the needs of Indigenous women as a matter of urgency by providing, developing and promoting appropriate legal and community services, community education programs, domestic violence support networks and funding models to ensure that the experience of Indigenous women within the justice system is fair and equitable. In implementing this recommendation, the Commonwealth Government, state/territory governments, legal aid commissions and other key stakeholders should consult widely with Indigenous women, so that the impetus for change comes from Indigenous women themselves.

## ***Indigenous people***

### **Legal needs analysis for Indigenous people**

**Recommendation 33:** The Committee recommends the Commonwealth Government conduct a legal needs analysis for Indigenous people throughout Australia through a national strategy involving all Aboriginal and Torres Strait Islander legal services, legal aid commissions, community legal centres and other key stakeholders.

## ***Regional rural and remote***

### **Research to determine needs and services required by people living in RRR areas**

**Recommendation 38:** The Committee recommends that the Commonwealth Government conduct research to determine needs and services required by people living in rural, regional and remote areas in Australia. The Committee urges the Commonwealth Government and the state/territory governments to develop mechanisms, in conjunction with legal aid commissions in each state and territory, to ensure that people living in rural, regional and remote areas are not disadvantaged, nor denied basic services and access to the legal aid system, simply because of where they live.

## **ANNEXURE B: Recommendations of the 2004 Report: adequacy of legal aid**

### **Funding model**

**Recommendation 1:** The Committee recommends that the Government reform the funding model for legal aid taking into account concerns raised by legal aid commissions in the recent review of the model. The committee is not satisfied with the justifications that have been offered regarding the 'suppressed' demand factor and the 'average case cost' factor, and recommends that they be removed.

**Recommendation 2:** The Committee recommends that the Commonwealth Government develop a new funding model to ensure a more equitable distribution of funding between the State and Territories. This model should be based on the work of the Commonwealth Grants Commission model, but with increased funding for the Northern Territory to account for the special challenges it faces in light of its high Indigenous population and remoteness.

### **Cost impact of new legislation**

**Recommendation 7:** The Committee recommends that Commonwealth and state/territory governments should provide legal aid impact statements when introducing legislation that is likely to have an effect on legal aid resources.

**Recommendation 8:** The Committee recommends that Commonwealth and state and territory governments engage in consultations with legal aid commissions when introducing legislation that may increase demand for legal aid. If such an increase is identified, governments should provide corresponding increases in funding to compensate legal aid commissions for this increase in demand.

### **Commonwealth Agreement and funding**

**Recommendation 9:** The Committee recommends that the current purchaser/provider funding agreement be abolished, and that Commonwealth funding be provided in the same 'co-operative' manner as existed prior to 1997.

## **Family law**

**Recommendation 14:** The Committee recommends that the Commonwealth Government increase as a matter of urgency the level of funding available for family law matters.

## **Domestic violence**

### **Recommendation 18**

The Committee repeats the recommendation made in its *Third Report* that the Commonwealth Government should:

- either provide an adequate level of funding for legal assistance in matters arising under state /territory law against domestic violence and child abuse (which are clearly aligned with the Commonwealth family law legal aid priority of providing assistance to spouses and children who are the victims of domestic violence); or
- enhance the remedies currently available under Commonwealth law for domestic violence and child abuse and then ensure that adequate funding is provided to enable victims of domestic violence and child abuse to access those remedies.
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## **RRR – new regional offices**

**Recommendation 36:** The Committee recommends that the Commonwealth Government and state/territory governments allocate additional funding to enable legal aid commissions, at their discretion, to open and maintain new regional and rural offices throughout Australia to provide legal services in those areas which legal aid commissions assess as being under-serviced.

## **Migration assistance**

**Recommendation 41:** The Committee recommends that the Commonwealth Priorities and Guidelines relating to the provision of migration assistance be amended such that assistance is available to those applicants meeting the means and merits tests, for preliminary and review stages of migration matters, including challenges to visa decisions and deportation orders.

**Recommendation 42:** In implementing Recommendation 41, the Committee recommends that the Commonwealth provide the necessary funding to legal aid commissions to meet the need for such services.

**Recommendation 44:** The Committee recommends that if the IAAAS scheme is to continue as the main source of assistance for migrants and refugees, this program should be administered by the Commonwealth Attorney-General's Department as opposed to the Department of Immigration and Multicultural and Indigenous Affairs, to avoid any conflict of interest.

**Recommendation 45:** The Committee recommends that if the IAAAS scheme is to continue as the main source of assistance for migrants and refugees, the funding periods should be extended from 6 months to 12 months to allow specialist services and community legal centres to engage in longer term planning.

**Recommendation 46:** The Committee recommends that the Migration Agents Registration Authority co-operate with specialist migration advice services and community legal aid centres to minimise the costs of complying with the continuing professional development requirements that it administers.

## **ANNEXURE C:Recommendations of the 2004 Report: adequacy of funding and resource arrangements for CLCs**

### **Collaborative research**

**Recommendation 58:** The Committee recommends that the Commonwealth Government and state/territory governments, legal aid commissions and community legal centres should engage in collaborative research to accurately determine the extent to which current legal aid funding arrangements impact upon the work and operations of individual community legal centres.

### **Addressing the needs of individual CLCs**

**Recommendation 59:** The Committee recommends that the Commonwealth Government urgently consult with state/territory governments, legal aid commissions and community legal centres to determine the needs of individual community legal centres and develop strategies for addressing these needs.

### **Increased levels of funding**

**Recommendation 60:** The Committee recommends that the Commonwealth Government should take a lead role in recognising and overcoming the diminishing capacity of community legal centres by, for example, providing increased levels of funding to enable community legal centres to better perform their core functions, and establishing new community legal centres to ease some of the burden on existing legal centres and to address unmet legal need.

**Recommendation 61:** The Committee recommends that the Commonwealth Government and state/territory governments should provide additional funding to enable community legal centres to recruit, train and retain staff, through adequate remuneration, skill development programs and improved employment conditions.

**Recommendation 62:** The Committee recommends that the Commonwealth Government and state/territory governments should provide additional funding to enable community legal centres to overcome existing operational difficulties, such as inadequate premises, facilities and resources, and enable them to better plan for such requirements in the future.

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