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ADVOCACY CENTRE LTD

Justice – not a matter of charity: Submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into Access to Justice

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1. Introduction

1.1 The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Government Department of Water and Energy for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

1.2 PIAC's work on Access to Justice

PIAC has a long history of working to achieve access to justice for marginalised and disadvantaged clients. PIAC has pursued this goal by developing and piloting models for unmet legal need, exploring and promoting innovative ways of funding and progressing public interest law and identifying, challenging and preventing systemic barriers to access to justice.

PIAC has been instrumental in the development of several Community Legal Centres (CLCs) to address unmet legal need, including the Communications Law Centre in 1987 and the National Children's and Youth Legal Centre, which became a separate entity based at the University of NSW in 1993.

In 1992, PIAC, together with the Law Society and the Private Bar, established the Public Interest Law Clearing House (PILCH). This was the first formal scheme to provide access to *pro bono* legal assistance from the private legal profession in Australia. PILCH links individuals and not-for-profit organisations with legal and other professional advisors to address issues of concern in the community.

PIAC'S Indigenous Justice Program (IJP) was initiated in 2001 as a response to the unmet need of Indigenous people for access to civil law advice and representation. With financial support from law firm, Allens Arthur Robinson, the IJP has assisted clients in relation to stolen wages claims, claims against police, race discrimination claims and a wide range of other civil matters.

In 2004, PIAC, in partnership with PILCH established the Homeless Persons' Legal Service (HPLS), which utilises lawyers from PILCH members to deliver services to people in the Sydney and Parramatta area who are homeless or at risk of homelessness. HPLS operates nine legal clinics based at agencies that provide other services to homeless people and provides legal information, referral, advice and in some cases, ongoing casework, in a large range of areas of law. It is currently piloting several other outreach services including a street outreach and an outreach service to young Aboriginal people in detention who are at risk of homelessness on release. It also conducts policy and advocacy work on issues arising from the legal services and its liaison work.

In 2008, PIAC launched the Mental Health Legal Services (MHLS) Project, a two-year initiative funded by Legal Aid NSW and PIAC that aims to explore the unmet legal needs of people in NSW who are mentally ill, initiate sustainable, effective processes to meet those legal needs and systematically identify and respond to the barriers to justice facing people in NSW who are mentally ill.

1.3 Preparatory remarks

As said by Saint Augustine:

> Charity is no substitute for justice withheld.

There have been a number of recent inquiries and reviews concerning access to justice and funding and the funding programs of legal aid, community legal centres and other community-based legal services providers.

PIAC refers in particular to the Senate Legal and Constitutional Affairs Committee's Inquiry into Legal Aid and Access to Justice, of which a Final Report was tabled in Parliament on 8 June 2004. The Inquiry considered, among other things, funding and other issues relating to legal aid, CLCs and Indigenous legal services and made 63 Recommendations.[1]

The Senate Committee had previously conducted an inquiry into the legal aid system in Australia, presenting reports in March 1997 (the First Report), June 1997 (the Second Report) and June 1998 (the Third Report). These earlier Reports and the submissions made to the Committee are referred to frequently in the Final Report of the 2004 Inquiry.

PIAC, the National Association of Community Legal Centres, a number of the state CLC associations and many individual CLCs made extensive submissions to the 2004 Inquiry. PIAC's views remain the same as those expressed then, except that current funding is even more inadequate as it has not kept pace with the increased costs of running existing services and as the need for services has increased. The Final Report made many important recommendations that still have not been implemented.

The Inquiry into Access of Indigenous Australians to Legal Services, conducted by the Commonwealth Parliamentary Joint Committee of Public Accounts and Audit, resulted in a report tabled in Commonwealth Parliament on 22 June 2005. That report included 17 Recommendations on the provision of legal services for Indigenous Australians[2], many of which remain unimplemented. The need for additional specialist

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1 Senate Legal and Constitutional Affairs Committee, *Legal Aid and Access to Justice* (2004) Parliament of Australia <http://www.aph.gov.au/senate/Committee/legcon_ctte/completed_inquiries/2002-04/legalaidjustice/report/report.pdf> at 12 May 2009.

2 Joint Committee on Public Accounts and Audit, *Report 403: Access of Indigenous Australians to Law and Justice Services* (2005) Parliament of Australia <http://www.aph.gov.au/house/committee/jpaa/atsis/report/fullreport.pdf> at 12 May 2009.

resources for Indigenous legal services is critical and should be one of the highest priorities for the Australian Government.

PIAC also refers the Committee to the Commonwealth Parliament's Standing Committee on Legal and Constitutional Affairs 1997 *Report of the Inquiry into Older People and the Law* and the recommendations made therein[3], in particular recommendations 38 and 39:

> The Committee recommends that the Australian Government increase funding to the Community Legal Services Program specifically for the expansion of services, including outreach services, to older people by Community Legal Centres.
>
> The Committee recommends that the Australian Government provide funding to Community Legal Centres to expand their community education role, with a specific focus on upon older people.[4]

PIAC also refers the Committee to the paper, *A New National Policy for Legal Aid in Australia*[5]. PIAC supports the policy position and practical proposals put forward by National Legal Aid in that document, which refers to legal aid in a broad sense, including CLCs and other community legal service providers as well as government legal aid agencies.

Three critical points made in the NLA policy paper are the need for the Australian Government to change Commonwealth legal aid policy to end the current division of state/territory and Commonwealth responsibilities in legal aid, the need to significantly increase funding for civil law legal aid and the need for the Commonwealth to increase its funding overall and return to a more equitable matching by the Commonwealth of its funding with state/territory funding.

PIAC submits that the first priority for the 2009 Inquiry, and for the Commonwealth Government, should be to have regard to earlier inquiries and reports and to take steps to implement those recommendations that have, to date, not been implemented.

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3 House of Representatives Standing Committee of Legal and Constitutional Affairs, *Older people and the law* (2007) Parliament of Australia <http://www.aph.gov.au/house/committee/laca/olderpeople/report/fullreport.pdf> at 12 May 2009.

4 Ibid xxii.

5 National Legal Aid, *A New National Policy for Legal Aid in Australia* (2007) <http://www.nla.aust.net.au/res/File/PDFs/nla_policy-11-07.pdf> at 12 May 2009.

2. The ability of people to access legal representation and the adequacy of legal aid

While access to justice involves ensuring access to legal representation and other individual legal services, it also necessarily involves a capacity to undertake review of existing laws and policies to identify where justice is being denied systemically and seek reform. This has been at the core of the work of community legal centres since they were first established in the mid 1970s.

Community legal centres are able to offer effective and creative solutions to legal problems based on their experience within their community. It is the community relationship that makes community legal centres vital organisations able to respond to the needs of their community as these needs arise and change. It is the relationship with their community that distinguishes CLCs from other legal services. That community may be a geographically defined community (generalist legal centres), or it may be defined by an area of law or a particular client group (specialist legal centres).

While providing legal services to individuals, CLCs also work beyond the individual. Community legal centres undertake community development, community legal education and law reform work that is based on client and community need, that are preventative in outcome and that strengthen the community they serve.

The clients of community legal centres are most commonly those who face economic, social or cultural disadvantage and whose life circumstances are often affected entirely by their legal problem.

Community legal centres harness the energy and expertise of thousands of volunteers across the country. Centres are committed to collaboration with government, legal aid, the private legal profession and community partners to ensure the best outcomes for their clients and the system of justice in Australia.

Community legal centres are about Justice and not simply the Law.

On a range of justice issues, community legal centres have worked together to identify how laws and programs fail the needs of the general community, particularly those facing financial disadvantage, and to develop more appropriate systems going forward. This work has often been done by generalist community legal centres.

While generalist community legal centres are able to provide assistance to individuals and sectors of their communities, they tend to have less capacity to address specialist legal needs (such as tenancy or criminal law) and/or high-needs groups, such as the homeless or those with disabilities (including mental illness). They also have limited capacity to conduct test-case litigation and intensive legal research and policy development work in specialist areas. Much of this work is done through the establishment and maintenance of specialist legal centres or specialist units within community legal centres. Such specialisation plays an important role in the development of law and policy and in challenging systemic barriers to justice in particular areas.

It is important in considering access to justice to ensure that there is capacity within the community legal centre sector to continue to undertake this sort of work and capacity to respond to new and emerging legal issues and needs. An example of such an emerging need—while not a new need, simply one that has been relatively newly identified—is in the area of the impact of law on homeless people. Another is the interface of mental illness and the law.

In both areas, it has been important to have the capacity not simply to provide advice and casework services to respond directly to individual needs, but also to be able to analyse the nature of legal problems being presented by clients, and whether there are trends or patterns in those legal problems that indicate a systemic issue—whether substantive, such as the disproportionate impact of a particular area of law on the identified client community, or procedural, such as particular difficulties the client community has in accessing or interacting with legal services or the legal process. Where such issues are identified, specialist services also need the capacity to conduct research into how such problems may have been addressed elsewhere, where the problem needs to be addressed and to develop and promote solutions. The benefit of having specialist services involved in this work is that they can analyse the likely effect of proposed changes through their understanding of the characteristics and circumstances of their client community and have already-established relationships within that client community that they can utilise to ensure consumer input to the solution.

2.1 Homeless people

Homeless access to legal advice and representation

Free legal services throughout NSW, including community legal centres, serve a valuable function for many members of the community; however they are under-utilised by homeless people. Further, many free legal services are not specifically tailored to suit the needs of homeless people. Most traditional services operate from their own stand-alone premises that are not visited by homeless people for any other purpose and may be difficult for homeless people to find and seem intimidating to them to approach.

Traditional models of legal service delivery present other barriers to homeless people. As many homeless people have pressing needs to attend to, such as finding accommodation and obtaining money, there can be little time or motivation to see a lawyer, and their legal problems often accumulate and compound the longer they are left unattended.

A significant number of those experiencing homelessness also have addictions, mental illnesses or intellectual impairment and thus have difficulty remembering to attend appointments, court dates and so on.

Finally, many homeless people have both legal and non-legal problems and may not be able to distinguish easily between the two, or even know that they have legal rights to assert. It has traditionally been difficult for them to obtain assistance to address their various issues at the one venue or in a way that promotes co-operation between those assisting them. It can also be hard to know where to find the appropriate help and how to arrange appointments with different services.[6]

Homeless Persons' Legal Service outreach model

The Homeless Persons' Legal Service (HPLS) is a joint initiative of PIAC and the Public Interest Law Clearing House (PILCH). It involves direct legal service delivery and public policy research and development work, as well as capacity building for homeless people and the homelessness sector. HPLS is managed by PIAC and the direct legal services are delivered by PILCH members on a *pro bono* basis.

The HPLS model has been developed to overcome some of the barriers faced by homeless people in accessing legal services and representation. HPLS's legal clinics are based at locations familiar and easily

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6 See generally, Suzie Forell, Emily McCarron and Lou Schetzer, *No Home, No Justice? The Legal Needs of Homeless People in NSW* (2005).

accessible to homeless people; that is, within agencies that already offer services and support to homeless people, such as casework, financial management, counselling and accommodation. Homeless people do not need to make appointments at the clinics and the length of time they can spend with the lawyer is not pre-set or limited.

Eight of the nine HPLS clinics currently operating in NSW are staffed by lawyers from private law firms on a *pro bono* basis.[7] In addition to the core staff of HPLS of a full-time Co-ordinator and a full-time Policy Officer, HPLS currently employs a Solicitor Advocate with specialist expertise in criminal law in order to directly assist the large numbers of homeless people seeking representation in minor criminal matters. Since commencing the position in January 2008, the HPLS Solicitor Advocate has provided advice and representation in criminal matters to over 120 clients.

Since the establishment of HPLS in 2004, PIAC has received start-up and ongoing financial support from government and the NSW Public Purpose Fund to run the service.[8] It has also received one-off funding for the establishment of a consumer advisory group, Street Care.[9]

In mid-2007, Legal Aid NSW (as a member of PILCH) became a partner in HPLS, providing lawyers to staff the legal clinic located in Parramatta. This has led to another development separate to, but supported by, HPLS: the development of homeless outreach services by Legal Aid NSW in regional NSW. These new services are based on the HPLS model, making lawyers available on a regular basis in local agencies that provide services and support to homeless people. This Legal Aid homelessness service fills a gap that HPLS would have had significant challenges filling because of the difficulty of identifying private law firms with the capacity and resources to send lawyers to regional NSW to provide such services on a regular basis.

The role of the private sector in the provision of legal services to homeless people

Maximising the role of the private sector in providing services to homeless people on a *pro bono* basis is very attractive from a cost-saving perspective. However, governments cannot and should not rely on the private sector to meet the unmet legal needs of homeless and vulnerable individuals.

Essential services should be provided to the most vulnerable members of our community as their *right*; they should not have to be reliant on charity or *pro bono* services to meet their basic needs. At a recent HPLS consultation meeting held in one of the HPLS clinics, a person who had experienced homelessness stated:

> Why aren't places like Legal Aid being better supported and funded? We become dependent on *pro bono*, volunteer work. Volunteer services are picking up the tab as the system's not working.

The decision by Legal Aid NSW to provide lawyers to the Parramatta clinic of HPLS and then to develop its own regional dedicated outreach services is a good example of how a project harnessing *pro bono* resources can demonstrate an unmet legal need and creative and effective ways to meet that need. The result of this demonstration should not be that government then relies on this *pro bono* work (or, even worse, reduces funding for existing free legal services), but rather that government should work with relevant stakeholders to itself address the unmet need.

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7 These law firms are all members of the Public Interest Law Clearing House. They are: Allens Arthur Robinson, Baker & McKenzie, Corrs Chambers Westgarth, Deacons, DLA Phillips Fox, Gilbert + Tobin, Henry Davis York, HWL Ebsworths, Minter Ellison.

8 Established and operated under the *Legal Professional Act 2004* (NSW) ss 285-294.

9 PIAC received 12-months' funding from the City of Sydney to establish Street Care.

HPLS lawyers need hours of training, supervision and support to ensure that their advice is accurate and their communication appropriate. This is because the skills and knowledge needed to do HPLS work is often very different to those private lawyers develop and use in the rest of their work. HPLS clients sometimes struggle with seeing different lawyers each time they present at a clinic. Lawyers are pressed for time because HPLS is a relatively small part of their busy workload. Lawyers do not always have extensive experience or expertise in dealing with people with complex needs, mental illness or those who have suffered from significant trauma. Thus, while HPLS lawyers provide an excellent quality service in the circumstances, the experience of some clients is not always as ideal as it could be.

Commitment under *The Road Home*

The Federal Government's White Paper, *The Road Home: a national approach to reducing homelessness*, released in December 2008, recognised the lack of available legal services and representation for people who are homeless or at risk of homelessness. *The Road Home* highlighted the correlation between legal issues and a lack of access to legal advice and increased homelessness. It further indicated that, under the National Partnership on Homelessness, a commitment of additional government funding will allow the states and territories to expand legal services to clients at risk of homelessness with a focus on family law, domestic and family violence, credit and debt and tenancy.[10]

Mapping the need for further legal services to increase access

Even though the HPLS model has been successful in fulfilling an unmet need in the provision of legal advice and representation to people who are homeless or at risk of homelessness, it has equally demonstrated that a number of gaps still exist in the ability of people to access legal services.

The HPLS Solicitor Advocate was at (or beyond) capacity within 12 months of being established and demand for assistance in minor criminal matters continues to grow. This reveals that while the Legal Aid Duty Solicitor plays an important role in access to justice, the model is not ideal to assist certain vulnerable and disadvantaged groups, like the homeless, people with a mental illness, intellectual disability or cognitive impairment. The limited time offered for interviews, the lack of continuity of solicitor appearing, the difficulties facing people with complex lives and needs in prioritising and attending court, and the logistics of locating a duty solicitor in a busy court environment are all obstacles that prevent vulnerable and disadvantaged groups from obtaining the best possible outcome.

Given the effectiveness of this position and the continuing challenge in responding to the unmet need for legal advocacy support in the area of civil law, HPLS is working to achieve the resourcing needed to maintain the current Solicitor Advocate position in criminal law and to have a dedicated civil law Solicitor Advocate who operates with the same flexibility as the criminal law Solicitor Advocate.

Through its work with the homeless community, HPLS has identified that many rough sleepers are still not able to access legal advice simply because they are unwilling or unable to access services that host the HPLS clinics. This may be for reasons including past experience with host agency, conflict with other homeless people or fear for personal safety. Another, more simple reason is that many rough sleepers do not even recognise that some of the barriers that confront them daily, such as difficulties with government agencies caused by lack of identification, are legal problems and/or could quite easily be resolved with appropriate legal assistance. HPLS considers that there should be no reasonable excuse to deny rough sleepers access to legal advice and representation.

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[10] Australian Government, *The Road Home: The Australian Government White Paper on Homelessness* (2008) <http://www.fahcsia.gov.au/sa/housing/progserv/homelessness/whitepaper/Pages/default.aspx> at 12 May 2009.

HPLS is currently trialling a program to provide legal advice to rough sleepers in their own space: on the street. By building relationships with homeless people themselves, and not just homeless service providers, HPLS hopes to increase the number of rough sleepers who are accessing legal advice and representation and asserting their legal rights.

The expansion of legal services needs to go further than just rough sleepers. According to the 2006 Census, women make up 44% of the homeless population in Australia, yet there is a dearth of targeted legal services for women. It is HPLS's experience that, in the main, women do not access mainstream homeless services. If a woman is leaving a domestic or family violence situation, they are generally more likely to access a specialised service. This service may not be able to provide legal assistance beyond the immediate family law or apprehended violence order issues. Unfortunately, their legal situation is usually far more complex and involves issues such as tenancy (for example, where the lease is held in joint names) and debt (for example, where bank loans are in joint names). These situations often involve renegotiating contracts and, if not resolved in a timely manner, can escalate into difficult legal problems.

HPLS is currently expanding its outreach legal advice service on a trial basis by arranging appointments to meet women who are homeless or at risk of homelessness in a place where they feel safe and which is accessible to them.

All of these initiatives challenge the traditional approach to providing legal services, that is, where the client attends an office or community legal centre at an appointed time to speak with a solicitor and aim to achieve better access to legal advice and ongoing representation for people who are homeless or at risk of homelessness.

Recommendation

1. *That the Federal Government allocate additional resources to the Homeless Persons' Legal Service and equivalent services in each state and territory to consolidate and strengthen its work providing legal advice and representation to homeless people and developing new responses to unmet legal needs within specific homeless communities.*

2.2 Mental illness and legal needs

PIAC currently has a project to develop and pilot responses to unmet legal and related needs.[11] The project commenced in 2008 with research into different models that have been developed in Australia and overseas to respond to these needs. From that research, PIAC developed four pilot service delivery programs and two training modules to focus on early intervention and prevention of legal and related problems for people with mental illness. PIAC is currently in the process of recruiting staff for the pilot service delivery programs and will be conducting ongoing evaluation using action research over the two-year life of the pilots.[12]

Improving access through holistic service delivery

The four pilot service delivery models are:

- a social work support service at the Shopfront Youth Legal Centre (Shopfront) in Darlinghurst;
- a legal support service at the Multicultural Disability Advocacy Association (MDAA) in Harris Park;
- an Indigenous Men's Access to Justice (IMAJ) Worker service at Redfern; and

[11] PIAC received funding to assist in the start-up of the project from Legal Aid NSW in late 2007.

[12] PIAC received funding for the four pilot service delivery programs from the NSW Public Purpose Fund.

- a legal support service at the NSW Service for the Treatment and Rehabilitation of Torture and Trauma Survivors (STARTTS) in Carramar.

The underlying principle that has informed the development of each of these pilots is that to be effective in achieving access to justice for people facing significant disadvantage and complex lives it is necessary to address their legal needs as part of a co-ordinated response to their broader needs. This reflects the approach taken in the Homeless Persons' Legal Service.

The other underlying principle is that to be effective in terms of justice more broadly than individual legal needs, it is necessary to have the capacity to bring together the diversity of those working in individual service delivery to identify trends and systemic issues.

Each of the pilots seeks to create a more holistic service through creating a direct service interface between legal services and other supports, such as non-legal advocacy, social work, clinical treatment and rehabilitation and community development. Many community legal centres aim to implement just such a model in their own community but have insufficient resources to employ a multi-disciplinary team and/or to afford the costs of co-location with other community service providers.

Improving access through education and capacity building

The training modules that have been developed as part of the mental health legal services project are:

- 'How to Sort Out Your (Pre)-Legal Problems', for consumers and their advocates; and
- 'How to Work With Consumers', for lawyers and other advocates.

Through these, PIAC aims to work with the staff and consumers of the pilot services and more broadly to enhance the capacity of legal and related service providers to work effectively with people with mental illnesses and for mental health consumers to get the best from legal and non-legal advocacy supports.

That means for the first time in Australia and for a period of two years, a co-ordinated program of innovative service models will work towards improving access to justice for people who are mentally ill. While there are existing mental health legal services in the CLC sector, these have developed on a model more closely aligned to other CLCs and have not had the opportunity or resourcing available to test the effectiveness of outreach models in their early development stages. It is hoped that a broad spectrum of people with mental illness, including Indigenous men, homeless young people, refugees, asylum seekers and people from non-English speaking backgrounds, will directly benefit from the pilots and the training. From the outset, the pilot projects and training modules will be overlaid by a comprehensive, action-research evaluation strategy, to identify and quantify both individual consumer outcomes and systemic legal and policy issues.

The self-identified needs of people with mental illness were pivotal in the design and development of the pilot projects and training modules. This input, together with background research, such as that conducted by the Law and Justice Foundation of New South Wales and extensive research by workers from PIAC's Mental Health Legal Services Project, confirmed that people with mental illness face multiple barriers to accessing justice.[13]

Some of these barriers come directly from the inadvertent design of the legal system with its inherent complexity. Others come through limited resources available to the more accessible and user-friendly legal

[13] M Karras, E McCarron, A Gray & S Ardasinski, *On the Edge of Justice: The Legal Needs of People with a Mental Illness* (2006).

service providers, the cost of accessing private lawyers and the limited scope of legal aid services. In addition to these barriers, there are other factors that impact on the need for effective legal interventions for people with mental illness. For example, people with mental illness are more likely than members of the community as a whole to be:

- the victims of crime;
- living in poverty;
- imprisoned; or
- homeless. [14]

They are also potentially subject to specific mental health laws and have extremely limited access to legal support in respect of the operation of those laws. In a recent paper on advocacy and legal representation in mental health tribunals, the authors reported that:

> Representation at Australian MHT hearings is still comparatively rare (5-10% in Victoria), partly because legal aid concentrates on involuntary in-patient admissions, neglecting the vast bulk of people on Community Treatment Orders (CTOs). In Swain's 2000 Victorian study, advocates appeared in just 8 per cent of cases, a rate which has remained stable (Swain, 2000; MHRB, 2006:31; Lesser, 2007:12). Similar rates (8.3%) apply in WA (MHRB (WA), 2006). Representation was higher in NSW in 2006 (16.2%), but mostly for inpatient rather than CTO reviews (MHRT (NSW), 2006).
>
> This low rate of legal representation is not for lack of evidence about need.[15]

The authors also pointed to and considered the obligation on State Parties to the UN *Convention on the Rights of Persons with Disabilities* to:

> … ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.[16]

Of course, this obligation is more extensive than ensuring access to legal representation for people with mental illnesses in mental health specific proceedings. It extends to ensuring appropriate legal support and access for all people with disabilities and has clear implications for Australia not only in terms of the funding and resourcing of effective legal service delivery but also in the design of the justice system.

Design of funding programs

It is rare for funding to be available to a CLC to implement such an approach to testing models of service delivery. Generally, funding is available to perhaps add one worker or a short-term project to the existing services available in a CLC. PIAC believes that there should be funding available to properly test new

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14 J Choe, L Teplin and K Abram, 'Perpetration of Violence, Violent Victimization, and Severe Mental Illness: Balancing Public Health Concerns' (2008) 59(2) *Psychiatric Services* 158-161; K Carter, T Blakely, S Collings, F Gunasekara and K Richardson, 'What is the Association Between Wealth and Mental Health?' (2009) 63 *Journal of Epidemiology and Community Health* 222-225; E Perese, 'Stigma, Poverty, and Victimization: Roadblocks to Recovery for Individuals with Severe Mental Illness' (2007) 13 *Journal of the American Psychiatric Nurses Association* 286 & 288-290.

15 Terry Carney, Fleur Beaupert, Julia Perry and David Tait, 'Advocacy and Participation in Mental Health Cases: Realisable Rights or Pipe Dreams?' Mental Health Review Board of Victoria [3] <www.mhrb.vic.gov.au/publications/documents/AdvocacyinMH.doc> at 15 May 2009.

16 UN *Convention on the Rights of Persons with Disabilities* (2006) Article 13(1). Australia is a State Party to the Convention, having ratified it on 17 July 2008.

models of service delivery and to conduct evaluation during the course of such projects. In the past PIAC has received much shorter-term pilot funding for new initiatives and has experienced the problem of lack of continued funding despite achieving the specified outcomes.

For example, PIAC received one year's pilot funding from the Federal Department of Family, Community Services and Indigenous Affairs (FaCSIA) in 2004 to implement the Homeless Persons' Legal Service. Towards the end of the first twelve months' PIAC engaged an independent consultant to evaluate the service and that evaluation report was provided to Government. Despite the evaluation indicating that the pilot was highly successful and evidence about the particular need that homeless people have for longer-term interventions in order to develop trust, the FaCSIA rejected PIAC's application for further funding on the basis that the project was no longer a pilot.

PIAC received some additional funding from the NSW Public Purpose Fund for the pilot but was unable to secure ongoing funding during the funded period. This resulted in PIAC having to retrench one of the two staff members in the project and use its limited reserves to continue the employment of the other staff member for seven months while waiting for decisions on funding applications. Fortunately, the NSW Public Purpose Fund determined, in June 2006 to allocate funding to mid-2009 to enable the continuation of the service. It has recently confirmed a further three years' funding.

Many areas of important public policy have ongoing resource allocations to ensure there is capacity for research and development outside of government. The experience of CLCs is that such funding in the area of justice is extremely limited and is not often available to those working most directly with communities.

Recommendations

2. *That the Federal Government fund and support innovative service models that work towards improving access to justice for people who are mentally ill and, where appropriate, work with the state and territory governments to ensure ongoing funding for effective programs.*

3. *That the Federal Government work with the state and territory governments and community advocates and lawyers to conduct a review of barriers within the justice system to access to justice for people with disabilities, including funding and resourcing the participation of the community sector and consumers in that review.*

4. *That funding be made available within the community legal services program more broadly to enable the research and development of new responses to unmet legal needs. Such a funding program should have guidelines that ensure sufficient funding to properly pilot and evaluate new models and avoid short-term pilots that provide insufficient time to fully implement and test the model. The program should also include a mechanism to review the evaluation prior to the end of the pilot and to ensure continuing funding where the pilot demonstrates its effectiveness in responding to unmet legal need and improving access to justice.*

3. The ability of Indigenous people to access justice

Accessing and achieving justice continues to be a significant challenge for many Indigenous Australians. The unique and complex nature of Indigenous disadvantage in our society translates into the vital need for accessible and quality legal services targeted to meet the specific legal needs of Indigenous people and enable them access to justice in its various forms.

PIAC is committed to redressing Indigenous disadvantage by improving access to justice and encouraging accountability and a more responsive approach by the Commonwealth, state and territory governments to addressing unmet legal needs. PIAC is also committed to addressing the systemic issues that prevent Indigenous people from effective participation in the legal system and achieving equality before the law. This submission highlights the issues and challenges of access to justice stemming from PIAC's own experiences providing legal assistance and representation to Indigenous people through its Indigenous Justice Program and more broadly.

3.1 Indigenous disadvantage

It has been well beyond a decade since the Royal Commission into Aboriginal Deaths in Custody and the National Inquiry into the Separation of Aboriginal Children from their Families. These landmark inquiries as well as a number of other inquiries, reports and statistics highlight the level and complexity of Indigenous disadvantage in Australia. The 2007 report, *Overcoming Indigenous Disadvantage*, which analyses indicators of Indigenous disadvantage and examines whether progress has been made, reveals that despite some advances regarding employment, educational and health outcomes for Indigenous people, overall they continue to be worse off than other Australians.[17] The most recent information relating to Indigenous disadvantage available at the time of writing reveals the following:

- Indigenous people continue to be over-represented in the criminal justice system both as victims and offenders. Statistics as at 30 June 2006 show that Indigenous people are 13 times more likely to be imprisoned than non-Indigenous people.[18]
- Indigenous children continue to have disproportionate contact with the child care and protection system compared to non-Indigenous children. In June 2006, almost 30 out of every 1,000 Indigenous children aged 0-17 years were under child care and protection orders compared with five out of 1,000 for non-Indigenous children.[19]
- Life expectancy for Indigenous people is estimated to be 17 years lower than that for the total Australian population.[20]
- Indigenous students continue to achieve worse outcomes than non-Indigenous students in the school system. In 2006, 21% of 15-year-old Indigenous children were not participating in school education compared with 5% of non-Indigenous 15-year-olds. Further in 2006, Indigenous students were half as likely as non-Indigenous students to continue to year 12.[21]
- Incomes of Indigenous people are generally below those of non-Indigenous people. In 2004-05, 52% of Indigenous people received most of their individual income from government pensions and

17 Steering Committee for the Review of Government Service Provision *Overcoming Indigenous Disadvantage: Key Indicators 2007* (2007) v.

18 Australian Bureau of Statistics, *Prisoners in Australia* (2006) 5.

19 Above n17, 45.

20 Ibid 11.

21 Ibid 13.

allowances, followed by 34% from salaries and wages and 10% from Community Development Employment Projects, commonly referred to as CDEP.[22]

These indicators, amongst others, illustrate the need for legal services and other measures to redress the inequality and gaps that continue to exist between Indigenous and non-Indigenous people. While it is acknowledged at the outset that not all forms of justice can be achieved through the existing legal system, the primary focus of this submission is on accessing justice utilising the legal system.

3.2 Indigenous access to legal representation and the adequacy of legal aid

The legal needs of Indigenous people are diverse. They are influenced by socio-economic disadvantages and a range of other social factors. They range from legal assistance with criminal, family and civil law matters to assistance with native title, wills, tenancy issues and intellectual property amongst others.[23]

There are a number of free legal services available to Indigenous people through Indigenous specific and mainstream legal aid service providers. The key legal aid service providers for Indigenous people in Australia are Aboriginal and Torres Strait Islander Legal Services (ATSILS), Family Violence Prevention Legal Services (FVPLSs), Legal Aid Commissions (LACs) and Community Legal Centres.

ATSILS are the specialist legal aid service providers for Indigenous people nationwide. Established in the 1970s in response to the over-representation of Indigenous defendants in the criminal justice system, ATSILS remain the legal aid service provider of choice for most Indigenous people.[24] In 1991, Commonwealth funding for the services increased dramatically following the report of the Royal Commission into Aboriginal Deaths in Custody, which highlighted the continuing and critical need for criminal law services for Indigenous people. Presently, Indigenous deaths in custody continue to occur at disproportionately high rates. ATSILS struggle to adequately meet the demands for their service as a consequence of inadequate funding arrangements. ATSILS 'function in an environment of effectively static funding and increasing demand which compromises their ability to provide sufficient quality and quantity of legal services'.[25] As a result of the increasing demand for criminal law services and the inadequacy of funding, ATSILS focus the majority of their limited resources on criminal law services.[26] Priority is given to criminal matters where the accused is at risk of incarceration.[27] As a result, gaps exist in the provision of other essential legal services such as family law, child care and protection and civil law services. Such services are not offered by ATSILS to the same extent as criminal law services, if at all.

The Aboriginal Legal Service (NSW/ACT) does not offer civil law services due to funding constraints. The service closed down its family law practice at the end of June 2008 as a result of there being no increase in its Commonwealth funding arrangements. This creates gaps in the provision of vital legal services for Indigenous people that is typically met by mainstream legal aid service providers such as LACs and CLCs.

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22 Ibid 17.

23 L Schetzer, J Mullins and R Buonamano, *Access to justice & legal needs, a project to identify legal needs, pathways and barriers for disadvantaged people in NSW Background paper*, (2002) Law and Justice Foundation of NSW <http://www.lawfoundation.net.au/report/background> at 12 May 2009.

24 Aboriginal and Torres Strait Islander Commission, Office of Evaluation and Audit, *Evaluation of the Legal and Preventative Services Program* (2003) 3.

25 C Cunneen and M Schwartz, *Funding Aboriginal and Torres Strait Islander Legal Services, Issues of Equity and Access* (2008) 32 *Crim LJ* 38 at 39.

26 Joint Committee of Public Accounts and Audit, *Inquiry into Access of Indigenous Australians to Law and Justice Services, Report 403* (2005) 9.

27 Ibid 10.

3.3 Legal needs

There is an acute legal need for increasing access to civil law services for Indigenous people in NSW. PIAC often gets enquiries from Indigenous people seeking assistance in civil law matters. Civil law cases make up the majority of the ongoing casework handled by the Indigenous Justice Program at PIAC. However PIAC is not a generalist legal aid service provider. PIAC provides legal assistance and representation to Indigenous people in matters of *public interest*. Much of PIAC's work representing Indigenous people and communities involves addressing the legal needs of those who have suffered discrimination and the consequences of unjust, unsafe or deficient laws, practices and policies. As such the scope of matters in which PIAC provides assistance is limited and PIAC often has to refer Indigenous people seeking legal assistance to other legal services.

The NSW Legal Assistance Forum (NLAF) is a coalition of specialist legal service providers and peak representative legal service delivery bodies which coordinate their efforts to develop and improve access to legal services for socially and economically disadvantaged people in NSW. NLAF established a Working Group on Civil Law Services for Indigenous people in NSW in response to the urgent need to address the serious gap in access to civil law advice and representation. The NLAF Working Group's strategies included publishing a guide to legal services for Indigenous people in NSW.[28] This guide serves as a beneficial resource particularly for those living in regional and remote areas of NSW. Another strategy includes improving networks between NSW *pro bono* referral schemes and the Aboriginal Legal Service (NSW/ACT) to develop referral mechanisms for civil law cases. Such initiatives are instrumental in improving access to justice for Indigenous people. Further, it is acknowledged that there is a very important role for the private sector to play in promoting and enabling access to justice for disadvantaged groups. However, PIAC submits that governments must take overall responsibility for ensuring that legal aid service providers are adequately funded to provide essential legal services to Indigenous people and address the problems of unmet legal needs. As stated in an article about funding ATSILS by Professor Chris Cunneen and Melanie Schwartz:

> The issue of adequacy of legal representation for Indigenous people goes to the heart of questions of access, equity and the rule of law. It represents the ability of Indigenous people to use the legal system (both criminal and civil) to a level enjoyed by other Australians.[29]

There is disparity between the funding allocated to ATSILS as compared to LACs, the mainstream, statutory legal aid service providers. LACs operate on a significantly greater budget than ATSILS yet the day-to-day workload of ATSILS lawyers is significantly higher than that of LAC lawyers. Professor Cunneen and Schwartz state:

> There is a significant lack of parity of funding between these two organisations that has severe ramifications for ATSILS capacity and therefore for adequacy of legal services for indigenous clients.[30]

The disparity that exists between ATSILS and LACs demonstrates a systemic barrier to access to justice for Indigenous people. Indeed one of the critical challenges ATSILS and other providers of legal services to Indigenous people face is the inadequacy of funding and resources to enable the provision of vital, accessible and quality legal services to Indigenous people.

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28 Aboriginal Legal Service (NSW/ACT), *Guide to Legal Services for Aboriginal People in NSW and the ACT* (2006) <http://www.alsnswact.org.au/publications/Guide%20to%20Legal%20Services%20for%20Aboriginal%20people%20in%20NSW-ACT.pdf> at 12 May 2009.

29 Above n25, 39.

30 Ibid 39.

3.4 Geographical Barriers

Geographical remoteness presents significant barriers to accessing justice for Indigenous people. As at 30 June 2006, 43% of Indigenous people were living in regional areas and a further 25% in remote or very remote areas.[31] The challenge of accessing essential legal services is even greater in regional areas where the services are either not available or difficult to access because of infrequent service delivery or distance. There is little capacity for the private sector to expand its *pro bono* services to regional and remote communities. Further, the ability of legal services such as ATSILS to retain experienced staff in regional and remote areas is a significant challenge for a variety of reasons including:

- uncompetitive salaries compared to LACs and private legal practices;
- extremely large workloads and lack of time to adequately deal with the work;
- lack of support and appropriate supervision of junior lawyers; and
- lack of potential career progression within the ATSILS.[32]

Legal outreach programs co-ordinated by LACs and efforts by NLAF's Working Group to provide community legal education and increase awareness about the legal services available to assist people in regional and remote areas with their legal needs are important measures designed to deliver legal services to Indigenous people in their communities and thus enable them access. There is a need, however, to address the systemic issues that create barriers to accessing justice such as addressing long-term funding problems and ensuring legal services operating in regional and remote areas are well supported and adequately resourced to cater for the needs of their clients.

3.5 Barriers to accessing justice for PIAC's Indigenous clients

PIAC's own experiences in representing Indigenous people demonstrate the need for increased funding for essential legal services for Indigenous people. To highlight the unique challenge PIAC's Indigenous clients face with accessing justice as a result of funding constraints, this submission focuses below on the difficulties faced by PIAC's Stolen Generation clients.

PIAC has advised and represented members of the Stolen Generations since 1996. PIAC's work with members of the Stolen Generations involves working to achieve redress for the experiences, harm and abuses suffered by them as a result of the laws, policies and practices of past governments that led to the forcible removal of Indigenous children from their families. The plight of members of the Stolen Generations is most notably documented in *Bringing them home*, the report of the National Inquiry into the Separation of Indigenous Children from their Families.[33]

Lack of funding to litigate creates significant barriers for members of the Stolen Generations who wish to exercise their rights to pursue civil claims through the courts as a consequence of their experiences as wards of the state. This challenge is reflected in a letter from Neil Gillespie, the Chief Executive Officer of the Aboriginal Legal Rights Movement in South Australia to The Hon Wayne Swan, Federal Treasurer, dated 16 January 2009. Mr Gillespie notes:

> The Commonwealth Government funded the successful Trevorrow Stolen Generations Test Case for a number of years which certainly must be applauded. It is unfortunate though that since that case was

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31 Australian Bureau of Statistics, *The Health and Welfare of Aboriginal and Torres Strait Islander Peoples* (2008) 5.

32 Above n25, 48.

33 Human Rights and Equal Opportunity Commission, *Bringing them home, Report of the National Inquiry into the Separations of Aboriginal and Torres Strait Islander Children From their Families* (1997).

> decided the Commonwealth has decided NOT to fund other similar claims that have resulted from the Trevorrow decision.[34]

The late Bruce Trevorrow is the only member of the Stolen Generations to have successfully sued an Australian government for compensation. It was thought that this landmark decision of the Supreme Court of South Australia would pave the way for other Stolen Generations litigants to bring claims before the court. However, rather than the decision representing a breakthrough in access to justice for members of the Stolen Generations, it now appears that the paucity of funding available to pursue claims will deny them access to justice.

In a similar vein, PIAC considers that it is the responsibility of government, when it creates new legal or quasi-legal rights, to consider the impact that this will have on service providers and other stakeholders providing assistance to relevant client or applicant groups. For example, in NSW, as in some other states, the Government has established an Aboriginal Trust Fund Repayment Scheme (ATFRS) to repay monies held in trust by the NSW Government from 1900 to 1968. PIAC was instrumental in lobbying the Government to return these trust monies to Indigenous owners and has made detailed submissions and representations to government on the proposed model from 2004 to date.

PIAC is appalled that no resources have been allocated by the NSW Government to assist Indigenous people to make applications to ATFRS. PIAC's Indigenous Justice Program (IJP), in partnership with the Public Interest Law Clearing House, (PILCH) established a Stolen Wages Referral Scheme, by which PILCH member firms provide *pro bono* advice and representation to stolen wages claimants. Many hundreds of claimants have been assisted by PIAC and PILCH. PIAC and PILCH received no funding to take on this project, which has required an enormous allocation of resources. Very recently, Legal Aid NSW has indicated its willingness to provide limited assistance to claimants, however with the 31 May 2009 deadline looming, this has made a negligible impact. The NSW Government should provide ongoing support and assistance to ATFRS claimants. Similarly, all governments should be mindful that people applying to various schemes and tribunals in many cases need assistance to do so or at least information about how to do so on their own. The creation of new legal or quasi-legal rights creates demand on service providers such as community legal centres that do not have capacity to take on additional workloads without additional resources.

3.6 Alternative Means of Delivering Justice

In its 2002 report, *Restoring Identity*, PIAC proposed an alternative to litigation for members of the Stolen Generations who seek redress for their experiences as a result of forcible removals.[35] PIAC proposed a framework for a national Stolen Generations reparations tribunal modeled after the recommendations from *Bringing them home*.[36] The function of the proposed tribunal is to provide a comprehensive reparations package including, but not limited to or focused on, monetary compensation to Indigenous people and communities to acknowledge and address the harms caused to members of the Stolen Generations. To date, the Governments of Tasmania, Queensland and Western Australia have established implemented similar schemes designed to provide ex-gratia payments to people who experienced harm in state care, and Tasmania has implemented a compensation scheme for Aboriginal children removed from their families.[37]

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34 Letter from Neil E Gillespie, to the Hon Wayne Swan MP, Treasurer, 16 January 2009, 6.

35 Public Interest Advocacy Centre, *Restoring Identity: Final Report of the Moving Forward Consultation Project* (2002).

36 Human Rights and Equal Opportunity Commission, above n33.

37 *Stolen Generations of Aboriginal Children Act 2006* (Tas).

3.7 Government responsibility and accountability

Commonwealth, State and Territory Governments must accept some responsibility for the failures of the justice system to adequately address the needs of Indigenous people and enable them access to justice. It is unacceptable that providers of essential and other legal services to Indigenous people continue to be under-funded for the services they provide. These are matters that fall squarely within the ambit of government responsibility; however there has been a failure of past and present governments to address the issue of inequality that exists in relation to the provision of legal and other services to Indigenous people.

It is a legitimate argument that the allocation of increased and adequate funding to services that cater to the essential needs of Indigenous people may directly impact on reducing Indigenous over-representation in the justice system and thus go towards redressing Indigenous disadvantage.

Recommendations

5. *That the funding disparity that exists between Aboriginal and Torres Strait Islander Legal Services (ATSILS) and Legal Aid Commissions be rectified so that ATSILS can deliver quality criminal and civil law services to Indigenous people.*

6. *That legal services operating in regional and remote areas are well supported and adequately resourced to cater for the needs of their clients.*

7. *That the Commonwealth Government establish a Stolen Generations Reparations Tribunal to provide redress to members of the stolen generations.*

4. The adequacy of funding and resource arrangements for community legal centres

PIAC endorses the submission to this Inquiry made by the National Association of Community Legal Centres (NACLC) and refers the Committee to NACLC's submission for more detail in relation to the issues raised in this section.

The Final Report of the Senate Legal and Constitutional Affairs Committee's 2004 Inquiry found that CLCs are a crucial part of providing access to justice for all Australians but noted that CLCs appeared to be facing a funding crisis.[38]

It is important to note that apart from the additional funding provided to CLCs in April last year by the Australian Government, there has been no significant injection of new funding into the sector by the Commonwealth since 1999-2000.

In its funding submission to the Federal Attorney-General in January 2008, the National Association of Community Legal Centres said:

> CLC funding has not kept pace with increased costs. CLCs have experienced an 18% reduction in funding over the last 10 years in real terms. This impacts on outcomes for clients, placing unsustainable stress on the organisations' ability to deliver service. CLCs have had to cut back on staff, service hours and other expenses that support innovation and growth of services[39].

The inadequacy of CLC funding and the detrimental effect on CLCs' ability to meet client demand has been noted in recent years by a variety of reputable sources, for example:

> Along with services for housing assistance and disability supported accommodation, CLCs are amongst the service providers with the highest 'turn away' rate for clients seeking assistance.[40]
>
> Some of the areas where people are being turned away, include those areas where the need is most acute, including ... community legal centres – where 1 in every 5 people who are eligible are being turned away.[41]
>
> The program in NSW 'is underfunded to meet the growing demand for services' and 'almost all centres are overwhelmed by demand for their services and cannot sustain their current levels of service, nor meet emerging service gaps'.[42]
>
> The comparison of funding levels confirms that community legal centres are generally poorly funded.[43]

On 11 January 2008, NACLC wrote to the Federal Attorney-General providing a detailed funding submission on behalf of the Commonwealth-funded community legal centres. That funding submission sought $10.3m

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38 Senate Legal and Constitutional Affairs Committee, *Legal Aid and Access to Justice* (2004) 218.

39 National Association of Community Legal Centres, *Community Legal Centres Across Australia – An investment worth protecting, Funding Submission to the Commonwealth Government 2007-2010* (2008) 1.

40 Australian Council of Social Services, *Australian Community Sector Survey Report 2007* (2007) <http://www.acoss.org.au/upload/news/2102__Community%20Sector%20Survey%202007.pdf> at 12 May 2009.

41 Australian Labor Party, *An Australian Social Inclusion Agenda* (2007).

42 Legal Aid NSW, *Review of the NSW Community Legal Centres Funding Program Final Report* (2006) 5.

43 Attorney-General's Department, *Review of Commonwealth Community Legal Services Program* (2008) 45.

to address the severe shortfalls created by the previous neglect of funding for CLCs. This amount was needed to catch up with cost rises and to invest in CLC infrastructure, enabling CLCs to harness additional voluntary, *pro bono* and other funding resources.

NACLC also sought, if necessary on a staggered introduction, additional itemised increases in funding to address certain priorities: one being services for regional and rural Australia.

On 18 April 2008, the Federal Attorney-General on behalf of the Australian Government announced a one-off allocation of $10 million to support the operation of the Community Legal Services Program (CLSP) for Commonwealth-funded CLCs and to help CLCs meet the increasing needs for legal assistance of the most vulnerable members of the community. While the CLC sector was grateful for this recognition and additional support, the use to which one-off funding can be put is limited.

NACLC has since that time written to the Australian Government requesting that the $10m be made recurrent funding and continuing to press for the other amounts sought in the January 2008 submission. PIAC notes the announcement on 9 May 2009 of $4 million to CLCs in another round of one-off funding.[44] Again, this is welcomed; however, it is critical that there be a move towards sustained funding increases for all CLCs, rather than one-off injections of funding that leave CLCs unable to develop ongoing responses to legal needs.

In the context of this Inquiry, PIAC makes the point that in NACLC's view, state-funded CLCs should also be funded to the minimum optimal level argued for in its submission.

PIAC also submits that existing CLCs not presently funded under the CLSP should be considered for funding under that program where they meet the criteria applied to other centres.

In PIAC's submission, the legal needs data presently being gathered in a number of contexts should be considered by the Australian Government and additional funding for new CLCs should be made available where the needs are demonstrated and an acceptable proposal satisfying agreed criteria is put forward.

4.1 Impact of new law and policy

On particular aspect of the justice system that requires an urgent response is the failure of successive government to commit to conducting and responding to legal aid impact assessments of new laws and policy. This failure is of particular concern in light of the fact that the Council of Australian Governments (COAG) has agreed on and implemented principles for best practice regulation that require consideration to be given to the impact of new regulation on business.[45] This process ensures impacts are considered, yet there is no equivalent process in place to consider the impact of new laws and policies on legal needs generally or for particularly disadvantaged communities. This results in the situation currently facing CLCs and Legal Aid Commissions of increasing demand for legal assistance and representation because of increased legislative activity affecting members of the general community and particular groups.

An example of where a legal aid impact assessment was conducted was at the introduction in 1992 of the *Disability Discrimination Act 1992* (Cth). Consideration was given to the increased demand for legal services for people with disabilities and a funding program was implemented, after consultation with CLCs, disability organisations and legal aid providers, to fund the establishment of disability discrimination legal services in

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44 The Hon Robert McClelland, Federal Attorney-General, and The Hon Bob Debus, Federal Minister for Home Affairs, 'Funding for Legal Assistance Services' (Media Release, 9 May 2009).

45 *COAG Requirements* (2008) Department of Finance and Deregulation <http://www.finance.gov.au/obpr/proposal/coag-requirements.html> at 15 May 2009.

each state and territory. Unfortunately, the level of resourcing was low, with the largest of the services—the NSW Disability Discrimination Legal Centre Inc— having funding for less than three staff. This funding level has not increased since 1993, although there was a one-off allocation last year and another this year.

By comparison, in some other countries legal aid impact assessments are mandatory. For example, in Northern Ireland there is a requirement for those involved in government policy development within the court service and in other government departments to consider whether policies being developed have a potential to impact on the 'workload of the courts or a legal aid cost'.[46] The UK more broadly implemented this requirement in 2005.

Recommendations

8. *That additional funding be provided to the CLC funding program.*

9. *That existing CLCs not presently funded under the Community Legal Services Program be considered for funding under that program and funded where they meet the criteria applied to other centres.*

10. *That the Council of Australian Governments develop and implement a legal aid impact assessment requirement to ensure that the impact on legal need and demand for legal assistance through CLCs and legal aid of new laws and policies be tested and appropriate resources allocated to respond to any increased needs and demand.*

46 *The Legal Aid Impact Test* (2008) Northern Ireland Court Service <http://www.courtsni.gov.uk/en-GB/Services/Legal+Aid/Legal+Aid+Policy/p_la_Legalaidimpacttest.htm> at 15 May 2009.

5. Access to Justice: Litigation issues

While litigation is only a small part of achieving justice, it can be an important element not only for individual litigants but also for the broader community and the development of law. PIAC has, since its establishment in 1982, sought to use litigation as one of a number of strategies to achieve public outcomes. Litigation can be an important mechanism to highlighting a particularly problematic aspect of legislation or conduct and, through that highlighting, increase public concern for amendment or reform. It can also be an important mechanism for ensuring that rights and obligations are understood and upheld, both at an individual, organisational and governmental level.

The courts are a core element of the Australian system of government and effective access to them is a critical element of access to justice and to upholding and enhancing democracy. Barriers to the courts can result in a failure of government to understand and be moved to act on unfairness in law and policy as the courts can be used to highlight system failures and to increase the imperative to respond to those failures.

An example of the use of the courts to develop the law in the public interest is the current proceedings in relation to non-discriminatory access to airline travel in which PIAC is representing to plaintiffs in the Federal Court against Virgin Blue. The litigation has provided an opportunity to get public attention to a particular aspect of Virgin Blue's policy and procedures that effectively excludes some people with disabilities from travelling and/or adds a significant cost burden to the traveller with a disability. While the proceedings are not yet finalised, already the case has been effective in gaining public attention to the issue and in highlighting one particular aspect of litigation that can create a barrier to justice: the issue of adverse costs orders.

5.1 Costs in human rights and public interest cases

A significant impediment to accessing justice for many people seeking to enforce their legal rights is the risk of an adverse costs order as a result of unsuccessful litigation. In PIAC's experience, even where *pro bono* legal representation or representation on a conditional fee basis is secured, many meritorious cases do not proceed due to the risk of an adverse costs order. This is especially the case in matters where there is a great disparity in resources between the applicant and respondent.

In the discrimination arena, many complainants decide not to pursue discrimination complaints beyond conciliation at the Australian Human Rights Commission (formerly the Human Rights and Equal Opportunity Commission) to the Federal Court or Federal Magistrates Court. This is because it is not uncommon in a Federal Court discrimination matter for the legal costs of a respondent to exceed $15,000 per trial day and for hearings to involve a number of days (both at the preliminary stages and in the hearing of the substantive matters). By comparison, applicants in state anti-discrimination matters are much more likely to proceed to a hearing in the Administrative Decisions Tribunal in NSW, where, in most cases, no costs orders are made.

It is PIAC's view that the human rights jurisdiction of the Federal Court should be a 'no costs' jurisdiction, where the general rule that should apply is that each party bears their own costs, with a discretionary power to award costs in extraordinary circumstances. There are strong public interest reasons why the human rights jurisdiction of the Federal Court should be treated differently from its other jurisdictions in relation to costs, including the purposes of human rights legislation and the lack of access to resources faced by many applicants in human rights cases. Alternatively, the costs rule should be amended in 'public interest' cases only. Absent change in the federal human rights jurisdiction in relation to costs, many applicants with

meritorious cases will fail to proceed and the realisation of rights under federal anti-discrimination law will remain limited.

Another way of alleviating the negative impact of adverse costs orders on federal human rights litigation would be to strengthen the application of Order 62A rule 1 of the *Federal Court Rules* (Cth). Order 62A provides that the Court may, by order made at a directions hearing, specify the maximum costs that can be recovered on a party and party basis. An Order 62A costs order has the potential to remove uncertainty about the level of risk of an adverse costs order from the applicant's shoulders, thereby allowing them to proceed in cases where they otherwise would not be able to.

The problem with the Order is its infrequent use, due to lack of awareness by practitioners and judges, and in cases where applications have been made, the reticence of judges to make orders limiting costs. Amendments to Order 62A should be made to ensure that it becomes commonly used in human rights cases to limit costs. This could be by way of a presumption in favour of costs limiting orders in human rights cases, and/or by way of guidance to judges in exercising their costs discretion in human rights cases. At the very least, where an applicant seeks an Order 62A, there should be a presumption in favour of limiting costs in 'public interest' matters, where 'public interest' is defined broadly to include all cases that could benefit a class of disadvantaged people, even though they may benefit the applicant as well.

In June 2008, in the proceedings referred to above against Virgin Blue, PIAC, acting on behalf of two people with disabilities, succeeded in obtaining costs caps in the two sets of proceedings being heard together in the Federal Court. The two applicants allege that Virgin Blue has discriminated against them by requiring that they travel with a carer at their own expense because of their disabilities. Justice Annabelle Bennett AO capped the costs the two applicants would be required to pay if they are unsuccessful in their claim against Virgin Blue at $35,000 and $15,000 respectively. This was the first time that cost capping under Order 62A has been ordered in a human rights case and it enabled PIAC's clients to proceed with their claim. In making her decision, Justice Bennett weighed the 'entitlement' of Virgin Blue to recover its costs if it was successful with a number of factors including: that the applicants did not stand to gain any personal financial benefit; that the matter was one that was in the public interest; and, that the applicants would be inhibited from proceeding with their claims if the Court did not make the order.[47]

5.2 Standing

Test case litigation has the capacity to create systemic change for large groups of people without the need for each person to bring a separate legal claim. In Australia, test cases that promote the public interest by creating, enforcing or clarifying legal rights must generally be brought by individuals prepared to expend significant financial resources, time and emotional energy on the proceedings. Litigation pursued by individuals may have broad-reaching effects and benefit others, however test case litigants are often almost crushed in the process. As a public interest legal practice seeking to promote human rights, PIAC has also witnessed the unfortunate situation where no person is prepared to take on the enormous burden and risk of bringing a legal claim, despite significant numbers of people suffering harm.

Standing rules in a number of other jurisdictions (such as South Africa and the US) reflect a more open approach that accommodates wider public participation in judicial decision-making and greater access to justice. PIAC considers that the rules of standing should be broadened to allow a wider class of people to bring civil proceedings. The experience in environmental law reveals the benefits that could flow from broader standing provisions, in terms of the development of law and policy. In particular, standing rules in

47 Corcoran v Virgin Blue Airlines Pty Ltd [2008] FCA 864.

public interest cases should be broadened so that organisations can bring proceedings on behalf of aggrieved people or groups of people.

Discrimination matters
If access to justice is to be achieved for marginalised groups who suffer systemic discrimination, standing provisions particularly need to be addressed in the federal discrimination jurisdiction.

It is already the case that organisations can bring complaints on behalf of aggrieved people to the Australian Human Rights Commission, where matters are investigated and conciliated. However if the parties do not reach agreement and an aggrieved person wishes to proceed to a hearing in the Federal Court or Federal Magistrate's Court, they must proceed as an individual or group of individuals. This means taking on the enormous burden, practically and financially, of litigation. This is even the case where the claim is to enforce the *Disability Standards for Accessible Public Transport 2002* (Cth) made pursuant to section 31(1)(d) of the *Disability Discrimination Act 1992* (Cth).

In September 2004, Access for All Alliance lodged a complaint with the (then) Human Rights and Equal Opportunity Commission (HREOC) pursuant to section 46P of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth). The complaint alleged that the Hervey Bay City Council installed bus stops that did not comply with the *Disability Standards for Accessible Public Transport 2002* (Cth). Access for All Alliance, an incorporated association, is a volunteer community group established to ensure equitable and dignified access to all premises and facilities, whether public or private, to all members of the community.

When no agreement was reached at conciliation and HREOC terminated the complaint, PIAC, on behalf of Access for All Alliance, filed proceedings in the Federal Court. However, Her Honour Justice Collier dismissed the application on the basis that Access for All Alliance did not have standing to bring the proceedings as it was not an 'aggrieved person' within the meaning of section 46P(2) of the *Human Rights & Equal Opportunities Commission Act 1986* (Cth).

There is an important public interest in ensuring that the *Disability Standards for Accessible Public Transport 2002* (Cth) are an effective compliance promotion tool to reduce the incidence of discrimination against people with disabilities. If only aggrieved individuals prepared to take on enormous financial risks have standing to make a complaint of a breach of standards, few complaints will be made to ensure their proper implementation. A broadening of the standing provisions would facilitate access to justice for those individuals who cannot shoulder the burden of lengthy and expensive litigation.

5.3 *Amicus curiae* and intervenors

Amicus curiae interventions are yet another legal procedure that can be utilised to achieve access to justice without the significant cost and risk associated with being a party to litigation. An *amicus curiae*, or 'friend of the court', is a person or bystander who seeks leave to intervene in proceedings to assist the court on a point of fact or law.

Public interest *amici* often seek to alert judges to the broad ramifications of the decision they will make in the context of the dispute between the parties before them. Thus their involvement in litigation may enhance the rights of people who are not parties to the proceedings.

An 'intervener' (as opposed to an *amicus curiae*) must normally have a direct financial or other interest in the outcome of the proceedings. An intervenor becomes a party to the proceedings and usually possesses the privileges and risks associated with being a party, such as the capacity to tender evidence, appeal the decision of a lower court, participate fully in the argument and be liable for costs.

PIAC has acted for various organisations that have sought leave to intervene in proceedings as *amicus curiae*. PIAC represented the NSW Combined Community Legal Centres' Group Inc and Redfern Legal Centre as *amici* in *APLA & Ors v NSW Legal Services Commissioner & the State of NSW* [2005] HCA 44. The Australian Plaintiff Lawyers Association (APLA) challenged the validity of Part 14 of the *Legal Professions Regulation 2002* (NSW), which made it an offence of professional misconduct for a legal practitioner to publish advertisements that had a connection with personal injury. The *amici* were concerned that the Regulation significantly impeded the work of community legal centres, by preventing their solicitors from publishing information about civil liberties, discrimination, domestic violence, sexual assault and social security (which arguably all have a connection to personal injury as it is broadly defined in the Regulation). The *amici* put submissions before the court that highlighted the effect that the Regulation had beyond that presented by the parties.

The Supreme Courts of Canada and the United States of America, as well as the Constitutional Court of South Africa, have welcomed submissions from public interest organisations and others, and have created court rules to accommodate and facilitate the participation of *amici* in cases raising important issues of public policy. In Australia, however, the superior courts have been reticent to grant leave to *amici* or intervenors and court rules have been absent or unhelpful in encouraging the participation of third parties in public interest and public law cases.

In 1996, the Australian Law Reform Commission proposed a new framework designed to facilitate the involvement of *amici* and intervenors in litigation before the courts.

In 2002, Order 6 Rule 17 and Order 52 Rule 14AA were inserted into the *Federal Court Rules* by the *Federal Court Amendment Rules* 2002 (No 2) (SR 222 of 2002). In *Sharman Networks Ltd v Universal Music Australia Pty Limited* [2006] FCAFC 178 (7 December 2006), the Australian Consumers' Association Pty Ltd, Electronic Frontiers Australia Inc, and New South Wales Council for Civil Liberties Inc (CCL) made a joint application for leave to be heard in the appeals as *amici curiae*. The Full Federal Court recognised that they could make useful submissions in the public interest on the proper construction of certain provisions of the *Copyright Act 1968* (Cth). Instead of accepting their application to be heard as *amicus curia*, however, the Court said at paragraph 11:

> … we think that the new rules are intended to regulate comprehensively the practice of the Court with respect to the intervention of non-lawyer parties in proceedings, both original and appellate. We think it is only the legal practitioner who is invited by the Court to assist it, who stands outside the rule régime. Even in that case, of course, the terms on which a legal practitioner is invited to participate as *amicus curiae* should be defined by the Court in an exercise of its implied power.

And at para 12:

> It would be inconsistent with the obvious intention of the rules for a non-lawyer entity to be free to seek leave to be heard as *amicus curiae* outside the comprehensive framework now provided by O 6 r 17 and O 52 r 14AA.

Considering the request as falling under Order 52 Rule 14AA, the Court then took the view that the question of whether the *amici* should have any liability for any costs should be determined at the conclusion of the matter. Due to the resulting uncertainty over the potential costs of continuing, CCL did not seek to exercise the leave granted to the *amici* jointly.

The Full Federal Court's interpretation of the rules in the *Sharman* case, and its resulting decision in relation to costs, served to discourage the intervention of CCL. This approach will thwart future interventions in the public interest and thus indirectly impact on people's access to justice in a negative way. Rather than encourage a culture of effective and useful intervention by public interest organisations, Australian case law appears to be heading the other direction.

Recommendations

11. *That the Federal and High Court's human rights jurisdiction be made a no costs jurisdiction where the general rule that applies is that each party bears their own costs.*

12. *That measures be put in place to encourage the use of orders to limit costs in human rights cases in the Federal Court, Federal Magistrates Court and High Court.*

13. *That a review of standing provisions both in general, and in public interest matters, be undertaken with a view to broadening standing and improving access to standing as* amicus curiae.