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## **Inquiry into Access to Justice**

Submission to the  
Senate Legal and Constitutional Affairs Committee

DLA Phillips Fox is a member of  
DLA Piper Group, an alliance of  
independent legal practices. It is a  
separate and distinct legal entity.

DLA Phillips Fox offices are located  
in Adelaide Auckland Brisbane  
Canberra Melbourne Perth Sydney  
and Wellington.

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## **1 Introduction**

### **About DLA Phillips Fox**

- 1.1 DLA Phillips Fox is one of the largest legal firms in Australasia with offices in Adelaide, Auckland, Brisbane, Canberra, Melbourne, Perth, Sydney and Wellington
- 1.2 DLA Phillips Fox offers a full complement of corporate and commercial legal services in over 40 legal competency areas. Our clients include a broad cross-section of local, national and international companies, as well as local, state and federal government.

### **About our pro bono practice**

- 1.3 DLA Phillips Fox maintains a 'best practise' pro bono program.
- 1.4 In the current financial year, the firm will deliver \$6.5million in pro bono legal services. This is roughly the equivalent of having a team of about 22 lawyers working full-time on a pro bono basis.
- 1.5 Our pro bono practice comprises:
  - 1.5.1 A team of dedicated pro bono lawyers;
  - 1.5.2 Short-term and long term secondments to Community Legal Centres;
  - 1.5.3 Work performed for individuals who have no other access to legal assistance;
  - 1.5.4 Work undertaken for charities and not-for-profits;
  - 1.5.5 Law reform and policy development.
- 1.6 DLA Phillips Fox currently provides pro bono lawyers on secondment to the following organisations:
  - 1.6.1 Human Rights Law Resource Centre (Victoria)
  - 1.6.2 Environment Defenders Office (Victoria)
  - 1.6.3 Environment Defenders Office (South Australia)
  - 1.6.4 Cape York Land Council (Queensland)
  - 1.6.5 Aboriginal Legal Service (New South Wales/Australian Capital Territory)
  - 1.6.6 Arts Law Service (Northern Territory/Western Australia)
- 1.7 We have also recently provided secondees lawyers to the following:
  - 1.7.1 Public Interest Law Clearing House (New South Wales)
  - 1.7.2 Queensland Public Interest Law Clearing House (Queensland)

1.7.3 Redfern Legal Centre (New South Wales)

1.8 DLA Phillips Fox is a signatory to the National Pro Bono Target promoted by the National Pro Bono Resource Centre. We also encourage each of our lawyers to adopt a personal pro bono target which is higher than the National Target.

1.9 More than 3% of all work undertaken by the firm is for a pro bono client.

**The role of pro bono**

1.10 Lawyers perform pro bono work, because it is our duty as lawyers to contribute to the administration of justice and because we recognise that our contribution can have a significant impact in the lives of our clients.

1.11 Pro bono work is undertaken principally in matters which have a public interest element, but increasingly pro bono is expanding to improve access to justice. In other words, many of the matters that are taken on a pro bono basis have no broader public benefit than to ensure that an individual gets proper advice, representation and access to justice.

1.12 Although it appears anecdotally that the availability of pro bono is increasing, pro bono will never be a complete answer to the unmet legal needs in the community.

1.13 As noted above, pro bono is only made available where no other more appropriate form of assistance is accessible by the client.

1.14 Pro bono is never in competition with commercial lawyers, Legal Aid or the community legal sector. Pro bono will only be made available where assistance from other sources is not available. As such pro bono is a last resort, or a safety net.

1.15 Whenever a client applies for, and qualifies for pro bono assistance, but nevertheless fails to obtain assistance due to capacity constraints, it can generally be assumed that the client will not access legal advice or representation.

1.16 Pro bono lawyers are therefore uniquely placed to comment on legal need and access to justice. As a substantial provider of pro bono services, we have gained an insight into the types of legal needs that are inadequately addressed by existing services.

**The scope of this submission**

1.17 This submission relates to the following terms of reference for the inquiry into Access to Justice:

1.17.1 the ability of people to access legal representation;

1.17.2 the adequacy of legal aid;

1.17.3 the adequacy of funding and resource arrangements for community legal centres;

1.17.4 the ability of Indigenous people to access justice.

1.18 In recent years, much of our pro bono work has been undertaken in the following areas, and consequently, many of the observations and recommendations in this submission relate to these clients groups and/or areas of law:

1.18.1 Human rights;

1.18.2 Indigenous legal issues;

1.18.3 Prisoners;

1.18.4 Remote communities;

1.18.5 Environmental protection.

## **2 Executive Summary**

2.1 Pro bono services are provided to improve access to justice for all people by providing free legal assistance to those who have no other means of obtaining such assistance.

2.2 Pro bono providers rely on effective frontline services, such as community legal centres, Legal Aid and clearing houses, in order to connect with pro bono clients. When these services are insufficiently resourced, pro bono providers are less able to respond to the unmet need because there is no immediate point of contact between the client and the pro bono provider.

2.3 Inadequate funding of frontline services has limited their capacity to provide appropriate levels of legal assistance or refer clients onto pro bono providers.

2.4 The low level of CLC salary funding in particular is also impacting on the ability of CLCs to recruit and retain quality staff.

2.5 Pro bono work often involves substantial costs in addition to lawyers' time. The cost associated with the delivery of pro bono services acts as a disincentive, or restricts or constrains the availability of pro bono services in some areas. This is particularly the case in relation to service delivery in rural, regional and remote areas of Australia. Pro bono providers are often prevented from acting for clients in professional indemnity matters due to the reluctance of the clients to engage in professional indemnity litigation at the risk of

2.6 A substantial barrier to access is the seemingly endless referral chain through which many clients pass while seeking legal assistance. In an effort to 'capture' individuals with legal needs, a multitude of services acting as entry-points have been created, with the unfortunate result that the various services established as entry points for particular client groups have become referral points, with high turn-away and referral rates, creating a vast and complex system of under-resourced service providers passing clients from one service to the next, often without ever reaching a service provider with capacity to assist.

## **Recommendations**

Recommendation 1: The Commonwealth and States should prioritise building the capacity and effectiveness of frontline community legal services.

Recommendation 2: The Commonwealth and States should increase Legal Aid Commission funding, which should be used to increase the level of assistance available, particularly in civil matters.

Recommendation 3: Additional funding should be provided to CLCs to enable them to overcome operational difficulties, such as inadequate premises, facilities and resources.

Recommendation 4: Salary levels in Community Legal Centres should be linked to legal aid salary bands to ensure the on-going ability of CLCs to recruit and retain quality staff.

Recommendation 5: The Commonwealth and States should provide funding increases for Aboriginal Legal Services to ensure they are adequately funded to be able to offer legal services in civil and family law matters.

Recommendation 6: The Commonwealth and States should fund the establishment of CLCs in rural regional and remote areas of Australia in order that individuals from these areas have access to legal services.

Recommendation 7: The Commonwealth and States should provide designated disbursement funding in relation to pro bono matters undertaken in RRR areas to increase the availability of legal assistance in such areas.

Recommendation 8: The Commonwealth and States should increase the availability of legal services for prisoners.

Recommendation 9: Single referral agencies should be established in each State to guarantee efficient referral to an appropriate pro bono provider where other legal services are unavailable.

Recommendation 10: The Commonwealth should provide disbursement funding in pro bono matters in order to facilitate more, and more effective pro bono service delivery.

Recommendation 11: The Commonwealth and States should adopt a policy that the government will not seek costs against an unsuccessful plaintiff in litigation brought to advance the public interest.

Recommendation 12: Protective costs orders should be introduced to enable individuals to bring public interest litigation without the risk of adverse costs orders if unsuccessful.

Recommendation 13: If a National Charter of Human Rights is introduced in Australia, the Commonwealth should fund the Human Rights Law Resource Centre to operate as a national service.

### 3 Deficiencies in Frontline Legal Services

#### Introduction

- 3.1 Pro bono providers rely heavily on effective frontline services, such as community legal centres (CLCs), Legal Aid, and clearing houses.
- 3.2 These frontline agencies act as a first point of contact for the community when legal assistance is sought. These agencies are accessible to clients - by way of affordability, location, opening hours, language and atmosphere - and often provide an integrated range of services.<sup>1</sup> They generally have well-grounded knowledge of their local communities and local services. This knowledge gives frontline agencies a significant 'triage' function within their communities, allowing them to refer on pro bono work to the most suitable providers.<sup>2</sup>
- 3.3 CLCs (and legal aid bodies) are best placed to respond to community needs and identify and make informed pro bono referrals of matters where the front-line service is unable to provide assistance.
- 3.4 The most successful pro bono programs result from close and ongoing working relationships with CLCs and other community organisations. Without well-resourced community and legal aid sectors, pro bono programs cannot reach their full potential. There is thus a direct relationship between publicly funded services, client need and pro bono.<sup>3</sup>
- 3.5 In most cases, individuals will not gain access to pro bono service providers unless they have access to appropriate frontline services. It is both rare and impractical for pro bono providers to take on matters via direct approaches from the public. The volume of requests alone would be prohibitive.
- 3.6 There has been an increase in the amount and complexity of demand for legal services in recent years.<sup>4</sup> However it is also observed that there is an inability to meet this increased demand due to inadequate funding.<sup>5</sup>

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<sup>1</sup> National Association of Community Legal Centres, *Response to the Internal Review of the CCLSP by the Commonwealth Attorney-General*, March 2007, <[http://www.naclc-qat.socialchange.net.au/multiattachments/2155/DocumentName/NALC-CLSP\\_Final.pdf](http://www.naclc-qat.socialchange.net.au/multiattachments/2155/DocumentName/NALC-CLSP_Final.pdf)> (**NALC Response**) p 25 (accessed 30 April 2009).

<sup>2</sup> Ibid 27.

<sup>3</sup> National Pro Bono Resource Centre, *Mapping Pro Bono in Australia*, May 2007, <[http://www.nationalprobono.org.au/ssl/CMS/files/cms/NPBRC\\_mapping\\_book\\_web.pdf](http://www.nationalprobono.org.au/ssl/CMS/files/cms/NPBRC_mapping_book_web.pdf)> (**Mapping Pro Bono in Australia**) at 6.2 (accessed 30 April 2009).

<sup>4</sup> NALC Response, p 13.

<sup>5</sup> Ibid 11.

- 3.7 Inadequate funding results in numerous gaps in frontline service delivery, which act as barriers to accessing legal services and pro bono legal services for many sections of the community.

**Recommendation 1:** The Commonwealth and States should prioritise building the capacity and effectiveness of frontline community legal services.

- 3.8 This section of our submission goes on to consider gaps or deficiencies in relation to the following frontline legal services:
- 3.8.1 Legal Aid
  - 3.8.2 Community Legal Centres
  - 3.8.3 Aboriginal Legal Services
  - 3.8.4 Rural, Regional and Remote Legal Services
  - 3.8.5 Prisoners' Legal Services
  - 3.8.6 Legal Referral Agencies

#### **Legal Aid Commission Funding**

- 3.9 Insufficient funding of Legal Aid Commissions, as with CLC's, results in negative outcomes in relation to access to justice. Limited resources and funding causes Legal Aid to apply overly restrictive means and merits tests, which exclude many people from receiving Legal Aid assistance. The Commissioner of Legal Aid noted in 2006 that funding constraints resulted in the inability of Legal Aid to provide a full range of legal services to comprehensively meet the needs of the economically and socially disadvantaged.<sup>6</sup>
- 3.10 The biggest gap in legal aid coverage is in civil matters, where there are many difficulties in obtaining a grant of Legal Aid. Similarly, those involved in family law proceedings are frequently ineligible for legal aid or their grant is exhausted through lengthy proceedings.<sup>7</sup>
- 3.11 Julian Burnside QC has commented that:

The reality is that legal aid is only available to the very poor and those with inadequate means to defend themselves against serious criminal

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<sup>6</sup> Grant B (Legal Aid Commission), *Legal Costs in Legal Aid Work: Muzzle Not the Ox*, Inaugural Access to Justice and Pro Bono Conference 2006, Melbourne, 10-11 August, 2006, <[http://www.nationalprobono.org.au/ssl/CMS/files\\_cms/Legalcostsinlegalaid.pdf](http://www.nationalprobono.org.au/ssl/CMS/files_cms/Legalcostsinlegalaid.pdf)> (accessed 30 April 2009).

<sup>7</sup> Mapping Pro Bono in Australia, at 6.5.



charges... The reality is that only the very rich and the very poor can afford litigation. The middle ground ought to be addressed by legal aid.<sup>8</sup>

- 3.12 Where needs are unmet by Legal Aid, clients may approach pro bono providers seeking assistance. Pro bono demand is inescapably tied to Legal Aid funding, as clients seeking legal assistance who are not assisted by Legal Aid may turn to pro bono providers for assistance.<sup>9</sup>
- 3.13 Even as one of the largest providers of pro bono legal services in Australia, DLA Phillips Fox refuses at least as many applications as we are able to accept. The result is that, in the case of plaintiff applicants, people who have legal rights or who are entitled to legal remedies are unable to realise rights or access remedies, and, in the case of defendants applicants, many appear self represented in courts and tribunals.
- 3.14 We have experienced an increase in the number of referrals from courts, and requests from individuals who are self represented litigants. There is a strong link between cuts to legal aid funding and the rising incidence of self-representation.<sup>10</sup> These matters raise a number of significant concerns:
- 3.14.1 Referrals from courts generally involve the placement of a litigant in person in proceedings which are at an advanced stage (the National Pro Bono Resource Centre comments that '11th hour factor makes it difficult for firms who have to juggle existing commitments. Even large firms have a limited capacity to act in a litigious matter at short notice'<sup>11</sup>).
- 3.14.2 Such matters are especially challenging because they entail taking over of conduct of proceedings which have commenced, and are typically poorly prepared and involve deficient preparation particularly in relation to pleadings or evidence.
- 3.14.3 In many instances proceedings on foot have little or no merit as pleaded, and ought never have been commenced. The late involvement of lawyers in the process often requires substantial effort to negotiate the discontinuance

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<sup>8</sup> Burnside J QC, *Access to Justice*, Inaugural Access to Justice and Pro Bono Conference 2006, Melbourne, 10-11 August, 2006, <[http://www.nationalprobono.org.au/ssl/CMS/files\\_cms/Burnside.pdf](http://www.nationalprobono.org.au/ssl/CMS/files_cms/Burnside.pdf)> p 3 (accessed 30 April 2009).

<sup>9</sup> Mapping Pro Bono in Australia, at 6.5.

<sup>10</sup> The Senate Legal and Constitutional References Committee, *Legal aid and access to justice: Fourth Report*, June 2004, <[http://www.aph.gov.au/senate/Committee/legcon\\_ctte/completed\\_inquiries/2002-04/legalaidjustice/report/report.pdf](http://www.aph.gov.au/senate/Committee/legcon_ctte/completed_inquiries/2002-04/legalaidjustice/report/report.pdf)> (**Senate Report**), p xx (accessed 30 April 2009). See also Corker J, (National Pro Bono Resource Centre), *Funding Litigation: The Challenge*, 24th AIJA Annual Conference 2006 Adelaide 15-17 September 2006, <[http://www.nationalprobono.org.au/ssl/CMS/files\\_cms/Funding-Litigation.pdf](http://www.nationalprobono.org.au/ssl/CMS/files_cms/Funding-Litigation.pdf)> (**Funding Litigation**) p 9 (accessed 30 April 2009) and Mapping Pro Bono in Australia, at 7.5.

<sup>11</sup> Funding Litigation, p 6. See also Mapping Pro Bono in Australia, at 7.5.

of proceedings in circumstances where the other party or parties have incurred substantial costs.

- 3.14.4 Proceedings are frequently commenced by individuals without any prior demand or effort to resolve the dispute through negotiation, leading to wasted time and cost, and high likelihood of adverse costs orders, even if successful.
- 3.14.5 There are increasing numbers of requests for pro bono assistance from litigants who are seeking to set aside court orders, set aside default judgments, and appeal against decisions.
- 3.14.6 We have recently seen numerous instances of clients who suffer from mental illness being involved in multiple sets of proceedings in multiple jurisdictions, each having been commenced without the benefit of any legal advice, representation or guidance.
- 3.15 Each of the issues identified above could be addressed in part or in whole by early intervention or early referral to legal advice. Assisting clients to "un-do" what has already been done, is more costly than providing advice and guidance early on.
- 3.16 The Court process in general has become too complex for litigants in person, particularly in the case of clients who face some special disadvantage.
- 3.17 Therefore it is important that self-represented litigants are diverted to assistance programs early, and ideally prior to the commencement of any action.

**Recommendation 2:** The Commonwealth and States should increase Legal Aid Commission funding, which should be used to increase the level of assistance available, particularly in civil matters.

### **CLC Funding**

- 3.18 The Commonwealth Community Legal Services Program review of CLC funding in NSW - the Review of the NSW Community Legal Centres Funding Program ("**Review**") - concluded that the CLC program 'is underfunded to meet the growing demand for services...[and that] almost all Centres are overwhelmed by demand for their services and cannot sustain their current level of service, nor meet emerging service gaps'.<sup>12</sup>
- 3.19 Funding constraints have impacted upon the work mix within the community legal sector. The Review noted that the limited resources of CLCs mean that most centres severely curtail the services they offer, by applying restrictive guidelines. The

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<sup>12</sup> Legal Aid Commission of NSW, *Review of the NSW Community Legal Centres Funding Program - Final Report*, June 2006 <<http://www.nswclc.org.au/useful%20reports/NSWclcReviewReport.pdf>> (**Review of NSW CLC Funding Program**) at 3.3 (accessed 30 April 2009).

consequence is that many clients cannot obtain legal advice or assistance in areas such as family law, employment law and other civil matters.<sup>13</sup>

3.20 The Commonwealth Attorney-General's Department has also noted that:<sup>14</sup>

A number of services have reduced the range of services delivered and hours of operation as a consequence of their financial difficulties. Reduction in services is often preferred by CLCs to closure. Accordingly, the number of closures is not indicative of the true financial difficulties being experienced in the sector. The loss or reduction in services provided by CLCs, particularly in regional and rural locations, may have a substantial impact on the people who are in need of those services. In many instances, the CLCs will be the only source of low cost legal services available in the area.

3.21 In particular, the sector appears to be pulling back from matters involving litigation in courts and tribunals. The National Association of Community Legal Centres acknowledges that:<sup>15</sup>

While CLCs see strategic or test-case litigation as an attractive option which by definition has the potential to help a large number of clients in the medium to long term, most CLCs simply don't have the ability to undertake time and resource-intensive litigation when the immediate day-to-day demand on their services is already overwhelming.

3.22 Therefore, CLCs reaction to reductions in funding is to restrict the areas in which they can assist clients to do more strategic policy work, at the expense of representing individual clients in litigation.<sup>16</sup> This trend has a number of consequences:

3.22.1 Where a client has rights that can be enforced, or has legal remedies available, litigation is not pursued. This means that the community legal sector is not servicing the needs of clients with legal problems that are more complex or difficult to resolve, or likely to have the most significant impact.

3.22.2 There is increasing pressure on pro bono providers to accept the referral of matters involving litigation. Reductions in funding to some parts of the legal aid system have resulted in an increase in demand for pro bono legal services.<sup>17</sup> This obligates pro bono to do more than complement publicly

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<sup>13</sup> Ibid.

<sup>14</sup> Commonwealth Attorney-General's Department, *Draft Civil Justice Strategy*, p 106, cited in NACLC Response, p 26.

<sup>15</sup> NACLC Response, p 59.

<sup>16</sup> Funding Litigation, p 10.

<sup>17</sup> National Pro Bono Resource Centre, *Submission to the Senate Legal and Constitutional References Committee Inquiry into Legal Aid and Access to Justice*, October 2003, <<http://www.nationalprobono.org.au/ssl/CMS/files/cms/senateinquiry.pdf>> (NPBRC Submission) p 3.

funded services, risking it becoming a replacement for government funded legal services.

- 3.22.3 The aversion to litigation is creating a skills deficit in the sector, which in turn will impact on the quality of advice being provided. In short, if lawyers have not been exposed to court processes, they are unable to properly advise parties to a dispute of likely outcomes. Aversion to litigation will result in an inability to expand the knowledge base, expertise and efficiencies of CLCs.<sup>18</sup>
- 3.22.4 We have seen anecdotal evidence of this through poor quality referrals from the community legal sector. Such referrals include matters where the client being referred for pro bono assistance has a claim with no legal merit, or a matter with no legal remedy, or very low prospects of success.
- 3.23 The inadequacies of CLC funding has a direct effect on pro bono providers. It is reported that in total, CLCs are leveraging around a staggering \$23m worth of legal assistance each year.<sup>19</sup> As the National Association of Community Legal Centres has noted, the lack of adequate core or maintenance funding for CLCs results in diminishing services provided, which in turn leads to:
- [I]ncreased pressure on other parts of the legal system such as the courts and transfer of costs to other under resourced parts of the justice system already struggling to meet demand (Legal Aid, ALS and pro bono assistance from the private profession).<sup>20</sup>
- 3.24 Julian Burnside QC comments that:<sup>21</sup>
- pro bono work has become a de facto substitute for legal aid. Pro bono lawyers step in, in cases of obvious injustice where legal aid is unavailable. Governments occasionally murmur comforting words about the contribution of pro bono lawyers, and well they might because pro bono lawyers help compensate for the inadequacies of Government funding of legal aid.
- 3.25 Increased reliance on pro bono must not become a replacement for properly funded legal services. Pro bono and government funded community legal services are complimentary, they are not alternative solutions to a single problem. Indeed, pro bono does not function to its full capacity without effective community legal services. Neither the continued existence of voluntary contributions of lawyers, nor any increase in such contributions, can make up for the shortfall in funding for legal aid

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<sup>18</sup> Review of NSW CLC Funding Program, p 55.

<sup>19</sup> Calculated from data collected annually by NACLC, and information from the NPBRC Submission.

<sup>20</sup> NACLC Response, p 13.

<sup>21</sup> Burnside J QC, *Access to Justice*, Inaugural Access to Justice and Pro Bono Conference 2006, Melbourne, 10-11 August, 2006, <<http://www.nationalprobono.org.au/ssl/CMS/files/cms/Burnside.pdf>> p 3 (accessed 30 April 2009).

and CLCs.<sup>22</sup> The role of frontline services is invaluable, and in reality, it is the funds available to these services that dictate the extent to which community need can be met.<sup>23</sup>

- 3.26 The Senate Committee recognised this, confirming that pro bono legal services, while being an important response to the need for legal assistance, are neither a substitute for an adequately funded legal aid system nor a panacea for overcoming gaps in other publicly funded legal services.<sup>24</sup> It is problematic that CLCs are increasingly relying on pro bono assistance to supply their core services and maintenance expenditures.

**Recommendation 3:** Additional funding should be provided to CLCs to enable them to overcome operational difficulties, such as inadequate premises, facilities and resources.

### CLC Salary Levels

- 3.27 CLC funding has failed to keep pace with rising costs. Over the past 10 years, CLCs have experienced an 18% reduction in funding in real terms.<sup>25</sup> Because almost all CLC funding is used to employ staff, reductions to CLC funding must necessarily impact either staffing levels or salary levels. A reduction in staffing levels would have a direct impact on service levels for the most disadvantaged people who access free legal advice through CLCs. For this reason, the Boards and management committees of CLCs have almost universally sacrificed salary levels to maintain services for those in the community who rely heavily on CLC services.
- 3.28 Aware of this issue, the Senate Committee recommended in 2004 that the Commonwealth Government and state/territory governments provide additional funding to enable CLCs to recruit, train and retain staff, through adequate remuneration, skill development programs and improved employment conditions.<sup>26</sup> They also suggested that adequate baseline funding for CLCs be established to enable them to attract and retain suitable staff, and to have appropriate facilities and

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<sup>22</sup> NPBRC Submission, p 1.

<sup>23</sup> Mapping Pro Bono in Australia, at 6.3.

<sup>24</sup> Senate Report, at 9.40.

<sup>25</sup> National Association of Community Legal Centres, *Community Legal Centres Across Australia - An investment worth protecting, Funding submission to the Commonwealth Government 2007-2010*, January 2008, <[http://www.naclc.org.au/multiattachments/2300/DocumentName/NACLCLC\\_fund08\\_CMYK.pdf](http://www.naclc.org.au/multiattachments/2300/DocumentName/NACLCLC_fund08_CMYK.pdf)> p 1 (accessed 30 April 2009). See also NACLCLC Response, p 11.

<sup>26</sup> Senate Report, p xxxi - xxxii.

resources to adequately perform their functions.<sup>27</sup> The continued inadequate salary levels of CLCs reveal that these recommendations have not been implemented.

- 3.29 In late 2006 the National Association of Community Legal Centres procured a remuneration report from Mercer Human Resource Consulting (**Mercer Report**).<sup>28</sup> The Mercer Report confirmed that salaries in CLCs are not competitive.
- 3.30 The Mercer Report found that the salaries of Principal Solicitors and Managers at CLCs were at about 50% of salaries paid at the equivalent level with the Australian Public Sector (APS), the Commonwealth Attorney General's Department (AG), Legal Aid and the Crown Solicitors Office.<sup>29</sup> Overall Mercer considers a range of plus or minus 15% around the target market to be competitive.<sup>30</sup>
- 3.31 The Mercer Report noted that Administrator and Administrative Assistant salaries in CLCs were marginally competitive. The Mercer Report observed that all legal roles were not competitive.<sup>31</sup> CLC base salaries were found to be at 70% of equivalent APS salary scales, at 69% of Commonwealth AG salary scales, at 62% of NSW Crown employee salary scales and at 71% of NSW Crown employee legal officers award.<sup>32</sup>
- 3.32 Salary levels in CLCs are now so low that service levels are being impacted. Where any employer pays salaries that are not competitive, there are substantial increased pressures on the organisation that absorb time and resources. In the case of CLCs, this reduces the capacity of centres to deliver free legal services.<sup>33</sup>
- 3.33 Low salary levels directly impact staff turnover rates. As turnover rates increase there is a flow-on cost to the centre and consequential impacts on service levels.<sup>34</sup> It has been argued that positions in CLCs are not comparable to positions at Legal Aid, but CLCs do compete with Legal Aid for talented employees.

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<sup>27</sup> Ibid at 11.47

<sup>28</sup> Remuneration Recommendations, National Association of Community Legal Centres, Mercer Human Resource Consulting, October 2006, <<http://www.naclc.org.au/multiattachments/2334/DocumentName/WorkValuereport051006.pdf>> (**Mercer Report**) (accessed 30 April 2009).

<sup>29</sup> Mercer Report, Tables 3, 4 and 5.

<sup>30</sup> Ibid 12.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid 11.

<sup>33</sup> NACLRC Response, p12.

<sup>34</sup> Ibid 13.

- 3.34 In addition to increased staff turnover, low salaries increase recruitment time leading protracted gaps in service delivery and increased time devoted to recruitment activities.
- 3.35 Channelling resources into recruitment activities has an immediate and direct effect on a CLC's ability to provide services for their communities.<sup>35</sup> Recruitment becomes difficult and time consuming because low salaries attract applicants who are too junior for the vacant position. Several rounds of advertising and interviews are required to find applicants who can fulfil the requirements of positions, absorbing significant time and effort, and often leaving advertised positions vacant for extended periods.<sup>36</sup> The suspension or discontinuation of activities during training and orientation similarly impact on service levels.
- 3.36 The calibre of staff that legal centres can attract is perhaps the most obvious risk associated with the payment of low salaries. With salary levels for legal staff slipping to 70% of equivalent APS salaries, it is impossible to ignore the impact of low salaries on the ongoing ability of the sector to attract and retain qualified, experienced staff.<sup>37</sup>
- 3.37 With the salaries of Principal Solicitors and Managers at CLCs at about 50% of salaries paid at the equivalent level in comparable positions, the Community Legal Sector's ongoing ability to recruit capable, competent individuals to effectively manage CLCs must also be seriously compromised.
- 3.38 Large and medium sized legal firms frequently respond to requests from CLCs for pro bono secondees. Traditionally secondees have been requested to work on short to medium term projects or to build the centre's capacity in a new or emerging area of need. This has been in keeping with the principle that pro bono legal services should be used to fill gaps in the availability of legal services, and should not be a substitute for legal services properly funded by government. Increasingly though, requests for pro bono secondees have come from CLCs looking for pro bono lawyers to fill funded positions that cannot be filled by normal recruitment activities. This is a significant change which illustrates the flow-on effects for the legal profession generally.
- 3.39 There is a clear connection between the low-level interest in advertised positions and the low salary levels revealed by the Mercer Report. In December 2007 DLA Phillips Fox created a full time pro bono position at a CLC in Melbourne. The position was properly funded to pay a competitive salary. More than 100 applications were received, most from candidates whose experience significantly exceeded the advertised requirements. The experience demonstrated the impact of a competitive salary on the ability to attract quality candidates and to recruit quickly and efficiently.

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<sup>35</sup> NPBRC Submission, p 5.

<sup>36</sup> See also NACLC Response, p 70.

<sup>37</sup> Ibid 9.

3.40 The Mercer report recommended a minimum 10% increase be applied to the majority of CLC positions, with a larger increase for Principal Solicitors and Managers.<sup>38</sup> Such an increase would bring CLC salaries to level that would be considered 'marginally competitive', and would obviate the need for a reduction in staffing levels. A larger increase would obviously be required to give CLCs maximum operating efficiency.

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<sup>38</sup> Mercer Report, p 14. See also National Association of Community Legal Centres, *Remuneration Recommendations*, October 2006, <<http://www.naclc.org.au/multiattachments/2334/DocumentName/WorkValuereport051006.pdf>> p 14 (accessed 30 April 2009).



### **Case Study : Aboriginal Legal Service Secondment**

DLA Phillips Fox provides a secondee solicitor to the Aboriginal Legal Service in Sydney. The secondee works in the children's legal section. The secondee lawyer visits young indigenous clients of the ALS in juvenile detention centres, represents juvenile offenders in bail applications, pleas, small criminal hearings and conducts legal education for ALS clients. The secondee is required due to resource limitations at ALS. The secondee performs 'core ALS services'. This would appear to suggest that the ALS does not receive adequate funding to provide basic essential legal assistance to indigenous youth in criminal matters, but rather must rely on pro bono assistance to provide a complete service in this area.

**Recommendation 4:** Salary levels in Community Legal Centres should be linked to legal aid salary bands to ensure the on-going ability of CLCs to recruit and retain quality staff.

### **Aboriginal Legal Service**

- 3.41 The Aboriginal Legal Service (NSW/ACT) no longer offers legal services in civil or family law matters, due to a lack of funding.<sup>39</sup> This is despite awareness as early as 2002 of the 'overwhelming levels of unmet legal need in Aboriginal communities, particularly in the civil and family law areas.'<sup>40</sup>
- 3.42 The gap in civil legal services at the ALS also limits access to civil pro bono services for indigenous clients, since the ALS no longer provides initial consultations which would enable the ALS to make referrals of appropriate matters to pro bono providers.
- 3.43 In 2008 the National Pro Bono Resource Centre released a publication titled *The Aboriginal Legal Service Pro Bono Guide*, the aim of which is to 'provide information to ...the Aboriginal Legal Service...in order to facilitate the delivery of effective and sustainable pro bono assistance to the ALS'.<sup>41</sup>
- 3.44 Despite the provision of the publication to every ALS office in New South Wales, anecdotal evidence suggests that there has been no increase in referrals of clients for pro bono assistance. We believe this can be attributed to the lack of resources available within the ALS to see clients and make referrals in civil matters.

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<sup>39</sup> Aboriginal Legal Service (NSW/ACT) website <<http://www.alsnswact.org.au/Default.aspx>> (accessed 30 April 2009).

<sup>40</sup> Submission from Legal Aid NSW to Law and Justice Foundation (2002), *Access to justice and legal needs. Stage 1: Public Consultations* <[http://www.lawfoundation.net.au/ljf/app/&id=7127CB146A1785BACA257060007D4EAB#bmk\\_fnote118#bmk\\_fnote118](http://www.lawfoundation.net.au/ljf/app/&id=7127CB146A1785BACA257060007D4EAB#bmk_fnote118#bmk_fnote118)> (accessed 30 April 2009).

<sup>41</sup> See National Pro Bono Resource Centre website <<http://www.nationalprobono.org.au/>>.

**Recommendation 5:** The Commonwealth and States should provide funding increases for Aboriginal Legal Services to ensure they are adequately funded to be able to offer legal services in civil and family law matters.

### Rural, Regional and Remote Australia

3.45 The Final Report of the Senate Legal and Constitutional Committee Inquiry into Legal Aid and Access to Justice<sup>42</sup> ("**Senate Report**") accepted that gaps in the legal aid system are greatly magnified in rural, regional and remote (**RRR**) areas of Australia.<sup>43</sup>

3.46 The Senate Legal and Constitutional Committee ("**Senate Committee**") concluded that:<sup>44</sup>

overwhelmingly, the evidence suggests that the current arrangements throughout RRR areas of Australia are inconsistent and inadequate, and generally fall well below acceptable standards for achieving geographic equity and uniform access to justice. In fact, it appears as though [sic] there is a growing crisis in effective legal aid service delivery in RRR areas. The Committee is of the view that the provision of legal aid should be nationally consistent. Funding and services should be available to provide assistance to all Australians with similar needs and circumstances, regardless of the location in which they live.

3.47 Large parts of regional Australia have no access to community legal services. The majority of community legal services around Australia are located in metropolitan areas.<sup>45</sup> People in rural, regional and remote areas experience difficulty accessing legal services. Outreach may be expensive and can place burdens on the staff at a centre who may be required to travel extensive distances, as well as the staff remaining at the centre with less support for local clients. Many centres are keen to undertake more outreach, but are prevented from doing so by the cost of doing this work.<sup>46</sup>

3.48 The Senate Report took the view that increased representation and face-to-face legal advice services were required throughout RRR areas of Australia. This could be achieved through outreach services operating from legal services in regional centres. They noted that additional funding was required to enable regional CLCs to expand and develop their outreach programs to remote, regional and rural areas where there were currently no outreach programs, or where demand for existing outreach

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<sup>42</sup> Senate Report.

<sup>43</sup> Ibid at 6.12.

<sup>44</sup> Ibid at 6.80

<sup>45</sup> National Association of Community Legal Centres, <<http://www.naccl.org.au/>>.

<sup>46</sup> NACLC Response, p 65.

programs was not being met.<sup>47</sup> The Senate Committee accordingly recommended in 2004 that:<sup>48</sup>

the Commonwealth Government and state/territory governments provide additional funding to state/territory legal aid commissions and community legal centres to allow them to expand their services, including outreach services, to rural, regional and remote areas which are currently seriously under-funded. Additional funding must take into account the significant resources that are required by legal aid commissions and community legal centres in undertaking resource-building initiatives in rural, regional and remote areas.

- 3.49 There is also evidence that some CLCs in RRR areas have been forced to reduce or cease their advice services as they were unable to staff these sessions with volunteers and paid staff.<sup>49</sup> RRR CLCs are particularly vulnerable to high turnovers of staff.<sup>50</sup> The Senate Committee discussed this issue, expressing concern at the shortage of lawyers working in RRR areas of Australia. It recommended that the viability of providing incentives such as subsidies aimed at attracting and retaining lawyers to live and work in rural, regional and remote areas of Australia be investigated.
- 3.50 To date, despite the Senate Committee recommendations, many parts of regional Australia continue to be considerably understaffed and underfunded, resulting in large parts of regional Australia having no access to community legal services.

#### **Case study : CLSD**

DLA Phillips Fox participates in the Cooperative Legal Service Delivery (CLSD) an initiative of Legal Aid NSW.

The CLSD is a regionally based approach to legal service delivery in New South Wales that aims to improve outcomes for economically and socially disadvantaged people by building cooperative and strategic networks of key legal services and community organisations.

Through this program law firms are partnered with regional areas in NSW with the aim being, inter alia, to promote greater access to pro bono assistance.

Through the CLSD program, DLA Phillips Fox has partnered with the Central Tablelands region, which spans from the Blue Mountains out to Forbes and up to Mudgee.

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<sup>47</sup> Senate Report, at 6.54.

<sup>48</sup> Senate Report, xxviii.

<sup>49</sup> NPBRC Submission, p 5.

<sup>50</sup> National Pro Bono Resource Centre, *The Australian Pro Bono Manual*, February 2005, <<http://www.nationalprobono.org.au/probonomanual/page.asp?sid=4&pid=10>> at 4.4 (accessed 30 April 2009).

The CLSD program has highlighted the importance of having effective frontline resources in place. In the Orange region, there are no civil Legal Aid lawyers, and there are no community legal centres.

In these circumstances, there is no front-line civil legal service to act as a contact point for clients in the region, and the firm's participation in the CLSD program has not resulted in any pro bono referrals, since there are no lawyers or legal services on the ground to refer matters. The lack of legal referrals is despite the high levels of legal need in RRR areas identified by LawAccess NSW data and data produced by the NSW Law & Justice Foundation<sup>51</sup>. The lack of legal referrals is also in spite of the firm's efforts to build contacts with social services in the region through attendance at CLSD meetings.

**Recommendation 6:** The Commonwealth and States should fund the establishment of CLCs in rural regional and remote areas of Australia in order that individuals from these areas have access to legal services.

**Recommendation 7:** The Commonwealth and States should provide designated disbursement funding in relation to pro bono matters undertaken in RRR areas to increase the availability of legal assistance in such areas.

### **Prisoner's Community Legal Services**

3.51 Prisoners are amongst the most marginalised in our community. In addition to having being denied of their liberty, they have frequently experienced mental illness, substance abuse, broken relationships and poverty.<sup>52</sup> As a result, they are extremely disadvantaged when it comes to enforcing or protecting their rights at law and many are in need of special assistance to overcome these barriers.

3.52 At present, programs and structures are in place to assist prisoners in relation to their criminal law issues. However many also require assistance in regard to civil and family matters.<sup>53</sup> The Law and Justice Foundation notes that:

prisoners commonly face a range of other civil and family law issues as well. Some arise from their chaotic lives and financial disadvantage prior

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<sup>51</sup> Coumarelos, C, Wei, Z & Zhou, AH, *Justice Made to Measure: NSW legal needs survey in disadvantaged areas*, Law and Justice Foundation of NSW, Sydney, 2006 (**Justice Made to Measure**).

<sup>52</sup> Grunseit A, Forell S, McCarron E, *Taking Justice into custody: the legal needs of prisoners – summary report* in "Justice Issues", Paper 2 June 2008, Law and Justice Foundation, <[http://xml.lawfoundation.net.au/ljf/site/articleIDs/1B8B9E6A87260D55CA25753E000D1763/\\$file/JI2\\_taking\\_justice\\_into\\_custody\\_web.pdf](http://xml.lawfoundation.net.au/ljf/site/articleIDs/1B8B9E6A87260D55CA25753E000D1763/$file/JI2_taking_justice_into_custody_web.pdf)> (hereafter "Taking Justice into Custody") p xxi.

<sup>53</sup> Ibid, 53.

to custody, including outstanding debt, unpaid fines, unresolved family law issues and apprehended violence orders. Imprisonment itself also may lead to further legal issues as the person is suddenly excised from their everyday life. Prisoners' housing, child custody arrangements, the retention of their personal effects, employment, the operation of any business and/or social security payments are all affected by their sudden separation from the community through incarceration.<sup>54</sup>

- 3.53 These non-criminal legal needs of prisoners are largely unmet. This is the case across most states, with many bodies having reported a lack of legal services in this area. In New South Wales for example, the Legal Aid Commission has acknowledged that '*there is untapped potential for pro bono legal assistance.*'<sup>55</sup> In Western Australia, the unmet needs of prisoners and their families have also been raised as a concern by the Community Legal Centre Review Steering Committee<sup>56</sup> and providing this unmet legal need has been listed as a priority area.<sup>57</sup>
- 3.54 Although some piecemeal programs are in place to address the civil and family law needs of prisoners, they are largely insufficient to cope with demand in this area. In NSW for example, Legal Aid established the Prisoners Legal Service (**NSWPLS**) in 1986. However the bulk of the services provided by the NSWPLS relate to criminal matters including appearances before the Parole Authority.<sup>58</sup> Included in the NSWPLS program is visiting advices, which is said to cover most jails. NSWPLS solicitors conduct over 300 interviews monthly.<sup>59</sup>
- 3.55 In Queensland, the Prisoners' Legal Service Inc (**QPLS**) (a community legal centre) was established in 1985 to '*provide free legal advice, information, assistance and referrals to Queensland prisoners and their families on matters relating to their imprisonment.*'<sup>60</sup> The QPLS is an independent legal centre that receives its operational funding from the Community Legal Centre Program, operated by Legal Aid Queensland. It employs three full time staff: A Co-ordinator Solicitor, Casework Solicitor and a full-time Administrator. It is also heavily dependent on volunteer

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<sup>54</sup> Ibid, 2.

<sup>55</sup> Legal Aid NSW, *Prisoners Legal Service- Review September 2006*, <<http://www.legalaid.nsw.gov.au/data/portal/00000005/public/48618001159334571125.pdf>> (hereafter "Prisoners Legal Service Review") p 41 (accessed 30 April 2009).

<sup>56</sup> Community Legal Centre Review Steering Committee *Joint Review of Community Legal Centres* (September 2003) p 76 <<http://www.legalaid.wa.gov.au/Page/LAServices/pdf/Joint%20Review%20of%20CLCs.pdf>> (accessed 30 April 2009).

<sup>57</sup> Ibid, 1.

<sup>58</sup> Taking Justice into Custody, 31.

<sup>59</sup> Prisoners Legal Service Review, 19.

<sup>60</sup> Prisoners' Legal Service Inc, *About Us* <[http://www.plsqld.com/About\\_Us.html](http://www.plsqld.com/About_Us.html)> (accessed 30 April 2009).

assistance provided by law schools in the state.<sup>61</sup> It also refers matters to pro bono lawyers when and where necessary, however the general focus of QPLS relates to matters of incarceration.<sup>62</sup>

- 3.56 Although such programs are commendable, they have their shortcomings. A review of the NSWPLS conducted in 2006 revealed that the service was then working '*at full capacity*' and highlighted the need for more resources to accommodate the increasing prison population.<sup>63</sup> The review also acknowledged the need for outreach services in relation to civil and family law matters. It was further indicated that:
- 3.56.1 The expertise of solicitors attending can be limited, for example, to criminal law only.
- 3.56.2 The visiting advices do not operate in Berrima, Broken Hill, St Heliers nor Oberon.<sup>64</sup>
- 3.57 The Law and Justice Foundation has also stated that the NSWPLS is over-subscribed,<sup>65</sup> resulting in inadequate time spent with clients, for example, as little as 5-10 minutes.<sup>66</sup>
- 3.58 Since that review was conducted the NSWPLS has increased its capacity and now employs a dedicated civil lawyer. However this lawyer is responsible for servicing the civil legal needs of all prisoners across NSW. Therefore, at its present resourcing level, it is unlikely that the NSWPLS is adequately meeting the civil law needs of a large and growing prison population. The Legal Aid Commission itself has recognised it '*is not in the position to meet all the unmet legal needs of prisoners.*'<sup>67</sup>
- 3.59 In addition, the QPLS 2006-2007 Annual Report revealed '*[d]espite our best efforts, our office is still drastically underfunded, compared with our client need. This is evidenced by our telephone records that show approximately 6000 missed calls to our advice line per month.*' Accordingly, many legal needs of prisoners are going unmet.

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<sup>61</sup> Ibid.

<sup>62</sup> Prisoners' Legal Service Inc, *Annual Report 2006 - 2007*, 4, <<http://www.plsqld.com/reports/first%20draft%2006-07%20ammended.pdf>> (accessed 30 April 2009).

<sup>63</sup> Prisoners Legal Service Review, 15.

<sup>64</sup> Ibid, 19.

<sup>65</sup> Taking Justice into Custody, xviii.

<sup>66</sup> Ibid xxii.

<sup>67</sup> Prisoners Legal Service Review, 30.

- 3.60 The clear gap in prisoners' legal service programs has become apparent to many pro bono legal service providers and some have instigated independent measures in attempt to address the situation. At DLA Phillips Fox, we have initiated programs in both Melbourne and Sydney. In Melbourne we have partnered with the Mental Health Legal Centre to establish *Inside Access* which is a program that provides a free and confidential legal services to prisoners in Marmak, a Specialist Mental Health Service within the Dame Phyllis Frost Prison. The main legal needs of the prisoners at present include administrative law appeals, debt matters, residential issues, family law and child custody, judicial reviews and inquests. Inside Access is a first for Victoria and provides legal advice to people who may not otherwise receive it. Currently employees of our Melbourne office attend the Mental Health Legal Centre office once a week and provide legal advice over the telephone to the prisoners in Marmak. In Sydney, one of our lawyers makes weekly visits to juvenile detention centres. Providing legal advice to children on remand, this outreach program is part of 3 month trial with the Homeless Persons' Legal Service (**HPLS**), mentioned below.
- 3.61 In order to ensure that the civil and family law needs of prisoners are met, a coordinated approach between publicly funded service providers and private pro bono lawyers is required in each state. The need for such a partnership was acknowledged by the NSW Legal Assistance Forum as recently as October 2008 when it was recommended that a Prisoners Community Legal Centre was necessary *'to coordinate and facilitate Pro Bono Schemes providing civil law advice and representation for prisoners.'*<sup>68</sup> This recommendation recognised that frontline services working with prisoners must first be enhanced in order for pro bono legal assistance to be properly utilised.
- 3.62 The potential for successful public/private partnerships in pro bono service delivery can be seen through the successful pro bono legal clinics for the homeless which are already prevalent across Australia. For example, the Public Interest Advocacy Centre (**PIAC**) coordinates the Homeless Persons Legal Service (**HPLS**) currently operating across Sydney. At the nine weekly HPLS clinics, lawyers from large corporate firms provide pro bono legal assistance on a variety of issues including fines, consumer debt, victims compensation and housing.<sup>69</sup> The firms currently participating in HPLS are Allens Arthur Robinson, Baker & McKenzie, Corrs Chambers Westgarth, Deacons, Ebsworth & Ebsworth, Gilbert + Tobin, Henry Davis York, Legal Aid Parramatta, Minter Ellison and DLA Phillips Fox.
- 3.63 HPLS was originally established through funding from the Federal Department of Family and Community Services and the (then) NSW Attorney General, the Hon Bob Debus MP, through the NSW Public Purpose Fund. It continues to be funded through the NSW Attorney General, the Hon John Hatzistergos MP, through the NSW Public Purpose Fund. Central to the success of HPLS has been the coordination efforts of

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<sup>68</sup> NSW Legal Assistance Forum, *NLAF Forum on the legal needs of prisoners* <[http://www.nlaf.org.au/reports/report\\_prisoners.html](http://www.nlaf.org.au/reports/report_prisoners.html)> (accessed 30 April 2009).

<sup>69</sup> Public Interest Advocacy Centre, *What can HPLS assist with?* <http://www.piac.asn.au/legal/clinics.html> (accessed 30 April 2009).

PIAC and its sister organisation, the Public Interest Law Clearing House (**PILCH**). Similar clinics also operate in Melbourne and Brisbane. The success of the HPLS clinics demonstrates that with sufficient and ongoing financial support from the government to centrally coordinate projects, pro bono service providers are willing and able to provide their services to the disadvantaged in our communities.

- 3.64 The proliferation of HPLS clinics is also indicative of the need for pro bono services. Many HPLS clients have had frequent contact with the criminal law system and are ex-prisoners. If the legal needs of prisoners are adequately met whilst they are incarcerated, they would have a better chance of successful re-integration into the community upon their release and potentially avoid the situation of homelessness. The NSWPLS itself has recognised that addressing legal need is important in assisting prisoners make a successful return to the community. In particular, NSWPLS has acknowledged Dr Eileen Baldry's submission that '*[t]he most important issues for a prisoner's successful return to the community are access to children, debt, and housing matters.*'<sup>70</sup>
- 3.65 Funding and coordination are all the more necessary due to the steady growth of the prison population. Alarming, this group increasing by 42% over the ten year period from 1996.<sup>71</sup> As of 30 June 2006, there were 25,790 prisoners (sentenced and unsentenced). This figure represented 163 prisoners per 100,000 adult population.<sup>72</sup> Indigenous people made up 24% of this population<sup>73</sup> and statistics indicate that approximately 80% of the prisoner population suffer from mental illnesses.<sup>74</sup>
- 3.66 Whilst we believe that existing programs are commendable, they are largely inadequate to meet the special needs of this growing and disadvantaged group. Through the introduction of a centralised referral service or a clinic model like HPLS, existing programs have the potential to be much more effective. For example, a prisoner focussed community legal centre, if funded, could attend prisons for legal clinics on a weekly/fortnightly basis and refer matters out to pro bono service providers as and when necessary. Pro bono service providers are available to help meet the unmet legal needs of this marginalised group. However they are frequently unable to provide the personnel to attend the prisons in person and on a regular

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<sup>70</sup> Prisoners Legal Service Review, 30.

<sup>71</sup> Australian Bureau of Statistics *Prisoners in Australia* (2006), p 3, <[http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/21A1C193CFD3E93CCA257243001B6036/\\$File/45170\\_2006.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/21A1C193CFD3E93CCA257243001B6036/$File/45170_2006.pdf)> (accessed on 30 April 2009).

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> Butler, T., and de Looper, M., Australian Government - Australian Institute of Health and Welfare *Prisoners' Health* (2006) <[http://www.aihw.gov.au/eventsdiary/ah06/presentations/tony\\_butler\\_prisoner\\_health.pdf](http://www.aihw.gov.au/eventsdiary/ah06/presentations/tony_butler_prisoner_health.pdf)> (accessed 30 April 2009).



basis. Accordingly, lawyers at the 'frontline' are required in order to coordinate the referral of prisoners' civil legal matters to pro bono service providers.

- 3.67 Without a coordinated approach to meeting the civil and family law needs of prisoners, there is a risk this already disadvantaged group will become increasingly disenfranchised. Providing prisoners with legal assistance in all areas, not just in criminal matters, is essential for the protection of their rights and interests whilst incarcerated. In addition, it has the potential to assist prisoners to have their affairs in order so that upon their release, they are not overwhelmed by the social, family and economic problems they face.

**Recommendation 8:** The Commonwealth and States should increase the availability of legal services for prisoners.

### Referral Agencies

- 3.68 The limited available data in relation to legal needs suggests that most people with legal need will not seek legal assistance from a lawyer,<sup>75</sup> most do not seek help at all. In *Justice Made to Measure*, a report of the Law and Justice Foundation, which surveyed of over 2400 people in NSW, participants indicated that they had sought help for their legal problems in only about half of the events reported (51%).<sup>76</sup> The report observed '[Wh]en people face legal problems, most do not go directly to a lawyer for assistance. Rather, some people do nothing, some deal with the issue themselves and some seek advice and assistance from non-legal sources and services'.<sup>77</sup> Legal services were approached in only 12 per cent of events where assistance was sought.<sup>78</sup>
- 3.69 It is therefore important that legal services retain those clients who do seek assistance.
- 3.70 In an effort to provide tailored and specialist assistance to a growing proportion of the community, many frontline legal services have been established. These include:
- 3.70.1 General Community Legal Centres;
  - 3.70.2 Specialist Community Legal Centres;
  - 3.70.3 Legal Aid;

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<sup>75</sup> Mapping Pro Bono in Australia, at 4.1.

<sup>76</sup> Justice Made to Measure, p 93.

<sup>77</sup> Pathways to Justice, at 4.1.

<sup>78</sup> Pathways to Justice, p 2.

- 3.70.4 Telephone advice services (such as NSW Law Access);
  - 3.70.5 Law Society referral schemes;
  - 3.70.6 Bar Association referral schemes;
  - 3.70.7 Public Interest Law Clearing Houses;
  - 3.70.8 Self-help resources (such as the Legal Information Access Centre);
  - 3.70.9 Outreach services (such as the Homeless Persons Legal Clinics); etc.
- 3.71 Each of these services acts as a 'doorway' to legal assistance. On one view, the more doorways that are established, the more people will gain access to legal services. The risk associated with the creation of large numbers of services, is that each can tend to become, not only a doorway or access point, but also a link in a referral chain.
- 3.72 The Australian Council of Social Services (ACOSS) Australian Community Sector Survey Report 2007 found that, 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. The Survey found that 72% of clients otherwise eligible for services are being turned away because services are operating at capacity.<sup>79</sup>
- 3.73 The annual report of Redfern Legal Centre (RLC) for the 2007-2008 financial year reports that RLC provided advice, information (and referrals) to 4,065 individuals during the year. In addition it opened matters and provided ongoing advice and representation in 1,208 instances.<sup>80</sup> In most legal centres around Australia, the same phenomenon can be seen. More clients receive referrals than those for whom a file is opened and on-going representation is provided.
- 3.74 Around Australia, dedicated legal centre volunteers staff telephone lines that ring endlessly throughout the day, with large numbers of callers simply being referred to the next volunteer at the next legal centre. The effort expended in this process is substantial, and the callers rarely reach a service that can cater to the clients' needs.
- 3.75 The National Pro Bono Resource Centre observes that there are:<sup>81</sup>
- multiple entry points into the pro bono system, different guidelines for eligibility and particular areas of legal expertise within a law firm can make it difficult for those seeking assistance to easily find legal help. Clients may need to be persistent and may have to tell, and retell, their

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<sup>79</sup> Australian Council of Social Services Australian Community Sector Survey Report 2007, p 10, cited in NACLC Response p 14.

<sup>80</sup> Redfern Legal Centre Annual Report 2007-8, <[http://www.rlc.org.au/about/Annual%20Reports/2007-08\[1\].pdf](http://www.rlc.org.au/about/Annual%20Reports/2007-08[1].pdf)> p 14 (accessed 30 April 2009).

<sup>81</sup> Mapping Pro Bono in Australia, at 7.9.

stories to a range of different people and service providers before they find a source of assistance.

### **Case Study : The Referral Process**

BG receives a letter serving a document which appears to BG to be a court document, naming him as a defendant in proceedings commenced in the local court. The matter is a contract claim involving an alleged debt. BG cannot afford to pay for legal assistance, and decides to investigate representing himself. BG mentions the problem to a doctor who recommends that BG attend the Legal Information Access Service (LIAC)<sup>82</sup> at his local library. BG receives some assistance from a specially trained LIAC librarian who assists with his research. In the course of their conversation BG is advised that he should contact Law Access and BG is provided with a free telephone number. BG contacts Law Access the following day. Law Access provides further valuable assistance, but states that in order to provide proper advice, a lawyer will need to review contract documents. He is referred to his local community legal centre, Macquarie Legal Centre, for face to face assistance. BG calls and makes an appointment at the CLC and attends later in the week for an appointment with a lawyer. The legal centre advises that he may have a defence to the claim, and gives BG some assistance in relation to the court process, but has no capacity to act on an on-going basis in the matter.

The legal centre is aware that another community legal centre, Redfern Legal Centre, has a specialist credit and debt service, which is funded to provide services to anyone in NSW in credit and debt matters, and BG is advised to contact RLC to see whether RLC can act in the matter. BG makes an appointment and travels a considerable distance to attend. RLC advises that it has no capacity to act in the court proceedings. RLC agrees though that the client's defence has merit and suggests that the client seek pro bono assistance through PILCH. The client contacts PILCH, and is advised that the matter has no public interest aspect, and BG is advised to apply for pro bono through the Law Society Pro Bono Referral Scheme, which does not apply a 'public interest test' to pro bono referrals. BG is provided with an 'assisted referral to the Law Society. The Law Society Pro Bono Scheme advises BG that it will only refer a matter for pro bono assistance where Legal Aid has been rejected. Although there is little prospect of obtaining Legal Aid in a civil matter in the local court, BG is asked to apply for Legal Aid and provide proof of rejection. BG contacts Legal Aid, makes an application, which is refused and reverts back to the Law Society Scheme. The Law Society is successful in making a referral to a pro bono lawyer working for a small firm in the client's local area.

- 3.76 In the scenario above, BG passes through seven referral points before finding assistance at the eighth point of contact. In this scenario BG has persisted through the process. In our experience, the average pro bono client would 'drop-out' early in the referral chain.
- 3.77 The position in Victoria is substantially better than the position NSW. In Victoria the Law Institute Pro Bono Scheme, the Bar Referral Scheme and the Public Interest Law

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<sup>82</sup> The LIAC service is promoted, inter alia, through the distribution of brochures which are disseminated in public places, such as in doctors' waiting rooms.

Clearing House and the Homeless Persons Legal Clinic all operate under one roof.<sup>83</sup> As a result, it is common in Victoria for DLA Phillips Fox to receive referrals of pro bono clients who have experienced only 1 or 2 referrals before accessing our pro bono services. Typically the client will have called or attended a CLC, been referred (often with assistance) to PILCH (VIC) before being referred (with assistance from PILCH) to the firm.

- 3.78 It is important to note that people rarely seek assistance from more than one source. *Justice Made to Measure* reported that in 78 per cent of legal events where help was sought, the individual only went to one service or adviser.<sup>84</sup> Many pro bono clients are at a position of disadvantage due to economic capacity, health status, English language skills, and/or have difficulty advocating for themselves and necessarily do not seek assistance even from one source, let alone eight sources.<sup>85</sup>
- 3.79 The implication of this is that ideally, the first point of contact should connect a client with the legal service required.<sup>86</sup>
- 3.80 In every State, a person seeking legal assistance should enter through one doorway; receive an assisted referral to a referral agency; and an assisted referral to an end point where the most comprehensive form of assistance will be available. This requires strengthening (through amalgamation and increased funding) of referral agencies. A widely recognised, well resourced single contact point for legal assistance and referral would vastly improve access to appropriate and timely legal assistance for those who have come through one of the many doorways that exist.<sup>87</sup>

**Recommendation 9:** Single referral agencies should be established in each State to guarantee efficient referral to an appropriate pro bono provider where other legal services are unavailable.

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<sup>83</sup> Mapping Pro Bono in Australia, at 8.4 states: 'From a client perspective, PILCH (Vic)'s single pathway avoids confusion and 'the referral roundabout' by enabling staff to readily direct clients to the appropriate scheme and while this model may not fit all jurisdictions, better coordination of service delivery ought to be an objective in each state and territory.'

<sup>84</sup> Justice Made to Measure, p 102.

<sup>85</sup> Over 50 per cent of people who seek help from CLCs receive some form of government assistance or income. Approximately 25 per cent live in government-funded housing. Between a third to a half of clients are born in countries where English is not the dominant language. About 40 per cent of clients have one to three dependants. National Pro Bono Resource Centre, The Australian Pro Bono Manual, February 2005, <<http://www.nationalprobono.org.au/probonomanual/page.asp?sid=4&pid=10>> at 4.4 (accessed 30 April 2009).

<sup>86</sup> Pathways to Justice, p 9.

<sup>87</sup> Ibid.

- 3.81 In recent years we have noted an increase in direct contacts from members of the public seeking pro bono assistance. This usually occurs by way of email, letters or telephone contact. The increase in direct requests suggests a lack of community awareness or confidence in the legal aid system and/or community legal sector.
- 3.82 Given the limited ability of pro bono services to meet community demands, this is a worrying trend. It is the frontline services, such as CLCs and Legal Aid, which should act as a contact point for those seeking assistance.<sup>88</sup>

## **4 Costs**

### **Availability of Disbursement Funding**

- 4.1 The direct costs associated with the provision of pro bono services is increasing, and is acting as a substantial barrier to effective pro bono service delivery.
- 4.2 Pro bono is often considered a donation of time, but in order to effectively deliver pro bono services, large law firms also maintain substantial pro bono budgets.
- 4.3 The costs associated with the delivery of pro bono services include disbursements on pro bono matters, such as:
- (a) Medical reports;
  - (b) Expert reports;
  - (c) Court filing fees (in some jurisdictions);
  - (d) Counsel costs;
  - (e) Travel costs;
  - (f) Transcripts of proceedings;
  - (g) Copying;
  - (h) Interpreter fees;
  - (i) Etc.
- 4.4 Many pro bono clients have no capacity to fund disbursements on pro bono matters. This acts as a substantial barrier to justice, particularly in relation to more complex litigation in higher courts.<sup>89</sup> While some large firms, including DLA Phillips Fox, maintain disbursement budgets and fund disbursements on behalf of our clients, not all lawyers are able to meet these costs, and any firm's capacity to meet client disbursements will be limited.

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<sup>88</sup> Justice Made to Measure, p 200.

<sup>89</sup> Funding Litigation, p 7.

- 4.5 It is true that disbursement assistance funding schemes exist in many State jurisdictions to provide disbursement assistance to litigants in some areas of civil litigation.<sup>90</sup> However, these schemes are not always attractive to pro bono providers, because:<sup>91</sup>
- 4.5.1 the availability of funding is limited;
  - 4.5.2 application for assistance can sometimes only be made after the disbursement cost has been incurred,
  - 4.5.3 the funds may apply application fees, means and merits tests; and
  - 4.5.4 assistance can be limited to cases involving the likelihood of recovering damages.
- 4.6 Disbursement funds are therefore not flexible enough to suit the different needs and circumstances which are inherent in pro bono matters.<sup>92</sup> A recent national survey of pro bono practice undertaken by the National Pro Bono Resource Centre indicated that while the majority of firms meet the costs of internal disbursements for pro bono clients, only 20% of firms met the complete cost of external disbursements for pro bono clients.<sup>93</sup>

#### **Case Study: Disbursements in litigation**

In early 2009, DLA Phillips Fox represented a pro bono client, LT in a claim in the Supreme Court. LT is a homeless man who has been diagnosed with mental illness including inter alia, schizophrenia, schizo-affective disorder and depression. LT receives a Disability Support Payment through Centrelink. LT's claim alleged that his house had been fraudulently transferred to the Defendant in the proceedings. The matter was prepared for hearing over a 2 year period and the hearing took place over 7 days. The legal costs were in excess of \$100,000. The disbursements on the matter included various expert costs, substantial copying costs, medical reports, witness attendance costs, service charges etc. LT had no capacity to pay the substantial disbursements. Had the disbursements not been paid by the firm, the client would not have been able to prosecute his legal claim in the courts.

- 4.7 The issue of disbursement funding is particularly relevant to the delivery of pro bono legal services RRR areas because of the substantial costs associated with delivering

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<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid. See also Mapping Pro Bono in Australia, at 7.5

<sup>93</sup> National Pro Bono Resource Centre, *National Survey: Report on the pro bono legal work of 25 large Australian Law Firms*, September 2008, <[https://wic030u.server-secure.com/vs155205\\_secure/CMS/files\\_cms/Firms%20survey%20report%20FINAL%20100908.pdf](https://wic030u.server-secure.com/vs155205_secure/CMS/files_cms/Firms%20survey%20report%20FINAL%20100908.pdf)>, p 24 (accessed 30 April 2009).

pro bono services in places where law firms do not already have lawyers working on the ground.

- 4.8 Interim findings from a survey conducted by the National Pro Bono Resource Centre suggest that of the respondents who receive pro bono assistance, about 65% are in metropolitan areas, 23% in regional/rural areas and only 11% in remote areas.<sup>94</sup>
- 4.9 Pro bono service providers generally aim to divert pro bono resources to the areas of highest need, but are constrained by the high cost of providing legal services in RRR areas.

#### **Case Study : Artists in the Black Project**

During the period 2007 - 2009 DLA Phillips Fox has partnered with the Arts Law Centre of Australia (a specialist Community Legal Centre) to deliver pro bono legal services to indigenous artists living in isolated communities in remote parts of South Australia, Western Australia and the Northern Territory. The project has on each occasion required a substantial commitment of time, as the firm's lawyers are removed from the office for extended periods. While pro bono work is principally a donation of a lawyer's time, a project of this nature also involves a very substantial cost commitment, since the lawyers must fly from their home city to Darwin, then travel by light aircraft to a regional centre, and then travel several hundred kilometres by car to reach their ultimate destination. There are also accommodation costs and other away-from-home allowances.

While on these trips our lawyers have observed high levels of legal need. Unfortunately our capacity to provide further resources in these areas is limited by cost constraints. If disbursement funding were made available, a greater proportion of our pro bono capacity (and presumably the capacity of other pro bono providers) could be diverted to RRR projects.

- 4.10 It is our observation that pro bono legal assistance could go some way to addressing legal needs in RRR areas, if some disbursement assistance was made available. There is a high level of willingness in the legal profession to deliver services to isolated communities, but this capacity is constrained by the high costs associated with the deployment of resources.

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<sup>94</sup> NACLC Response, p 40.

### **Case study : Prohibitive Disbursements**

DLA Phillips Fox acted for AG on a pro bono basis in 2007. AG had been diagnosed with Paranoid Schizophrenia and was the subject of a Community Treatment Order, which required him to attend the Redfern Community Health Centre on a fortnightly basis for Risperdal injections. AG wanted to challenge the treatment plan under the Community Treatment Order as he believed the medication levels were too high and were causing significant adverse psychiatric and physical side effects such as arm pain.

In order to qualify for Legal Aid assistance to challenge the Community Treatment Order, AG was required to provide a psychiatrist report, outlining an alternative treatment and confirming the psychiatrist would provide ongoing care for AG. The psychiatric report would also be required by the Mental Health Review Tribunal before any previous orders were varied. However, psychiatric reports generally cost upwards of \$1000, and as AG's sole source of income was a disability support pension, he had no means of paying for that or for ongoing treatment. AG was effectively restricted from being able to access Legal Aid or challenge his treatment plan by reason of the significant disbursements associated with the legal process.

Our ability to act for AG was also constrained by the issue of disbursement costs, because, although we could fund the cost of a report, we were unable to provide ongoing funding for AG's treatment. The firm conducted extensive searches for a psychiatrist who would agree to treat AG free of charge but none was found. One psychiatrist agreed to treat AG on a bulkbilling basis, but only if an amount of \$1,760 was paid to cover the cost of an initial consultation and psychiatric report. DLA Phillips Fox paid this amount and acted for AG before the Mental Health Review Tribunal. We were successful in varying the conditions of the client's Community Treatment Order. AG's prescribed medication is now substantially reduced and the client states that his condition has significantly improved, with no side effects. His psychiatrist reports that he is progressing well.

Without funding for disbursements in such matters, clients are denied access to justice.

**Recommendation 10:** The Commonwealth should provide disbursement funding in pro bono matters in order to facilitate more, and more effective pro bono service delivery.

- 4.11 If a fund for disbursements in pro bono matters was introduced, it could be used to divert pro bono capacity to areas where high levels of legal need have been identified. This could be achieved by restricting availability of disbursement funding to specific types of matters, classes of clients, or clients' geographic location.



## Public Interest Litigation

- 4.12 Public interest matters are generally accepted to be those legal matters which affect a significant number of people, raise matters of broad public concern, or impact on disadvantaged or marginalised groups.<sup>95</sup>
- 4.13 Public interest litigation is an important instrument in law reform, as the proceedings cause issues of public law and policy to be examined. If successful, the benefits from the litigation are able to flow onto the broader community. Benefits of public interest therefore include:<sup>96</sup>
- 4.13.1 development of the law leading to greater certainty, greater equity and access to the legal system and increased public confidence in the administration of the law (which in turn should lead to less disputes and less expenditure on litigation);
  - 4.13.2 economies of scale;
  - 4.13.3 impetus for reform and structural change to reduce potential disputes (for example, a test case can encourage the development of rules and procedures designed to ensure greater compliance with a particular law);
  - 4.13.4 contribution to market regulation and public sector accountability by allowing greater scope for private enforcement;
  - 4.13.5 reduction of other social costs by stopping or preventing costly market or government failures.
- 4.14 Sir Anthony Mason affirmed that public interest proceedings 'can enhance the democratic process by making government accountable and by enabling us to scrutinise government actions and its decision-making processes.'<sup>97</sup>
- 4.15 However, in our experience many potential public interest litigants, are deterred from commencing proceedings by the prospect of adverse cost orders. This is a pervasive and longstanding deterrent, given that as far back as 2001, the Pro Bono Task Force

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<sup>95</sup> See PILCH (Vic) website: <<http://www.pilch.org.au/whichscheme/>>.

<sup>96</sup> The Australian Law Reform Commission, *Beyond the door-keeper Standing to sue for public remedies*, ALRC 78, <<http://portsea.austlii.edu.au/au/other/alrc/publications/reports/78/ALRC78.html#ALRC78>> (accessed 30 April 2009).

<sup>97</sup> Keynote Speech by The Honourable Sir Anthony Mason AC KBE, *PILCH: Access to Justice and the Rule of Law*, PILCH (Public Interest Law Clearing House) 9 September 2004, <<http://www.vicbar.com.au/webdata/VicBarNewsFiles/130PILCH.pdf>> (accessed 30 April 2009).

Team noted that was of the view that the threat of adverse costs orders provided a significant barrier to pro bono work and needed addressing.<sup>98</sup>

4.16 The Public Interest Law Clearing House (Vic) makes the following observations:<sup>99</sup>

In its role as a pro bono legal referral service for public interest cases, PILCH has observed that many meritorious public interest matters are not ultimately pursued because of the risk of an adverse costs order. In this way, the costs regime acts as a disincentive to public interest litigation, particularly for marginalised and disadvantaged people.

Courts in other jurisdictions have been prepared to make orders protecting public interest litigants against adverse costs orders. The orders are described as 'protective costs orders' (PCOs) and may include orders that: a party will not be exposed to an order for costs if it loses at trial; the amount of costs that a party will be required to pay if it loses at trial will be capped at a certain amount; or there will be no order for costs whatever the outcome of the trial.

Australia does not have any specific public interest costs regime and PILCH believes that the legislature should intervene and confirm the courts' jurisdiction to make PCOs and clarify what factors are relevant to the discretion to make such an order in public interest matters.

4.17 The general rule regarding costs is that they follow the event and have the purpose of compensating the successful party for the vindication of its position. This rule strongly discourages public interest litigants from engaging in litigation, as they may potentially be required to pay substantial costs in the event they are unsuccessful. For example, although public interest environmental litigation plays an important role in protecting the environment, the most significant obstacle to this litigation is the threat of adverse costs.<sup>100</sup>

4.18 In this way, the possibility of adverse costs orders acts as a disincentive to public interest litigation, particularly for marginalised and disadvantaged people. The Public Interest Law Clearing House (Vic) has noted that this problem is heightened where novel or untested issues arise, as legal advisors are not able to advise with certainty on the likely outcome of litigation.<sup>101</sup>

4.19 The concern for pro bono providers is that, even in cases with merit, they cannot offer their clients any guarantee that the public importance of the issues litigated, or the fact that they are acting on a pro bono basis and not for personal gains are sufficient

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<sup>98</sup> National Pro Bono Task Force, *Recommended Action Plan for National Co-Ordination and Development of Pro Bono Legal Services*, June 2001, <[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~pro+bonofinalreport.doc/\\$file/pro+bonofinalreport.doc](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~pro+bonofinalreport.doc/$file/pro+bonofinalreport.doc)> p 19 (accessed 30 April 2009).

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<sup>100</sup> McGrath C, *Flying foxes, dams and whales: Using federal environmental laws in the public interest* (2008) 25 EPLJ 324.

<sup>101</sup> McKernan L, *Protective Costs Orders - PILCH Matters End of Year Edition 2008*, <<http://www.pilch.org.au/Page.aspx?ID=245>> (accessed 30 April 2009).

reason to vary the usual order that the unsuccessful party pay the costs of the successful party.<sup>102</sup>

- 4.20 It is true that there are several exceptions to the general rule. For example, courts have a discretion in relation to costs orders. In 2001 the Full Court of the Federal Court considered the fact of pro bono representation as a matter relevant to costs orders. However, the Court affirmed that there is no general principle that usual costs orders should not apply if the subject matter of litigation is a matter of public interest, and reiterated that costs awards remain an exercise of the discretion of the court.<sup>103</sup> The High Court has established principles to determine when not to award costs in environmental cases.<sup>104</sup> However these principles have been applied narrowly by the courts.<sup>105</sup>
- 4.21 Given the value of public interest litigation, particularly as an important law reform tool, it is necessary to better facilitate public interest litigation. The significant benefits of public interest litigation mean it should not be impeded by the costs order regime. This can be achieved through altering the general rule in relation to cost orders to ensure that adverse cost orders are not made in public interest litigation. In order to create greater certainty on behalf of prospective litigants, it would be more appropriate to implement a policy in which costs are not ordered against unsuccessful public interest litigants than make these decision on a case by case basis.<sup>106</sup> Litigants ought to be able to secure declaration as to the public interest nature of the matter, and the protective cost consequences early in any proceedings, and before the other party to the proceeding has incurred substantial costs.

**Recommendation 11:** The Commonwealth and States should adopt a policy that the government will not seek costs against an unsuccessful plaintiff in litigation brought to advance the public interest.

**Recommendation 12:** Protective costs orders should be introduced to enable individuals to bring public interest litigation without the risk of adverse costs orders if unsuccessful.

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<sup>102</sup> Lauchland K, *Access to justice: Lawyers' costs when acting pro bono in public interest litigation*, (Bond University Faculty of Law Papers), 2003, <[http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1088&context=law\\_pubs](http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1088&context=law_pubs)> p 15 (accessed 30 April 2009).

<sup>103</sup> *Ruddock v Vadarlis (No.2)* (2001) 115 FCR 229

<sup>104</sup> See *Oshlack v Richmond River Council* (1998) 193 CLR 72.

<sup>105</sup> See *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (unreported FCA 10 July 2000, 16 August 2000 and 16 November 2001).

<sup>106</sup> See also PILCH (QLD), *Costs and fees in public interest litigation - To the Hon Rod Welford MLA Attorney-General and Minister for Justice*, 5 February 2002, <[http://www.qpilch.org.au/\\_dbase\\_upl/costs\\_fees.pdf](http://www.qpilch.org.au/_dbase_upl/costs_fees.pdf)>.

## 5 Emerging Issues

### Human Rights Charters

- 5.1 On 10 December 2008, the Australian Government announced a National Human Rights Consultation (**National Consultation**). The National Consultation Committee has been asked to consider 3 key questions:<sup>107</sup>
- 5.1.1 Which human rights (including corresponding responsibilities) should be protected and promoted in Australia?
  - 5.1.2 Are these human rights currently sufficiently protected and promoted?
  - 5.1.3 How could Australia better protect and promote human rights?
- 5.2 A possible outcome of the National Consultation is that the Commonwealth Government will introduce legislation to promote the protection of human rights in Australia.
- 5.3 Given that the terms of reference of the National Consultation stipulates that the possible options for the future should preserve the sovereignty of the Parliament and not include a constitutionally entrenched bill of rights,<sup>108</sup> it is likely that the national legislation will take the form of a legislative charter on human rights. This is the approach that has been adopted in Victoria, the Australian Capital Territory and the United Kingdom.<sup>109</sup>
- 5.4 The main provisions of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Victorian Charter**) came into effect on 1 January 2007, although provisions relating to the interpretation of laws and duties of public authorities did not come into force until 1 January 2008. The Act acknowledges and protects civil, political, and cultural rights.
- 5.5 The Victorian Charter was created as an act of parliament and is legally binding in on all public authorities within the state of Victoria, who are required to observe the rights. Every new piece of law passed by the Victorian Government must be proven compatible with the rights protected in the Act.

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<sup>107</sup> See the National Human Rights Consultation website: <[www.humanrightsconsultation.gov.au](http://www.humanrightsconsultation.gov.au)>.

<sup>108</sup> Ibid.

<sup>109</sup> See the *Charter of Human Rights and Responsibilities Act 2006* (Vic), the *Human Rights Act 2004* (ACT), and the *Human Rights Act 1998* (UK).

- 5.6 The Human Rights Law Resource Centre (**HRLRC**) is Australia's first specialist human rights legal service. It is an independent community legal centre, jointly established in January 2006 by the Public Interest Law Clearing House (Vic) and Liberty Victoria. Its principal aim is to promote, protect and contribute to the fulfilment of human rights in Australia - particularly the human rights of people who are disadvantaged or living in poverty - by contributing to the harmonisation of law, policy and practice in Australia with human rights norms and standards.<sup>110</sup>
- 5.7 DLA Phillips Fox has funded a full-time senior legal position at the HRLRC during the past 3 years, and is thus familiar with the work undertaken by the HRLRC.
- 5.8 The HRLRC plays an invaluable role in fulfilling the purpose of the Victorian Charter. It engages in the content, implementation, operation and review of the Victorian Charter through:<sup>111</sup>
- 5.8.1 Monitoring, reporting on and, where appropriate, intervening in cases relating to the Victorian Charter;
  - 5.8.2 Conducting and disseminating research and information regarding the utility, importance and impact of legislatively protecting economic, social and cultural rights;
  - 5.8.3 Convening seminars in relation to economic, social and cultural rights;
  - 5.8.4 Engaging in community education of the Victorian Charter through such publications as the Human Rights Law Resource Manual (which includes chapters on the Victorian Charter of Human Rights and Responsibilities and strategic human rights litigation in a domestic context) and a comprehensive online Guide to the Victorian Charter of Human Rights and Responsibilities; and
  - 5.8.5 Meeting on a bi-annual basis with the advisor to the Victorian Attorney General, advisor to the Minister for Victorian Communities and the Victorian Department of Justice Human Rights Project Team to discuss the HRLRC's activities and operations and the Government's implementation of the Charter of Human Rights and Responsibilities.
- 5.9 The HRLC is among the most effective Community Legal Centres operating in Australia. It has recently undergone an independent external review,<sup>112</sup> which has found, inter alia:

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<sup>110</sup> See the Human Rights Law Resource Centre website: <<http://www.hrlrc.org.au/about-us/history>>.

<sup>111</sup> See the Human Rights Law Resource Centre website: <<http://www.hrlrc.org.au/our-work/focus/victorian-charter-human-rights/>>.

<sup>112</sup> <http://www.hrlrc.org.au/files/hrlrc-evaluation.pdf>

- 5.9.1 The HRLRC has very strong relationships with and support from the community, commercial and public sectors.
- 5.9.2 The HRLRC has made a significant and positive contribution to the promotion of human rights through its case work, litigation, policy work and educational activities.
- 5.9.3 The HRLRC's capacity to proactively and strategically litigate as a method of promoting and protecting human rights is a major distinguishing feature.
- 5.9.4 The contribution of the HRLRC to law reform is evident and represents 'significant impact', particularly in raising the profile of these issues and contributing to public discourse on human rights.
- 5.9.5 The HRLRC's publications are valued resources which disseminate detailed and wide-ranging information about human rights law issues.
- 5.9.6 The planning and governance of the HRLRC have been 'exemplary'.
- 5.10 It is clear from the Victorian experience that in order for the full potential of a Charter of Rights to be realised, it is essential that the community, the community sector and the private legal sector have access to resources, advice and information about the Charter and its operation.
- 5.11 If the result of the National Consultation is a national charter of human rights, it is similarly essential that the Australian community can access education, and expertise in relation to the operation of any Charter. This is necessary in order for the community to be able to derive the full benefit of human rights protections under any new legislation.

**Recommendation 13:** If a National Charter of Human Rights is introduced in Australia, the Commonwealth should fund the Human Rights Law Resource Centre to operate as a national service.

## 6 Conclusion

- 6.1 DLA Phillips Fox is committed to improving access to justice by providing significant pro bono services to the community in response to unmet legal needs.
- 6.2 It is important that frontline services such as legal aid and the community legal sector are properly funded to meet community legal needs.
- 6.3 As a pro bono provider, we rely on frontline services to act as a first point of contact for, and referrer of, people seeking legal assistance.
- 6.4 To the extent that there are no adequate frontline services addressing the legal needs of particular groups or sections of communities within Australia, pro bono is not and cannot be a complete solution to meeting the legal needs of those groups or communities.

- 6.5 Pro bono legal services and government funded legal services are complimentary, and operate best where both forms of assistance are available. Pro bono services will in fact struggle to provide any services to sections of the community that are not properly serviced by government funded community legal services.
- 6.6 Further, pro bono service delivery could be substantially enhanced through:
- 6.6.1 Increased availability of disbursement funding; and
  - 6.6.2 Changes to the rules relating to costs orders in public interest litigation.

## **7 Further Information**

- 7.1 For further information in relation to the matters raised in this submission, please contact:

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