The Senate

Legal and Constitutional References Committee

Legal aid and access to justice

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TERMS OF REFERENCE

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

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

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

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

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EXECUTIVE SUMMARY

This inquiry presented an opportunity for the Committee to re-examine the state of legal aid, following the previous Committee's report in June 1998. That report, the *Inquiry into the Australian Legal Aid System: Third Report*, was conducted following the introduction of the Commonwealth "purchaser/provider" funding agreements in 1997. At that time, the Committee was limited in its ability to assess the long-term impacts that those changes had on legal aid.

This inquiry allowed the Committee to survey the legal aid landscape after nearly eight years under the "purchaser/provider" funding model. In addition, some serious issues in relation to legal aid and access to justice more generally were drawn to the Committee's attention.

Funding

This report begins with a consideration of the funding of legal aid, including the levels of Commonwealth and state/territory funding, the funding model used by the Commonwealth to allocate legal aid funding, and the implications of having a strict Commonwealth and state/territory divide for the application of legal aid funding.

The Committee heard significant criticisms of the current Rush/Walker funding model, particularly in relation to components such as the 'suppressed demand factor' which result in more funding for some jurisdictions. Accordingly the Committee recommends the model be reformed.

The Committee also recommends a return to the co-operative model of funding that was in place prior to the Commonwealth Government's introduction of the "purchaser/provider" model. A return to cooperation between the Commonwealth and states/territories would reduce administrative costs and bureaucratic difficulties that people face where matters do not clearly fall within one jurisdiction. More importantly, such a move signifies a cooperative approach to meeting the obligation that a civilized society owes to its citizens in providing access to justice, particularly to those who are already disadvantaged.

The Committee has also considered the role of some specialist legal services. During its previous inquiry the Committee heard that the Environmental Defenders Office, was prevented from using the Commonwealth funding it receives for litigation purposes. The Committee recommended that the restriction be removed, and in light of further evidence to this inquiry, repeats that recommendation.

The Committee also heard evidence suggesting there is a need for a national forensic institute to ensure defendants in criminal cases have access to forensic services, and supports that proposal.

Finally, the Committee was concerned that when new legislation increases the emphasis on crime and law enforcement, there appears to be no supplementary funding to legal aid commissions to counter increased demand for their services. The Committee considers that a legal aid impact statement should be required for such legislation and that supplementary funding should be provided.

The lack of data on demand and unmet legal need

In order to ensure that funding is being distributed in an equitable and efficient manner, there needs to be an understanding of the demand and unmet need for legal services that exists across Australia.

One of the key findings of the *Third Report* was the need for the Commonwealth to collect, analyse and publish more meaningful data on the impact of recent changes to the legal aid system and on the continuing operation of the system. The Government undertook a two stage Legal Assistance Needs study between 1997 and 1999, that study forming the basis of the current Rush/Walker funding model. In this inquiry the Committee heard criticism that this analysis had no regard to unmet need.

The Committee is concerned that in 2004 there is still a serious lack of appropriate data, and recommends that a national survey of both demand for legal aid services and an assessment of unmet need should be undertaken as a matter of urgency. Such research should be undertaken in conjunction with state/territory legal aid commissions and community legal centres.

Groups with particular needs

During this inquiry there was much evidence to suggest that various groups are particularly restricted in gaining access to justice, due to such factors as socioeconomic disadvantage, cultural background and remoteness from mainstream legal services. The Committee examined the needs and concerns of some key groups and has suggested various strategies to address their needs.

Women and family law

The Committee heard evidence that current legal aid arrangements do not provide sufficient or uniform access to justice for women, particularly in relation to family law. Limited financial resources remain a major concern for many women, particularly in cases of family breakdown. More restrictive criteria in legal aid for family law matters, particularly in relation to the "cap" on legal aid funding, the more extensive merit tests and the need to engage in primary dispute resolution even in cases where domestic violence may be alleged, have had a significant impact since the last report.

The Committee considers that more funding is urgently needed for family law matters. Moreover, there should be a review of legal aid service provision more generally to ensure that the particular needs of women are addressed. Cases where domestic

violence or child abuse is alleged need particular attention, and the impact of new Family Court guidelines on child representatives must also be monitored.

The needs of women in other areas, including immigration law, civil law and the needs of women in prison, must also be addressed.

Indigenous Australians

The Committee is particularly concerned about the state of legal service provision to Aboriginal and Torres Strait Islander people. The need for specialist culturally appropriate services, particularly in light of the over-representation of Indigenous people in the justice system, has been well documented in many other reports and studies. However, the Committee heard significant concerns about the current shortfall in funding of Indigenous legal services.

A particular issue which the Committee considers needs urgent attention is the need for increased services to Indigenous women. They remain chronically disadvantaged in terms of advice as to their legal rights, access to legal services and the high levels of violence which many of them experience within their communities. While eight Indigenous women's legal services have received funding from the Commonwealth and a number of Family Violence Prevention Unit programs appear to have been successfully established, the Committee considers that much more needs to be done for Indigenous women. Also of concern is the conflict of interest that arises where a local legal service cannot provide advice to both parties to a matter: evidence suggests that it is often the female victims of violence who miss out on assistance, and this must be remedied.

Another issue on which the Committee heard strong concern is the Government's recent decision to put Indigenous legal services out to tender. The Committee is strongly opposed to this course of action and considers that the exposure draft of the request to tender that is currently being circulated should be withdrawn and its underlying policy reconsidered.

Finally, the Committee is also concerned about the Government's recent decision, in light of the proposed abolition of the Aboriginal and Torres Strait Islander Commission, to "mainstream" Indigenous legal services. It must be ensured that the need for targeted, culturally sensitive and specialised Indigenous legal aid services is recognised by decision-makers.

People living in regional, rural and remote Australia,

The *Third Report* identified various difficulties that people living in rural and remote areas face, including a lack of lawyers with particular expertise, conflicts of interest, high transport costs and the need to rely on telephone advice services rather than personal contact.

During this inquiry the Committee heard that the inadequacies in legal aid provision are greatly magnified in rural and remote areas. Large areas of Australia are not

covered by legal aid or free legal services. A number of initiatives are in place, including outreach programs, duty lawyer schemes and the use of videoconferencing or telephone advice services, such as the Government's Regional Law Hotline established in 2001. While the Committee supports such technological initiatives, they cannot take the place of face-to-face contact, particularly in sensitive or complex matters, and should be seen as an adjunct to them.

The Committee is also particularly concerned about the apparent shortage of lawyers in non-metropolitan areas. Incentives such as subsidies should be investigated by the Commonwealth, state and territory governments in consultation with the law societies.

As with other issues addressed during this inquiry, the Committee also recommends that research be conducted on the needs of people living in rural, regional and remote areas, and that consultation with local communities take place prior to the introduction of new or expanded services.

Migrants and refugees

The Committee is concerned that the Commonwealth Priorities and Guidelines introduced in 1997 have resulted in reduced legal assistance to migrants and refugees. While there is specialist funding under the Immigration Advice and Application Assistance Scheme (IAAAS) administered by the Department of Immigration and Multicultural and Indigenous Affairs, legal aid commissions should be able to provide more assistance, particularly in the preliminary stages of matters. The Committee is also concerned that the increased demand caused by the introduction of temporary protection visas is not currently being met. The necessary funding should be provided to assist legal aid commissions in this task.

In addition, the Committee agrees with concerns that the administration of the IAAAS by the Department may cause a conflict of interest and for that reason recommends that the Attorney-Generals' Department assume that responsibility.

The Committee also recommends increased funding for interpreter services and that barriers to practice as non-feeing charging migration agents should be minimised, through such measures as reducing the costs of continuing professional development.

Other groups

The Committee also heard evidence of the particular barriers to access to justice faced by homeless people, the mentally ill and young people.

Specialist programs for homeless people such as those run by the Public Interest Law Clearing House appear to be very valuable, but the Committee considers that the existing services provided by community legal centres and legal aid commissions should be supported in terms of ensuring they have adequate funding to address the demands of their clients.

There is often a link between mental illness and homelessness. The Committee did not receive sufficient evidence during this inquiry to enable it to assess the extent to which mentally ill people are deprived of legal representation throughout Australia, but views with great concern evidence from Advocacy Tasmania about the lack of representation for people who may be deprived of their liberty for extended periods. Vulnerable citizens need access to proper legal representation to protect and enforce their rights, whether that be in courts or other tribunals that can have a significant impact on their lives.

The Committee also heard of the barriers young people face in getting legal assistance, particularly the prohibitive costs, but also their lack of legal knowledge, the alien nature of the court system and the lack of knowledge of youth workers about legal issues. Preventing young people from becoming caught up in the criminal justice system is particularly important, and the Committee heard evidence of the valuable role that outreach services can play. This is another area where the Committee has recommended the Government consult with state and territory legal aid commissions about the need for increased funding to youth legal services.

Changing aspects of the system

The Committee found that changes to legal aid funding and the unmet demand for legal assistance appear to have had a significant impact on particular components of the legal system since its last report. This report considers in some detail the provision of pro bono legal services, the increasing number of self-represented litigants and the increased demand on community legal centres.

Pro bono services

In the *Third Report* the Committee noted that the Government appeared to believe that more of the legal aid workload could be shifted to the private legal profession, and warned of the limited capacity of the private profession to take more responsibility.

Since 1998, there have been significant developments in pro bono service provision, particularly in terms of increased coordination of those services. Major initiatives include two national conferences on pro bono legal services and the establishment in 2002 of the National Pro Bono Resource Centre, partly funded by the Commonwealth over four years. However, data on the nature and extent of pro bono services nationally is still sparse. The Committee considers that the Government should commit itself to ongoing funding of the National Pro Bono Resource Centre past 2006 and should provide additional funding to allow it to develop better data.

Evidence to this inquiry also repeatedly warned that pro bono legal services should not be seen as a substitute for adequate legal aid funding. There are still areas where private law firms provide very limited assistance, particularly in some of the lower profile areas of law such as community law.

The Committee also considers that lawyers who provide pro bono services should be entitled to recover their costs in appropriate cases.

Self-represented litigants

The Committee in the *Third Report* concluded that an indicator of how well the legal aid system was working was the number of litigants who appear before the courts without legal advice or representation. Evidence at that time suggested that this was occurring increasingly, although comprehensive data was not available. The Committee made various recommendations, including that the Government should analyse and publish annual data on unrepresented litigants in the various courts, and report on whether the savings made by denying legal aid were outweighed by the impact of unrepresented litigants on court time and resources.

Various reports and research projects, including those by the Australian Law Reform Commission and the Family Law Council, have established a strong link between cuts to legal aid funding and the rising incidence of self-representation, particularly in the Family Court. While some individuals may choose not to have a lawyer because, for example, they perceive they will have a tactical advantage, evidence to this inquiry suggests that reduced legal aid funding is directly responsible for the lack of legal representation for many others. This has potentially serious consequences for the enforcement of individual rights. The Committee also heard evidence of the adverse impact of self-represented litigants on other parties, court registries, judicial officers and the administration of justice generally.

While the legal community, including the courts and legal aid commissions, have introduced various initiatives to remedy those disadvantages, including the establishment of duty solicitor schemes at some courts and improving information services to the public, the Committee believes that more government support is needed. In particular, the effectiveness of legal information services should be evaluated, and duty solicitor schemes should be expanded for criminal, civil and family law matters.

Community legal centres

The Committee heard significant evidence of concerns amongst community legal centres of the increased demand for their services. Throughout Australia there are over 200 centres that assist many disadvantaged clients who cannot afford legal representation but who are not eligible for legal aid. The Government provides approximately $20 million in funding to over a hundred of these centres; however, there was compelling evidence that many centres are facing a funding crisis. It is difficult for them to attract and retain skilled staff, particularly legal staff. Moreover, the Committee heard that the condition of premises was so inadequate that competitions have been held for the worst office and some lawyers routinely interview clients in their cars. This cannot be allowed to continue.

The Committee considers that the community legal centre sector is a crucial part of providing access to justice for all Australians and is concerned that centres appear to be under extreme pressure. Consequently, an analysis of the impact of reduced legal aid funding on demand for their services, coupled with increased funding to this sector, is urgently required.

Conclusion

The Committee believes that the recommendations contained in this report if implemented will play an important part in improving access to justice for all Australians and assist in the administration of legal aid.

RECOMMENDATIONS

Recommendation 1

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

Recommendation 2

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

Recommendation 3

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

(a) extend eligibility to those earning less than $30,000 after tax; and

(b) in criminal matters, where a person passes the income test, disregard home equity.

Recommendation 4

2.92 The Committee recommends that the Commonwealth introduce a duty solicitor service for the Commonwealth Administrative Appeals Tribunal.

Recommendation 5

2.103 The Committee recommends that the Commonwealth remove the restriction on the Environmental Defenders Office from using Commonwealth funds for litigation purposes.

Recommendation 6

2.106 The Committee recommends that the Government fund the establishment of a national forensics institute to provide forensic opinions for defendants in serious criminal matters facing forensic evidence.

Recommendation 7

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

Recommendation 8

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

Recommendation 9

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

Recommendation 10

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

Recommendation 11

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

Recommendation 12

4.25 The Committee recommends that the Commonwealth Government address discrimination against the circumstances of women in the application of the current family law legal aid funding guidelines and priorities, by commissioning national research into the perceived gender bias in legal aid decision-making.

Recommendation 13

4.26 The Committee strongly endorses the recommendation made in the Committee's *Third Report* that legal aid expenditure be closely scrutinised by the Commonwealth Government to determine generally if disproportionate expenditure in certain priority areas is having the effect of depriving other areas of appropriate funding.

Recommendation 14

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

Recommendation 15

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

Recommendation 16

4.51 The Committee repeats the recommendation in its *Third Report* that the Commonwealth Government should act to ensure the necessary data on the operation of the "cap" in family law matters is collected, analysed, published and acted upon to ensure that capping does not deny justice in particular cases.

Recommendation 17

4.52 The Committee recommends that a pilot project similar to the Magellan Project be adopted where the usual legal aid guidelines are altered in cases involving allegations of domestic violence. In effect this would mean removing the "cap" on legal aid funding so that women who are victims of domestic violence would be guaranteed unlimited legal aid funding. Similarly to the Magellan Project, the usual means and merit tests should be maintained. Pending wider application of that principle, the Committee recommends that the "cap" should be indexed annually for movements in the Consumer Price Index.

Recommendation 18

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

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

Recommendation 19

4.83 The Committee recommends that victims of domestic violence not be required by legal aid commissions to participate in primary dispute resolution processes as a condition of access to legal aid.

Recommendation 20

4.84 The Committee recommends that the Commonwealth Government adopt appropriate guidelines and procedures in relation to grants of legal aid for women whose circumstances are not suitable for participation in primary dispute resolution.

Recommendation 21

4.89 The Committee recommends that the Family Court and legal aid commissions closely monitor the new Family Court guidelines on child representatives to determine what impact, if any, they have on legal aid budgets for family law matters generally.

Recommendation 22

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

Recommendation 23

4.102 The Committee strongly recommends that the Commonwealth Government provide legal funding to enable legal representation to be available to all parties in family law disputes where there are allegations of domestic violence or child abuse, or other serious allegations.

Recommendation 24

4.110 The Committee recommends that appropriate coordinated schemes to deal with domestic violence be implemented in those states and territories where they do not presently exist, as well as in the Family Court, and that such schemes be modelled on successful schemes already in place. The Committee also considers that current schemes could be usefully expanded to include a greater emphasis on community education with the aim of removing the stigma often associated with domestic violence.

Recommendation 25

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

Recommendation 26

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

Recommendation 27

5.128 The Committee recommends that the Commonwealth Government should urgently increase the level of funding to Indigenous legal services in order to promote access to justice for Indigenous people. In doing so, the Government must factor issues of language, culture, literacy, remoteness and incarceration rates into the cost of service delivery.

Recommendation 28

5.129 The Committee recommends that the Commonwealth Government's 'Exposure Draft of a Request for Tender for the Purchase of Legal Services for Indigenous Australians' should be withdrawn and its underlying policy reconsidered.

Recommendation 29

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

Recommendation 30

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

Recommendation 31

5.135 The Committee recommends that the Government allocate sufficient funding to Indigenous legal services and Indigenous Family Violence Prevention Legal Services to enable adequate provision of effective legal services for Indigenous women in family law and family violence matters, including funding for additional culturally sensitive services in areas of highest need.

Recommendation 32

5.137 The Committee recommends that the Commonwealth Government and state/territory governments address the serious problem of lack of access to justice for Indigenous people in remote areas by providing resources to support the expansion and development of available services.

Recommendation 33

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

Recommendation 34

6.49 The Committee recommends that technological initiatives such as videoconferencing and telephone advice services should be used by the Commonwealth Government and state/territory governments, legal aid commissions and community legal centres as part of an integrated approach to providing services in rural, regional and remote areas. The use of technology can potentially provide practical solutions to those living in such areas, in conjunction with face-to-face legal services.

Recommendation 35

6.56 The Committee recommends that 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.

Recommendation 36

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

Recommendation 37

6.74 The Committee recommends that the Commonwealth and state/territory governments, in conjunction with the law societies in each state/territory and the Law Council of Australia, fully investigate the viability of providing a subsidy (or any other relevant incentives), and developing a coordinated national approach, aimed at attracting and retaining lawyers to live and work in rural, regional and remote areas of Australia.

Recommendation 38

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

Recommendation 39

6.86 The Committee recommends that any increase in funding for rural, regional and remote areas should not be at the expense of funding for

metropolitan areas. Additional funding is urgently required to address the problem of lack of legal and related services in rural, regional and remote areas.

Recommendation 40

6.87 The Committee recommends that the Commonwealth Government and state/territory governments ensure that thorough consultation takes place with rural, regional and remote communities in order to determine the most appropriate legal and associated services required in particular communities. All consultations should occur before any establishment of any new services.

Recommendation 41

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

Recommendation 42

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

Recommendation 43

7.44 The Committee recommends that the Commonwealth and states/territories should jointly fund a $100,000 pilot program in each jurisdiction to assess the viability of a "one-stop-shop" interpreter service for community legal centres and legal aid services, to be administered by the legal aid commissions.

Recommendation 44

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

Recommendation 45

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

Recommendation 46

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

Recommendation 47

8.50 The Committee recommends that the Government consult with state and territory legal aid commissions about the need for increased Commonwealth funding to youth legal services.

Recommendation 48

9.21 The Committee recommends that the Commonwealth government provide additional funding to the National Pro Bono Resource Centre to enable it to encourage and provide support to law firms, community legal centres, pro bono referral schemes and legal aid commissions in recording and reporting statistics on pro bono service provision.

Recommendation 49

9.32 The Committee recommends that the Commonwealth Government commit ongoing funding to the National Pro Bono Resource Centre past 2006 to enable it to continue its work to improve the provision of pro bono legal services.

Recommendation 50

9.52 In conjunction with Recommendation 11, the Committee recommends that the Commonwealth Government provide additional funding to allow community legal centres, clearing houses and other pro bono services to collect detailed information on the community need for legal services.

Recommendation 51

9.61 The Committee recommends that the Attorney-General issue binding directions to federal government agencies that the fact that a legal service provider has acted or is likely to act against the Commonwealth Government or its agencies in a pro bono matter is not to be taken into account to the detriment of the provider when decisions relating to the procurement or purchasing of legal services are made. The Committee urges state and territory governments to issue similar directions.

Recommendation 52

9.80 The Committee recommends that all courts consider amending their rules to allow lawyers who provide pro bono legal services to recover their costs in similar circumstances to those litigants who pay for their legal representation.

Recommendation 53

10.30 The Committee recommends that all Federal courts and tribunals should report publicly on the numbers of self-represented litigants and their matter types, and urges state and territory courts to do the same.

Recommendation 54

10.43 The Committee recommends that the Commonwealth and state/territory governments commission research to quantify the economic effects that self-represented litigants have on the federal justice system, including the costs these

litigants impose on courts and tribunals, other litigants, community legal centres and the social welfare system.

Recommendation 55

10.71 The Committee recommends that the Commonwealth Government fund and publish an evaluation of the legal information services that it funds, in order to determine the extent to which those services assist in resolving self-represented litigants' legal problems.

Recommendation 56

10.72 The Committee urges providers of legal information services to evaluate the contribution that those services make in resolving self-represented litigants' legal problems.

Recommendation 57

10.83 The Committee recommends that the Commonwealth Government and the state/territory governments provide funding to establish a comprehensive duty solicitor scheme in all states and territories of Australia. The scheme should offer, at the very least, a duty solicitor capacity in courts of first instance (criminal, civil and family) and should provide legal advice and representation on all guilty pleas, not guilty pleas in appropriate matters, adjournments and bail applications, and assistance for self-represented litigants to prepare their evidence and narrow the issues in dispute.

Recommendation 58

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

Recommendation 59

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

Recommendation 60

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

Recommendation 61

11.52 The Committee recommends that the Commonwealth Government and state/territory governments should provide additional funding to enable

community legal centres to recruit, train and retain staff, through adequate remuneration, skill development programs and improved employment conditions.

Recommendation 62

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

Recommendation 63

11.59 The Committee recommends that any legislation in relation to the definition of charities ensure that organisations involved in the provision of pro bono legal services are not prevented from providing advocacy policy services.

ABBREVIATIONS

AAT	Administrative Appeals Tribunal
ADR	alternative dispute resolution
AIJA	Australian Institute of Judicial Administration
AJAC	Aboriginal Justice Advisory Committee
ALAO	Australian Legal Aid Office
ALRC	Australian Law Reform Commission
ALRM	Australian Legal Rights Movement
ANAO	Australian National Audit Office
ATSIC	Aboriginal and Torres Strait Islander Commission
ATSILS	Aboriginal and Torres Strait Islander Legal Services
ATSIS	Aboriginal and Torres Strait Islander Services
CCLCG	Combined Community Legal Centres Group of New South Wales
CDEP	Community Development Employment Project
CLCs	Community Legal Centres
COALS	Coalition for Aboriginal Legal Services NSW
CPD	continuing professional development
DIMIA	Department of Immigration and Multicultural and Indigenous Affairs
EDO	Environmental Defenders Office
Exposure Draft	'Exposure Draft of a Request for Tender for the Purchase of Legal Services for Indigenous Australians'
Family Law Act	*Family Law Act 1975* (Cth)
IAAAS	Immigration Advice and Application Assistance Scheme
IARC	Immigration Advice and Rights Centre
LACs	legal aid commissions
Managing Justice	Australian Law Reform Commission, *Managing Justice – A Review of the Federal Justice System*, Report No 89, 2000
MARA	Migration Agents Registration Authority
NACLC	National Association of Community Legal Centres
NCSMC	National Council of Single Mothers and their Children
NLA	National Legal Aid

NNIWLS	National Network of Indigenous Women's Legal Services
NNWLS	National Network of Women's Legal Services
NTLAC	Northern Territory Legal Aid Commission
PDR	primary dispute resolution
PILCH	Public Interest Law Clearing House
PILCH HPLC	Homeless Persons' Legal Clinic
the Program	Community Legal Service Program
QAILS	Queensland Association of Independent Legal Services
RACS	Refugee Advice and Casework Service
RRR	rural, regional and remote
Second Report	Senate Legal and Constitutional References Committee, *Inquiry into the Australian Legal Aid System,* Second Report, June 1997
TIS	Commonwealth Translating and Interpreter Service
TPV	Temporary Protection Visa
Third Report	Senate Legal and Constitutional References Committee, *Inquiry into the Australian Legal Aid System*, Third Report, June 1998
VALS	Victorian Aboriginal Legal Service
VLA	Victoria Legal Aid

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CHAPTER 1

INTRODUCTION

Background

1.1 On 17 June 2003, the Senate referred the matters set out in the terms of reference to the Senate Legal and Constitutional References Committee for inquiry and report by 3 March 2004. On 2 March 2004, the Senate agreed to extend the reporting date to 31 March 2004. Because of the pressure of other Committee inquiries, the reporting date was extended to 26 May 2004.

1.2 The Committee presented an interim report on 25 May 2004, noting that it would present its final report on or before 8 June 2004.

Previous reports

1.3 The Committee has previously conducted an inquiry into the legal aid system in Australia, presenting reports in March 1997, June 1997 (the *Second Report* referred to elsewhere in this report*)* and June 1998 (the *Third Report*).

Conduct of the inquiry

1.4 The Committee advertised the inquiry in *The Australian* on 2 July 2003, 16 July 2003 and 13 August 2003, and invited submissions by 21 August 2003. Details of the inquiry and associated documents were placed on the Committee's website. The Committee also wrote to almost 300 organisations and individuals inviting their submissions, and later in its inquiry contacted a range of Indigenous remote communities seeking their response on access to justice issues in their communities.

1.5 The Committee received 115 submissions from various individuals and organisations and these are listed at Appendix 1. Submissions were placed on the Committee's website for ease of access by the public.

1.6 Public hearings were held in Port Augusta on 11 November 2003, Melbourne on 12 November 2003, Sydney on 13 November 2003 and Canberra on 9 February 2004 and 10 March 2004. A list of witnesses who appeared at the hearings is at Appendix 2. Copies of the Hansard transcripts are available at http://aph.gov.au/hansard.

Acknowledgement

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

Note on references

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

CHAPTER 2

LEGAL AID FUNDING

2.1 This chapter discusses:

- the recent history and levels of Commonwealth and State and Territory funding to Legal Aid;
- the funding model used to determine the distribution of Commonwealth funding;
- the application of Commonwealth priorities and guidelines in granting Commonwealth funds;
- the breakdown of funding by type of matter: criminal, family and civil;
- specialist legal services;
- the need to recognise the relationship between "law and order" legislation with the resulting increase in demand for legal aid; and
- the Commonwealth/State dichotomy.

Recent history of funding to legal aid

2.2 Prior to 1997 the legal aid commissions (LACs) of each state and territory were responsible for determining their own budget priorities and expenditure. The Commonwealth participated in such decisions through the Commonwealth Attorney-General's representation on the board of LACs. In 1996 the Commonwealth withdrew from this arrangement, and since July 1997 the state and territory legal aid commissions have been restricted to allocating Commonwealth funding to matters arising under Commonwealth laws.

2.3 This funding arrangement is referred to as a 'purchaser/provider' arrangement, as under the legal aid agreements the Commonwealth sets the priorities, guidelines and accountability requirements regarding the use of Commonwealth funds.

2.4 In its *Second Report*[1] the Committee expressed its basic disagreement with the Commonwealth Government's decision no longer to accept responsibility for the funding of any matters arising under state and territory laws. The Committee

1 Senate Legal & Constitutional References Committee, *Inquiry into the Australian Legal Aid System: Second Report*, June 1997.

reiterated its concern in its *Third Report*.[2] The Committee also expressed concern at the level of Commonwealth funding for legal aid.[3]

2.5 In 1996/97 the level of Commonwealth funding for legal aid was $128.3 million. With the introduction of the new 'purchaser/provider' agreement Commonwealth funding was reduced to $109.68 million in 1997/98, and to $102.84 million in 1998/99.[4]

2.6 On 15 December 1999, the Commonwealth Attorney-General announced that the Commonwealth would provide $64 million in additional legal aid funding nationally over four years, commencing 2000/2001. Commonwealth funding for legal aid nationally in 2003/04 was $126.48 million.[5] The current legal aid agreements expire on 30 June 2004.

2.7 In the 2004/05 budget the Government increased Commonwealth funding of legal aid by $52.7 million over four years.[6] In a media release regarding the Budget, the Attorney-General announced:

> Additional funds will be available to State and Territory legal aid commissions when they enter new legal aid agreements – which are currently being negotiated – from 1 July 2004.
>
> In return, the Government will be seeking timely reporting and greater financial accountability from legal aid commissions.[7]

Levels of overall Commonwealth funding

2.8 The Law Council of Australia noted that although the current four year funding agreements included an increase of funding of $64 million over the four year period, the level of Commonwealth funding in 2003/04 ($126 million) was less than the level of funding in 1996/97 ($128 million), due to the massive cuts to Commonwealth funding in 1997.[8]

2.9 It should also be noted that in real terms, the level of funding in 2003/04 is substantially less than that provided in 1996/97. After taking account of inflation,

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2 Senate Legal & Constitutional References Committee, *Inquiry into the Australian Legal Aid System: Third Report*, June 1998, p.xvi.

3 ibid.

4 Correspondence from Commonwealth Attorney-General's Legal Assistance Branch to the Committee dated 9 February 2004.

5 ibid.

6 Portfolio Budget Statements 2004-05, Attorney General's Portfolio, Budget Related Paper No.1.2, p. 29.

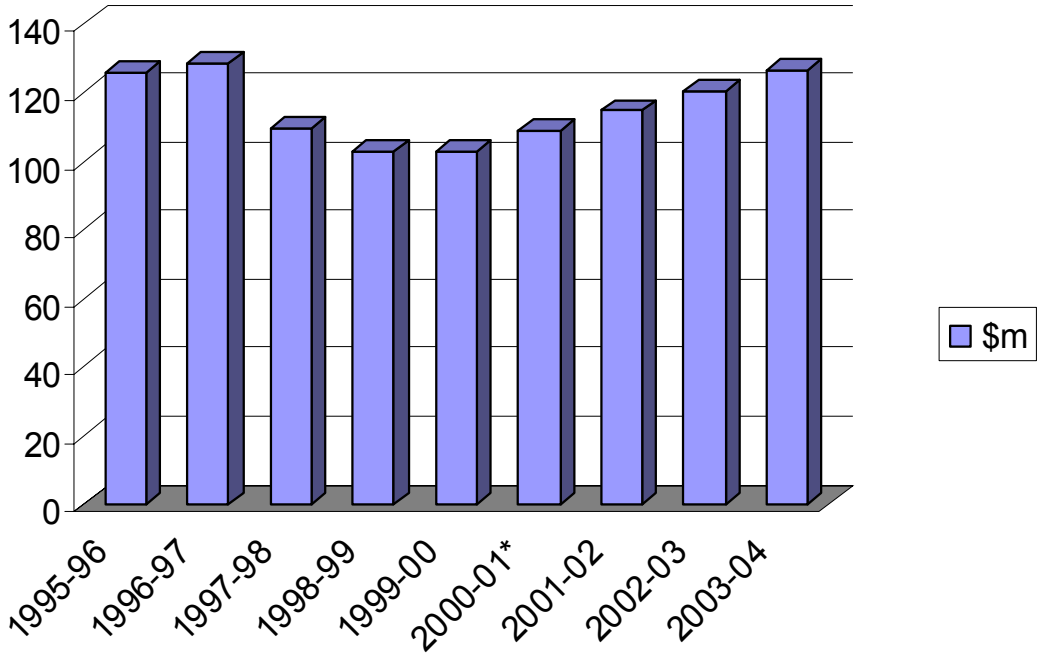
7 The Hon. Philip Ruddock MP, Attorney-General, *News Release*, "More Money for Legal Aid", 11 May 2004.

8 Law Council of Australia, *Submission 62*, p.5.

$128 million in 1996/97 is actually $153 million in real terms for 2003/04. This means that in real terms, the 2003/04 Commonwealth funding is $27 million less than it was in 1996/97.

2.10 Figure 1.1 below shows the history of Commonwealth funding for legal aid for the years 1995/96 – 2003/04.

Figure 1.1 – Commonwealth Funding for Legal Aid



Source: Based on figures provided in correspondence from Commonwealth Attorney-General's Legal Assistance Branch to the Committee dated 9 February 2004.

2.11 National Legal Aid (NLA), which comprises the Directors of each state and territory LAC also noted that funding had only returned to the levels of 1996/97. NLA argued further that due to increased costs of service delivery, there has actually been a decrease in the quantity of services being delivered:

> The additional $63m legal aid funding for 2000-2004, given CPI factors, was no more than an attempt to return to levels prior to the 1996 funding reduction. It should be noted that the $63m has not been indexed and, while the cost of providing legal services has and will continue to increase, the increased funding is not keeping pace with increases in these costs.
>
> Whilst the quality of legal service has not been affected by the cuts, the quantity and extent of that service has. The so called "purchaser/provider" approach has added an additional layer of administration and financial accountability for all Commissions.[9]

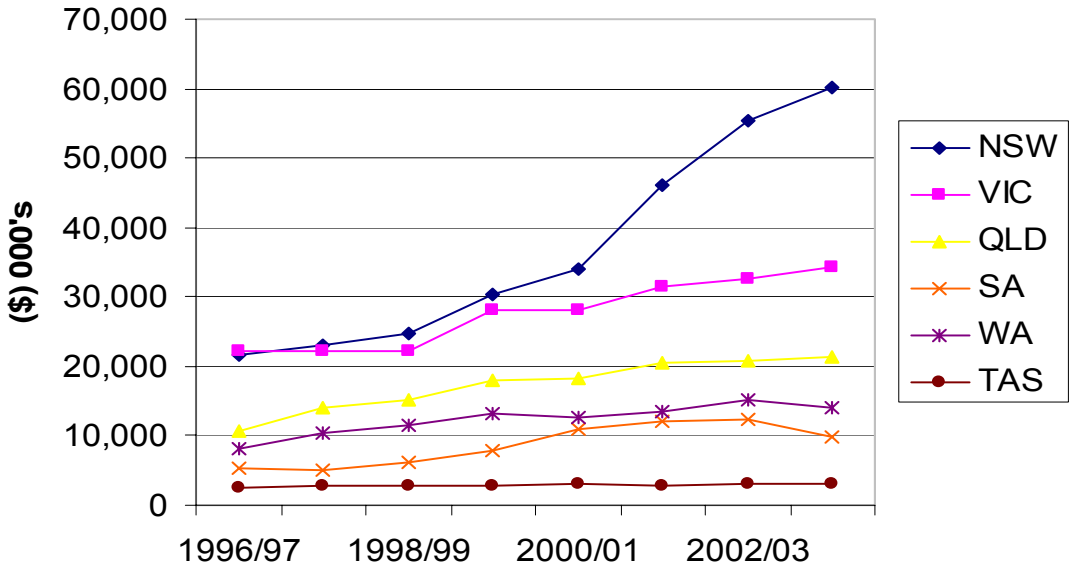
9 *Submission 81*, p.8-9.

Levels of state and territory funding to legal aid

2.12 In its response to the Committee's *Third Report*, the Government criticised the Committee's report for not adequately detailing the levels of funding contributed by states and territories to legal aid.[10]

2.13 As noted above in Figure 1.1, Commonwealth funding to legal aid dropped steadily from 1996 to 2000. The four year funding package implemented in 2000 has meant that in 2004, funding has returned to below what it was in 1996 (again, it should be noted that in real terms it is $27 million less than it was in 1996/97). In contrast State and Territory contributions to legal aid have, in the main, steadily increased from 1996 to 2004.

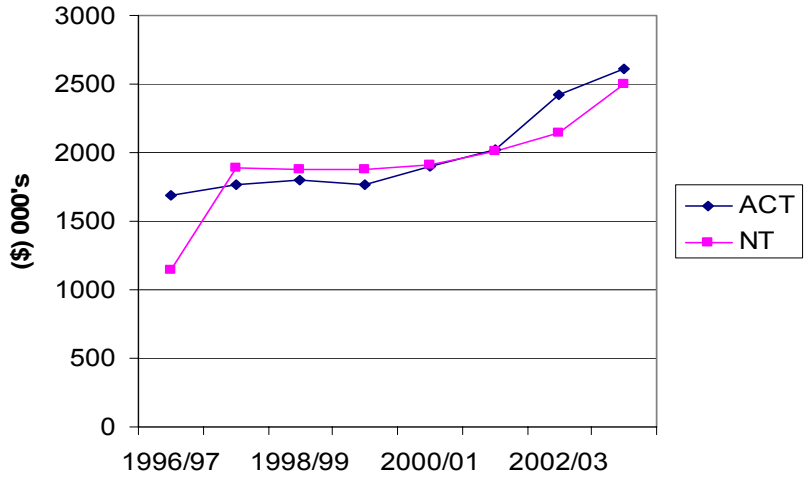
Figure 1.2 – State Funding of Legal Aid



Source: Based on figures from National Legal Aid website, accessed 10 March 2004: http://www.nla.aust.net.au

10 *Government Response to the Senate Legal and Constitutional References Committee Inquiry into the Australian Legal Aid System (3rd Report)*, p.3.

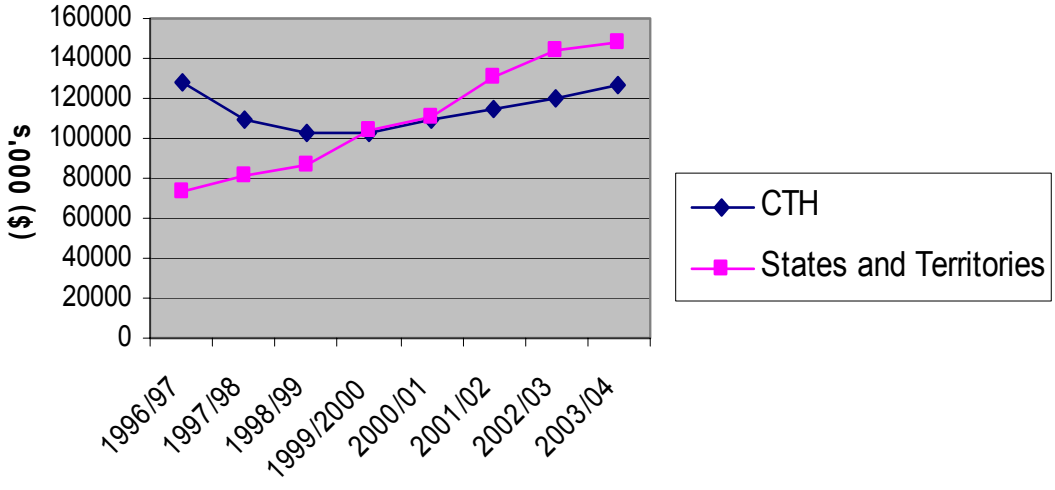
Figure 1.3 – Territory Funding of Legal Aid



Source: Figures for State and Territory Funding from National Legal Aid website, accessed 10 March 2004: http://www.nla.aust.net.au, Commonwealth funding figures from correspondence from Commonwealth Attorney-General's Legal Assistance Branch to the Committee dated 9 February 2004

2.14 The Government's introduction in 1996 of the Commonwealth/State funding dichotomy was intended to move funding responsibilities to the jurisdiction within which a matter arose. The Commonwealth would only fund matters arising under Commonwealth law, whilst the States and Territories would fund matters arising under their laws. Prior to 1996 the Commonwealth made a proportionately greater contribution to legal aid than the States and Territories, since that time this has been reversed, as the following figure shows.

Figure 1.4 – State vs Commonwealth funding of legal aid



Source: Based on figures from National Legal Aid website, accessed 10 March 2004: http://www.nla.aust.net.au

Differences in Commonwealth funding to each State and Territory

2.15 Funding between the state and territory LACs is currently distributed under a 1999 funding model that was based on research conducted by John Walker Consulting Services and Rush Social Research. Submissions from each state and territory LAC lamented that there is an insufficient level of Commonwealth funding.[11] Some commissions also commented on the model used (discussed in more detail in the next section) and the inequality of Commonwealth related legal aid services that are available to citizens in each state and territory.

2.16 Legal Aid Western Australia argued that in per capita terms, 25% fewer people obtain legal representation to resolve a family law matter in Western Australia than do the national average.[12] It also noted that Western Australia is the lowest funded state or territory on a per capita basis, and as a result has the highest refusal rate on applications received.[13] It also pointed out that in real terms, per capita Commonwealth funding to Western Australia has decreased by 28% over the last ten years.[14]

2.17 The Victorian Department of Justice explained that in 2003/04 NSW can expect to receive 50% more funding than Victoria, despite only having a 36% greater population, and that Victoria can expect only 8% more funding than Queensland, despite the fact that Victoria has 31% more people.[15]

2.18 Victoria Legal Aid commented that in addition to different funding levels, the different practices of each Commission (in relation to debt recovery and in the way they apply the Commonwealth guidelines) can mean that citizens in each state and territory face unequal chances of receiving Commonwealth related legal aid:

> Victoria Legal Aid has a very strong capacity to fund family law matters, whereas other states, such as Western Australia and Tasmania, on a regular basis have to say to applicants for aid for family law matters: 'I'm sorry. Your application meets the means test, the merits test and the guidelines test, but we just do not have the money to fund you.' So if you are a Victorian with a family law matter you are in luck, but if you are in Western Australia you may well be in trouble.[16]

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11 Legal Aid Queensland, *Submission 31*, p.3; Legal Aid Commission of New South Wales, *Submission 91*, p.2; Legal Services Commission of South Australia, *Submission 51*, p.3; Legal Aid Western Australia, *Submission 44*, p.1; Northern Territory Legal Aid Commission, *Submission 82*, p.10.

12 Legal Aid Western Australia, *Submission 44*, p.1.

13 ibid.

14 ibid, p.3.

15 Department of Justice, Victoria, *Submission 97*, p.8.

16 Mr Tony Parsons, *Committee Hansard*, 12 November 2003, p.32.

The funding model

2.19 There were substantial criticisms of the model used to distribute Commonwealth funds. The criticisms involved both in-principal objections to its assumptions and methodology as well as specific errors in its application.[17]

2.20 The Victorian Department of Justice and Victoria Legal Aid criticised three aspects of the model, as well as general factors: unmet need, the 'suppressed demand' factor and the 'average case cost' factor.

2.21 The first criticism was that the model was based on the number of applications to LACs and hence assessed met need and did not attempt to assess unmet need.[18]

2.22 The second criticism related to the 'suppressed demand' factor used in the model. The 'suppressed demand factor' seeks to account for reductions in demand for legal aid, as a result of publicity regarding a lack of available funds:

> The philosophy behind that weighting was that in 1995, 1996 and 1997 the publicity in some jurisdictions about the drastic cuts to legal aid was so severe that the demand for legal aid in some jurisdictions was suppressed. It was an entirely speculative exercise that that was the case. To apply a demand suppression factor to only three of the eight jurisdictions was also entirely speculative and to apply the weighting according to 10 per cent was entirely speculative.[19]

2.23 A representative of the Attorney-General's Department explained the 'suppression factor' in the following way:

> I think it could be described this way: due to publicity about levels of legal aid, people may not have been making applications for legal aid in anticipation that they would not be successful. A suppression factor was built into the model to increase anticipated demand. It was adding in so you could anticipate that without that suppression factor more applications would have been coming in some jurisdictions.[20]

2.24 The third criticism made by the Victorian Department of Justice related to the 'average case cost' factor included in the model:

> The average case cost element beggars belief, in terms of its logical foundations. It runs according to this: if in a particular jurisdiction a legal aid commission has to pay a higher average case cost to buy the service for the legal aid applicant, then logically that commission can only afford to purchase fewer legal aid services. If a commission can only purchase fewer legal aid services it must have a lower level of demand, which therefore

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17 Department of Justice, Victoria, *Submission 97*, pp. 4-5.

18 Mr Tony Parsons, *Committee Hansard*, 12 November 2003, p. 33.

19 ibid.

20 Ms Philippa Lynch, *Committee Hansard*, 9 February 2004, p. 11.

> justifies lower levels of funding. That is the way the average case cost factor was applied in the 1999 funding formula, and it is a nonsense.[21]

2.25 In evidence, the Attorney-General's Department explained the 'average case cost' factor in the following terms:

> The cost per case factor was included because it was felt at the time that it reflected a significant inverse statistical correlation of the cost per case with demand for legal aid and as costs go up, depending on the cost per case, a legal aid commission would be able to meet less demand and that would have an ongoing impact on demand. The rationale for it is set out in the report of the model.[22]

2.26 Mr Tony Parsons, Managing Director of Victoria Legal Aid, argued that the model included substantial errors. He pointed out that where the model sought to include population figures of women, it erroneously included the population figures of men.[23] He also pointed out the population figure of people from non-English speaking backgrounds was not based on Australian Bureau of Statistics figures, and hence underestimated the population.[24] Victoria Legal Aid expressed concerns over the model and noted the reduced funding that Victoria had suffered as a result:

> We have contacted the creators of the model—Rush-Walker developed the model for the Commonwealth in 1999—and they have confirmed those errors. So in the last four years, the Commonwealth has distributed something like $450 million nationally for legal aid according to a flawed funding distribution formula. Victoria takes a very strong stance on this because Victoria was the great loser from that distribution model. In the last four years—the life of the agreement that was controlled by that funding distribution model—Western Australia's funding increased by 30 per cent, South Australia's by nearly 20 per cent, Queensland's by 33 per cent, New South Wales's by 62 per cent and Victoria's by zero per cent. So we have grave concerns about that model and we urge the Senate committee to seriously review its application.[25]

2.27 Victoria Legal Aid provided the Committee with a version of the Rush/Walker model with the following amendments (see Table 1.1):

- removal of the suppression and cost per case risk factors for 2003/04 funding;
- inclusion of 2001 Census Data for all states and territories in the relevant demographic field - state and territory populations by sex and age, non-

21 Mr Tony Parsons, *Committee Hansard*, 12 November 2003, p.33.

22 *Committee Hansard*, 9 February 2004, p.11.

23 Mr Tony Parsons, *Committee Hansard*, 12 November 2003, p.33.

24 ibid.

25 ibid, p.34.

English speaking background persons aged 10 and over and Aboriginal and Torres Strait Islander persons aged 10 and over;

- inclusion of new data for divorces involving children aged under 18 years for the 2001 calendar year; and
- inclusion of new data for the proportion of households earning less than $300 per week.[26]

Table 1.1 – Original Rush-Walker funding model compared to 'updated' model for 2002-03 and 2003-04

Distribution of Commonwealth Funding for the two years to 30 June 2004 based on the original Rush-Walker funding model					**Calculated Distribution of Commonwealth Funding for the two years to 30 June 2004 based on the updated Rush-Walker funding model**				
State	2002-03		2003-04		State	2002-03		2003-04	
	$m	%	$m	%		$m	%	$m	%*
NSW	38.956	32.31%	41.574	32.87%	NSW	32.699	27.12% (-5.19)	34.302	27.12% (-5.75)
Vic	27.75	23.02%	27.75	21.94%	Vic	29.648	24.59% (1.57)	31.102	24.59% (2.65)
Qld	23.709	19.66%	25.612	20.25%	Qld	24.801	20.57% (0.91)	26.017	20.57% (0.32)
SA	10.351	8.59%	10.802	8.54%	SA	12.286	10.19% (1.6)	12.889	10.19% (1.65)
WA	10.486	8.70%	11.232	8.88%	WA	12.684	10.52% (1.82)	13.306	10.52%(1.64)
Tas	3.88	3.22%	3.934	3.11%	Tas	3.569	2.96% (-0.26)	3.744	2.96% (-0.15)
ACT	3.104	2.57%	3.137	2.48%	ACT	3.448	2.86% (0.29)	3.617	2.86% (0.38)
NT	2.334	1.94%	2.441	1.93%	NT	1.435	1.19%(-0.75)	1.505	1.19% (-0.74)
Total	120.57	100.00%	126.482	100.00%	Total	120.57	100.00%	126.482	100.00%
					* Same Percentage Values used as for 2002-03 Data				

Source: Victoria Legal Aid, *Submission 97B,* Attachment 1, p.2.

2.28 If the model were to be subjected to the changes outlined above, the dramatic changes in funding that would occur are a considerable reduction of funding to New

26 Victoria Legal Aid, *Submission 97B,* Attachment 1, p.2.

South Wales, a reduction in funding to Northern Territory, and an increase in funding to Victoria.

2.29 However it was not this model that Victoria Legal Aid put forward as its preferred model.

The Commonwealth Grants Commission model

2.30 Mr Parsons on behalf of Victoria Legal Aid suggested that the current funding model should be replaced with a Commonwealth Grants Commission model. He pointed out that the Commonwealth Grants Commission had developed a simple model in conjunction with the Attorney-General's Department and National Legal Aid.[27]

2.31 Victoria Legal Aid gave the Committee a copy of this model which is shown below at Table 1.2. The basis for this model is different from the Rush-Walker Model, in that it does not rely on LAC data, but bases its calculations on Grants Commission assessment methods and relativity factors relating to (amongst other things) the relative cost of delivering legal services in each state and territory.[28]

2.32 The most obvious difference between the current funding model (or even the amended one provided by Victorian Legal Aid) and this 'Grants Commission' model is the funding to the Northern Territory and the ACT, which would receive dramatically less funding under the Grants Commission model.

2.33 Victoria Legal Aid explained that the Commonwealth has been provided with all the work that Victoria Legal Aid and National Legal Aid have done in relation to developing a new model. Mr Parsons also told the Committee that the Commonwealth had committed to having discussions with the LACs before the end of 2003, before the new funding agreements are due to be signed off by the end of the financial year 2003-04.[29]

2.34 Victoria Legal Aid's criticisms of the model were echoed by the Legal Aid Commission of New South Wales, who also commented on the fact that the model does not account for unmet legal need. It also confirmed it had consulted with the Commonwealth about their concerns with the model:

> [W]e are talking with the Commonwealth, but not so much about the details of the model because, to be perfectly honest, they are all flawed. The Commonwealth Grants Commission have done some great work for us, but their work is not definitive either. The real problem with all of that is: there is no way at the moment you can get an accurate gauge of legal need;

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27 Mr Tony Parsons, *Committee Hansard*, 12 November 2003, p.35.

28 For further detail on the basis for the 'Grants Commission' model, see Victoria Legal Aid, *Submission 97B*.

29 Mr Tony Parsons, *Committee Hansard*, 12 November 2003, p.41.

therefore you cannot factor that very important point into these formulas—because we simply do not know how to measure legal need or unmet need at the moment. That is the difficulty.[30]

Table 1.2 – A Commonwealth legal aid funding model based on Commonwealth Grants Commission assessment methods, and application of estimated state relativities to an illustrative 2002-03 funding pool

	NSW	Vic	Qld	WA	SA	Tas	ACT	NT	Aust
General legal aid expenditure component (99.9%)									
2000-01 input costs factor (a)	1.01355	0.99773	0.98285	1.00804	0.98190	0.98243	1.01549	0.99924	1.00000
Dispersion factor (b)	0.99936	0.99525	1.00278	1.00694	0.99755	1.00770	0.98567	1.04242	1.00000
Cross border factor (c)	0.99304	1.00000	1.00000	1.00000	1.00000	1.00000	1.13985	1.00000	1.00000
Low income socio-demographic composition factor (d)	0.98405	0.97364	1.05089	0.94433	1.13019	1.18670	0.64655	0.85119	1.00000
Component factor (e)	0.99171	0.96868	1.03775	0.96039	1.10917	1.17710	0.73908	0.88834	1.00000
Contribution to relativity (f)	0.99072	0.96771	1.03671	0.95943	1.10806	1.17592	0.73834	0.88745	
Isolation related expenditure component (0.1%)									
2000-01 isolation factor (g)	0.00000	0.00000	0.00000	0.00000	0.00000	0.00000	0.00000	98.10726	1.00000
Component factor (h)	0.00000	0.00000	0.00000	0.00000	0.00000	0.00000	0.00000	98.10726	1.00000
Contribution to relativity (f)	0.00000	0.00000	0.00000	0.00000	0.00000	0.00000	0.00000	0.09811	
State relativity (i)	**0.99072**	**0.96771**	**1.03671**	**0.95943**	**1.10806**	**1.17592**	**0.73834**	**0.98556**	**1.00000**
Estimated State funding ($m) (j)	**40.28**	**29.06**	**23.33**	**11.39**	**10.40**	**3.46**	**1.44**	**1.21**	**120.57**

(a) Sourced from CGC 2002 Update Working Papers (Vol. 4) for Administration of Justice assessments. Assumes wages account for 60 per cent of expenditure assessed in 'General legal aid expenditure' component.

(b) Sourced from CGC 2002 Update Working Papers (Vol. 4) for Administration of Justice assessments. Based on ABS 1996 Census data.

(c) Sourced from CGC 2002 Update Working Papers (Vol. 4) for Administration of Justice assessments. Based on ABS 1996 Census data.

(d) For each State, factor based on the proportion of low income persons (of all ages) in the 1996 Census population, as set out in CGC 1999 Review Working Papers (Vol. 3) for major factor assessments. In the 1999 Review, the CGC defined low income persons as those living in family households with an annual income of less than $26 000 or in single person households with an annual income of less than $15 600. Data sourced from ABS 1996 Census of Population and Housing.

(e) For each State, derived by multiplying the factors at (a), (b), (c) and (d), and then rebasing the product using 2000-01 Mean Resident Populations to ensure the factor for Australia is 1.00000.

(f) For each State, component factor multiplied by the relevant component weight (99.9 per cent or 0.1 pert cent).

(g) Based on professional infrastructure isolation assessments as set out in CGC 2002 Update Working Papers (vol. 3) for major factor assessments.

(h) Identical to factor at (f) as based on 2000-01 Mena Resident Populations.

(i) For each State, the sum of the two weighted component factors (the contribution to relativity rows) at (f).

(j) Estimated State relativities applied to illustrative 2002-03 legal aid funding pool of $120.57 million.

30 Mr William Grant, *Committee Hansard*, 13 November, 2003, p.12.

Source: Victoria Legal Aid, *Submission 97B*, p.4, based on Commonwealth Grants Commission 2002 Update and 1999 Review Working Papers; ABS *Legal Services Industry*, Cat 8667.0, 1998-99.

2.35 The Attorney-General's Department confirmed that it is aware of some errors in the model, and that it has been reviewing the model in consultation with the Commonwealth Grants Commission and the Legal Aid Commissions:

> In addition to the cost per case factor and the suppression factor there were issues discussed in the course of the review about whether the model should use actual rather than projected population statistics. There were issues raised about whether it was a demand driven model or a need driven model. There were also issues raised about the use of Commonwealth Grants Commission factors and indices, which I understand have since been changed. I think there were comments made about the risk factors that were used in the model at the time. There were also what might be described as technical criticisms of the methodology that was used, on a more econometric basis.
>
> …
>
> …we have been discussing those concerns with the Commonwealth Grants Commission staff in the course of the review and we have put a number of reworked models back to the commission for comment along the way.[31]

2.36 Victoria Legal Aid explained that a serious impediment in finding consensus in consultations between the Commonwealth and the Legal Aid Commissions is that in any change to the formula there will be winners and losers:

> National Legal Aid will never reach a unanimous view on a funding distribution model, because a funding distribution model is always going to involve winners and losers. No-one wants to go to their board and say, 'I have just agreed to a model that is going to reduce the funding of our state legal aid commission—and here is my resignation.' We rely on the Commonwealth to show leadership in this area. We want them to show leadership by adopting a model based on solid empirical data; not the smoke and mirrors of the Rush-Walker model of 1999.[32]

2.37 The Attorney-General's Department told the Committee that it was preparing a report of the review of the model for the Attorney-General, and that a decision as to whether the model will be changed is a decision that will be made by Government.[33]

Committee view

2.38 The Committee is concerned by evidence that the model the Commonwealth currently uses to distribute funding between states and territories contains errors and does not account for unmet legal need.

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31 Ms Philippa Lynch, *Committee Hansard*, 9 February 2004, p.12.

32 Mr Tony Parsons, *Committee Hansard*, 12 November 2003, p.41.

33 *Committee Hansard*, 9 February 2004, p.13.

2.39 The Attorney-General's Department has confirmed some of the errors pointed out by the Victorian Department of Justice. A separate issue is the methods or factors used in the model such as the 'suppressed demand factor' and the 'average case cost factor'. Both of these factors appear to be arbitrary and without sufficient foundation.

2.40 The Committee notes that the Commonwealth Grants Commission has developed a basic alternative funding model that utilises Commonwealth Grants assessment methods. Whilst the Committee acknowledges that the Grants Commission model accounts for the relative costs of delivering legal services in each State and Territory, the Committee believes that a funding model should account for the levels of demand and need for legal services in each state and territory. For example, the Committee is not satisfied that the simple 'Grants Commission Model' supplied by Victoria Legal Aid sufficiently takes into account the specific challenges faced in the Northern Territory, particularly amongst Indigenous Australians. The Committee believes that a new funding model based on the Grants Commission model would be appropriate if it were adjusted to acknowledge the special challenges faced by the Northern Territory in providing legal services and access to justice in light of its high Indigenous population and remoteness. These issues are discussed further in Chapter 5.

2.41 The Committee is concerned that the current funding model (as well as the 'Grants Commission model') does not account for unmet need for legal services. The Committee notes that the Law and Justice Foundation of NSW is conducting an assessment of legal need in that State, and commends this. At the time of writing, Stage 2 of that assessment had just been released, which involved a quantitative legal needs survey for disadvantaged people in NSW.[34] These issues are discussed in more detail in Chapter 3.

2.42 Clearly the unmet need for legal aid cannot be included in the funding model until an assessment of unmet need has been made. Assessing the level of unmet need for legal aid in Australia is clearly a priority if the Commonwealth is to be able to develop a funding model that optimises the level of access to justice for all Australians.

2.43 The Committee notes that the Attorney-General's Department is reviewing the current funding model in consultation with the LACs. The Committee also notes that the Government's 2004-05 Budget proposes to increase Commonwealth funding for legal aid by $52.7 million over four years. The Portfolio Budget Statements 2004-05 for the Attorney-General's portfolio notes that this increase will enable 'redistribution of legal aid funds across jurisdictions to meet demographic changes'.[35]

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34 *Access to Justice and Legal Needs, Stage 2: Quantitative Legal Needs Survey, Bega Valley (Pilot)*. Law and Justice Foundation of New South Wales. November 2003.

35 *Portfolio Budget Statements 2004-05, Attorney General's Portfolio*, Budget Related Paper No.1.2, p. 29.

2.44 The Committee supports increasing Commonwealth funding for legal aid, however it is not clear how 'demographic changes' will be determined, and as a result it is unclear on what basis the increased funding will be redistributed. The Committee is concerned that despite an increase in funding, there does not appear to be provision for an assessment of unmet need in each state and territory.

2.45 The Committee believes that a new funding model needs to be developed to ensure that increases in Commonwealth funding to legal aid are distributed in an equitable and effective manner. As part of developing a new model, the Committee recommends that the Government undertake or commission an assessment of both demand for legal aid services and unmet need in relation to legal aid (discussed further in Chapter 3).

Recommendation 1

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

Recommendation 2

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

Application of Priorities and Guidelines

2.48 The Commonwealth Priorities and Guidelines are set out in the legal aid funding agreements between the Commonwealth and each state and territory. The Commonwealth's "Priorities" outline the broad areas which should be given priority in using Commonwealth funds and are contained in Schedule 2 of the funding agreements.

2.49 The "Guidelines" are the tests that are to be applied by Commissions when assessing legal aid applicants for Commonwealth related matters. They are contained in Schedule 3 of the agreements and are made up of four parts. Part 1 contains the 'means' and 'merits' tests that are to be applied to applicants, and parts 2-4 identify the types of family, criminal and civil matters for which Commonwealth funds may be granted.

2.50 Various comments were made in submissions and evidence about the different way that these priorities and guidelines are implemented in states and territories.

The means test

2.51 The 'means test' set out in the guidelines assesses an applicant's assessable income and assets. Applicants must qualify on both aspects, but if either is exceeded, a grant may be made if the applicant makes a contribution.[36]

2.52 There are two types of means test that can be used in assessing applicants for legal aid. These are the National Legal Aid Means Test and the Simplified Legal Aid Means Test. The two tests have the same assets test component, but assess income in a different way. The Simplified Legal Aid Means Test varies from the National Legal Aid Means Test in that it uses a formula that takes into account the number of dependant persons in the applicant's household as well as the employment status of the applicant and partner (if applicable).[37]

2.53 Currently, all LACs except Queensland and Tasmania use the National Means Test. The Attorney-General's Department noted that the Commonwealth preferred the use of the Simplified Means Test because it considers it easier to administer than the National Means Test, and therefore more cost efficient.[38] The Committee did not receive evidence from the LACs on the two tests.

2.54 In relation to the means test, National Legal Aid argued that many people who presently do not qualify for legal aid are unable to afford the services of private lawyers to conduct their cases, or are unable do so without undue hardship.[39]

2.55 National Legal Aid argued that Commonwealth funding should be increased to allow the means test to be adjusted to improve access to legal aid for those unable to afford private representation.[40] It also noted that it had recently commissioned research by Griffith University which indicated that there was a relationship between the level at which the means test was set and self-representation in the Family Court: 'It would not be unreasonable to speculate that the situations identified in this research are likely to be paralleled in other areas of the law.'[41]

2.56 A submission from Professor Rosemary Hunter and Associate Professor Jeff Giddings of Griffith University, who conducted the research commissioned by National Legal Aid, noted that their research showed a significant income difference between those who met the means test and those who were able to afford private

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36 Attorney-General's Department, *Submission 78*, pp. 4-5.

37 Attorney-General's Department, *Submission 78*, p. 4.

38 Attorney-General's Department, *Submission 78F*, p. 2.

39 National Legal Aid, *Submission 81*, p. 11.

40 ibid.

41 ibid. The research referred to is R Hunter, J Giddings & A Chrzanowski, *Legal Aid and Self-Representation in the Family Court of Australia,* Social Legal Research Centre, School of Law, Griffith University, May 2003.

representation.[42] Those eligible for legal aid earned less than $25,000 p.a. after tax, yet people only became able to afford private representation once they earned over $45,000 p.a. after tax. Professor Hunter and Associate Professor Giddings noted that those between these income levels may have had financial commitments that were not taken into account in the income test. They also pointed out that low income people often met the income test but failed the assets test, despite not having access to those assets being assessed.[43]

2.57 The Hon. Justice Alastair Nicholson, Chief Justice of the Family Court, also referred to this gap:

> There is undoubtedly a gap, if you like, between qualification for legal aid and the ability to fund your own legal proceedings. Too many people fall into that gap… A lot of these people have no hope of being able to pay for legal expenses, yet the means test is set at such a level that they are excluded.[44]

2.58 The Welfare Rights Centre argued that this issue was particularly relevant to low income defendants in welfare fraud prosecutions, who may have no income other than welfare, but may own their family home, and hence fail the assets test:

> There should be no regard to the value of their principal home, if the person is on low income. A classic example is someone [who] is on a disability support pension and all they have is their principal home, who is charged with an offence in relation to a $20,000 social security debt. There should be accessible legal aid for that person, because they are not going to get legal representation anywhere else. A disability support pension recipient may have an intellectual, psychiatric disability or a brain injury that may be slightly relevant in that person having incurred the debt in the first place and also highly relevant in them not having chosen to access admin review of the debt before it got to that point.[45]

2.59 The Welfare Rights Centre explained that in NSW a person's equity in his or her own home is disregarded up to $195,200. In non-criminal matters the Commission is given the discretion to disregard a person's home equity, however for criminal matters there is no such discretion.[46] The Welfare Rights Centre argued that for criminal matters the means test for low income earners or those on social security should be disregarded and for non-criminal matters the threshold at which home value is considered should be raised significantly.[47]

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42 *Submission 24*, p.4.

43 ibid.

44 *Committee Hansard*, 10 March 2004, p. 5.

45 Ms Linda Forbes, *Committee Hansard*, 13 November 2003, p. 73.

46 Welfare Rights Centre, *Submission 55*, p. 3.

47 ibid.

2.60 Professor Hunter and Associate Professor Giddings submitted that their research suggests a correlation between the application of the means test (particularly the assets test) and increasing levels of self-representation.[48] They suggested three reforms to the means test which they argue would reduce the levels of self representation in the Family Court:

> These are:
>
> > 1. take into account the question of whether the litigant has realistic access to assessable assets
> >
> > 2. take into account previous attempts to pay for private legal representation and existing debts to previous legal representatives
> >
> > 3. extend eligibility to include a higher proportion of clients earning less than $30,000 after tax.[49]

2.61 However, if the means tests used by the LACs were modified in such a way without increasing funding, it may simply lead to a more stringent application of the merits test, as the Northern Territory Legal Aid Commission noted:

> Without a substantial increase in funding, the NTLAC is unable to increase the means test to enable more people to qualify for legal aid. If the means test limits were to be increased on existing funding, the NTLAC would have no choice but to read the merits test more narrowly to exclude enough applicants for the NTLAC to remain within budget. The number of self-represented litigants would therefore not be reduced but would simply be caused by other reasons.[50]

The merits test

2.62 The 'merits test' essentially comprises three elements:

- a legal and factual merits test;
- a prudent self funding litigant test; and
- an appropriateness of spending limited public funds test.[51]

2.63 The legal and factual merits test looks at whether the applicant has a reasonable prospect of success. The prudent self funding litigant test is met if the Commission considers that a prudent self funding litigant would risk their own funds in the

48 *Submission 24*, p.4.

49 *Submission 24*, p.5.

50 Northern Territory Legal Aid Commission, *Submission 82*, p.15.

51 Attorney-General's Department, *Submission 78*, p.4.

proceedings. The final element of the test is whether the Commission considers the costs involved are warranted by the likely benefit to the applicant or the community.[52]

2.64 The Committee heard various arguments that the elements of the merits test are substantially subjective. The Legal Aid Commission of NSW argued that the 'prudent self funding litigant' test should be abolished, on the grounds that it is subjective, ambiguous, and difficult to apply in a transparent manner.[53]

2.65 The difficulty in applying such a subjective test was echoed by the Combined Community Legal Centres Group of NSW (CCLCG). In regards to the 'prudent self funding litigant' test, Mr Simon Moran explained:

> Your guess is as good as mine as to what that means. We have ideas and ways of addressing the commission which we feel deal with that. Then there is this kind of catch-all test at the end, which is whether the case is an appropriate spending of limited public legal aid funds. Again, this leads to a sense of arbitrariness with the provision of legal aid, which does not assist clients or, particularly, solicitors when they are considering acting on a legal aid basis. That has led to an increase of those issues regarding eligibility. We have sensed their increase over the last five to seven years, and that has had an impact on community legal centres as well as other legal service providers.[54]

2.66 There were also concerns raised regarding the 'appropriateness of spending limited public funds test'. The CCLCG gave an example to illustrate the subjective or discretionary nature of the test:

> The [case was] a disability discrimination case that was brought by a man who had a disability and who could only have accessed the town centre using his wheelchair. He could not access the town centre as a result of various problems with footpaths, with paving and with access on and off buses. So he considered bringing a complaint of disability discrimination against the town council on the basis that he could not access the premises—the premises being the footpaths. We applied for legal aid there. Essentially Legal Aid said, 'It's going to cost too much to run; we can't fund this case,' even though that person fitted into the means test and there were reasonable prospects of success.[55]

2.67 There was concern that the merits test is applied in different ways between states and territories.[56] Quoting research by Griffith University,[57] National Legal Aid stated in its submission:

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52 Attorney-General's Department, *Submission 78* (Attachment), p.6 (see Schedule 3 of the Commonwealth's Legal Aid Guidelines).

53 Legal Aid Commission of NSW, *Submission 91*, p.27.

54 Mr Simon Moran, *Committee Hansard*, 13 November 2003, p.30.

55 ibid, p.33.

56 National Legal Aid, *Submission 81*, p.13.

> Amongst our concerns has been parity of eligibility across LACs. In this regard the report which states 'There were evident differences between Registries in both relative success rates in legal aid applications, and the reasons why applications were unsuccessful. These differences appear to reflect the respective family law funding positions of the Legal Aid Commissions. In Brisbane, where demand for family law legal aid funding considerably exceeds the available supply, applicants were more likely to be unsuccessful, and applications were more likely to be rejected on the basis of merits. In Melbourne, where the reverse situation applies, applicants were more likely to be wholly successful, and the applications were more likely to be rejected on the basis of means. In Canberra, and Perth, which fall somewhere in between, applications are more likely to be successful.'[58]

2.68 Legal Aid Queensland confirmed that the different application of the guidelines was due to different levels of available funds in each commission:

> Legal Aid Queensland applies the merit test with great rigour and reads it more expansively than do other legal aid commissions. This is due to the funding shortfall requiring funding constraints in the granting of legal aid for family law applications.[59]

Committee view

2.69 The Committee's *Third Report* noted that under the National Means Test the various jurisdictions were allowed to set different monetary limits to items allowed under the test. The Committee noted that this was to cater for both inter and intra-jurisdictional differences in economic conditions. Whilst the Committee noted that it did not oppose such variations in the means test levels if they were necessary in order to achieve equitable outcomes in the light of differing economic conditions, the Committee opposed such variations if based on inadequate provision of legal aid funds by governments.[60]

2.70 The Committee recommended that the Commonwealth Government ensure that the means test income and asset levels were set at the same amounts for all parts of Australia, unless regional variations could be shown to be justified by differing economic conditions. The Committee also recommended that the Government conduct a review of the appropriateness of the means test levels that currently apply.[61]

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57 R Hunter, J Giddings & A Chrzanowski, *Legal Aid and Self-Representation in the Family Court of Australia,* Social Legal Research Centre, School of Law, Griffith University, May 2003. p.iii.

58 National Legal Aid, *Submission 81*, p.13.

59 Legal Aid Queensland, *Submission 31*, p.13.

60 *Third Report*, p.64

61 *Third Report, Recommendation 8*, p.65.

2.71 The Government responded that it was unaware of any evidence that the legal aid commissions tighten the means test to limit eligible applications for assistance, and as a result it did not consider a review of the means tests was necessary. It also noted that the Commonwealth preferred the use of the Simplified Means Test.[62]

2.72 Regardless of whether legal aid commissions are using the means or merits test in order to limit applications by otherwise eligible applicants for budgetary reasons, the Committee is genuinely concerned by evidence that there is a considerable gap between those who qualify for assistance, and those who are able to afford private representation.

2.73 The Committee acknowledges that in many states, particularly New South Wales, the means test appears to place a large obstacle for many home owners. The Committee is concerned by evidence given by the Welfare Rights Centre that many of its clients, particularly those with intellectual disabilities, are stopped from accessing legal aid due to their levels of home equity, despite having a very low income or being reliant on social security.

2.74 The Committee is also concerned by comments from Professors Hunter and Giddings, as well as the Chief Justice of the Family Court, that there is a considerable gap between those eligible to receive legal aid, and those who are actually able to afford private representation.

2.75 However, the Committee is also aware that if the means tests are made too liberal, then Commissions may simply be forced to rely on arbitrary application of the merits test in order to distribute limited resources.

2.76 The Committee acknowledges the recommendations made by the Welfare Rights Centre and Professors Hunter and Giddings. The Committee believes that LACs should conduct an assessment of current applications, and consider what the increase in successful applications would be if those recommendations were implemented. This is necessary to be able to assess the increase in demand these changes would place on current legal aid resources.

Recommendation 3

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

(a) extend eligibility to those earning less than $30,000 after tax; and

62 *Government Response to the Senate Legal and Constitutional References Committee Inquiry into the Australian Legal Aid System*, 3rd Report. p.9.

(b) in criminal matters, where a person passes the income test, disregard home equity.

Breakdown of funding by type of matter: criminal, family and civil

2.78 The Committee's *Third Report* noted that there had been concern that the Commonwealth Guidelines may cause criminal matters to be funded at the expense of family matters, and that both criminal and family matters may be funded at the expense of civil matters.[63] However the Committee noted that there was no support for a strict hierarchy in the Guidelines to ensure a particular distribution across the various types of matters, as the result may be that the system is too rigid.[64]

2.79 The Committee heard arguments that the funding priorities and guidelines favour criminal matters over family law matters (see further in Chapter 4). The Committee also heard that there are serious deficiencies in the level of legal aid available for civil matters as a result of the Commonwealth funding guidelines.

2.80 The Victorian Department of Justice explained that following the Commonwealth funding cuts and the introduction of the Commonwealth Priorities and Guidelines in 1997, funding for civil matters was almost abolished:

> The impact for Victoria was severe. It included the almost complete abolition of legal aid for civil matters so that now grants of legal aid are very rarely made for matters such as discrimination, consumer protection, tenancy law, social security law, contract law and personal injuries. Some of those matters have been picked up by the private profession on a 'no win, no fee' basis, but substantial areas of law, particularly poverty related law, have not been picked up.[65]

2.81 A similar assessment was provided by the Legal Services Commission of South Australia:

> There are major gaps in legal service available to the South Australian community. No legal representation is funded for any civil disputation—for example, householders versus builders, car dealers and insurance companies.[66]

2.82 Ms Zoe Rathus on behalf of the National Network of Women's Legal Services (NNWLS) also noted that funding to civil matters had resulted in a drought of services:

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63 *Third Report,* para 4.7, p.56.

64 *Third Report*, para 4.7 – 4.11, pp. 56-57.

65 Victorian Department of Justice, *Committee Hansard*, p. 32.

66 *Committee Hansard*, 11 November 2003, p. 11.

> I want to start by reminding the committee of the number of areas of law that are simply not covered anymore by legal aid and the concern amongst community legal centres generally that there are areas of law where people can say, 'There's no legal aid for that.' There seems to be a full stop, particularly in areas such as immigration law and large areas of civil law for which legal aid is simply not available anymore. We do not consider it acceptable for those kinds of areas to exist.[67]

2.83 Whilst the news from LACs was bleak in relation to the effect of the Commonwealth Guidelines on assistance in civil matters, there was praise for the way that NSW Legal Aid was providing assistance in civil matters:

> The Legal Aid Commission of New South Wales has a very innovative, very highly skilled inhouse civil law program. Our experience as community legal centres is that they are very highly skilled. They are very good at their job, and they have specialist skills that other solicitors do not have. I believe that is the only in-house civil unit in Australia, and it has been shown in New South Wales to be very valuable. I think other commissions throughout Australia would be wise to adopt a similar model.[68]

2.84 Despite the effectiveness of the civil unit administered by NSW Legal Aid, the Committee heard that there is still substantial unserviced demand for civil assistance in NSW, particularly in regional areas:

> We see clients who have problems with civil law, although New South Wales is one of the better states in its civil law funding. We find that there is a huge demand for legal assistance in employment law, particularly in the Blue Mountains, which is a tourist area and has a lot of parttime work and employment of young people in under award situations. We are finding that, with that, a deunionised work force and an increase in Australian workplace agreements, we are getting a lot of demand in the complex area of employment law. Our region needs either our centre or Legal Aid to fund an employment lawyer and possibly a discrimination lawyer as well.[69]

2.85 The Committee heard that Commonwealth funding for representation in Administrative Appeals Tribunal (AAT) matters is limited to certain areas. The Committee also heard that without free assistance in the non-cost jurisdictions of the AAT, many people will not proceed, as the costs will often outweigh the award. The Law Council of Australia explained that in the non-cost jurisdiction of the AAT, up to a third of people are unrepresented:

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67 *Committee Hansard*, 10 March 2004, p. 9.

68 Mr Simon Moran, CCLCG, *Committee Hansard*, 13 November 2003, p. 29.

69 Mr Crozier, Blue Mountains Community Legal Centre, *Committee Hansard*, 13 November 2003, p. 94.

> … that is a lot of people. It is important to those people because they are often disputing employment problems or welfare problems and so on…. [70]

2.86 The Law Council of Australia argued that the solution, apart from increasing funding, is to relax the guidelines in relation to civil matters. [71]

2.87 Westside Community Lawyers suggested that another way to remedy the lack of legal aid for assistance and representation in civil matters was to provide duty solicitors for such matters and noted that a pilot study into such a service was being conducted with final year university students in the Adelaide civil registry.[72]

Committee view

2.88 The Committee is concerned that the Commonwealth Priorities and Guidelines deny adequate assistance in family and civil matters.

2.89 Whilst the Committee acknowledges the importance of representation in criminal matters, the Committee believes that adequate funding should be provided to legal aid such that less restrictive guidelines may be introduced.

2.90 The Committee is particularly concerned that adequate legal aid is not available to those appearing before the Commonwealth AAT, as a substantial proportion of such matters involve important issues such as employment and discrimination.

2.91 The Committee believes that a duty solicitor service should be available for the AAT.

Recommendation 4

2.92 The Committee recommends that the Commonwealth introduce a duty solicitor service for the Commonwealth Administrative Appeals Tribunal.

Specialist legal services

2.93 One way to ensure that traditionally neglected types of matters receive a minimum level of service is through the funding of specialist legal services. The Committee received evidence in relation to the Commonwealth funding of two particular services:

- the Environmental Defenders Offices; and
- an argument that the Commonwealth should create and fund a forensic science institute to provide services to defendants.

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70 Mr North, Law Council of Australia, *Committee Hansard*, 9 February 2004, p.50.

71 ibid.

72 Mr Bulloch, Westside Community Lawyers, *Committee Hansard*, 11 November 2003, p.43.

Environmental Defenders Office

2.94 The Environmental Defenders Office (EDO) was established to ensure there were legal services representing public interest environmental law. The EDO ensures that where a member of the public seeks to advocate an issue that is of environmental public interest (and as a result may be unable or not prepared to fund it themselves) the matter is accorded the necessary legal services.

2.95 In terms of Commonwealth funding, the EDOs are restricted from using their funding for litigation purposes. The Committee heard in its last inquiry that this restriction imposed a significant constraint on the EDO advocating to its full potential, and the Committee recommended that this restriction by the Commonwealth be removed.[73] Mr Mark Parnell on behalf of the EDO explained to the Committee the impact this restriction on Commonwealth funding had on them, and why it should be removed:

> To a certain extent, this inquiry today has an element of deja vu about it. It has very similar terms of reference to those of the inquiry back in 1997 and 1998, when the Senate last looked at this, and I am saying very similar things to what a colleague of mine said at that inquiry. We raised the issue of the litigation restriction. We made the point that it had no basis in policy and that it was politically motivated, and the Senate committee at that stage recommended that that condition be removed.
>
> …
>
> The only policy grounds for not letting us litigate with legal aid money seems to be the inherently political nature of environmental law. We are very often challenging the decisions of the executive. We are challenging decisions of statutory authorities and of ministers. We are challenging them on the merits and on legality. The view seems to be that public funds should not be used to challenge those sorts of decisions. The argument that I would put is that that is like saying that we should not publicly fund criminal defence work because it simply suggests that our law enforcement officers do not get it right sometimes and that there should be no public funds used for defence. It is exactly the same in relation to environmental law.[74]

2.96 Fitzroy Legal Service also argued that the litigation restriction that is placed on the Environmental Defenders Office should be removed.[75]

Commonwealth funding for a forensic science institute

2.97 Liberty Victoria advocated the need for the Commonwealth to establish an independent forensic science institute to assist in the defence of those defendants who are facing charges supported by forensic evidence. Their argument was that a lack of

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73 *Third Report*, para 4.7, p.155.

74 Mr Mark Parnell, *Committee Hansard*, 11 November, 2003. p.35-36.

75 Fitzroy Legal Service, *Submission 48*, p.22.

resources means that many defendants are unable to afford the necessary defence to face charges that are supported by forensic evidence.

> Our principal concern is that the field is heavily weighted against accused persons because they simply do not have access to either the scientific or legal resources to enable them to be, in a sense, playing on an even field. It is Liberty's submission that, very rapidly, steps need to be taken to correct this situation.
>
> Liberty Victoria submits that it is necessary for a discrete institute to be established for the use of accused persons and that, being a scientific institute, it should have resources somewhat equivalent to those now available to the prosecution authorities. At the present time, if accused persons wish to challenge the scientific evidence relied upon by the prosecution, they have to go looking in appeal to see if they can find qualified experts who are not associated with the prosecution. That is very difficult. As DNA evidence in particular becomes increasingly relied upon by the prosecution, that is going to become an even more significant problem for accused persons.[76]

2.98 Liberty Victoria proposed that if such an institute were created, it would be able to attend major crime scenes and offer an effective check to ensure that forensic evidence is collected and processed in a proper manner.[77]

Committee view

2.99 The Committee believes that although criminal matters appear to be funded at the expense of family matters and that both criminal and family matters are funded at the expense of civil matters, the Commonwealth Priorities and Guidelines should not be amended to mandate a particular distribution of funding between types of matter.

2.100 The Committee reiterates the point it made in the *Third Report* that whilst attention must be paid to how funds are distributed between matters, it would not be of benefit to have a rigid or inflexible set of priorities for the purposes of funding allocation.

2.101 The Committee was disappointed to hear that the EDO is still facing operational difficulties because of contractual restrictions in its funding agreement with the Commonwealth. The rationale for having a Commonwealth funded EDO is to ensure that the area of public interest environmental law, which would otherwise have little priority for receiving legal aid, is effectively advocated. For the EDO to be able to effectively advocate, it needs to have the freedom to choose how it uses its funding in relation to litigation.

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76 Mr Greg Connellan, *Committee Hansard*, 9 February 2004, pp. 1-2.

77 ibid, p. 4.

2.102 The Committee repeats its recommendation that the Commonwealth remove the restriction on the EDO from using Commonwealth funding for litigation purposes.

Recommendation 5

2.103 The Committee recommends that the Commonwealth remove the restriction on the Environmental Defenders Office from using Commonwealth funds for litigation purposes.

2.104 The Committee was interested in the suggestion by Liberty Victoria that a national institute for forensic science be established to ensure defendants have equal access to such science as the prosecution does. Consequently the Committee considers that the Government should support the establishment of such an institute.

2.105 The Committee notes, however, that whilst it supports the idea in principle, it does not believe the funding of such an institute should be done at the expense of further funding to legal aid generally.

Recommendation 6

2.106 The Committee recommends that the Government fund the establishment of a national forensics institute to provide forensic opinions for defendants in serious criminal matters facing forensic evidence.

'Law and order' legislation and increased demand for legal aid

2.107 The Committee heard from LACs that when state governments engage in 'law and order' campaigns, and introduce corresponding legislation, there is an increase in demand for legal aid.

2.108 The Legal Services Commission of South Australia explained in evidence that the recent law and order campaign in that state, which manifested itself in the form of stricter criminal trespass legislation, has lead to a steady increase in demand for legal aid.

> Our hypothesis is that as the law and order campaign takes effect and new legislation is brought in for serious criminal trespass, which has elevated the penalties imposed by the courts on people trespassing on people's property when they are present … the number of matters going to the district court has increased significantly, they are being contested hard and, because the emphasis is on longer sentencing, the sentencing submissions are being fought much harder. Our statistics have borne that out. We are getting the Office of Crime Statistics and Research to validate the research we have done. At the rate we are going, we have had to ask the government for $1 million more in the next financial year just to maintain the rate at which we are currently expending funds in the criminal jurisdiction.[78]

78 Mr Gilmore, *Committee Hansard*, 11 November 2003, p.14.

2.109 This view was supported by Victoria Legal Aid. Mr Tony Parsons noted that as a result of a road safety campaign there has been an increase of applications for legal aid for road safety matters that involve the risk of prison. These have included third offences, driving over the legal limit (0.05) and dangerous driving. He noted that Victoria Legal Aid had been fiscally compensated for this impact by the Victorian Government.[79]

2.110 Victoria Legal Aid was asked in evidence for its views on a 'legal aid impact statement' when legislation is introduced. Mr Parsons supported the idea:

> It is a very sensible proposal. Obviously legislation can have ripple effects and it is very important that those ripple effects be taken into account so that the needs can be best met.[80]

2.111 The Committee asked Victoria Legal Aid whether the Commonwealth had undertaken such an assessment or consultation with LACs. Mr Parsons noted that Commonwealth legislation has had an impact on legal aid demand, and gave the specific examples of changes to the Family Law Act, social security provisions and changes to the migration law.[81] He noted that LACs are generally well consulted by the Commonwealth on reviews of legislation and have the opportunity to respond to proposed legislative programs. Despite such consultations, when a legislative program does proceed, there is no corresponding compensation given by the Commonwealth, even where an impact on legal aid demand is identified.[82]

Committee view

2.112 The Committee believes that state and territory governments should pay specific attention to the impact on legal aid demand when developing proposed legislation. This consideration could either be in the form of including a 'legal aid impact statement' in the explanatory memorandum to legislation, or through consultations with LACs.

2.113 However, the Committee notes Victoria Legal Aid's comments that although the Commonwealth consults over such proposed legislation, there is no corresponding compensation when an increase in demand for legal aid services is identified.

2.114 The Committee believes that state and territory and the Commonwealth Government must take responsibility for increases in demand for legal aid that result from its new legislation, and provide supplementary funding for LACs accordingly.

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79 Mr Parsons, *Committee Hansard*, 12 November 2003, p. 42.

80 ibid.

81 ibid.

82 ibid.

Recommendation 7

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

Recommendation 8

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

The Commonwealth/State dichotomy

2.117 There was substantial 'in-principle' opposition to the Commonwealth/State funding dichotomy. In addition to the in-principle opposition, there were criticisms that the separation increased administration costs and resulted in an inefficient use of what funding was available for Commonwealth matters.

In-principle opposition

2.118 The Committee heard argument that the insistence of the Commonwealth that Commonwealth funds only be used for matters arising under Commonwealth laws was inefficient, and resulted in the Commonwealth failing to meet its obligations to those for whom it has special responsibility.[83]

2.119 The Law Institute of Victoria argued strongly against the dichotomy:

> The rule that Commonwealth funds may only be applied to Commonwealth matters is illogical and arbitrary in its operation. It is this rule that has resulted in the legal aid system failing so abjectly to meet the needs of the very people that it is supposed to serve. We adopt the position that this rule should be abolished and that VLA [Victoria Legal Aid] should be allowed to allocate legal aid funding according to need. It should be left to VLA to determine where the interests of justice require that legal aid be made available. Distinctions between Federal and State laws are historical anomalies that are meaningless for present purposes. The cynical adoption of this arbitrary distinction operates to diminish the standing of the administration of justice in the eyes of those who come into contact with it. To adopt these distinctions as a basis for withholding funding encourages obfuscation of the issues by allowing the Federal and State governments to shift responsibility for the gaps in the legal aid system.[84]

83 For example, Law Council of Australia, *Submission 62*, p.8.

84 Law Institute of Victoria, *Submission 88*, p.8-9.

2.120 There was a strong opposition to the dichotomy in submissions,[85] with no submissions supporting it.

Administration costs

2.121 Because the funding agreements first introduced in 1997 require that the LACs only use Commonwealth funds on matters arising under Commonwealth laws, the LACs are effectively required to maintain two sets of books.

2.122 Victorian Legal Aid explained that under the funding agreement they are permitted to, and do, spend five per cent of the Commonwealth allocation on administering the Commonwealth Priorities and Guidelines.

> The Commonwealth permits VLA to take five per cent of the annual Commonwealth funding to administer the Commonwealth's program in this state. We have provided them with financial data that indicates that that is about what it costs us to administer the Commonwealth program. A substantial part of that five per cent is having to effectively run two sets of books.[86]

2.123 The substantial administration costs that are created by maintaining separate accounts for funding was reinforced by the Legal Aid Commission of New South Wales, which explained they spend 4.5 per cent of their Commonwealth funding on administration.[87]

Inefficient use of Commonwealth funds

2.124 There was criticism that the restrictions imposed by the guidelines stopped commissions from using funds in matters that should rightly receive Commonwealth funding. The Legal Aid Commission of NSW argued that the restrictions imposed by the guidelines preclude those without dependant children from accessing aid in a property dispute. Furthermore the requirement that the applicant's equity in the matrimonial home be less than $100,000 precludes the vast majority of those in NSW from accessing legal aid:

> The range of family law areas, which LACNSW is permitted to undertake, is limited. Whilst it can undertake work in child-related matters including residence and contact, child support and certain maintenance areas, it is severely restricted in the types of property dispute matters it can undertake.
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> For example, Guideline 8.2 states that legal assistance for property matters may only be granted if the Commission has decided that it is appropriate for

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85 Queensland Legal Aid, *Submission 31*, p.17; South Australian Legal Services Commission, *Submission 51*, p.3.; National Legal Aid, *Submission 81*, p.9.; Northern Territory Legal Aid, *Submission 82*, p.9.; NSW Legal Aid, *Submission 91*, p.23.;Victoria Legal Aid, *Submission 97*, p.12.

86 Mr Tony Parsons, *Committee Hansard*, 12 November 2003, p.35.

87 Mr William Grant, *Committee Hansard*, 13 November 2003, p.5.

> assistance to be granted for other family law matters. The guidelines further state that legal assistance should not be granted if the only other matter is spouse maintenance, unless there is also a domestic violence issue involved.
>
> This guideline effectively precludes people who have not had children or whose children are adult, from obtaining a grant of aid. It also indirectly precludes aid for older people. This guideline is discriminatory and could be unlawfully so. If the guideline is changed as it should be, further funding will be required to support the likely increase in the number of cases which present.
>
> Another problem is that legal aid may only be granted in certain property disputes where the applicant's equity in the matrimonial property is valued at less than $100,000. Given real estate values in NSW, the effect of this restriction is to deprive many people who would otherwise be deserving of assistance.[88]

2.125 There was also criticism that Commonwealth funds were being applied inconsistently between each state and territory. The Victorian Department of Justice explained that as different Commissions apply the guidelines differently, and some engage in debt recovery processes that others do not, some LACs have scarce Commonwealth funds available whilst some have a surplus they are unable to use:

> The fact of the matter is that, in the course of the last five years, we have built up a $20 million-odd reserve of Commonwealth funds. I want to spend that money. You could never say that Legal Aid is meeting unmet legal need in the state of Victoria. The fact that the Commonwealth micromanage how we can spend their money means that we struggle to do that; we struggle to spend the money that we efficiently and rigorously collect from the community who can afford to repay it.[89]

2.126 Victoria Legal Aid explained that they regularly approach the Commonwealth for permission to use this surplus for matters that are arguably of Commonwealth responsibility, and are denied. When asked what the Commonwealth agreement said on the issue, Mr Parsons responded:

> That money is collected from clients who previously were given legal aid in Commonwealth law matters. So the money we have collected is identified as a Commonwealth asset in our bank account but the Commonwealth funding agreement says that we can only spend Commonwealth revenue on a limited range of Commonwealth law legal aid matters; that is, family law involving children and a very limited range of other matters—for example, veterans' affairs.[90]

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88 Legal Aid Commission of NSW, *Submission 91*, p.31.

89 Mr Tony Parsons, *Committee Hansard*, 12 November 2003, p.36.

90 ibid, p.37.

2.127 When asked whether Victoria Legal Aid had sought permission to spend this surplus, he responded that they had 'constantly and regularly' and were always refused.[91]

2.128 The South Australian Legal Aid Commission proposed a compromise which would allow a more flexible and efficient use of Commonwealth funds. It proposed that the Commonwealth allow legal aid commissions to use 5-10 per cent of funding for state matters.[92] This would stand as a compromise, as the Commonwealth's desire to retain Commonwealth funding for Commonwealth matters would be retained, but Commissions would have the flexibility of using 5-10 per cent of funding for matters that may exist in the grey area of the guidelines or may be of particular need.

Committee view

2.129 The Committee believes that the Commonwealth/State funding dichotomy is arbitrary as many legal matters do not fall neatly in either category. Making such an arbitrary distinction not only inhibits the effective servicing of legal needs, it creates unnecessary administration costs for legal aid commissions. The Committee is concerned by evidence from commissions that between 4 per cent and 5 per cent of Commonwealth funding is spent in administration costs. Clearly the overall administration costs for Commissions would be reduced if they were not required to maintain two separate accounts for funding.

2.130 The Committee is also concerned by evidence from Victoria Legal Aid that it has a surplus of Commonwealth funds, but is unable to use it on cases that may not fall clearly within the Commonwealth Guidelines.

2.131 The Committee believes that the Commonwealth/State funding dichotomy (ie the 'purchaser/provider' model) should be abolished, and funding should be returned to the co-operative funding arrangements that were in place prior to the creation of the dichotomy.

2.132 However, if the current funding arrangements are retained, the Committee supports the recommendation by the Legal Services Commission of South Australia that Legal Aid Commissions be given a discretion of 10 per cent of Commonwealth funding, to be used at the discretion of the LACs. This would allow them some flexibility in accounting for demands for service that may not fall clearly within the Commonwealth guidelines, but should rightly be serviced by Commonwealth funds.

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91 ibid.

92 *Submission 51*, p.6.

Recommendation 9

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

Recommendation 10

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

CHAPTER 3

DEMAND AND UNMET LEGAL NEED: THE LACK OF DATA

3.1 This chapter discusses:

- the current lack of data on the level of demand and unmet need for legal aid in Australia; and
- what data needs to be collected to facilitate an equitable and effective distribution of funding for legal aid.

The current lack of data

3.2 In the *Third Report* the Committee lamented the lack of, and deficiencies in, available data in relation to the need for legal aid in Australia.[1] The Committee recommended that:

- the Commonwealth continue to be a clearinghouse for, and publisher of, detailed information on the operation of all aspects of the Australian legal aid system, not just those it directly funds;
- the Commonwealth take steps to collect, analyse and publish more meaningful data on the impact of the changes on the legal aid system and on the continuing operation of the system. This data could be in a standardised form that enables comparisons between jurisdictions and over time; and
- the Attorney-General's Department examine in consultation with National Legal Aid and individual LACs about whether there was a continuing need for all the data contained in its Statistical Yearbooks on legal aid in Australia to be collected and published.[2]

3.3 The Government's response was that National Legal Aid had indicated:

> … that it would like to have a shared role in the management of the national data collection. Accordingly, the Government has authorised the Attorney-General's Department to discuss with National Legal Aid options for a cooperatively managed national legal aid data warehouse."[3]

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1 *Third Report*, para 2.3, p.13.

2 *Third Report*, Recommendation 1, p.23.

3 *Government Response to the Senate Legal and Constitutional References Committee Inquiry into the Australian Legal Aid System, 3rd Report*, p.4.

3.4 The Government response further noted that the Commonwealth:

> …intends to approach National Legal Aid to see if agreement can be reached on a meaningful set of case outcome measures."[4]

3.5 The response also stated that the Commonwealth and LACs had been working together for some time to standardise data collection, and that reports using data provided by legal aid commissions to the Commonwealth's Legal Aid Statistical System Information Exchange (LASSIE) were available on request from the Attorney-General's Department.[5]

3.6 Between 1997 and 1999, the Commonwealth conducted a two stage Legal Assistance Needs study.[6] The purpose of the study was, among other things, to identify needs and gaps in service delivery. The two part study formed the basis of the Rush/Walker funding model discussed in Chapter 2, and based its analysis of demand on the applications for assistance made to state and territory LACs.

Criticism of the Government's response

3.7 National Legal Aid noted in its submission that the Commonwealth's study had no regard to unmet need:

> NLA believes that there is a level of need which is not known and not met and which is likely to go well beyond the applications to Legal Aid Commissions for legal assistance that are refused in accordance with the guidelines. Whilst the Commonwealth conducted a study in 1999 which was named the "Legal Needs Study" this study was used as the basis for distributing a finite amount of Commonwealth funds for "Commonwealth matters" across the States and Territories. It used the number of applications received by Commissions as the primary tool for measurement and did not recognise the number of people who never access or receive legal services, and the social and personal factors that define lack of access. As a result of its concern that there is a further level of unknown and unmet need NLA has attempted to obtain non-Government funding for a comprehensive legal needs study. These attempts have unfortunately been unsuccessful.[7]

3.8 This criticism of the Commonwealth's 1999 Legal Assistance Needs study was echoed by the Fitzroy Legal Service:

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4 ibid.

5 ibid, p.5.

6 *Legal Assistance Needs Phase I: Estimation of a Basic Needs-Based Planning Model*, Prepared by: Rush Social Research and John Walker Consulting Services, prepared for: Legal Aid and Family Services Division, Attorney General's Department, December 1996; *Legal Assistance Needs Project: Phase Two, Summary Report*, prepared for: Legal Aid and Family Services Division, Attorney General's Department, May 1999.

7 National Legal Aid, *Submission 81*, p.8.

> The [Commonwealth's 1999 report] was disappointing as it focused less on an analysis of legal need, and more on distribution of funding between the states and the territories. To date therefore there has not been any adequate study of the extent of unmet legal need throughout Australia. The paucity of such research is astounding! It is vital for the Commonwealth to act, either by commissioning their own study or in concert with the states to conduct a study of need.[8]

3.9 When asked what assessment the Commonwealth has made of unmet need, a representative of the Attorney-General's Department explained that the Department had consulted with state governments and LACs to undertake a series of reviews in relation to CLCs on a state by state basis.[9] She added:

> [T]he review has Commonwealth and state representatives and community legal service representatives. In some cases it also has what we would see as a public interest representative… The review looks at a range of issues, including demographics, and tries to identify areas of need in that way but also takes submissions and is a public process from the point of view of taking submissions.[10]

3.10 The Department provided the Committee with copies of such reviews for Queensland, Western Australia and South Australia.[11] These reviews did not contain a quantitative assessment of unmet need, but rather involved a consultative or submission-based process to make an assessment.

What data needs to be collected

3.11 The Committee heard various suggestions as to how an assessment of demand and unmet need for legal services should be undertaken.

3.12 For example, the Law Council of Australia suggested that the Government should commission and fund a legal needs survey to be conducted by the Australian Law Reform Commission (ALRC):

> The Commonwealth should commission and fund a legal needs survey to be conducted by or at the direction of the Australian Law Reform Commission to determine the context of the need for legal representation and advice in the family, civil and criminal jurisdictions in this country, with the results of the survey to be tabled in the Senate within three months of its receipt by the Attorney-General and with a view to providing sufficient funds to meet the identified need.[12]

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8 Fitzroy Legal Service, *Submission 48*, p.11.

9 Ms Sue Pidgeon, *Committee Hansard*, 9 February 2004, p.22.

10 ibid.

11 Attorney-General's Department, *Submission 78E*.

12 Law Council of Australia, *Submission 62*, p.2.

3.13 The CCLCG explained to the Committee that in NSW community legal centres (CLCs) together with the NSW Legal Aid Commission and Aboriginal and Torres Strait Islander Legal Services (ATSIS) are "mapping" all existing legal services throughout NSW to determine what new services may be required.[13] CCLCG also noted the studies being conducted by the NSW Law and Justice Foundation into legal needs and the National Pro Bono Resource Centre study of CLC needs in regional areas.[14] The CCLCG recommended that the Commonwealth fund a study or contribute funding to the study being conducted by the NSW Legal Aid Commission and CCLG to identify what legal needs exist in NSW.[15]

3.14 Numerous submissions referred to the survey of legal need that is currently being conducted by the NSW Law and Justice Foundation. On 26 March 2004, the Foundation launched three reports from the first and second stages of its Access to Justice and Legal Needs study. Stage Two of the program included a pilot study comprising a quantitative legal needs survey of the Bega Valley. This pilot is part of a wider assessment which, according to the Law and Justice Foundation, will be the largest quantitative legal needs survey in Australia in over 30 years.[16]

3.15 The pilot study was conducted in the Bega Valley in October 2002, and is part of a wider survey planned for South Sydney, Fairfield, Campbelltown, Newcastle, Nambucca and Walgett local government areas.[17] In designing the study, the NSW Law and Justice Foundation drew on both the *Paths to Justice*[18] studies, and on recent legal needs surveys conducted across the United States.[19]

3.16 The survey was conducted over the phone and in person. The areas covered by the survey include:

- legal events encountered in the previous 12 months;
- how these were handled;
- how services were accessed;
- barriers in obtaining assistance;

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13 NSW Combined Community Legal Centres Group, *Submission 60*, p. 12.

14 ibid.

15 ibid, p. 25.

16 http://www.lawfoundation.net.au/media/260304.html (accessed 5 April 2004).

17 *Access to Justice and Legal Needs, Stage 2: Quantitative Legal Needs Survey*. Law and Justice Foundation, November 2003, p. 2.

18 Professor H Genn, *Paths to Justice: What People do and think about going to law*, Hart Publishing, Oxford, 1999.

19 *Access to Justice and Legal Needs, Stage 2: Quantitative Legal Needs Survey*, Law and Justice Foundation, 2003, p. 5.

- perceptions of outcome; and
- demographic characteristics of participants.[20]

3.17 Although this pilot study was limited to a very specific area (the Bega Valley), the survey identified the most common forms of barrier to legal assistance. The most commonly experienced barriers to legal assistance were:

- difficulty getting through or being kept on hold on telephone lines (28 per cent);
- lack of local services (25 per cent);
- difficulty getting an appointment (21 per cent);
- difficulty affording assistance (16 per cent); and
- problems with the opening hours of service providers (15 per cent).[21]

3.18 The report for the pilot survey noted that, although the proportion of residents born in a non-English speaking country is relatively low in the Bega Valley, seven participants (which represented half of all participants born in a non-English speaking country) indicated that they would prefer to speak in a non-English language. The report noted that in an area with a higher proportion of migrants, this might have significant implications for service delivery in terms of the availability of translators.[22]

Committee view

3.19 The Committee believes that in order to assess the state of access to justice in Australia, there needs to be a better understanding of the level of demand and unmet need for legal assistance across the country. Despite the Committee's recommendations in the previous report, there is still a lack of data on such demand and unmet need.

3.20 The Committee commends the Law and Justice Foundation for its efforts in assessing the demand and unmet need for legal services in NSW. The Committee believes that similar research should be undertaken nationally. The objectives of the survey should be to assess the levels of such demand and unmet need across the country, as well as assessing what the major obstacles are for the delivery of such services.

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20 ibid, p. 6.

21 ibid, p. 125.

22 ibid, p. 126.

3.21 Whilst the NSW Law and Justice Foundation survey model appears to have been successful in its pilot stage, a national survey may benefit from awaiting the outcome of the Law and Justice Foundation statewide survey.

3.22 The Committee believes that the Commonwealth Government should fund a national survey, involving the cooperation of state LACs and CLCs, and that the Law and Justice Foundation study would be a good model on which to base such a survey.

Recommendation 11

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

CHAPTER 4

WOMEN AND FAMILY LAW

4.1 This chapter discusses:

- the particular barriers faced by women in accessing the legal system, particularly in the context of family law matters;
- the impact of current legal aid family law funding arrangements on women; and
- how the current legal system might be changed to more adequately provide access to justice for women in family law matters.

Introduction

4.2 During the course of its inquiry, the Committee received evidence that current legal aid arrangements do not provide sufficient or nationally uniform access to justice for women, and are fundamentally inadequate.[1] Women are particularly affected by a lack of legal aid funding in family law matters. Several submissions argued that the reduction in Commonwealth legal aid funds for family law matters since 1997 has had a serious impact on the rights of adults and children who are victims of domestic violence.[2]

4.3 The ALRC report, *Equality Before the Law: Justice for Women*,[3] and the Attorney-General's Department report, *Gender Bias in Litigation Legal Aid*,[4] argued that women were systematically disadvantaged by the fact that the legal aid system was strongly biased towards criminal law. Legal aid arrangements for women have not significantly changed since the publication of these reports. While additional funds for women's legal services were allocated by the Commonwealth Government under Prime Minister Keating in 1995, much of this funding has been withdrawn by the current Commonwealth Government.[5]

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1 Women's Legal Service Victoria Inc (in conjunction with Domestic Violence and Incest Resource Centre; Victorian Women's Refuges and Associated Domestic Violence Services), *Submission 27*, p. 4.

2 See, for example, National Council of Single Mothers and their Children Inc, *Submission 19*, p. 4; Sole Parents Union, *Submission 20*, pp. 6-7.

3 Report No 69, ALRC, 1994.

4 Office of Legal Aid and Family Services, Commonwealth Attorney-General's Department, 1994.

5 J Giddings, 'Women and legal aid' in J Giddings (ed), *Legal Aid in Victoria: at the crossroads again*, Fitzroy Legal Service, Melbourne, 1998, p. 125.

4.4 The Committee heard that it has become especially difficult for women and children to achieve safety and due process through the legal system. Women were described as 'a particularly vulnerable sector of the community'[6] and it is widely suggested that the incidence of domestic violence in Australia is underestimated. The information that is available reveals that hundreds of thousands of Australian women are subjected to violence within their relationships. Studies consistently indicate that such violence occurs in all social classes, races and cultures, and that women comprise the majority of victims, while men constitute the majority of perpetrators.[7]

Particular issues facing women in accessing justice

4.5 Family law matters raise significant issues for women. Women may face various legal problems following a separation or divorce, often in circumstances that are quite different to those of men. For example, limited financial resources remain a major impediment faced by many women in need of legal assistance.[8] Evidence received by the Committee suggests that, amongst other things, men are more likely to have a better capacity to afford private legal representation after a separation or divorce[9] and many women (and their children) often become 'permanently financially disadvantaged following separation or divorce.'[10]

4.6 Among the main concerns voiced by women's groups who made submissions was the violence that takes place by men against women, particularly in the home, and the failure of the legal system to adequately address it. It is suggested that 'the message is that the legal system incorporates (the) bias (in society) and helps to perpetuate it.'[11] The legal aid system has a central role to play in improving the access that women have to equality and justice.

4.7 While women as a group in society with particular needs may find it difficult to achieve access to justice and equality of rights, it is especially difficult for certain women. For example, Indigenous women, women from non-English speaking

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6 Ms Kathryn Seear, Women's Legal Service Victoria, *Committee Hansard*, 12 November 2003, p. 54.

7 Women's Legal Service Victoria Inc (in conjunction with Domestic Violence and Incest Resource Centre; Victorian Women's Refuges and Associated Domestic Violence Services), *Submission 27*, pp. 2-3.

8 J Giddings, 'Women and legal aid' in J Giddings (ed), *Legal Aid in Victoria: at the crossroads again*, Fitzroy Legal Service, Melbourne, 1998, p. 123.

9 Women's Legal Service Victoria Inc (in conjunction with Domestic Violence and Incest Resource Centre; Victorian Women's Refuges and Associated Domestic Violence Services), *Submission 27*, pp. 4-5.

10 Ms Kathryn Seear, Women's Legal Service Victoria, *Committee Hansard*, 12 November 2003, p. 54.

11 J Giddings, 'Women and legal aid' quoting E Evatt, 'Foreword' in R Graycar & J Morgan, *The Hidden Gender of the Law*, 1990, Federation Press, Leichardt, p. v, in J Giddings (ed), *Legal Aid in Victoria: at the crossroads again*, Fitzroy Legal Service, Melbourne, 1998, p. 123.

backgrounds and women with disabilities are chronically marginalised in terms of access to legal services and face significant disadvantage in relation to awareness and exercise of their legal rights, and support in areas such as domestic violence.[12]

Impact of current legal aid funding arrangements on women

4.8 The majority of applicants for and recipients of legal aid for family law matters are women and children.[13] Therefore, issues regarding the effect of current legal aid funding arrangements on women usually arise in the context of family law. Evidence received by the Committee overwhelmingly emphasised the difficulty women experience in obtaining legal aid in matters important to them, particularly family law matters. The majority of these submissions addressed the impact of the current family law legal aid funding arrangements on women.

4.9 The Commonwealth Government's current family law funding priorities were introduced in July 1997 and include more restrictive criteria for applications of legal aid than had previously been in place. For example, the merits test is more extensive, the types of family law matters that can be funded by legal aid are more limited, there is an overall "cap" on the amount of legal aid available to be expended by a party in relation to a matter, and applicants are only to be granted legal aid for court proceedings if attempts to resolve the dispute through primary dispute resolution (PDR) have been unsuccessful.[14]

4.10 The practical implications of the family law funding priorities and guidelines appear to have a far-reaching and serious effect. The National Network of Women's Legal Services (NNWLS) submitted:

> There is no question that legal aid availability for representation in family law proceedings has diminished over the last few years. So have the numbers of private solicitors prepared to take on legal aid family law cases.[15]

The Committee also received evidence that the limited amounts of funding available for family law matters 'creates a tension between providing assistance to a greater number of clients in less resource intensive cases and providing appropriate services and representation for clients involved in difficult and complex matters.'[16]

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12 Women's Legal Service SA Inc, *Submission 72*, p. 2; Northern Territory Legal Aid Commission, *Submission 82*, p. 9; National Network of Women's Legal Services, *Submission 86*, p. 3.

13 See, for example, Women's Legal Service SA Inc, *Submission 72*, p. 5; Women's Legal Service Victoria Inc (in conjunction with Domestic Violence and Incest Resource Centre; Victorian Women's Refuges and Associated Domestic Violence Services), *Submission 27*, p. 5.

14 R Hunter, 'The Mirage of Justice: Women and the Shrinking State', *The Australian Feminist Law Journal*, vol 16, p. 69.

15 *Submission 86*, p. 8.

16 Legal Aid Queensland, *Submission 31*, pp. 13-14.

4.11 Evidence presented to the Committee suggests that the current guidelines place constraints on the use to which legal aid funding can be put even in the narrow areas of law where Commonwealth funding is available. Restrictive criteria in relation to means and merit testing can result in assistance being unavailable to families with high and complex needs.[17] Further, empirical evidence indicates that at least from mid-1997 to mid-2000, the level of Commonwealth funding for family law legal aid was insufficient even to provide grants to everyone who met these restrictive criteria.[18]

4.12 Ms Zoe Rathus from the NNWLS told the Committee:

> We are very concerned about the way the merit test is applied. It is basically a budgetary control mechanism used by legal aid commissions, which are drastically underfunded. We are very concerned about the way that has had a bearing on legal matters, because it often means that legal aid is withdrawn just before trials or even during trials … We are concerned to see things like cost orders becoming more likely, the issues around cost orders being made in respect of paying for child representatives and the expectation legal aid commissions appear to increasingly have that people are advised of the possibility of having to make a contribution towards a child representative once that representative has been appointed.[19]

4.13 In Queensland, for example, the merits test appears to be applied particularly stringently, arguably as a means of limiting access to legal aid as opposed to facilitating it:

> Research carried out by a number of respected socio-legal researchers since the late 1990's indicates that Legal Aid Queensland has increasingly applied means and merits testing more stringently as a means of regulating a shrinking pool of legal aid funding for family law matters … where family law clients meet the means test imposed by Legal Aid Queensland, a higher number of them would have their application for assistance rejected on the basis of merit than in any other state … In effect, clients who are deemed ineligible for assistance in Queensland would conceivably receive assistance from legal aid if they live in some other state.[20]

4.14 Professor Rosemary Hunter and Associate Professor Jeff Giddings from Griffith University submitted that the Commonwealth guidelines for family law legal aid grants restrict the availability of legal aid for particular categories of cases (for example, divorce, property matters, variation of orders, enforcement proceedings) and

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17 Redfern Legal Centre, *Submission 61*, p. 5.

18 R Hunter with A Genovese, A Melville and A Chrzanowski, *Legal Services in Family Law*, Justice Research Centre, Sydney, 2000, p. 220 in R Hunter, 'The Mirage of Justice: Women and the Shrinking State', *The Australian Feminist Law Journal,* vol 16, p. 68.

19 Ms Zoe Rathus, National Network of Women's Legal Services, *Committee Hansard*, 10 March 2004, p. 10.

20 Queensland Association of Independent Legal Services Inc (QAILS), *Submission 73*, p. 27.

include a series of eligibility tests and funding "caps" in areas in which legal aid is available.[21] These restrictions have an adverse impact on identifiable groups of women applicants, including women who have been victims of violence by their former partners.[22] For example, the requirement for family law disputes to be in relation to a "substantial issue" often causes problems:

> To apply for a contact order is considered to be a substantial issue but to apply for residence, and formalised residence and contact arrangements, is often seen to be not substantial and therefore legal aid is not granted. That can often leave a situation where women and children are at risk.[23]

4.15 There are further problems with the Commonwealth guidelines as they apply to family law:

> The guidelines were intended to provide for some form of rational and consistent decision-making in a situation where funds were severely limited. However … this situation now pertains unevenly across the country, so that in some States the guidelines continue to be applied stringently, while in other States, there is funding available that is unable to be spent due to the restrictions imposed by the guidelines. While the guidelines have undergone some revision over the years, it is arguable that a thorough review of their impact and continuing relevance is required.[24]

4.16 The Committee notes that the Commonwealth will contribute approximately $20 million towards the Community Legal Services Program (the Program) in 2003-2004.[25] The Attorney-General's Department advised that some of the CLCs funded by the Program provide legal services in specific areas of law, including women's legal service, Indigenous women's projects, child support services and rural women's outreach projects.[26] The Department's submission included a list of CLCs funded by the Commonwealth under the Program. Specialist women's legal services in each state/territory (one in each state and the ACT, and three in the NT) are included in this funding.[27]

4.17 The Committee also notes that the Commonwealth Government's Budget 2004-2005 includes an increase in legal aid funding for family law matters arising under Commonwealth law.

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21 Professor Rosemary Hunter & Associate Professor Jeff Giddings, *Submission 24*, p. 4.

22 ibid.

23 Ms Marie Hume, *Committee Hansard*, 11 November 2003, p. 2.

24 Professor Rosemary Hunter & Associate Professor Jeff Giddings, *Submission 24*, p. 4.

25 Attorney-General's Department, *Submission 78*, p. 8.

26 ibid, p. 9. CLCs are discussed in more detail in Chapter 11.

27 ibid, Attachment D.

Indirect gender bias in current legal aid arrangements

4.18 On the surface, the granting of legal aid appears to be gender-neutral because legal aid guidelines do not distinguish between men and women applicants. However, gender-neutral guidelines do not necessarily produce the same results for men and women in practice. Evidence presented to the Committee argued that women do not have equal access to legal aid, nor to the legal system in general, and that there is an indirect gender disparity in the way that legal aid is granted.[28]

4.19 Criminal matters in which there is a possibility of imprisonment are given the highest priority in relation to legal aid funding due to the High Court decision of *Dietrich v R*[29]. Statistics indicate that the majority of recipients of legal aid are men and that it is more likely that men will receive a criminal law grant as opposed to a family law grant.[30] Overall, many more men than women receive grants of aid and there are fewer limitations on grants made in criminal law proceedings than family law.[31] For example, in the 2000-2001 financial year, women received 52 per cent of family law grants but only 34 per cent of all grants made by Legal Aid Queensland, comprising 37 per cent of Legal Aid Queensland's grants expenditure for that year.[32] Men are also more likely to have access to a larger amount of legal aid funding than women.[33] This creates gender inequity as the "cap" in criminal and civil law matters is greater than the "cap" in family law matters.[34]

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28 See, for example, National Network of Women's Legal Services, *Submission 86*; Women's Legal Service Victoria Inc (in conjunction with Domestic Violence and Incest Resource Centre; Victorian Women's Refuges and Associated Domestic Violence Services), *Submission 27*.

29 (1992) 177 CLR 292. The High Court held that a person accused of a serious crime has a right to a fair trial and, if the judge forms a view that a fair trial is unlikely to result because the accused cannot afford or does not have legal representation, a stay of proceedings must be ordered. Similarly, under the *Crimes Act 1958* (Vic) for example, a court may order that Victoria Legal Aid provide representation if the court is of the view that the accused may not obtain a fair trial without it: Women's Legal Service Victoria Inc (in conjunction with Domestic Violence and Incest Resource Centre; Victorian Women's Refuges and Associated Domestic Violence Services), *Submission 27*, p. 5.

30 Women's Legal Service Victoria Inc (in conjunction with Domestic Violence and Incest Resource Centre; Victorian Women's Refuges and Associated Domestic Violence Services), *Submission 27*, p. 5.

31 National Network of Women's Legal Services, *Submission 86*, p. 8.

32 Women's Legal Aid, *Gender Equity Report: A Profile of Women and Legal Aid Queensland*, Brisbane, 2002, pp. 4-5 in Professor R Hunter & Associate Professor J Giddings, *Submission 24*, p. 3.

33 Women's Legal Service Victoria Inc (in conjunction with Domestic Violence and Incest Resource Centre; Victorian Women's Refuges and Associated Domestic Violence Services), *Submission 27*, p. 5; Women's Legal Service SA Inc, *Submission 72*, p. 5.

34 Women's Legal Service SA Inc, *Submission 72*, p. 5. In criminal law matters, the minimum available "cap" is $15,000 with a maximum "cap" of $60,000. The "cap" in family law matters is $10,000 and there is a $15,000 "cap" for child representatives.

4.20 The Women's Legal Service SA submitted that the notion that a criminal matter may have more serious consequences for an individual, and therefore warrant representation where other matters may not, is a gendered one. Although the potential sanctions involved in a criminal prosecution can indeed be serious, the NNWLS argued that there needs to be recognition that the potential consequences of family law proceedings can also be serious.[35] In evidence at the Melbourne hearing, Ms Kathryn Seear of the Women's Legal Service Victoria stated that:

> Our view is that family law funding should be a priority at a Commonwealth level ... There needs to be a philosophical shift in the sense that family law matters are particularly serious. People tend to think of them in a way that is different from criminal law matters. There seems to be a general view that criminal law matters have a very significant consequence if somebody is found guilty of an offence. But, in our view, there are very serious consequences for clients we see in family law matters—women who lose their children; children who are being subject to sexual abuse or child abuse—and there is simply not the money available to fully investigate those matters.[36]

4.21 The Women's Legal Service SA also stated that it is ironic that women and children are often the victims of the criminal offences for which men receive legal aid, but are left unrepresented in any legal proceedings they may have to initiate as a result.[37] The NNWLS contended that the decision of the Commonwealth Government to insist on two separate pools of funding for criminal law and family law has exacerbated the problems already created by the preference for funding criminal law matters.[38]

Committee view

4.22 Evidence presented to the Committee suggests that there is gender disparity in the distribution of legal aid funds in practice, resulting in indirect but significant discrimination against the circumstances and needs of women in their access to justice. The Committee is concerned about the Commonwealth Government's apparent lack of recognition of some of the particularly grave consequences of family law disputes. The Committee does not believe that legal aid funding for criminal law matters should come at the expense of funding for family law.

4.23 The Committee considers it unacceptable that there should be fewer grants of legal aid for family law matters than for criminal law matters. It is also unacceptable that less funding is available for family law matters generally. LACs should not be

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35 Women's Legal Service Victoria Inc (in conjunction with Domestic Violence and Incest Resource Centre; Victorian Women's Refuges and Associated Domestic Violence Services), *Submission 27*, p. 6; Women's Legal Service SA Inc, *Submission 72*, p. 5.

36 *Committee Hansard*, 12 November 2003, p. 56.

37 Women's Legal Service SA Inc, *Submission 72*, p. 5.

38 National Network of Women's Legal Services, *Submission 86*, p. 8.

forced to effectively misapply the Commonwealth guidelines and priorities in order to regulate an inadequate amount of funding for family law matters.

4.24 The Committee is of the view that a reassessment of the application of the Commonwealth guidelines and priorities to determine grants of assistance is urgently required. Recognition in the legal system of the particular circumstances and needs of women may help them to better seek legal redress and lessen the financial burdens they often experience. The continuing focus of the legal aid system on criminal law does not assist women in achieving equality of treatment.

Recommendation 12

4.25 The Committee recommends that the Commonwealth Government address discrimination against the circumstances of women in the application of the current family law legal aid funding guidelines and priorities, by commissioning national research into the perceived gender bias in legal aid decision-making.

Recommendation 13

4.26 The Committee strongly endorses the recommendation made in the Committee's *Third Report* that legal aid expenditure be closely scrutinised by the Commonwealth Government to determine generally if disproportionate expenditure in certain priority areas is having the effect of depriving other areas of appropriate funding.

Recommendation 14

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

Recommendation 15

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

The "cap" in family law matters

4.29 Individual litigants seeking legal aid assistance in family law matters are subject to a $10,000 funding "cap". There is a $15,000 "cap" for child representatives. The Committee's *Third Report* found that while capping may bring some benefits in the form of more efficient expenditure of legal aid funding, the "cap" created many

problems and was too low.[39] The Committee notes that the "cap" in family law matters has not increased since the time of the *Third Report*.

4.30 The ALRC in its report, *Managing Justice,* found that statistics provided by the LACs showed that 'only a very small percentage of cases actually reach the cap before resolution.'[40] However, the Committee received a substantial amount of anecdotal evidence indicating that exhaustion of the family law funding "cap" is a significant problem. For example, the National Council of Single Mothers and their Children (NCSMC) contended that the cap on legal aid funding in family law matters 'is limited in the sense that it is unlikely to meet the demands of a complex case'.[41] There is often insufficient funding to last the duration of Family Court hearings:

> … in the pre trial manoeuvring, in interim contact orders and variations to those, specific issues orders and perhaps breach of contact orders, the cap gets exhausted and then, come the trial, the person can be left literally in the middle of the trial without representation. And they have no capacity to deal with that.[42]

4.31 Mr Sam Biondo of the Fitzroy Legal Service noted that:

> There is a lot of anecdotal discussion about the capping situation. In the initial stages of the cap, I recall quite clearly that we had many people approaching us for assistance, and many agencies who had also been approached by people who had reached their caps had significant problems.[43]

4.32 Ms Sally Smith of the Community Legal Centres Association (Victoria) concurred:

> When I worked at Werribee Legal Service we had quite a few clients come in whose cases were quite progressed in the family law court. They would come in with folders of stuff when they had run out of legal aid. There was often domestic violence involved, and they had been to court quite a few times. These women were very distressed, and it was very difficult for us too. We could not represent them in court. We would have to try to find a pro bono barrister to represent them. We could provide them with some assistance and try to help them navigate the system, but at that level of the Family Court proceedings it is very difficult for someone to represent themselves.[44]

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39 *Third Report*, p. xx.

40 ALRC *Managing Justice: a review of the federal civil justice system,* 2000, para 5.103.

41 Dr Elspeth McInnes, National Council of Single Mothers and their Children, *Committee Hansard*, 11 November 2003, p. 3.

42 ibid.

43 *Committee Hansard*, 12 November 2003, p. 49.

44 ibid.

4.33 Mr Mark Woods of the Law Institute of Victoria argued:

> Although it is not noted in our submission, the reality is that the fee caps which were imposed, I think, six years ago now have not kept pace with either inflation or changes to the law, certainly not to changes to the cost scales. What that means is that, whereas six years ago someone would get X quantum of legal work done within the fee cap, they now simply cannot get to that stage. The reality is that only five per cent of cases ever go to hearing—therefore, the proposition that budgets are put together on the basis that they all go to hearing, and hence we should have that sort of cap, is economic nonsense.[45]

4.34 Mr Woods argued further:

> Given that only five per cent of cases go to hearing, I expect that [only] two per cent [of cases reaching the "cap" before resolution] is probably quite right. There are certainly cases that can be conducted and concluded within the existing fee caps; there is no doubt about that. I do not know how many cases two per cent translates to, but I am sure it is in the hundreds, even though I do not have the figures in front of me. The point is, though, that the fee cap applies to all family law matters in relation to a particular grantee of aid so that, if that person has a contested matter which runs to a hearing and the $10,000 is used up and a further problem develops that requires not enforcement but actual changes in orders of the court—changes of circumstances and so forth—then the cap continues to apply. So, although the initial grant may be sufficient for three per cent of that five per cent, it will not be if there is a change in circumstances, as there so often is.[46]

4.35 Legal Aid Queensland expressed the following view:

> If the financial cap is reached there is a residual discretion in the Chief Executive Officer of Legal Aid Queensland to extend the cap. Again, there is only one fund in relation to family law matters, so the more that is expended on a case of particular difficulty or complexity, the less that is available for other parties seeking assistance for representation in family law proceedings.
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> A party who reaches the financial cap, but still satisfies the means and merits tests applied in the normal course by Legal Aid Queensland, can therefore be refused further aid. It is likely that these cases will have features of complexity or difficulty and assistance will have to be withdrawn at possibly the most crucial time of the case, and the client will have to represent themselves at the final hearing.[47]

4.36 This may have distressing consequences for a number of reasons:

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45 ibid, p. 23.

46 ibid, p. 24. For further discussion of self-represented litigants, see Chapter 10.

47 Legal Aid Queensland, *Submission 31*, p. 15.

> It is questionable whether many of these clients will have the capacity to conduct their own case, whether because of complexities of legal issues, or family dynamics or cultural issues involved in the case, or because of the mental or physical functioning or language capabilities or level of education of the client.[48]

4.37 Between 1998 and 2000, the Family Court in Melbourne conducted the Magellan Project, which involved special judicial case management of cases in Victoria in which there were serious allegations of sexual or physical abuse of children. It has now been established in all Australian states and territories, except NSW (where it has yet to be launched[49]), and WA (which has its own experimental program called the Columbus Project). Under the Magellan Project legal aid "caps" are waived for child representatives and for lawyers representing parents, provided they satisfy the means and merit tests in Magellan cases.

4.38 At the second public hearing in Canberra, Chief Justice Alastair Nicholson of the Family Court of Australia stated that the Magellan Project could usefully be adapted to other sensitive areas of the Family Court's work.[50] However, he emphasised that:

> … one of the ingredients of the success of Magellan has been the cooperation of the state welfare authorities and their investigative activities.[51]

4.39 Chief Justice Nicholson indicated that the Family Court hopes to have the cooperation of the relevant state authorities in utilising similar programs in domestic violence matters in the future.

4.40 Several submissions and witnesses argued that such an approach would have significant benefits. For example, Ms Kathryn Seear from the Women's Legal Service Victoria said:

> We are also concerned that women who are the victims of domestic violence will resort to self-representing in the Family Court and in state family violence matters where legal aid funding is not available. We would propose the introduction of a pilot project, similar to Project Magellan, which is discussed in some detail in our written submission. The evaluation of that project was overwhelmingly positive. We would propose that a pilot project be introduced, whereby the usual legal aid guidelines be altered in cases involving allegations of domestic violence, especially where children

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48 ibid, p. 15.

49 NSW 'is the only state where we have not been able to launch it because the state department is simply not cooperating. I have seen the minister, and she has indicated cooperation, but we do not seem to be able to get past the bureaucratic backlog': Chief Justice Alastair Nicholson, Family Court of Australia, *Committee Hansard*, 10 March 2004, p. 4.

50 *Committee Hansard*, 10 March 2004, p. 4.

51 ibid.

> have witnessed such violence or where there is a risk that they may continue to witness violence.[52]

4.41 Ms Seear continued:

> My understanding is that the Columbus Project, which is in operation in Western Australia at the moment—I am not sure whether you are familiar with it—extends the principles of the Magellan Project into areas of domestic violence. We would be proposing something similar. But certainly many of the concepts in the Magellan Project would be appropriate for a domestic violence type issue. In the Magellan Project the usual means and merit tests in legal aid matters were maintained but there was no cap on legal aid funding. We would be suggesting a pilot project in domestic violence issues, so that woman who are victims of domestic violence would be guaranteed unlimited legal aid funding. In reality, the financial consequences of the Magellan Project were very great, and some information has been provided to you in that regard. But in cases involving domestic violence we would hope that principles similar to those in the Magellan Project could apply.[53]

4.42 Ms Seear noted further:

> There is an example … of a case wherein a woman involved in Family Court proceedings had legal aid terminated at the beginning of a trial. As a result, she represented herself and, because of her self-representation, the ensuing case became extremely long and drawn out. It ended up being one of the five most expensive cases in Project Magellan. There was a consensus at the end of the project that it may have been more financially viable for that woman's legal aid to be continued, rather than to have the flow-on effect of wasting Family Court resources and so forth.[54]

4.43 The vexatious litigant approach was also raised as a problem faced by many women in their negotiation of the legal aid system. The NCSMC argued that women whose ex-partners use violence are typically faced with responding to the violent person's repeated applications to the court. This uses up legal aid funding, often resulting in women being left without representation in the middle of a trial:

> This seriously limits their capacity to protect themselves and their children from a violent partner. The cap on legal aid is unrealistic and quickly exhausted.[55]

4.44 Other submissions and witnesses presented similar evidence. At the Melbourne hearing, Ms Kathryn Seear of the Women's Legal Service Victoria expressed the following view:

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52 *Committee Hansard*, 12 November 2003, p. 55.

53 ibid, p. 59.

54 ibid, p. 60. See Chapter 10 for further discussion of self-represented litigants.

55 *Submission 19*, p. 3.

> My understanding is that, at this stage, there is a stage of matter funding limit in family law matters so that each stage of the proceeding has a maximum that is allocated. We would suggest that that remain in place but that perhaps each stage of the matter be increased. We see clients on a regular basis who are facing vexatious litigants—people who take them back to the Family Court time and again weeks or months after final orders are made and a new application is issued—and there is certainly a risk of this. But I do not think that that is any reason for avoiding funding for women who do need it. If a woman is facing a vexatious litigant there is an even greater need for her to have financial assistance.
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> …
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> We see a number of clients who are legally aided and whose cap is exhausted because the other party knows that the woman is legally aided and only has a certain amount of money that she can access. We regularly see cases where a man has access to significant financial resources. I know of one case where a man was able to spend upwards of $150,000 on his own legal fees whereas the woman was subjected to the $10,000 cap. He knows that and he knows that sooner or later her funding will be exhausted. So in fact in our experience it has been the reverse. It is a disincentive rather than an incentive to settle, where you have a difficult opposition.[56]

4.45 Ms Naomi Brown of the Community Legal Centres Association (WA) agreed:

> I recall talking to a community legal centre about the fact that, at every point along the legal process, there was some sort of barrier to going forward. The intention was expressed by one party to the other party, the woman, that the reason he was putting up these barriers was that he knew her funding was going to run out.[57]

4.46 At the Sydney hearing, the President of the ALRC, Professor David Weisbrot, told the Committee:

> With the Family Court, although we did not go into substantive family law, we certainly saw evidence of many cases where it seemed that the parties would use the processes of the court as another aspect of their internecine warfare, rather than as a means of resolving disputes. Some of the disputes seemed to me to be frivolous if they were not so serious for the parties concerned. There were long drawn out battles about the exact point at which children would be dropped off or picked up. It was not an uncommon thing to see a very large portion of the family estate dissipated in litigation which probably ended in a result that was not going to be very different from what it would have been if the parties had engaged more constructively at the beginning.[58]

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56 *Committee Hansard*, 12 November 2003, pp. 56-57.

57 ibid, p. 50.

58 *Committee Hansard*, 13 November 2003, p. 21.

4.47 Ms Libby Eltringham of the Domestic Violence and Incest Resource Centre argued that the family law system itself can perpetuate such problems:

> One of the things that domestic violence services would argue or submit is that sometimes the family law system is part of continuing the abuse—the vexatious litigant approach is used to continue to maintain power over a woman and to continue to make life difficult for her. That is a significant thing for many of the women that we work with. We acknowledge that it is still a small proportion of family law cases that have to go through to contested hearings, but family violence is a significant factor in the cases that do go up, and that it is often used as a means of controlling a woman or trying to keep tabs on her. We see that quite a lot through the services that we work with.[59]

4.48 The Committee also received evidence that, unlike other jurisdictions, the Family Court may be more reluctant to declare someone a vexatious litigant. This means that an individual must have brought many applications before they will be declared "vexatious":

> Up until that time, women we see may be subject to countless family law proceedings; often these proceedings are initiated by her former partner over relatively minor matters.[60]

Committee view

4.49 The Committee agrees that the "cap" in relation to family law funding creates significant problems. The Committee believes that if the "cap" is to remain, there needs to be greater discretion to exceed it in particular cases. However, the Committee reiterates its view in the *Third Report* that, given the lack of funding generally, 'any exercise of the discretion becomes an exercise in robbing Peter to pay Paul.'[61] It is not appropriate that applicants in more expensive cases benefit at the expense of other equally meritorious applicants. The Committee strongly believes that more funding is required. As the *Third Report* concluded, '(n)o amount of juggling with discretions and cap levels will overcome this sort of dilemma.'[62]

4.50 The Committee notes the Commonwealth Government's announcement in the Budget 2004-2005 that there will be an increase in certain "caps" on grants associated with family law matters.

Recommendation 16

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59 *Committee Hansard*, 12 November 2003, p. 60.

60 Women's Legal Service Victoria (in conjunction with Domestic Violence and Incest Resource Centre; Victorian Women's Refuges and Associated Domestic Violence Services), *Submission 27*, p. 8.

61 *Third Report*, p. xx.

62 ibid.

4.51 The Committee repeats the recommendation in its *Third Report* that the Commonwealth Government should act to ensure the necessary data on the operation of the "cap" in family law matters is collected, analysed, published and acted upon to ensure that capping does not deny justice in particular cases.

Recommendation 17

4.52 The Committee recommends that a pilot project similar to the Magellan Project be adopted where the usual legal aid guidelines are altered in cases involving allegations of domestic violence. In effect this would mean removing the "cap" on legal aid funding so that women who are victims of domestic violence would be guaranteed unlimited legal aid funding. Similarly to the Magellan Project, the usual means and merit tests should be maintained. Pending wider application of that principle, the Committee recommends that the "cap" should be indexed annually for movements in the Consumer Price Index.

The impact of the Commonwealth and state/territory dichotomy

4.53 As discussed in Chapter 2, since 1 July 1997 the Commonwealth has accepted responsibility for providing legal aid funding for certain Commonwealth matters only and in accordance with Commonwealth priorities and guidelines. This includes matters arising under the *Family Law Act 1975* (Cth) (Family Law Act), the *Child Support (Assessment) Act 1989* and the *Child Support (Registration and Collection) Act 1988* but does not include, for example, state/territory court proceedings in relation to domestic violence. It has been stated that the Commonwealth and state/territory dichotomy is not ' legally or intellectually justified' and that it creates:

> … very real problems … out in the field for … lawyers who have to apply … an artificial distinction between federal and state matters.[63]

4.54 According to the Commonwealth priorities set out in the Commonwealth-State Legal Aid Agreements 2000-2004, family law cases involving children are priority matters. As a matter of urgency, legal aid is to be granted for an interim order or injunction where a child's or applicant's safety or welfare is at risk, where there is an immediate risk of removal of a child from Australia or to a remoter geographic region in Australia, where there is a need to preserve assets, or other exceptional circumstances exist.[64] Further:

> In deciding whether to grant legal aid for a family law matter, the highest priority must be given to protecting the safety of a child, or a spouse, who is at risk.[65]

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63 Mr Mark Woods, *Committee Hansard*, 12 November 2003, pp. 21-22.

64 Commonwealth-State Legal Aid Agreements 2000-2004, 'Commonwealth priorities', Sch 2, subclause 2(5).

65 ibid, subclause 2(4).

4.55 However, the NNWLS has submitted that these seem to be the very cases excluded from grants of aid[66] since the Commonwealth does not provide funding for family law matters which involve domestic violence only. Further, the NNWLS submitted that:

> In practice, this level of priority seems to be restricted to cases where there has been an abduction or other extreme action, where unusual risks exist. The on-going potential for abuse in families which experienced domestic violence and/or child abuse prior to separation of the parents, does not seem to attract such priority.[67]

4.56 Commonwealth legal aid funding may be available to deal with certain aspects of a family dispute but in cases involving state-based issues such as domestic violence, Commonwealth funding is not available for that particular problem upon a relationship breakdown.[68] As a result, women and children with domestic violence issues may not be receiving the extent of assistance they need.

4.57 In the *Third Report*, the Committee expressed the view that a major issue of concern was 'the capacity of the legal aid system to deal effectively and rapidly with domestic violence issues'[69] since in the context of legal aid agreements between the Commonwealth and the states/territories, domestic violence is a priority area for the Commonwealth only to the extent that domestic violence is linked to matters within the jurisdiction of the Family Court.[70]

4.58 This was also noted by Mr Tony Parsons of Victoria Legal Aid in evidence in the current inquiry at the Melbourne hearing:

> The arrangements … only permit commissions to assist applicants in Family Law Act matters. Inevitably in those situations there are corresponding state law issues that need to be addressed, often including intervention order applications under state law. That service cannot be provided by Commonwealth funds. Often the Department of Human Services is involved in care and protection applications for the children of a relationship. Assisting people in those proceedings cannot be done using Commonwealth funds, so commissions using Commonwealth funds can only partially address the priorities of the Commonwealth itself, because of those arrangements.[71]

4.59 Mr Parsons stated further:

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66 National Network of Women's Legal Services, *Submission 86*, p. 18.

67 ibid, p. 9.

68 Mr Mark Woods, *Committee Hansard*, 12 November 2003, p. 22.

69 *Third Report*, para 5.14, p. 74.

70 ibid, para 5.18, p. 74.

71 *Committee Hansard*, 12 November 2003, p. 33.

> We face the ridiculous problem of service delivery to clients where, if we are going to be absolutely scrupulous about the application of the Commonwealth funding agreement—and we try at all times to be—we actually have to say to a client, 'The solicitor that you have built up a relationship with, the one that you have learnt to trust, the one that is running your major matter in the Family Court is not funded to go to court for you to get an intervention order to stop the domestic violence, so you have to go to another lawyer to provide that kind of service.' That affronts every precept of appropriate service delivery to clients, and we do not do it. We refuse to disillusion clients in that way when no other legal practice in the country would treat a client so poorly, but it is very difficult. But it is very difficult because, at the end of the day, our accounts are still audited by the Victorian Auditor-General and we still have to sign off to make sure that we are executing our side of the Commonwealth agreement effectively and with integrity. So we end up dividing the resource to have that particular lawyer in the office between the state and the Commonwealth. It is just unnecessary administration to provide a better service for the client, and therefore those are dollars wasted on administration that could be used to purchase legal services.[72]

4.60 This point was also made by Ms Judith Walker of the Legal Aid Commission of NSW:

> We often have the situation where domestic violence matters are going to be dealt with in the state court and there might be concurrent proceedings in the Family Court or the Federal Magistrates Service, which is also involved in domestic violence issues. So people are moving between courts. The proceedings come under the Commonwealth program when in the Family Court, but when they are in the state court they come under a different program, but it could be the same client. The solicitor who may be assisting in the Family Court is not going to be the solicitor who may be assisting in the state court. That is a difficult situation.[73]

4.61 Legal Aid Queensland agreed:

> Clients frequently have legal problems in their lives that include issues of domestic violence, family law and child protection. Their difficult situations are compounded by additional barriers and complexities caused by different forums, legislation and funding issues created by family law issues being a Commonwealth jurisdiction and child protection and domestic violence issues being State jurisdictions.
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> …
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> It is confusing for clients to have to attend different courts, and apply for separate grants of aid for what they see as one set of problems surrounding the breakdown of their relationship and family. The effect of the artificial divide between funding in State and Federal matters means that a party can

72 ibid, pp. 35-36.

73 *Committee Hansard*, 13 November 2003, p. 5.

> be represented in one forum but not another. This causes distress and confusion to parties who are already in very stressful situations and militates against holistic service delivery for clients.[74]

4.62 The Committee also noted in the *Third Report* that since the separation of funding between Commonwealth and state/territory matters and the fact that Commonwealth funding cannot be used for state/territory domestic violence matters, the onus is on the relevant state/territory to fund such matters. However, that state/territory may not give priority to domestic violence. This may in turn send the message that the safety of women and children is not a priority.[75]

4.63 During the current inquiry, Dr Elspeth McInnes of the NCSMC stated:

> … the majority of referrals from the Family Court to the state child protection system do not get investigated. The court simply gets information back which says, 'This has not been substantiated.' But it also encompasses the fact that it has never been investigated.[76]

4.64 The NCSMC indicated that one of the reasons for the failure of referrals of child abuse to be investigated is the lack of consistency between Commonwealth and state/territory laws. Although the Family Law Act requires that any disclosure of child abuse must be reported to the relevant state/territory child welfare authority, the relevant child welfare authority is not subject to the Family Law Act. Such reporting means that Family Court officers have complied with their obligations under the Family Law Act but the child welfare authority is not compelled to take the matter further. The reality is that 'only a relatively small percentage of high-risk, immediate danger to children'[77] cases are investigated:

> The state department looks at the referrals from the Family Court in the same way as it would look at referrals from any other source. They prioritise those referrals according to their criteria, which means that the majority of referrals from the Family Court do not rate an investigation, because they are not seen as immediate and serious on that day. The Family Court cannot instruct state departments to do anything, so a frequent outcome is that there is no investigation of those allegations.[78]

4.65 There are also problems if allegations of child abuse 'come out in the Family Court after there has been a decision not to proceed with criminal charges for whatever reason'.[79] The role of the Family Court is not to determine whether or not

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74 *Submission 31*, p. 17.

75 *Third Report*, para 5.20, p. 75.

76 *Committee Hansard*, 11 November 2003, p. 6.

77 ibid.

78 ibid, p. 8.

79 Ms Marie Hume, *Committee Hansard*, 11 November 2003, p. 5.

abuse has actually occurred but rather to determine the best interests of the child and whether there is a risk of abuse of the child in the future. This means that:

> … often … information is not available to the court to make a decision because of the problems between that system and the state child protection system. In a lot of cases, no investigation is conducted because they see this as a federal matter and therefore the Family Court is left with making decisions without a proper investigation being conducted.[80]

4.66 The Committee notes the pertinent point made by the Queensland Association of Independent Legal Services (QAILS) in relation to the dichotomy issue:

> This process of demarcation is worthy of comment because in many respects it goes to the heart of a justice system in which the question "who is responsible" has replaced "who is in need". Two observations are relevant. Firstly, the distinctions often drawn (for example between so-called "Commonwealth and state matters") are arbitrary and take place in a vacumn [sic], which ignores the interconnectedness of law and policy.
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> The most notable example of this has been in the area of family law and domestic violence … The potential for family law problems to manifest themselves in other ways (such as through domestic violence) or to lead to non-family law problems (such as debt problems arising from the breakdown of a relationship) inevitably involves a raft of laws at both Commonwealth and State level. To this end, the Commonwealth and the states must be committed towards working together to ensure the operation of a seamless system of justice for those people affected by family breakdown. Regrettably, in the experience of Queensland community legal centres, this has not been, and continues not to be, the case.[81]

4.67 QAILS also argued that there is 'something manifestly unjust' with a legal system:

> … which tells clients that the success of having their legal need met depends upon their ability to:
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> - identify which Commonwealth/State laws afford protection; and
> - make a decision to proceed under the law most likely to afford access to legal aid (rather than access to a solution to their immediate problem).[82]

4.68 QAILS noted that, in the experience of Queensland CLCs, the "seamless system" which existed prior to the distinction between Commonwealth and state/territory laws

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80 ibid.

81 *Submission 73*, p. 23.

82 ibid, p. 24.

'functioned more effectively to meet the needs of clients across all areas and jurisdictions'.[83]

Committee view

4.69 The Committee reiterates its view in the *Third Report* that the Government's distinction between Commonwealth and state/territory matters is artificial and inappropriate. It is particularly unsuitable in relation to matters involving domestic violence and child abuse. These matters are clearly aligned with the Commonwealth family law legal aid priority of providing assistance to spouses and children who are the victims of domestic violence. The Committee believes that insistence on maintaining the distinction is a convenient excuse being used by governments to shift or avoid responsibility, rather than properly addressing legal needs.

4.70 The Committee considers that it is imperative that there be adequate funding of legal assistance for actions taken under state/territory law involving domestic violence since the scope for action under Commonwealth law is extremely limited. LACs should not be prohibited from applying Commonwealth legal aid funds at their sole discretion to matters arising under state/territory law.

4.71 The Committee considers that if the division between Commonwealth and state/territory matters is to be retained, the Commonwealth Government should comprehensively review the domestic violence and child abuse remedies currently available under Commonwealth law. It should then ensure that adequate legal aid funding is provided to enable victims of domestic violence and child abuse to access appropriate remedies in order to secure safe outcomes. This would necessarily involve amendment of the Commonwealth guidelines to permit Commonwealth funding of matters in support of Commonwealth legal aid priorities.

Recommendation 18

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

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

83 ibid.

Primary dispute resolution as a prerequisite for legal aid

4.73 The Commonwealth Government's family law funding priorities promote, as far as practicable, resolution of disputes through non-litigation processes. This includes the use of counselling services and other alternative dispute resolution (ADR) services, such as the conferencing models currently in use in some LACs. Applicants for legal aid are required to use primary dispute resolution (PDR) before any grant is made for court proceedings since assistance for litigation should be pursued only as a last resort.[84]

4.74 Several submissions argued that PDR is usually not appropriate where there has been domestic violence. The NNWLS submitted that:

> A number of LACs now seem to require parties to attend a family law conference as an almost mandatory first step in obtaining legal aid. Concerns have been specifically expressed in NSW, Tasmania, ACT, WA and Queensland.[85]

4.75 While it is acknowledged that there are benefits in attempting to keep some families out of court and giving some parents the best opportunity to reach agreement on parenting arrangements after separation, the NNWLS argued that many of its clients express concern about negotiating with their former partner even in the moderately formal atmosphere of a legal aid conference.[86]

4.76 The NNWLS noted further:

> All LACs which conference have policies which allow clients to be excused from the necessity to conference where there is a history of domestic violence, but the experience of NNWLS is that this rarely happens. It is more likely that 'shuttle' conferencing will be arranged. There is very strong pressure placed on parties to compromise at conferences and many women advise [women's legal services] that they found it impossible to raise the history of domestic violence at the conference itself or that the relevance of any domestic violence was minimised. Therefore it is not taken into account in devising the arrangements for the children.[87]

4.77 Ms Lea Anderson of the National Association of Community Legal Centres agreed:

> Some commissions have the view that they can protect women in those circumstances by offering them shuttle conferences, but it is our view that the negotiations are occurring under the shadow of the law and that that is not good enough. Although people are in separate rooms, they may feel coerced or pressured into arriving at decisions that they will walk away

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84 Commonwealth-State Legal Aid Agreements 2000-2004, 'Commonwealth priorities', Sch 2.

85 *Submission 86*, p. 18.

86 ibid.

87 ibid.

> from and that are unworkable and unfair, and then, in fact, they go back into the system, represent themselves and face litigation.
>
> …
>
> My view is still that that is where the funds are so clients are being encouraged to go into ADR and PDR in the first instance. I do not think that is the best way to look at clients' legal needs, particularly where there is experience of family and domestic violence. We are glad that there are alternatives within the system, but they are not the panacea and they do not adequately meet the needs of everyone—particularly, women with families who have had experience of domestic and family violence. You cannot replace representation for those clients.[88]

4.78 Other concerns were also expressed by the NNWLS. For example, it submitted that conferencing is used as part of the merit test but what is really assessed is the attitude of the client towards the father and contact arrangements, and the best interests of children are not paramount (reaching an agreement between the parents is the main objective).[89] The NNWLS also argued that, while some LACs have developed policies and procedures for screening clients before conferencing and for conducting conferences where there has been violence, there appears to be no uniformity throughout Australia.[90]

4.79 Ms Sarah Vessali of the Women's Legal Service Victoria also noted some serious problems with PDR processes:

> Because of the nature of the clients we see, the vast majority of our clients have a history of family violence and abuse of some sort. In that situation there are very few cases where we would consider requiring the woman to attend some form of PDR would be appropriate. There are reality issues of a power imbalance. Whether or not the mediator will be thinking about that, the woman just cannot mediate on a level basis with the perpetrator of the violence against her, against the children or against both of them.[91]

4.80 Chief Justice Nicholson of the Family Court told the Committee of a pilot program involving a less adversarial approach which has commenced in Parramatta and Sydney (discussed further in Chapter 10). The Chief Justice noted that such an approach may help solve some of the problems associated with PDR processes:

> We are very conscious of domestic violence issues and we are very conscious of power imbalances. We are hopeful that this approach may assist the judge to deal with those power imbalances better than can be done now. One of the features of it is that, for example, the configuration of a courtroom is very much in the hands of the judge, so if you have a case that

88 *Committee Hansard*, 13 November 2003, pp. 39 & 40.

89 *Submission 86*, pp. 19-20.

90 ibid, p. 20.

91 *Committee Hansard*, 12 November 2003, p. 57.

> does involve violence he or she will probably sit in a conventional courtroom. If it is a less fierce type of contest, the judge may well sit in a conference room type of format. There are factors that we hope we have built in to consider that, but we felt we could not exclude cases where allegations of violence were made, because that would give you a skewed result in terms of how effective this process was. The other thing is that the judge is empowered to prevent cross-examination at any time, so if, for example, you have an overbearing person who is in effect adopting a threatening position the judge will simply say, 'All right, that's enough; I'm not hearing any more of that,' and can do it much more readily.[92]

4.81 Mr Tony Parsons of Victoria Legal Aid also told the Committee about a new PDR service it proposed to introduce in Victoria in January 2004:

> We have called this roundtable dispute management. Victoria Legal Aid has been one of the slowest commissions to pick up an in-house, effective PDR service for family law clients. Every other legal aid commission in Australia provides primary dispute resolution to one extent or another. [Victoria Legal Aid], for philosophical and financial reasons, has been slow to pick up that program but now we recognise that we have the money and why should the Victorian community be deprived of that kind of service if we are able to provide it? So we are implementing the service. The Commonwealth Attorney-General thinks it is a wonderful service on paper; we propose to make it a wonderful service in reality. It will consume those Commonwealth reserves over the next three to four years.[93]

Committee view

4.82 The Committee considers that extreme caution should be exercised in relation to the use of PDR in matters involving domestic violence. The Committee does not believe that PDR should be a prerequisite to obtaining legal aid assistance in such matters. The Committee is of the view that better processes need to be developed in order to deal with family violence and child abuse cases. The Family Court's new inquisitorial pilot program may go some way towards achieving better outcomes for women who have experienced domestic violence. However, the Committee believes that other guidelines and procedures may need to be developed in relation to grants of legal aid for women whose circumstances are not conducive to participating in PDR.

Recommendation 19

4.83 The Committee recommends that victims of domestic violence not be required by legal aid commissions to participate in primary dispute resolution processes as a condition of access to legal aid.

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92 *Committee Hansard*, 10 March 2004, p. 2.

93 *Committee Hansard*, 12 November 2003, p. 36.

Recommendation 20

4.84 The Committee recommends that the Commonwealth Government adopt appropriate guidelines and procedures in relation to grants of legal aid for women whose circumstances are not suitable for participation in primary dispute resolution.

Funding for child representatives

4.85 The Committee received evidence that the increasing proportion of legal aid funding expended on appointing child representatives has added to the pressures and difficulties of funding parties in family law cases. Legal Aid Queensland argued that:

> There has been an exponential increase in the appointments of child representatives by courts exercising family law jurisdiction in recent years. The Commonwealth Guidelines and policy of Legal Aid Queensland is to fund the appointment of child representatives where the criteria of *Re: K (1994) FLC 92-461* are met. In recent times the appointment of child representatives has been closely scrutinised, because of the increasing proportion of legal aid funds that are expended in this area. On occasion where a child representative has been re-appointed and there has been significant funding provided to the child representative previously, further funding of a child representative has been declined by Legal Aid Queensland.
>
> … The new guidelines for child representatives issued by the Family Court of Australia may also have the consequence of increasing the unit cost of cases. There is only one fund in relation to family law matters, so the more that is expended on child representatives, the less that is available for parties seeking assistance for representation in family law proceedings.

4.86 The NNWLS stated that one of the effects of the decision of *Re K*[94] has been to reduce the monies available from LACs to fund parents in family law matters. A significant problem is created because child representatives are appointed by the Family Court and the Federal Magistrates Court, not LACs. This effectively removes control over some aspects of family law funding from LACs.[95]

4.87 The NNWLS agreed with Legal Aid Queensland, arguing that the new Family Court guidelines for child representatives introduced by the Family Court in 2003:

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94 In *Re K*, the Full Court of the Family Court set out clear guidelines for when a child representative should be appointed. This includes cases involving allegations of child abuse; intractable conflict between the parents; issues of cultural or religious difference affecting the child; and issues of significant medical, psychiatric or psychological illness or personality disorder in relation to the child or persons significant to the child.

95 *Submission 86*, pp. 6-7.

> … could mean that child representatives are required to undertake more work in some cases. While this may benefit children and produce better case outcomes, it will also place a further strain on legal aid budgets.[96]

Committee view

4.88 The Committee acknowledges the problems with the separate pool of funding for child representatives and the impact this appears to have on general funding for family law matters. The Committee recommends that the Family Court and LACs closely monitor the new Family Court guidelines on child representatives to determine their fiscal impact. The Committee also believes that a separate pool of funding for child representatives should ultimately be established so that legal aid grants for parents in family law proceedings are not unduly affected.

Recommendation 21

4.89 The Committee recommends that the Family Court and legal aid commissions closely monitor the new Family Court guidelines on child representatives to determine what impact, if any, they have on legal aid budgets for family law matters generally.

Recommendation 22

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

Self-representation in court proceedings

4.91 Evidence presented to the Committee suggests there are serious problems with the availability of legal aid for representation in family law matters, resulting in many women being left unrepresented in Family Court proceedings and in state domestic violence matters.[97] Current data on self-representation in the Family Court indicates that nearly half of the litigants are self-represented at some stage during their case,[98] as is discussed in more detail in Chapter 10.

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96 ibid, p. 7.

97 National Network of Women's Legal Services, *Submission 86*, p. 13; Women's Legal Service SA Inc, *Submission 72*, p. 4; Ms Kathryn Seear, Women's Legal Service Victoria, *Committee Hansard*, 12 November 2003, p. 55.

98 National Network of Women's Legal Services, *Submission 86*, p. 13, quoting R Hunter, A Genovese, A Chranowski and C Morris, *The changing face of litigation: unrepresented litigants in the Family Court of Australia*, Law and Justice Foundation of NSW, 2002, p. 41.

4.92 Ms Zoe Rathus from NNWLS noted that the number of self-representing women in the Family Court is increasing. This also has adverse flow-on effects on the provision of services generally:

> Quite frequently, particularly with the women's legal services based in capital cities, where family law becomes so much of our workload, we end up spending our time assisting women who are representing themselves in the Family Court. This means we do not have an opportunity to develop other areas of expertise; we do not have the capacity to assist women with other legal problems; and we are engaged in the very bizarre process that the chief justice was describing of the unbundling of legal services, where you do bits and pieces for clients. If we took on individual clients fully we simply would not be able to meet the kinds of performance targets expected of us in terms of number of clients assisted. So we end up grappling with very difficult decisions.[99]

4.93 The NCSMC argued that victims of violence need legal representation in order to effectively participate in the legal system since exposure to violence can have serious long-term consequences which might impair a victim's capacity to represent themselves.[100] The extreme difficulties experienced by women and children in accessing and achieving safety and due process through the legal system seem to be directly attributable to the fact that they are often unable to obtain legal representation.[101] The serious shortage of legal aid funding for family law and domestic violence issues, along with the "cap" on funding for family law matters, means that women are often in a situation where they do not have a lawyer who is willing to act for them.[102]

4.94 Research commissioned by National Legal Aid (NLA) to examine the relationship between the limited availability of legal aid funds for family law matters and self-representing litigants in the Family Court concluded that there was an extensive relationship, as is discussed in more detail in Chapter 10:

> That relationship is found not just in legal aid rejections of terminations, but also in non-applications for legal aid. [The results] also show that in some cases, litigants may appear unrepresented even while holding a grant of legal aid.[103]

4.95 It has been argued that this is due to current legal aid policies:

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99 *Committee Hansard*, 10 March 2004, p. 10. "Unbundling" is discussed further in Chapter 10.

100 National Council of Single Mothers and their Children, *Submission 19*, p. 2.

101 Sole Parents Union, *Submission 20*, pp. 6-7.

102 National Council of Single Mothers and their Children, *Submission 19*, p. 4.

103 ibid, pp. 13 & 14, quoting R Hunter, A Genovese, A Chranowski and C Morris, *The changing face of litigation: unrepresented litigants in the Family Court of Australia*, Law and Justice Foundation of NSW, 2002, p. 33.

> … which tend to leave parties unrepresented or under represented at early stages of their proceedings – often when critical legal and strategic decisions are made. Then when the situation has become unworkable and the parties are locked in traumatic litigation, aid is granted for along the road to a contested trial … (F)unding some clients for court proceedings early may be a preferable course to take. This would enable the preparation of a meaningful affidavit of evidence in chief and perhaps the subpoenaing of critical independent material.[104]

4.96 The Women's Legal Service SA argued that women often withdraw from proceedings by accepting unsuitable consent orders that are not in their best interests rather than proceed unrepresented.[105] This often means that they are unable or unwilling to comply with the orders out of concern for the welfare of their children:

> … we will see women who have signed consent orders—often potentially very disadvantageous consent orders for them—because they know their legal aid is about to run out and if they do not reach a settlement they are going to be self-representing. So it results in consent orders, which potentially six months later are unworkable or are being abused in some ways, that have been signed in a hurry and under pressure. That is the reality.[106]

4.97 Women may then 'find themselves the subject of further Family Court proceedings for enforcement of these orders, and often receive penalties as they are again without legal representation.'[107] This not only creates an unfortunate situation for the women, but also has a significant impact on Family Court resources.

4.98 Problems are also created when women are forced to deal directly with a self-represented former partner in cases where there is a history of domestic violence. Women may be subjected to the trauma of cross-examination by the perpetrator of the violence.[108] Self-represented victims of violence may:

> … have to question and be questioned by a person who has terrorized and violated and degraded them. Some women have been so traumatized that they are unable to attend the court, with the consequence that they are excluded from access to the law.[109]

4.99 Women may also find themselves having to cross-examine other witnesses:

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104 ibid, p. 22.

105 *Submission 72*, p. 4.

106 Ms Sarah Vessali, Women's Legal Service Victoria, *Committee Hansard*, 12 November 2003, p. 57.

107 Women's Legal Service SA Inc, *Submission 72*, p. 4.

108 Women's Legal Service Victoria Inc (in conjunction with Domestic Violence and Incest Resource Centre; Victorian Women's Refuges and Associated Domestic Violence Services), *Submission 27*, p. 6.

109 National Council of Single Women and their Children, *Submission 19*, p. 2.

> In one case we saw a woman whose legal aid funding was exhausted during a trial in the Family Court. On day 5 of a 21-day trial her legal aid funds ran out. On day 6 she turned up to represent herself, having to cross-examine witnesses, including expert witnesses.[110]

Committee view

4.100 The Committee shares the concerns of a number of witnesses in relation to the high levels of self-representing women in family law matters. In particular, the Committee considers that where violence has taken place, legal representation is needed to ensure that women can participate effectively in the legal system. The Committee agrees that lack of legal representation has a direct effect on the difficulties experienced by women and children in achieving due process. While the incidence and impact of self-representation is considered in more detail in Chapter 10, the Committee considers it crucial that legal representation is provided in cases involving violence or abuse.

4.101 The Committee notes the Commonwealth Government's Budget 2004-2005 statement relating to increased funding for legal aid which will include a component to provide a new duty lawyer service for self-representing litigants in family law matters before the Family Court and the Federal Magistrates Court. The Attorney-General has stated that he 'will be inviting legal aid commissions to provide the new service.'[111] The new funding also contains a component to assist LACs to pay a minimum rate of $120 (GST exclusive) per hour to solicitors undertaking Commonwealth family law matters.

Recommendation 23

4.102 The Committee strongly recommends that the Commonwealth Government provide legal funding to enable legal representation to be available to all parties in family law disputes where there are allegations of domestic violence or child abuse, or other serious allegations.

Lack of coordinated services to deal with domestic violence

4.103 At the Port Augusta hearing, Ms Marilyn Wright from the Women's Legal Service SA suggested that in most areas there needs to be 'a coordinated response as far as legal services, health services and counselling services are concerned, because they all cross over.'[112] Often, lawyers and support workers are involved in 'multiple and simultaneous causes of action to try and establish immediate social, legal and

110 Ms Kathryn Seear, Women's Legal Service Victoria, *Committee Hansard*, 12 November 2003, p. 55.

111 The Hon Philip Ruddock MP, Attorney-General, *Media release*, 'More Money for Legal Aid', 11 May 2004.

112 *Committee Hansard*, 11 November 2003, p. 56.

financial protection for a woman.'[113] Therefore, a coordinated response is important to achieve the best possible outcome for women facing separation and divorce. It is particularly important in cases of domestic violence.

4.104 In SA there is currently no coordinated service in the Magistrates Courts to support, advise, and represent women who are seeking restraining orders. Such services are established in the eastern states and are effective in reducing barriers to women seeking protection from domestic violence through the court system. Support services in SA are limited to support for women at court and running programs for perpetrators outside court but do not provide ongoing advocacy and support for women beyond court. Similarly there is no service to provide support for women who have experienced domestic violence as they negotiate their way through the Family Court.[114]

4.105 In its submission to the Committee, the Women's Legal Service SA noted the achievements of the coordinated domestic violence scheme in NSW.[115] At the Port Augusta hearing Ms Marilyn Wright also stated that the ACT's collaborative response to domestic violence was particularly good:

> It has a duty solicitor at the Magistrates Court. It has women's shelters in different areas of the ACT. It has a Domestic Violence Crisis Service that is well funded and it is a 24-hour service. It provides court support as well. Their workers attend with police on victims when there is a domestic violence call-out. There is a domestic violence coordinator, who is based at the Magistrates Court.[116]

4.106 It appears that when seeking advice and support women prefer to see other women who can better understand the issues they face. However, the stigma often associated with domestic violence may mean that there are difficulties getting women to attend even those services provided exclusively by other women:

> Women tend to call us after we have left the area. They feel more comfortable doing that than approaching us directly where other people could possibly see that they had sought assistance from us. There seems to be a culture that it is not acceptable to discuss what happens within the private sphere. That is pretty prevalent amongst all the different groups.[117]

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113 Women's Legal Service Victoria Inc (in conjunction with Domestic Violence and Incest Resource Centre; Victorian Women's Refuges and Associated Domestic Violence Services), *Submission 27*, p. 4.

114 Women's Legal Service SA Inc, *Submission 72*, p. 3.

115 ibid. Some of these achievements include: improved integrated responses from Local Courts, legal practitioners, police prosecutors and community services; a decrease in the number of women withdrawing Aggravated Domestic Violence Order applications; women are provided with appropriate support and information; an increased feeling of safety for women; and an actual enhancement of safety for women.

116 *Committee Hansard*, 11 November 2003, p. 58.

117 Ms Zita Adut Ngor, *Committee Hansard*, 11 November 2003, p. 60.

Committee view

4.107 The Committee considers that a coordinated, properly funded approach is essential if women are to be provided adequate access to justice. The Committee agrees that a number of different services are often required in situations where women experience domestic violence and that many of these services overlap. Such services include the provision of legal advice, information/education, crisis response, accommodation, counselling, support and referrals.

4.108 The Committee has heard evidence that some states/territories have developed particularly effective coordinated domestic violence schemes. However, in some states, such as SA, these schemes do not exist. The Committee is of the view that where such schemes do not exist, there is an immediate need for appropriate services to be implemented. This includes the provision of ongoing support services for women in the Family Court.

4.109 There would also be value in expanding the existing arrangements so that they are better able to accommodate the growing number of women who have experienced domestic violence. This would necessarily involve financial commitment by the Commonwealth Government and state/territory governments. Such an expansion should include a greater emphasis on community education with the aim of removing the stigma often associated with domestic violence.

Recommendation 24

4.110 The Committee recommends that appropriate coordinated schemes to deal with domestic violence be implemented in those states and territories where they do not presently exist, as well as in the Family Court, and that such schemes be modelled on successful schemes already in place. The Committee also considers that current schemes could be usefully expanded to include a greater emphasis on community education with the aim of removing the stigma often associated with domestic violence.

Inadequacy and inaccessibility of services in rural, regional and remote areas

4.111 There is a clear indication that legal services in rural, regional and remote (RRR) areas are especially inadequate and inaccessible for women. Research has shown that there is a higher reported incidence of domestic violence in RRR communities than in metropolitan areas but as funding levels are generally lower, women in such areas are often denied access to essential legal services.[118] While women-only advice and information may be available in some areas, there is still a significant gap in service delivery due to a severe lack of funding.[119]

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118 Women's Legal Service Victoria Inc (in conjunction with Domestic Violence and Incest Resource Centre; Victorian Women's Refuges and Associated Domestic Violence Services), *Submission 27*, p. 4.

119 Northern Rivers Community Legal Centre, *Submission 22*, pp. 8-9.

4.112 In rural and remote areas, it can be extremely difficult for women to access the services they need. Rural outreach programs are limited because they do not have the funding to go on all the court circuits, which is seen as being critical in certain areas.[120] The Rural Women's Outreach Program, Port Augusta and the Women's Legal Service SA gave evidence at the Port Augusta hearing that women in isolated towns do not have facilities such as women's shelters or safe houses. Although there might be shelters in the major regional areas, the cost of transportation to those shelters is a significant issue for many women, especially if they are living in very remote areas.[121] In some areas it may be impossible for women to get police to attend domestic violence incidents, or even talk directly to police in their local area.[122]

4.113 It is important that women have access to services in the areas in which they live. It is not practicable for women in rural and remote communities to have their solicitor living in towns or cities that are large distances away from them. As Ms Marilyn Wright of the Women's Legal Service SA stated in evidence to the Committee:

> I think there is a core base already, with community legal centres, women's legal services and legal service commissions. Again, I think there needs to be some kind of cooperative way of working. The Legal Services Commission and community legal centres are Commonwealth funded, but we have instances where we work with women who, as I said, may be eligible for legal aid because English is not their first language, but they do not want to have their solicitor in Adelaide when they are in Port Augusta. Aboriginal women may not have a telephone or a vehicle, so it suits them to come into the office in Port Augusta to give instructions and for the solicitor to take instructions. It is very important to have that service in that area.[123]

4.114 The Northern Rivers Community Legal Centre also raised a number of barriers to justice which are experienced by women in RRR areas. For example, the low number of private practitioners in rural areas increases the risk of client conflict of interest in family law matters, often with the woman losing access to the solicitor rather than the full-cost paying male client. Rural women are also less mobile than

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120 Ms Marilyn Wright, *Committee Hansard*, 11 November 2003, p. 57.

121 ibid.

122 For example, '… calls to the police station in Cooper Pedy after eight o'clock get diverted to Port Augusta, which is a six-hour drive away. If any domestic violence occurs after eight o'clock you have very little chance of getting police to attend the scene, which causes quite a lot of trouble for women…': Ms Zita Adut Ngor, *Committee Hansard*, 11 November 2003, p. 57. Some women in rural and remote communities (even in regional centres such as Port Augusta) may not have telephones to call for police attendance in the first place: Ms Marilyn Wright, *Committee Hansard*, 11 November 2003, p. 57.

123 Ms Marilyn Wright, *Committee Hansard*, 11 November 2003, p. 61.

women living in metropolitan areas, often having limited access to transport to attend legal services in distant towns, and there are fewer female lawyers in rural areas.[124]

4.115 The Committee also heard evidence in relation to the difficulties experienced by women in RRR areas who work in the field of legal and related services:

> The kind of work that people do in remote and regional community legal centres is really quite extraordinary, particularly in the women's legal services and Indigenous women's legal services, where you have single women workers who travel to remote areas, often travelling hundreds of kilometres at times. There is often not sufficient recompense for the expense of doing that and for the expense of having the family looked after while engaged in such activities.[125]

Committee view

4.116 The Committee acknowledges the overwhelming evidence presented to it in relation to the limited and inadequate access to services in RRR areas and, in particular, the specific difficulties faced by women in these areas. The Committee considers it unacceptable that women living in RRR areas should be disadvantaged and denied basic services and the right to access justice simply because of where they live.

4.117 General issues arising in RRR areas are discussed in more detail in Chapter 6. However, the Committee considers it important that the particular needs of women in such areas are given special attention.

Recommendation 25

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

Other areas of law affecting women inadequately funded by legal aid

4.119 The NNWLS stated in its submission to the Committee that legal aid has not been readily available for a number of years for many civil law, administrative law and human rights law matters. The NNWLS submitted that it is a concern that certain areas of law have been deemed to fall outside the domain of legal aid when alternative services are not adequately funded. It submitted that this is particularly the case in immigration law matters:

> The CLCs working in this area cannot possibly meet demand and staff are often overwhelmed by huge and emotionally draining case loads of their

124 Northern Rivers Community Legal Centre, *Submission 22*, p. 8.

125 Ms Zoe Rathus, National Network of Women's Legal Services, *Committee Hansard*, 10 March 2004, p. 9.

> clients. For many women, immigration law, family law and domestic violence intersect and some women pay a high price if they are unable to obtain timely and accurate immigration or refugee advice.[126]

4.120 In their submission, Professor Rosemary Hunter and Associate Professor Jeff Giddings made note of the very limited availability of legal aid for civil proceedings which potentially disadvantage women who might wish to bring claims for personal injury, crimes compensation, sex discrimination, or domestic violence restraining orders.[127]

4.121 Further, a group of women who are often overlooked in discussions about legal aid are women prisoners. It has been submitted that women prisoners throughout Australian do not have satisfactory access to legal services:

> There is no systematic approach to providing legal services to women prisoners. Some LACs provide services related to the offences with which the women have been charged, but for many women prisoners their legal problems relate to family law issues, care and protection, access to their children, credit and debt and a range of internal correctional issues. This group of Australians is almost ignored by the legal aid radar. [128]

Committee view

4.122 In its submission to the Committee, the NNWLS recommended research be conducted, and service delivery and community education be improved for women in relation to immigration and refugee law, human rights law, civil law, administrative law, and women in prison. The Committee supports the view that research be carried out with the aim of improving service delivery and community education for women in these areas of law, and for women in prison.

Recommendation 26

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

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126 National Network of Women's Legal Services, *Submission 86*, p. 32.

127 *Submission 24*, p. 3.

128 National Network of Women's Legal Services, *Submission 86*, pp. 32-33.

CHAPTER 5

INDIGENOUS LEGAL SERVICES

5.1 This chapter discusses the following issues that were raised by submissions and during public hearings:

- funding for Aboriginal and Torres Strait Islander legal services (ATSILS);
- the need for separate legal aid services for Indigenous people;
- the Commonwealth Government's proposed introduction of tendering for Indigenous legal services;
- issues relating to Indigenous women, including conflict of interest issues;
- alternative dispute resolution; and
- broader access to justice issues.

Funding for Indigenous legal services

5.2 Prior to the establishment of the Aboriginal and Torres Strait Islander Commission (ATSIC) in 1989, ATSILS were funded by the Commonwealth Government through grants-in-aid administered by the then Department of Aboriginal Affairs.[1]

5.3 ATSILS are now funded by the ATSIC Legal and Preventative Services Program,[2] administered by ATSIS.[3] The principal funding recipients are a network of 25 ATSILS, located at 96 service sites nationally. These are Indigenous owned and controlled organisations that provide legal aid in a culturally appropriate way.[4] ATSIS also provides funding for a network of Family Violence Prevention Legal Services.

5.4 The total amount of legal funding administered by ATSIS in its Law and Justice Program for the 2002-03 financial year was $57.093 million.[5] In the same financial year, ATSILS received a total of $43.053 million for legal representation to 69,292

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1 *Aboriginal Legal Aid*, House of Representatives Report, July 1980, p. 163.

2 See ATSIC website: http://www.atsic.gov.au/programs/Social_and_Cultural/Default.asp.

3 ATSIC, *Submission 98,* p. 6; ATSIC *Annual Report 2002-2003*, p. 183.

4 ATSIC, *Annual Report 2002-2003*, p. 183.

5 ANAO *ATSIS Law and Justice Program,* Performance Audit Report No. 13 2003-2004, p. 25.

Indigenous clients in 113,698 duty matters.[6] State and territory governments also provide funding for ATSILS.[7]

5.5 In its submission, ATSIC stated:

> ATSILS are required to prioritise provision of services in accordance with ATSIS' National Program Policy Framework for ATSILS … Accordingly, in face of sheer demand for assistance, ATSILS predominantly provide legal aid services for criminal matters (89% of case and duty matters in 2001-02; compared with only 2% family matters and 2% violence protection matters).[8]

5.6 ATSIC also submitted that current challenges for its legal aid program are:

- the rapid growth in the number of young Indigenous people, with over 40 per cent of Indigenous people being under 15 years of age;
- growing demand for ATSILS to provide services relating to child protection, civil and family matters; and
- funding shortfalls.[9]

Funding shortfalls

5.7 Several Indigenous legal service providers expressed concern that they are unable to meet increasing demands because of inadequate funding.[10]

5.8 ATSIC noted that financial constraints prevent genuine access to justice for Indigenous people on a wide range of matters and contribute to high incarceration rates and recidivism amongst Indigenous Australians:

> It should be emphasised that there is a very real disadvantage experienced, now, by Indigenous people due to the constrained resources provided to

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6 ATSIC, *Submission 98,* p. 6.

7 Commonwealth Government's Response to recommendations made by the House of Representative Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Justice Under Scrutiny: Report of the Inquiry into the Implementation by Governments of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody*, November 1995, p. 27.

8 *Submission 98*, p. 7.

9 ibid, p. 10.

10 For example, see Katherine Aboriginal Regional Legal Aid Service, *Submission 2,* p. 2; Coalition of Aboriginal Legal Service, *Submission 5,* p. 39; North Australian Aboriginal Legal Aid, *Submission 7,* p. 7; Aboriginal Legal Rights Movement, *Submission 16,* p. 24; Miwatj Aboriginal Legal Service, *Submission 35,* p. 1; Redfern Legal Centre, *Submission 61,* p. 1; Victorian Aboriginal Legal Service, *Submission 67,* p. 2; Top End Women's Legal Service, *Submission 74,* p. 3.

> Indigenous legal aid services which simply do not match the number of people and matters requiring assistance.[11]

5.9 ATSIC's submission referred to an overall funding shortfall for Indigenous legal aid services when compared with LACs:

> ATSIC's submission to the Department of Finance and Administration Pricing Review in 2001 found a $12 million annual funding shortfall of ATSILS compared to Legal Aid Commission benchmarks. ATSIS commissioned the Australian Institute of Criminology to develop a funding allocation method (FAM) to advise proportionate need for legal service funds between the ATSIC Regions. While the formal report is not yet available, initial studies point to a severe shortfall in funding against current indicators of need.[12]

5.10 ATSIC argued that, while there are serious resource strains across the whole legal aid system which need urgent supplementation, within this general constraint:

> … the resources currently available to LACs and ATSIS are not equivalent. At the very least the ATSIS indigenous legal aid program needs to be funded at similar levels to LACs in order to recruit effectively and provide much needed services.[13]

5.11 A 2003 Australian National Audit Office (ANAO) report also referred to the shortfall in funding for Indigenous legal aid services:

> Other reports on the provision of legal services by ATSILS have referred to 'shortfalls in ATSIC funding' for legal aid of either $12.4 million or $25.6 million. Grantee organisations advised the ANAO that in the current environment service delivery is suffering. ATSILS are slowly becoming less effective as they are forced to reduce the number of lawyers they employ, or reduce the range of services delivered, while the demand for assistance is increasing. This reflects increasing demand for ATSILS' services, increasing costs and relatively flat funding levels.[14]

5.12 The ANAO stated that the development of a whole-of-government approach (by Commonwealth, state and territory governments) to address the legal aid needs of Indigenous Australians would provide:

> … the best opportunity for all providers to achieve a standard of service delivery that is consistent and appropriate. Achieving this will require ATSIS to work with funding agencies to provide governments with a comprehensive picture of the issues involved in providing legal aid to Indigenous Australians. In addition, unless ATSIS acts to provide realistic specifications for the services ATSILS are to provide, there are clear risks

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11 *Submission 98*, p. 5.

12 ibid, p. 10.

13 ibid, p. 5.

14 ANAO *ATSIS Law and Justice Program,* Performance Audit Report No 13 2003-2004, p. 42.

> that there will be continued reductions in the ability of ATSILS to deliver quality services.[15]

5.13 ATSIC's submission referred to the report of an audit in 2003 by the Office of Evaluation and Audit in ATSIC, which found that:

> • ATSILS are providing legal services at a cost that is significantly lower than that paid by mainstream LACs for legal work undertaken on a referral basis by private practitioners, and that it is achieved at a level of client satisfaction no different from that reported by LAC clients.
>
> • The national shortfall in ATSIC funding to ATSILS, if their outputs are costed at the same level as LAC-paid legal work, is $25,605,598.
>
> • There is low morale and high staff turnover among ATSILS practitioners.[16]

5.14 The Katherine Regional Aboriginal Legal Aid Service submitted that it is severely underfunded:

> While our workload has experienced generally a steady but at times explosive incline, our funding has steadily decreased in both real and nominal terms. This has [led] to a series of very significant problems for our clients.
>
> First, areas of law where services need to be provided and where proactive solutions may be made … are constantly being sidelined in favour of the non-stop rigo[u]rs of providing assistance in crime …
>
> Second, there is a shortage of money to pay lawyers appropriately. This has led in turn to 2 problems: (a) a complete inability to attract experienced practi[t]ioners (especially in areas outside of crime); and, (b) very high attrition rates for lawyers within the service. Our regional location compounds that secondary problem.[17]

5.15 Mr Neil Gillespie of the Aboriginal Legal Rights Movement (ALRM) also advised that reductions in legal aid funding has resulted in its lawyers being paid lower salaries than their LAC counterparts:

> In real terms we have had a substantial reduction rather than just a loss of $50,000. Once you take into consideration the loss of purchasing power of our dollars you will understand why we exhibit frustration in the total funding of ALRM. We have staff, for argument's sake, who are on 30 per cent less than their counterparts in the Legal Services Commission. I was at a function the other day and I found out that I am on far less than my counterparts—CEOs in native title representative bodies. The average salary there is in the vicinity of $140,000. My salary is 50 per cent of that.

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15 ibid.

16 *Submission 98*, citing ATSIC, Office of Evaluation and Audit *Evaluation of the legal and preventive services program*, 2003, pp. 1 & 2.

17 *Submission 2*, p. 2.

> That is indicative of the plight in our funding. We cannot afford to pay our people the dollars they command.[18]

5.16 The North Aboriginal Legal Aid Service submitted that ATSIC should lobby both the Commonwealth Government and the Northern Territory government to provide the same level of service to the remote communities as in Darwin.[19]

5.17 The Victorian Aboriginal Legal Service stated:

> Given the myriad studies and research that undeniably demonstrate the abysmal levels of disadvantage suffered by Indigenous people in Australia, it is incredible that an Indigenous organisation continue to be funded well below the levels of mainstream services.[20]

The need for separate legal services

5.18 In 1980, the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs strongly supported the existence of specialist Aboriginal legal services.[21] The Royal Commission into Aboriginal Deaths in Custody in 1991 also supported the continued existence of such services, while making various recommendations on their operations.[22]

5.19 Submissions to this inquiry also expressed strong support for specialist Indigenous legal services that provide culturally sensitive services to Indigenous people.

5.20 Many remote Aboriginal communities endure chronic lack of health and educational services, overcrowded housing, substance abuse including severe alcoholism and petrol sniffing, and very high levels of violence.[23] Aboriginal and Torres Strait Islander people are widely regarded as the most disadvantaged group in the Australian justice system.

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18 *Committee Hansard*, 11 November 2003, p. 23.

19 North Australian Aboriginal Legal Aid Service, *Submission 7,* p. 6.

20 Victorian Aboriginal Legal Aid Service, *Submission 67,* p. 10. Also see Top End Women's Legal Service, *Submission 74,* p. 2.

21 *Report,* p. 30.

22 Recommendations 105-108 quoted in Coalition of Aboriginal Legal Services NSW, *Submission 5*, pp. 11-12.

23 Katherine Regional Aboriginal Legal Aid Service, *Submission 2*, p. 2. See also ATSIC, *Submission 98*, pp. 5 & 6.

5.21 The high incarceration rate of Aboriginal and Torres Strait Islander people is one indication of that disadvantage.[24] The Victorian Aboriginal Legal Service (VALS) submitted that:

> The legal situation of Indigenous people in Victoria, as in the rest of Australia, is appalling. At the end of June 2002, Indigenous people in Victoria were 13 times more likely to be imprisoned than non-Indigenous people, which was an 8% increase since June 2001.[25]

5.22 The Coalition of Aboriginal Legal Services NSW (COALS) noted that:

> In August 1995, nearly a third (31%) of all people held in police custody were Aboriginal … Indigenous people also appear in court at a rate five times higher than that which would be expected given their population size, and their rate of incarceration is twelve times higher than that of non-Indigenous Australians. … almost one in five prisoners currently incarcerated in Australian correctional facilities is an Aborigine or Torres Strait Islander.[26]

5.23 COALS stated that the incarceration rates for young people were even more disturbing: as at 31 December 2000, 41 per cent of detainees in juvenile corrective institutions were Indigenous. This rate is almost 16 times higher than the rate for non-Indigenous juveniles.[27] As Mr John Boersig from COALS explained to the Committee, most of those incarcerated are boys. However:

> … the recidivism of Indigenous women and girls is increasing at dramatic rates. This is a very big issue. Aboriginal youth comprise 42 per cent of inmates around Australia. What that means is in New South Wales, for example, of 350 kids in custody 123 are going to be Indigenous. That is incredible. You walk into the shelter at Dubbo or the shelter at Grafton and you find that all the kids there are Indigenous.[28]

5.24 Mr Boersig told the Committee that, due to the fact that the Indigenous prison population is increasing by about 8 per cent per year:

> … there is a great need to maintain representation in criminal matters. That of course is broader than simple representation in court, although that is important. It is not just about being there when someone is sentenced; it is

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24 Coalition of Aboriginal Legal Services, *Submission 5,* p. 6; Aboriginal Legal Rights Movement, *Submission 16,* p. 4; Victorian Aboriginal Legal Services, *Submission 67,* p. 2; Wirringa Baiya Aboriginal Women's Legal Centre, *Submission 89,* p. 5; Yilli Rreung Regional Council, *Submission 95,* p. 1; ATSIC, *Submission 98,* p. 5; ABS Year Book 2003, ABS Catalogue No. 1310.0, p. 360; ABS Corrective Services, Catalogue No. 4512.0, June 2003, pp. 20-24.

25 *Submission 67*, p. 5.

26 *Submission 5*, pp. 5-6.

27 *Submission 5*, p. 6, citing Australian Institute of Criminology *Persons in Juvenile Corrective Institutions 1981 – 2000: With a Statistical Review of the Year 2000*, unpublished, AIC, Canberra.

28 *Committee Hansard*, 13 November 2003, p. 47.

> about the way the matter is conducted, it is about being out there in the field when people are arrested and it is about prevention. It is getting out there and educating people about their rights and responsibilities. Ultimately the point I am making is that in relation to the landscape we also need to find creative ways to address these issues, apart from money and apart from recognising this issue of core business.[29]

5.25 VALS stated:

> Lack of appropriate levels of funding to Indigenous organisations that deal with allied problems such as alcohol and substance abuse, family violence, lack of employment opportunities, education and health are also contributing factors to the continued over-representation of Indigenous people in the justice system.[30]

5.26 COALS submitted that it is because of these social problems and the unique relationship ATSILS have with the Indigenous community that such services are better placed to prepare and provide all relevant facts for the sentencing of Aboriginal offenders.[31] COALS also argued that legal representation of Indigenous people is best carried out by Indigenous legal organisations and their peak representative bodies, and submitted:

> … that any attempt to mainstream Indigenous legal services would only serve to exacerbate the already serious problem of the vast over-representation of Aborigines and Torres Strait Islanders within police and prison populations.[32]

5.27 Mr Frank Guivarra from VALS argued:

> VALS provides around 85 per cent of the criminal law services and over 65 per cent of the family law and civil law services required by Indigenous people in Victoria. These figures show that even though there are other services available, such as legal aid and community legal centres, Indigenous people still prefer to use VALS. Why is that? A 1980 House of Representatives inquiry found that Aboriginal and Torres Strait Islander legal services create a unique relationship of trust and cultural understanding with their clients that simply could not be emulated by a large, mainstream legal aid service. This relationship means that Indigenous people feel more confident with the legal system and are therefore more likely to access legal representation when they need it.[33]

5.28 COALS submitted that Commonwealth and state governments have made commitments to the recommendations of the Royal Commission into Aboriginal

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29 ibid, p. 44.

30 Victorian Aboriginal Legal Aid Service *Submission 67*, p. 10.

31 *Submission 5*, p. 45.

32 ibid, p. 41.

33 *Committee Hansard*, 12 November 2003, p. 71.

Deaths in Custody.[34] These commitments include funding legal aid services for Aboriginal and Torres Strait Islander people.[35]

Tendering for Indigenous legal services

5.29 A concern expressed repeatedly by Indigenous legal service providers during the Committee's inquiry is the proposed introduction of competitive tendering for Indigenous legal services. Early in the inquiry the Committee was told that ATSIC/ATSIS was intending to implement a "contestability" policy or competitive tendering, in accordance with Commonwealth Government policy.[36]

5.30 The Commonwealth Government's policy on competitive tendering is contained in Commonwealth Procurement Guidelines issued by the Minister for Finance and Administration:[37]

> The Government is committed to ensuring an efficient and effective public sector through the discipline of contestability. Recent regulatory and legislative changes ensure that Government business activities do not have net competitive advantages over their private sector competitors simply as a result of their public ownership. In a contestable environment, agencies must meet Competitive Neutrality requirements.
>
> Competitive Neutrality policy promotes efficient competition between public and private business operating in the same market.[38]

5.31 ATSIC advised that its move to competitive tendering 'will ensure that service providers are sympathetic to Indigenous people's circumstances, needs and culture'.[39] However, ATSIC warned:

> The successful tenderers alone will not be able to provide all Indigenous peoples' need for legal aid and justice, leaving significant gaps in service

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34 *Submission 5,* p. 4. See also House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs *Justice Under Scrutiny: Report of the Inquiry into the Implementation by Governments of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody*, November 1994, pp. 2-4.

35 Commonwealth Government's Response to recommendations made by the House of Representative Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Justice Under Scrutiny: Report of the Inquiry into the Implementation by Governments of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody*, November 1995, p. 27.

36 ATSIC, *Submission 98*, p. 3.

37 Commonwealth Procurement Guidelines, p. 5, issued under Regulation 7(1) of the Financial Management and Accountability Regulations. The Guidelines are available at http://www.finance.gov.au.

38 ibid, p. 7. The Commonwealth Government's Competitive Neutrality policy can be found at http://www.ccnco.gov.au/cn_display.html.

39 *Submission 98*, p. 9.

> which will require co-operation with other providers and additional resources.[40]

5.32 In March 2004 the Minister for Immigration and Multicultural and Indigenous Affairs released the 'Exposure Draft of a Request for Tender for the Purchase of Legal Services for Indigenous Australians'. In a media release, the Minister stated that the aim of the reforms is to:

> … ensure that legal services are tendered in a competitive environment thereby ensuring that Indigenous people get value for money. A larger emphasis will also be put on allocating the services to those most in need.
>
> As we prepare to commit more than $120 million to the purchase of Indigenous legal aid services from January 2005 to December 2007, there is no better time for reform.[41]

5.33 The media release also stated that it was expected that a final draft of the Request for Tender guidelines would be finalised by August 2004, so that the first funds could be released under new contractual arrangements from 1 January 2005.[42]

5.34 When questioned about concerns raised during the inquiry about the tendering issue, a representative from ATSIC told the Committee that:

> The way the system is now has failed Indigenous people regarding justice. The services provided for Indigenous people just were not sufficient. We had to take into consideration that the best way to deliver a service was to actually go to tender, with real outcomes. [43]

5.35 Although it was somewhat unclear from ATSIC's submission and from questioning in a public hearing, it appears that it was the ATSIC board that made the decision to tender:

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

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40 ibid, pp. 4-5.

41 Minister for Immigration and Multicultural and Indigenous Affairs, 'Legal aid reforms to benefit Indigenous Australians', *Media release*, 4 March 2004, at www.atsia.gov.au (accessed 13 April 2004).

42 ibid.

43 Mr Lionel Quartermaine, Aboriginal and Torres Strait Islander Commission, *Committee Hansard*, 9 February 2004, p. 35.

> …
>
> Ministerial direction encourages us to use modern approaches to arranging service delivery. It is not mandating us to use tendering in the arrangement of services that we purchase, but in the area of legal services we believe that it is the most appropriate way to go to secure the best outcomes.[44]

5.36 The Committee also heard ATSIC's view that going out to tender would assist it to save money. However, no study was conducted to indicate that this would be the case.[45]

Criticism of the decision to tender

5.37 The Committee received evidence indicating serious concern within ATSILS that competitive tendering would mainstream the provision of legal aid services, resulting in the disempowerment of Aboriginal communities.[46] Some ATSILS were also concerned that mainstream legal services are not approached by Indigenous clients because of language and cultural barriers.[47]

5.38 ATSIC itself stressed the importance of ATSILS as preferred legal service providers compared with LACs, CLCs and private legal services:

> The reasons for Indigenous peoples' preference for approaching Indigenous-specific organisations rather than mainstream service providers are multi-faceted. However, it is essentially the ATSILS' ability to cater for the cultural needs of Indigenous clients that render them the most suitable avenue for Indigenous people in need of legal aid, particularly in the areas of:
>
> - Dealing with language difficulties;
> - Representation and explanation of the law in the face of what is often limited understanding of the justice system by Indigenous people; and
> - Advocating and negotiating with relevant government authorities for services to Indigenous people.[48]

5.39 COALS argued that the effectiveness of ATSILS in meeting Indigenous legal needs:

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44 Mr Bernie Yates, ATSIS, *Committee Hansard*, 9 February 2004, p. 39.

45 Mr Rodney Dillon, ATSIC, *Committee Hansard*, 9 February 2004, p. 43.

46 Coalition of Aboriginal Legal Services, *Submission 5,* p. 76; Australian Legal Assistance Forum *Submission 113*; Western Suburbs Legal Service Inc *Submission 114*.

47 Wirringa Baiya Aboriginal Women's Legal Centre, *Submission 89,* p. 7. Also see *Committee Hansard,* 13 November 2003, p. 57.

48 ATSIC, *Submission 98*, p. 9.

> … is primarily attributable to their accessibility and acceptability to the Indigenous population, their community-based structure, and the specialised nature of the legal service they provide … These organizations have earned their place as an essential part of the legal system of this country, and they should continue to be supported in their endeavours.[49]

5.40 Further, COALS expressed its strong objection to any suggestion to merge ATSILS with other legal service providers. Instead, it urged that:

> … consideration be given to expanding these organizations and their representative bodies such that Indigenous participation within the justice proves be granted. It is submitted that any attempt to mainstream services to Aborigines and Torres Strait Islanders will inevitably lead to disempowerment of Aboriginal communities.[50]

5.41 COALS emphasised that Indigenous participation and self-determination in the provision of legal services are vital, since this:

> … facilitates the building of trust between organizations and Indigenous communities. This, in turn, increases the level of service acceptance by those communities and contributes to their long-term sustainability. This focus on long-term sustainability of Indigenous programmes is the most effective way in which the negative effects of dispossession and colonization, including high rates of Indigenous incarceration and high levels of Indigenous deaths in custody, can be addressed.[51]

5.42 COALS also argued that ATSILS' approach to assessing legal aid was more appropriate than that of the LACs:

> In line with the object of maximising the access of *all* Indigenous Australians to appropriate legal representations, ATSILS guidelines are relatively flexible and discretionary. To a large extent, they avoid the formal and administratively intensive assessment procedures outlined in the Legal Aid Commission's guidelines in favour of more personal and culturally appropriate consultation between staff and clients … In accordance with its objective of maximising the participation of Indigenous people in legal processes, the approach adopted by ATSILS more effectively promotes the rights of Indigenous people to empowerment, identity and culture, and in doing so, reduces the disproportionate number of the Indigenous population involved in the criminal justice system.[52]

5.43 Mr Neil Gillespie from ALRM told the Committee that the basis on which any output-based service delivery of legal aid services is to be applied is unclear:

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49 Coalition of Aboriginal Legal Services, *Submission 5*, p. 43.

50 ibid, pp. 43-44.

51 ibid, p. 44.

52 ibid, p. 46.

> We have no problem with tendering. We have no problem with output based service delivery. However, we would like to understand the basis on which we are expected to provide the services. We have, for a long time, been seeking a revision and a realistic approach to performance and also to service delivery. The systems that we operate at the moment do not help us in providing a better service to our clients. This is highlighted, again, in both ATSIC's own internal document and the National Audit Office report.[53]

5.44 VALS also questioned the appropriateness of the decision to tender:

> The Senate Inquiry into competition policy raised questions about the appropriateness of extending competition policy to areas of social welfare provision. The public interest test should be applied when considering whether to tender ATSILS. There is ample evidence that the services are poorly funded and working with disadvantaged communities.[54]

5.45 VALS described the Exposure Draft as 'a formula designed to have ASTILS squeezed out of existence'.[55] The National Association of Community Legal Centres (NACLC) was even more critical:

> The present arrangements with ATSILS have been developed around concepts of empowerment, community-based services, flexibility in service delivery, the preventative strategies of running test cases and law reform activities, and the need for broad based assistance such as information, education and research. All these are absent in the Exposure Draft.
>
> The Exposure Draft in its present form will make it difficult for ATSILS to win tenders and appears to have been designed to maximise the opportunities for private law firms to do so. As such, the continued existence of ATSILS as specialist community based Indigenous organizations seems unlikely. Consequently, it appears to undermine the right of Indigenous Australians to self-determination.[56]

5.46 In response, a representative from ATSIC told the Committee:

> This is not necessarily going to go to private services. We would like to think that Aboriginal services will quote for these and get these services—not private services. We are thinking along the lines of rules that they will have to understand Indigenous communities, and the majority of the people that understand communities will be the Aboriginals services now.[57]

5.47 The NACLC argued that arrangements for providing services to Indigenous clients were contrary to recommendations of the Royal Commission into Aboriginal

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53 *Committee Hansard*, 11 November 2003, p. 31.

54 VALS, *Submission 67*, pp. 7-8.

55 VALS, *Submission 67B*, p. 1.

56 NACLC *Submission 84B*, p. 3.

57 Mr Rodney Dillon, ATSIC, *Committee Hansard*, 9 February 2004, p. 35

Deaths in Custody.[58] Further, the Exposure Draft was 'not a commercially realistic document'[59] and its proposals 'are designed to implement the agenda to mainstream aboriginal services'[60] and shift costs from the Commonwealth to the states, with the following results predicted:

> The Exposure Draft will not result in the delivery of quality legal services to Indigenous people nor will it improve access to justice for these the most disadvantaged people in our community. The ideological agenda driving this proposal is likely to have a number of expensive and damaging consequences.[61]

5.48 The NACLC also claimed that:

> The need for targeted legal services for Indigenous people and the effectiveness of the service delivered have rarely been questioned, even though, at times, there have been concerns about the governance of ATSILS. All the reviews of ATSILS have concluded among other conclusions, that the fundamental issue affecting ATSILS has been the lack of funds. The level of service delivery, given this under-resourcing, the climate of instability created by the many reviews of ATSILs and the overwhelming need, is outstanding.[62]

5.49 Of particular concern to the NACLC was that there is no requirement in the Exposure Draft that organisations be Indigenous or employ Indigenous staff. In fact, the NACLC argued that, in its current form, the Exposure Draft would make it difficult for ATSILS to win tenders as it appears to maximise the opportunities for private law firms. This means that the continued existence of ATSILS as specialist organisations is unlikely and will result in an undermining of the right of Indigenous people to self-determination.[63] Further, the NACLC claimed that:

> Replacing Aboriginal legal services with white organizations, possibly private practices of lawyers, make it less likely that Aboriginal people will seek assistance. It is widely known and recognised that in the vast majority of cases Aboriginal people prefer to use Aboriginal managed legal services. Access to justice will thus be further restricted for Aboriginal people.[64]

5.50 The NACLC also argued:

> The benefits of tendering are often exaggerated and the costs and other unintended consequences are often underestimated … Studies such as the

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58 NACLC *Submission 84B*, citing Recommendations 84, 105, 106 and 107.

59 ibid, p. 2.

60 ibid.

61 ibid, p. 3.

62 ibid, p. 2.

63 ibid, p. 3.

64 ibid, p. 4.

> Office of Evaluation and Audit (ATSIC 2003) indicated that ATSILS are already under funded and cheaper than Legal Aid … Loss of supplementary funding, pro bono support and in kind assistance associated with moving services to private practitioners would be likely to cancel any supposed cost savings.
>
> The tender as proposed does not offer any transparent value-free method of comparing the quality of the service being offered. Often the end result of a tender process for human services is poor quality, less appropriate services.[65]

5.51 Strong criticisms were also voiced by the Australian Legal Assistance Forum (comprising the Law Council of Australia, the Community Legal Centres, National Legal Aid and ATSILS)[66] and Western Suburbs Legal Service Inc.[67]

5.52 Another aspect of the Minister's recent announcement was that a means test would be introduced for anyone with an income over $40,000. CDEP (Community Development Employment Projects) participants and those receiving Centrelink benefits would be exempt.[68] The NACLC argued that this would increase costs for legal services:

> The eligibility requirements appear to enable the vast majority of Indigenous clients to receive a service. However the means test outlined is broader than that used by legal aid commissions and ATSILS will be required to administer it before advice or duty lawyer services are provided. The administration of the means test will add new costs to ATSILS. It appears that for the very few who will not qualify, the introduction of this requirement is an unnecessary expense. There has been no provision made for the additional resources required to manage these requirements.[69]

Indigenous women's issues

5.53 The special needs of Indigenous women have been increasingly recognised in recent years, particularly since the ALRC's 1994 report, *Equality Before the Law: Justice for Women*, recommended the establishment of specialist legal services to meet their needs. The report identified the lack of access to culturally accessible legal

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65 ibid, p. 5.

66 *Submission 113*.

67 *Submission 114*.

68 Minister for Immigration and Multicultural and Indigenous Affairs 'Legal aid reforms to benefit Indigenous Australians' *Media release*, 4 March 2004, at www.atsia.gov.au (accessed 13 April 2004).

69 *Submission 84B*, p. 6.

aid for Indigenous women and determined that Indigenous women are the most legally disadvantaged group in Australia.[70]

5.54 The Committee received evidence that, almost ten years after the ALRC report, Indigenous women remain chronically disadvantaged in terms of their access to legal services, awareness and exercise of their legal rights, and domestic violence support.[71]

5.55 VALS advised that the imprisonment of Indigenous women has increased 250 per cent over the past ten years, making them the most imprisoned group in Australia.[72] In Victoria, 80 per cent of women who are imprisoned are mothers, mostly with young children. Such high rates of incarceration mean that:

> … the imprisonment of Indigenous women not only impacts on offenders, but also their children and their communities.[73]

5.56 Mr Frank Guivarra referred to some of the systemic reasons behind the high rate of incarceration of Indigenous women:

> A lot of it revolves around the poverty trap: shoplifting, social security fraud and stuff like that. Drugs have also been a factor for a high percentage of the people incarcerated.
>
> …
>
> Centrelink overpayments and people not notifying. They are saying, 'There's the money; it's great,' and then, all of a sudden, they are caught and they cannot pay. It is the nonpayment of fines and stuff like that; they cannot make restitution, so the person has got to be locked up.[74]

5.57 The Wirringa Baiya Aboriginal Women's Legal Centre argued that many Indigenous women are imprisoned because they have fought back against abuse.[75] The Top End Women's Legal Service referred to the high levels of violence against many Indigenous women, including aggravated and sexual assault in circumstances where weapons are used. Meanwhile support and assistance, including legal assistance to remote indigenous women in relation to violence, is seriously inadequate.[76]

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70 Report No 69, 1994, especially chapter 5 and recommendation 5.2 concerning the establishment of specialist legal services for Aboriginal and Torres Strait Islander women. See also Criminal Justice Commission, *Aboriginal witnesses in Queensland's criminal courts,* 1996, chapter 7.

71 For example, Women's Legal Service SA Inc, *Submission 72*, p. 2; Northern Territory Legal Aid Commission, *Submission 82*, p. 9; National Network of Women's Legal Services, *Submission 86*, p. 3.

72 Victorian Aboriginal Legal Service, *Submission 67,* p. 5.

73 ibid.

74 *Committee Hansard*, 12 November 2003, p. 77.

75 *Submission 89*, p. 5.

76 *Submission 74*, p. 3.

5.58 Several submissions and witnesses raised particular concern about the level of violence within Indigenous communities. Ms Marilyn Wright of the Women's Legal Service SA expressed the view that domestic violence is about power imbalance:

> Domestic violence is about power and it is about an abuse of that power. It is about lack of equal relationships. I guess that is why women, particularly Aboriginal women and women whose second language is English, are at a disadvantage because those power relationships may be accentuated. It is about the society we live in.[77]

5.59 However, Ms Winsome Matthews from the National Network of Indigenous Women's Legal Services (NNIWLS) expressed the view that violence in Indigenous communities encompasses more than domestic violence within families and power imbalances:

> … we are dealing with family and community violence. That refers to a broad spectrum of events that all people now need to get their heads wrapped around, because domestic violence is not something that occurs in our communities; it is family and community violence. It is intergenerational, it is same gender, it encapsulates suicide and homicide and it also encapsulates the vast spectrum of dysfunctional community syndrome—which is about the rape and killing of elders and children. This is how bad family violence is. It is not about the power imbalance between a man and woman.[78]

The extent of funding

5.60 Ms Leanne Matthews from NNIWLS argued that more funding must be allocated to the needs of Indigenous women:

> One of the things we have been told consistently is that there is just not enough money in the Attorney-General's Department to enhance current activity or to introduce a new scheme. So it comes back to the Commonwealth government's budget priorities: how much of a priority are the needs of black women in this country, especially when we are dying at the hands of our own community through violence? In New South Wales alone, 52 per cent of murders are those of Aboriginal women who have been beaten to death.[79]

5.61 Ms Matthews explained how the NNIWLS is funded:

> We came about through the 1996 last-minute funding allocation of the Labor government, which placed a whole heap of money into the National Network of Women's Legal Services, which are predominantly mainstream and non-Aboriginal. They were given that money to strike an Indigenous women program because of the evidence and findings of the Equality

77 *Committee Hansard*, 11 November 2003, p. 59.

78 *Committee Hansard*, 12 November 2003, p. 69.

79 ibid, p. 65.

> before the law report, which showed the vast disadvantage that Indigenous women were suffering.[80]

5.62 Ms Mathews explained that the funding is provided through the Attorney-General's Department, and noted:

> We have attained other money to enhance our position and to expand our network through philanthropic grants. The Myer Foundation and the Reichstein Foundation are two organisations that have supported us quite well. We were able to develop the network to a position where it could become incorporated so that we could get real change happening, as there was a lack of infrastructure for Indigenous women and for their policy and political lobbying avenues.[81]

5.63 There are currently eight federally funded Indigenous women's legal service projects which are sponsored by generalist women's legal services and community legal services. The NNIWLS told the Committee that Wirringa Baiya Aboriginal Women's Legal Service (funded by the NSW Attorney-General's Department) is the only independent Indigenous legal service in Australia.[82]

5.64 The following table shows the extent and distribution of Commonwealth funding for Indigenous women's legal services in 2002/03.

80 ibid.

81 ibid.

82 *Submission 90*, p. 3.

Table 5.1 Commonwealth community legal services allocation for Indigenous women's legal services 2002-03

Jurisdiction		$ Amount
NSW Women's Legal Resource Centre		244,166
QLD Women's Legal Service		137,317
North Queensland Women's Legal Service		158,443
	Qld total	295,760
SA Women's Legal Service		95,065
WA Geraldton Resource Centre		58,096
Kimberley Community Legal Service		58,096
Pilbara Legal Service		58,096
	WA total	174,228
TAS Women's Legal Service		42,252
TOTAL FUNDING		**851,531**

Source: NNIWLS, document tabled on 12 November 2003.

5.65 The Committee notes that the total amount of funding is less than a million dollars (the Attorney-General's Department advising that the total in 2003/04 had increased to $0.9 million),[83] and that there is no Commonwealth funding for projects in Victoria, the NT or the ACT.

The need for a review

5.66 The NNIWLS recommended that funding be allocated for a major national solution-focused review of Indigenous women's legal needs, available legal services and any gaps. Such a review would assist with future policy formulation, service targeting and quality improvement and should be undertaken in partnership by an office such as the Human Rights and Equal Opportunity Commission's Indigenous Social Justice Commissioner, with the NNIWLS.[84] At the Melbourne hearing, Ms

83 Correspondence from Ms Sue Pidgeon, Attorney-General's Department, 3 May 2004, which stated that the Commonwealth allocated $4.4 million in 2003/04 for specialist legal services solely for women. Of this, $2.9 million was allocated to provide generalist women's legal assistance and referral services; $0.6 million for women in rural and remote areas; and $0.9 million for projects to assist the particular needs of Indigenous women.

84 *Submission 90*, p. 6.

Winsome Matthews of the NNIWLS added that ATSIS should be included as a necessary component of the review.[85]

5.67 ATSIC also recommended that a comprehensive national study be undertaken to accurately determine Indigenous women's needs for legal aid and access to justice:

> It is clear that Indigenous women are not being appropriately served by existing legal aid services but the extent and nature of their need for services has not been adequately identified or analysed. Therefore, an analysis of Indigenous women's legal needs is required and a strategy developed to address them.[86]

5.68 When questioned as to whether ATSIC or ATSIS itself might be best placed to conduct such a study, a representative from ATSIS stated:

> … we do not have a comprehensive national database of unmet need, particularly as it relates to female Indigenous people. It is an important gap. We are between a rock and a hard place with our legal services. As you pointed out, almost 90 per cent of its business is focusing on criminal matters.[87]

5.69 The Committee notes that some ATSILS have implemented forums to help Indigenous women gain access to adequate legal representation:

> In order to make its service more accessible to women, in 2002 VALS made a successful application to the Department of Justice for an Indigenous Women's Justice Forum Coordinator. The forums provide a space for Indigenous women to explore justice issues affecting them such as family violence and access to adequate legal representation. The aim of the forums is to link information about programs and services across communities and organisations. They also provide the opportunity to develop Indigenous community-controlled strategies to help resolve issues affecting women and their families.[88]

5.70 At the Port Augusta hearing, Ms Marilyn Wright of the Women's Legal Service SA told the Committee that change should come from Indigenous women themselves:

> We have seen how strong the elders in Coober Pedy have been recently regarding the mining issues, the dumping of uranium. They are an incredibly strong group of women. So the potential is there within the communities to solve the problem, but it is a matter of having the support, the resources and access to services.

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85 *Committee Hansard*, 13 November 2003, p. 62.

86 *Submission 98*, p. 15.

87 Mr Bernie Yates, ATSIS, *Committee Hansard*, 9 February 2004, p. 34.

88 Victorian Aboriginal Legal Aid Service, *Submission 67,* p. 4.

> … If we are talking about change in Aboriginal communities, it has to come from the actual communities themselves on the basis of self-determination, and most of the communities have incredibly strong groups of women.[89]

5.71 Ms Winsome Matthews from the NNIWLS agreed:

> … it is about the localisation of authority and the power being given back to the people. There are a few principles by which Aboriginal people are now well placed to identify what their problems are but also the solutions to those problems and how government should be facilitating the resourcing of such. This is a view we take in New South Wales. We are looking at community justice groups being established across the state to become the point of reference for the community and also policing and criminal justice authorities about legal issues and conditions in those communities.[90]

Family violence prevention services

5.72 At the Port Augusta hearing, Mr Mark Forth from the Warndu Wathilli-Carri Ngura Aboriginal Family Violence Legal Service noted that Indigenous communities have their own particular complexities when it comes to family violence and that community involvement is essential in addressing family violence issues:

> Family violence does have its own particular issues and there are certain ways of dealing with aspects of it … Particularly in Indigenous communities, it requires the involvement of the people in the community itself, because they want to get involved in order to rid themselves of this curse, so to speak. Although as a practitioner I have a lot of confidentiality issues, we certainly call upon many people—staff members and people outside the office—for help in dealing with the issue. So, while it is certainly a difficult legal problem, it is also a community problem; and it is something the community wants to address. My submission to the committee, from my experience and contacts I have with people in remote and rural communities, is that there is a very big unmet need for help in this area which we have limited resources or ability to deal with.[91]

5.73 The Committee heard that ATSIS has funded 13 Family Violence Prevention Services in remote, rural and regional areas, with funding in 2003/04 of $4.8 million. As Mr Bernie Yates of ATSIS told the Committee:

> We have been progressively trying to address the situation of women in the system with the establishment of family violence prevention legal services … It is a separate program but it is an integral part of the total picture of how you try to meet some of the needs in this area.[92]

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89 *Committee Hansard*, 11 November 2003, p. 60.

90 *Committee Hansard*, 12 November 2003, p. 64.

91 *Committee Hansard*, 11 November 2003, p. 47.

92 *Committee Hansard*, 9 February 2004, p. 34.

5.74 The following table shows the funding for each service, broken down by base funding and funding for a sexual assault worker. Two services have not yet received funding for such workers because their project proposals are still to be finalised. There are services in each state and territory, except Tasmania and the ACT.

Table 5.2 Family Violence Prevention Services

FVPS Provider	Location	Base Funding	Sexual Assault Worker Funding
Central Australian Aboriginal Family Legal Unit	Alice Springs	$313 770	$48 115
Walanbaa Yinnar Wahroo – Walgett Family Violence Prevention Unit	Walgett	$324 002	$34 334
Tharpuntoo Family Violence Unit	Cairns	$294 002	$46 884
Many Rivers Violence Prevention Unit	Kempsey	$323 969	$57 952
Darwin Family Violence Prevention Unit	Darwin	$320 980	
Fitzroy Crossing Family Violence Prevention Unit	Fitzroy Crossing	$294 002	$33 652
Yamatji Family Violence Prevention Unit	Geraldton	$294 002	$27 622
Thungula Goothada – Family Support Legal Centre	Kalgoorlie	$305 502	$31 500
Katherine Aboriginal Families' Support Unit	Katherine	$305 502	$62 646
ATSIC Family Violence Prevention and Legal Service	Melbourne	$300 000	
Mt Isa Indigenous Families Support Unit	Mt Isa	$314 002	$37 129
Warndu Wathilli – Carri Ngura Aboriginal Family Violence Legal Service	Port Augusta	$306 126	$50 000
Kamilaroi Family Violence Legal Support Centre	Moree	$336 857	$36 458

Source: ATSIS, *Submission 111*, pp. 2-3.

5.75 The NNIWLS spoke highly of the services:

> Services are reporting a high level of community acceptance and many ATSIC regions are pressing for the establishment of [Family Violence Prevention Units] in their area. The Network considers that this is a dramatic breakthrough and it is critical that there is a strong and supportive response … While there will probably never be enough [Units] there is the strongest possible case for more of these services to be established.[93]

5.76 This view was supported by other witnesses. Ms June Lennon of the Warndu Wathilli-Carri Ngura Aboriginal Family Violence Legal Service told the Committee that the service was well-known within the Port Augusta Indigenous community:

> If one of our family, if you like, is experiencing family violence or doing it, we try and refer them to this place because we think that—particularly as we focus on the victims of family violence and their children—they are more likely to go there if they know about what the service offers. Sometimes when you have the word 'legal' in the description of your service, they are not really sure of what type of legal service is provided.[94]

5.77 Ms Lennon continued:

> Once people started learning about the service, and I think a lot of it happened through word of mouth—people were able to say that they had used our service and they were helped in whatever way—that promoted our service even more. Also, our staff network with most members of the Aboriginal community, basically on a daily basis. They only have to walk down the street and people access them. We have been receiving through the community more inquiries about what we actually provide. I think that is because we have been there, we have been operating, and people have come in for a number of matters and we have been able to explain to them why we are actually there. I feel that they are accessing our service more comfortably now than when they first started to.[95]

Conflict of interest

5.78 One issue which was brought to the Committee's attention numerous times was the conflict of interest in legal aid matters involving Indigenous people where more than one party applies for legal assistance. This is particularly relevant for women who are denied access to assistance because their partner has received assistance first.

5.79 ATSIC submitted that:

> ATSILS provide approximately 89% of the advice and representation for criminal matters. This trend has discouraged Indigenous women from approaching ATSILS for assistance initially, particularly given the

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93 NNIWLS 'Policy and Budget Submission - January 2003', *Submission 90,* Attachment 2.

94 *Committee Hansard*, 11 November 2003, p. 50.

95 ibid.

> likelihood of ATSILS defending the perpetrator. The problem has often been attributed to the "first-in, first-serve" nature of ATSILS work. The lack of alternative service providers in many of the jurisdictions in which ATSILS operate means that even if the victim sought ATSILS assistance first, if refused, they at least have the option of seeking police assistance. However were the ATSILS to turn away the perpetrator, he would have nowhere else to seek representation. ATSIS acknowledges that wherever possible LACs have attempted to represent indigenous women in cases of conflict where the partner is represented by the ATSILS. However it remains that in many instances the victim lacks any legal advice beyond that provided by the police.[96]

5.80 The Top End Women's Legal Service submitted that while steps had been taken in recent years, Indigenous women were still disadvantaged by the focus by LACs and ATSILS on representing offenders:

> They are generally unable to assist victims of crime. Steps have been taken in the last few years to address the problem. ATSIS now funds Aboriginal Family Violence Prevention Units in Alice Springs, Katherine and Darwin. The Northern Territory government funds domestic violence legal units in Alice Springs and Darwin. These are commendable efforts. However, there remain enormous gaps in service provision. To give just a few examples, where is the assistance for indigenous women living in violent towns such as Tennant Creek or Borroloola or communities with high rates of violence such as Maningrida or the Tiwi Islands?[97]

5.81 At the Melbourne hearing, Ms Winsome Matthews of the NNIWLS went further, informing the Committee that legal services may not be provided to a woman if there is the *potential* for a conflict of interest:

> Traditionally [Aboriginal legal services] have been [gender] exclusive to the point where service will not be provided to a woman if there is a potential that her husband may be a client in the future.
>
> …
>
> There have been a number of examples of that in rural New South Wales, especially in relation to the Walgett violence prevention unit and the difficulty they had in provision of service prior to the establishment of that unit.[98]

5.82 An ATSIC representative also recognised the problem during the first Canberra hearing:

> In the past we have addressed the perpetrator and not the innocent person. The innocent person has usually been covered by the prosecutor, but we

96 *Submission 98*, p. 15.

97 *Submission 74*, p. 3.

98 *Committee Hansard*, 12 November 2003, pp. 63 & 64.

> know that this system is not good for us and we are trying to address it—it is going to take us time—with the little money we have got.[99]

5.83 Ms Katharine Hairsine from VALS told the Committee that Indigenous women often feel they cannot get legal assistance or representation even when this is not the case:

> A lot of women feel that if there is a conflict of interest we will not represent them. Anecdotally, a lot of women within the community do not think that they can get representation from the Aboriginal Legal Services.
>
> …
>
> Anyone who came to us would not be unrepresented. In the past we also made funding applications to set up a separate women's annexe. That would have got rid of that conflict of interest but we were unsuccessful in that application. There definitely are women who would not apply to VALS because they assume that they would not get representation, even though they would.[100]

5.84 Ms Hairsine stated that VALS took measures to address such situations:

> For instance, if you have a family law case where the husband has already had representation by VALS it means the woman cannot be represented by VALS. But VALS will ensure that representation for that woman is provided by another legal service provider, and VALS will fund that. It means that the woman does not go without representation—but it will not be by VALS, and that means people like client service officers. Also, having Indigenous staff in the organisation can make it easier for people to use the service.[101]

5.85 Mr Chris Charles explained that the ALRM had a slightly different approach:

> The ALRM policy has always been that if there are parties in dispute, as in one family feuding against another—we have literally had cases like that, with multiple assault charges laid between family members; I had quite a lot of it in Ceduna some years ago—ALRM will not act at all. We will brief out both sides or ask both sides to get independent representation. Our view is that if we are seen to take sides by representing one side at the expense of another we are picking sides within the community and we do not want to do that. That will decrease access to our services by both families later and we do not want that to happen because we would like both sides to be able to come to us later. We do not want to pick sides.
>
> On the other hand, there has been a change in our policy recently whereby we have given priority to assistance being given to victims of domestic violence and women. Now if we have a domestic violence situation and the

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99 Mr Rodney Dillon, ATSIC, *Committee Hansard*, 9 February 2004, p. 43.

100 *Committee Hansard*, 12 November 2003, p. 76.

101 *Committee Hansard* , 12 November 2003, p. 73.

> woman comes to us first we will act for the woman first and the male perpetrator will have to go elsewhere. That is a recent change in our policy which was consistent with our recognition of the need to look after the interests of women and domestic violence victims.[102]

5.86 Mr Charles added, however:

> We have a briefing out budget of about $100,000 to $150,000 a year, which is, frankly, ludicrous. We do not have the resources to pay for the separate representation of the many people who we think under our properly formulated policies ought to be separately represented. We do not ever get a budget sufficient to enable us to provide for their representation and that gives rise to the Legal Services Commission picking them up.[103]

5.87 Mr John Boersig from COALS told the Committee that:

> In New South Wales [the issue of conflict of interest] is addressed by saying in the policy framework that the first person in is the person who gets the advice and assistance. That is a very difficult policy to implement at times, particularly when the core business for many organisations is criminal law.[104]

5.88 The Committee received evidence that Indigenous women experience significant obstacles within their own communities that seriously affect their rights and their ability to access justice. ATSIC recognised these difficulties:

> The effect of delayed access to justice for Indigenous women is even more severe given the cultural inhibitions in their own communities such as beliefs in the sanctity of kinship and fear of community retribution. If they overcome this threat and seek representation, only to be met with refusal by the under-resourced ATSILS the lesson can be devastating. These considerations have often led to reluctance in seeking legal advice by many women.[105]

5.89 This means that:

> … reference to the statistics of clients accepted or refused by the ATSILS does not present the real picture of the legal needs of indigenous women, particularly in relation to family violence.[106]

5.90 At the Melbourne hearing, Ms Winsome Matthews of the NNIWLS expressed a similar view:

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102 *Committee Hansard*, 11 November 2003, pp. 31-32.

103 ibid, p. 32.

104 *Committee Hansard*, 13 November 2003, p. 43.

105 *Submission 98*, p. 16.

106 ibid.

> Our remote and rural people—the women who work in those locations—have the added tension of dealing with law men and their right under customary law.
>
> …
>
> We are pretty much talking about those locations where traditional law is still strong—and I am talking more about where the patriarchal systems of law of custom is active—and the struggle that our own women have in addressing those issues.
>
> …
>
> It is not just about legal disadvantage of women; it is about the overall role of Aboriginal women in society and about how disregarded, underestimated and simply not considered we are.[107]

5.91 Ms Matthews told the Committee that Indigenous women's groups are attempting to make positive changes to ensure that the rights of Indigenous women are upheld and actively promoted:

> We are also looking at embedding an Indigenous perspective into current areas of investigation and review, because of how absent it has been. Often you get an Aboriginal perspective that is predominantly represented by the Aboriginal Legal Service which never upholds the perspective or legal needs or concerns of Indigenous women.[108]

5.92 ATSIC argued further that:

> These observations indicate that current arrangements for Indigenous women's access to justice are poor, especially in remote areas. However while ATSIC/ATSIS and its ATSILS committed to stamping out family violence, the prioritising of scarce resources to criminal matters means that, in practice, victims are not assisted while those responsible, are. Within existing resources ATSIS is limited in its capacity to give its own policies concrete substance. This contradiction will be overcome only through additional resourcing of ATSILS and Indigenous women specific legal service providers.[109]

Alternative dispute resolution

5.93 In 1980 the House of Representatives Committee encouraged ATSILS to make more effective use of alternative legal aid services, particularly in metropolitan areas where such services may be available. It also recommended that ATSILS should

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107 *Committee Hansard*, 12 November 2003, pp. 65 & 69.

108 ibid, p. 66.

109 *Submission 98*, p. 16.

direct more resources towards rural areas where such services were unavailable.[110] The Committee was interested in the extent to which such services were needed.

5.94 ALRM supported the use of alternate dispute mechanisms as they are similar to how disputes are dealt with in traditional Indigenous society:

> ALRM believes that alternate dispute resolution mechanisms such as mediation and conciliation could prove useful within Indigenous communities because they are more similar to how disputes would be traditionally resolved.[111]

5.95 At the Sydney hearing, Mr John Boersig from COALS noted the success of family conferencing and the importance of "local solutions" in Indigenous communities:

> Family conferencing has a fascinating history. It started in New Zealand to address the issues of Maori people. It developed in New Zealand and has been imported into New South Wales under the Young Offenders Act. Its value is that it keeps children out of court and tries to find solutions between victims and offenders, in the context of minimising harm to the community.
>
> …
>
> In New South Wales they are trying to bring Indigenous people in to be involved as conference convenors. There are wider issues about elder involvement that are addressed in both circle sentencing and youth conferencing. There will always be a struggle with a one-size-fits-all system in addressing particular local needs. As you have no doubt heard from Indigenous people, they are very much interested in local solutions and local needs. The development of youth conferencing needs to take that into account and provide local solutions.[112]

5.96 Ms Matthews from the NNIWLS noted the success of community justice groups in the NT and far north Queensland:

> … they have been extremely successful with their community justice groups. The community of Yuendumu in the Northern Territory have extended their community justice groups to also have a traditional high court and a senate to deal with local issues, particularly the legal matters of the people. They have expanded to also look at the legal context of other social issues that they are confronted with … It is a move that is rising amongst Aboriginal communities, and community justice groups in New

110 House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs *Aboriginal Legal Aid*, July 1980, p. 130.

111 *Submission 16,* p. 17.

112 *Committee Hansard*, 13 November 2003, p. 47.

> South Wales have a legislative base under the alternative justice process, which is complementary to the circle-sentencing initiative.[113]

5.97 However, some notes of caution were sounded. Mr Mark Forth from the Warndu Wathilli-Carri Ngura Aboriginal Family Violence Legal Service informed the Committee that:

> We do try to use mediation quite a bit. Very rarely is it successful, I should add. Usually those people who get into these intractable situations are not the same sorts of people who are able to find solutions at mediation. That is not say it never happens; it does happen occasionally. Usually you get a fairly good inclination of that right at the beginning and you try to find some solution without heading off to court. Most of the time, regrettably, you really have to at least commence some sort of legal action and get something under way before one of the parties realises you are serious. That, regrettably, is usually the state of play in these matters.[114]

5.98 However, Mr Forth added:

> Regarding the success rate for mediation—and this is just off the top of my head—less than a handful have succeeded at mediation to resolve some sort of issue. I find that that is not dissimilar to the sort of rate you get in the non-Indigenous community.[115]

5.99 The Redfern Legal Centre also cautioned against the use of mediation in family law matters where violence is involved:

> Legal Aid eligibility requirements and the procedures of the Family Court are heavily focussed on counselling and mediation. Unrepresented women in fear of violence are at risk of agreeing to unsuitable arrangements especially with regard to contact with children, because of fear of the perpetrator. Those who are too scared to participate are at risk of becoming ineligible for assistance. While mediation and counselling are often appropriate and constructive ways of resolving family problems, proper representation of the parties is essential for proper protection of the safety of women and children.[116]

Other access to justice issues

5.100 As well as the lack of available legal services, various barriers have prevented Aboriginal and Torres Strait Islander people from accessing legal aid. The most common barriers include language issues, lack of cultural awareness amongst service providers, telecommunications issues, and transport to and from remote areas.

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113 *Committee Hansard*, 12 November 2003, p. 64.

114 *Committee Hansard*, 11 November 2003, p. 49.

115 ibid, p. 51.

116 *Submission 61,* p. 6.

Language

5.101 The Top End Women's Legal Service advised that a common barrier to accessing legal aid representation is language as most of their clients have English as either a second, third, or fourth language.[117] Literacy rates are also low amongst clients who are socially and economically marginalised.[118]

5.102 Language barriers are not peculiar to remote Aboriginal communities. There are also misunderstandings about Aboriginal English which is spoken quite widely in metropolitan Aboriginal communities:

> Aboriginal English is a language in Australia that must be recognised as equal to English, and non-Aboriginal workers need training in this language and its nuances to better engage with Aboriginal women and children escaping domestic violence and all forms of sexual assault.[119]

5.103 The Yilli Rreung Regional Council referred to the large number of clients of the North Australian Aboriginal Legal Aid Service who speak an Indigenous language at home:

> The Australian Bureau of Statistics, 2001 Census data reports that 11.8% of Indigenous people residing in the Darwin region and 84.5% of Indigenous people residing in the Jabiru region speak an Indigenous language at home. In some communities serviced by NAALAS, English is reserved for speaking with non-Indigenous people. Indigenous individuals residing in remote areas may use English as a second, third or fourth language. A large number of NAALAS clients speak an Indigenous language at home.[120]

5.104 The Yilli Rreung Regional Council also noted that:

> The use of an interpreter, where required, is vital to effective provision of legal services. However, it can be time consuming to organise for an interpreter to be present when providing a service to clients and where an interpreter is used, more time is needed. This impacts on the resources which the service provider uses and needs.[121]

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117 *Submission 74*, p. 2. See also Miwatj Aboriginal Legal Service, *Submission 35*, p. 3; Yilli Rreung Regional Council, *Submission 95*, p. 8; ATSIC, *Submission 98*, p. 20.

118 Top End Women's Legal Service, *Submission 74*, p. 2.

119 Wirringa Baiya Aboriginal Women's Legal Service, *Submission 89*, p. 7.

120 *Submission 95*, pp. 6-7.

121 ibid.

5.105 The Committee notes that in the recent Budget the Government announced that the Aboriginal Interpreter Service would be extended in the Northern Territory.[122] While this is a welcome initiative, more remains to be done.

Cultural awareness training

5.106 ALRM submitted that understanding Aboriginal society is an integral part of delivering affective legal aid services, particularly in communities where the society is organised in a fundamentally different way to western mainstream society.[123] ALRM argued that funds were needed to educate the community about Indigenous culture, in order to help dissolve misconceptions of Indigenous people in the justice system.[124] There was also a need for culturally appropriate legal practitioners and organisations that understand the Indigenous community.[125]

5.107 This view was also expressed by ATSIC which recommended that:

> … cultural awareness training is made available for non-Indigenous lawyers, particularly those working in LACs.[126]

5.108 The Yilli Rreung Regional Council emphasised the importance of understanding cultural differences:

> The society of the client group is often organised according to traditional custom and social structures. Many clients in the region practice customary law and recognise customary law authority structures. The provision of legal education, advice and representation to this group is a complex and time consuming exercise which requires the legal service to recognise and work within the existing social structures.[127]

5.109 However, it is not just a question of ensuring that lawyers are appropriately trained. Culturally appropriate services must be provided in other parts of the justice system. Ms Naomi Brown representing the Community Legal Centres Association (Western Australia) Inc referred to the case of an Indigenous woman from a rural area who had to travel to Perth for a welfare report:

> … there were no Indigenous court counsellors. There is not necessarily a process to decide whether, if the counsellor is male, it is appropriate for the woman and/or her children to talk with that person about, for example,

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122 Minister for Immigration and Multicultural and Indigenous Affairs 'Australian Government announces new initiatives in Indigenous affairs', *Media release*, 11 May 2004, where it was stated that the Aboriginal Interpreter Service was part of a $3.9 million package which funds a pre-court juvenile diversion scheme.

123 *Submission 16*, p. 7.

124 ibid, p. 24.

125 Wirringa Baiya Aboriginal Women's Legal Centre, *Submission 89,* p. 4 & 7.

126 *Submission 98,* p. 9.

127 ibid.

> issues of sexual abuse. If you are looking at the systems, there is discrimination against not only Indigenous people but also people of culturally and linguistically diverse backgrounds. These sorts of questions are not even looked at: how are we going to get this story; is there an appropriate way of actually getting the story about the issues in the family; do we have an understanding of how this family works? … The women I spoke with in Western Australia in relation to that were very strong about saying, 'There need to be services that are culturally appropriate,' and that includes access to legal aid services as well. There are no Indigenous liaison officers attached to Legal Aid, not even in remote areas where there [is] a wealth of Indigenous cultures—there are for Aboriginal legal services; but there are not for legal aid services.[128]

Telephone advice and videoconferencing for remote communities

5.110 The Top End Women's Legal Service submitted that in many remote communities Aboriginal people cannot access the most basic services, as very few Aboriginal people own a phone or can access a public phone to ring the '1800' numbers for government funded legal advice and services.[129] Moreover, in some places, as the Alpurrurulam Community Government Council noted:

> [Residents'] only access is through the use of Council telephones. Privacy cannot always be guaranteed and waiting for return phone calls involves lengthy waiting periods.[130]

5.111 Many people in remote communities do not know about the various civil authorities and therefore are less likely to contact them.[131] Some Aboriginal communities when asked about use of telephone advice services in their communities noted other problems:

> If general legal advice is available by telephone the Council has not been given this information … Country-men do not know what questions to ask, and therefore assistance is required for office staff and Managers and more visits from legal representatives.[132]

5.112 Some Indigenous legal providers also saw access to telephones or computers with Internet access as ineffective.[133] Further, videoconferencing facilities may not be always be appropriate:

> ATSIC representatives of Indigenous clients living in remote communities have expressed concerns that the use of videoconferencing facilities is not a

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128 Ms Brown, *Committee Hansard,* 12 November 2003, p. 53.

129 *Submission 74*, p. 2.

130 *Submission 109*, p. 1.

131 *Submission 74*, p. 2.

132 Nyirranggulung Mardrulk Ngadberre Regional Authority *Submission 100*¸ p. 1.

133 See, for example, Miwatj Aboriginal Legal Service, *Submission 35,* p. 6.

> substitute for face to face contact and does not necessarily translate to an increase in access to justice. For example, the video conferencing facility in the community may still be hundreds of kilometres from clients living in outstations. Those clients may have difficulty in travelling to the community for a videoconference on a designated time and date.[134]

5.113 More general concerns about reliance on such technology in rural and remote areas are discussed in more detail in Chapter 6.

Transport to and from remote areas

5.114 In 1980 the House of Representatives Committee found:

> Geographical isolation is a major factor affecting the access of Aboriginals to legal aid. In remote areas, Aboriginals' lack of access to legal assistance can be attributed partly to the absence or limited number of legal practitioners in these areas.[135]

5.115 Legal aid lawyers and staff are still prevented in many cases from meeting face-to-face with their clients in regional and remote areas. Travelling to client locations can be costly. For example, North Australian Aboriginal Legal Aid advised the Committee that over $86,000 is required each year to cover lawyers' travel and accommodation to provide services to clients in remote communities.[136]

5.116 Ms Leanne Matthews from NNIWLS explained the practical effect of living in a remote community:

> To give a quick scenario, in some remote towns there is no legal service. Legal providers, such as legal aid and the Aboriginal Legal Service, fly in half an hour prior to court commencing. They barely have enough time to speak with their clients and obtain a brief about the charges and to explain what options are available to them. Often they are advised to plead guilty.[137]

5.117 The lack of any contact with their legal advisors until just before court commenced was confirmed by a number of remote Aboriginal communities that responded to Committee correspondence about their circumstances.[138]

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134 Yilli Rreung Regional Council, *Submission 95*, p. 4. The use of videoconferencing facilities is discussed in more detail in Chapters 6 and 10.

135 *Aboriginal Legal Aid*, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs Report, July 1980, p. 11.

136 ibid, p, 6.

137 *Committee Hansard*, 12 November 2003, p. 61.

138 Amoonguna Community Incorporated *Submission 104*; Yuelamu Community Council Inc *Submission 105*; Gurungu Council Aboriginal Corporation *Submission 106*.

Civil legal aid assistance

5.118 The Katherine Regional Aboriginal Legal Aid Service advised that civil matters such as family law work, debt recovery, credit, consumer, and tort related law matters are sidelined by criminal law matters.[139] Other Indigenous legal service providers made similar comments.[140]

5.119 The North Australian Aboriginal Legal Aid Service argued that a particular need is consumer legal assistance in remote communities in relation to such matters as being forced to pay high prices for basic food items, unfair dismissals, 'used car rip offs' and discrimination.[141]

5.120 The Top End Women's Legal Service argued that:

> The access to justice in remote areas is so inadequate that remote indigenous people cannot be said to have full civil rights. Their civil rights are severely reduced because they do not get adequate information let alone advice or representation about a range of civil law matters, for example welfare rights, housing, discrimination law, consumer rights, credit and debt, employment law, motor accidents compensation, crimes compensation, negligence, family law and so on.
>
> Furthermore remote indigenous people have no effective access to a range of civil authorities that could assist them to assert their civil rights … [142]

5.121 Mr John Boersig from COALS stressed the importance of developing and promoting a range of services that can be cross-referred to assist Indigenous people with their legal needs:

> There are civil and family law services—no doubt you have heard about that at length—in which domestic violence issues are crucial, as well as all the issues associated with that, such as victim's compensation, mediation, child care and protection.[143]

5.122 As an example Mr Boersig referred to the office where he works in Newcastle:

> There are three different service providers operating out of the same premises. The key service provider is the University of Newcastle Legal Centre. Attached to that are the civil lawyers with the Legal Aid Commission, and also attached is one of the officers of the Many Rivers Aboriginal Legal Service. Each of those services has a particular specialty. The Many Rivers Aboriginal Legal Service focuses on criminal law, the

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139 *Submission 2,* p. 2.

140 Victorian Aboriginal Legal Aid Service, *Submission 67,* p. 10; Top End Women's Legal Service, *Submission 74,* p. 1.

141 *Submission 7,* p. 7.

142 *Submission 74*, p. 1.

143 ibid.

> university provides family law and other related civil services, and the Legal Aid Commission provides civil services.
>
> …
>
> Both in Newcastle and, indeed, in other areas, including Lismore and Redfern, officers of Aboriginal legal services also involve students. That has been very effective in adding value to the kinds of services that can be provided.[144]

Committee view

5.123 The Committee is gravely concerned by the evidence it received about the overwhelming deficiencies in the legal aid system as it relates to Indigenous people in Australia, particularly those living in remote areas. The Committee is particularly concerned about the critical lack of access to justice for Indigenous women, especially in relation to domestic violence matters. While the Committee recognises that there are serious problems in the provision of legal aid and access to justice for many Australians, it is apparent that Indigenous people are disproportionately disadvantaged in seeking legal assistance and related services.

5.124 The Committee considers that the Commonwealth Government's decision to introduce competitive tendering in relation to the provision of Indigenous legal services is ill-considered and inappropriate. The decision is particularly difficult to comprehend given the recognition by ATSILS and, indeed, the Commonwealth Government that ATSILS are the preferred service providers of Indigenous people due to their ability to cater to specific cultural needs. The Committee agrees with the submission by the NACLC and its claim that '(u)nder the cloak of contestability policy dramatic new policies are being proposed that will reduce the effectiveness of Legal Aid provision to one of the most disadvantaged groups in Australia'.[145]

5.125 The Committee urges the Commonwealth Government to recognise the importance of ATSILS and acknowledge that there is a clear need for targeted, culturally sensitive and specialised Indigenous legal aid services in order to enable Indigenous people to achieve access to justice. Further, evidence suggests that the approaches taken by ATSILS in providing services most effectively promote the rights of Indigenous people to empowerment, identity and culture. The Committee considers that the 'Exposure Draft of a Request for Tender for the Purchase of Legal Services for Indigenous Australians' should be immediately withdrawn and the Commonwealth Government's policy in this area reconsidered as a matter of priority.

5.126 The Committee is particularly concerned by the Government's decision announced during the last stages of this inquiry that it will abolish ATSIC and

144 ibid, pp. 43 & 44.

145 *Submission 84*, p. 6.

"mainstream" funding for Indigenous services.[146] The Committee notes that the Government intends to transfer the responsibility for funding Aboriginal legal services and Family Violence Prevention Services to the Attorney-General's Department.[147]

5.127 The Committee urges the Government to ensure that Departmental officers administering these programs recognise that ATSILS are usually the most appropriate providers of legal services to Indigenous people, and acknowledge that there is a clear continuing need for self-determination and for targeted, culturally sensitive and specialised Indigenous legal aid services. Moreover, the Government must ensure that ATSILS are recognised for their role as the main provider of legal services to Indigenous people and that the integrity, capacity, strength, effectiveness and value of ATSILS are maintained.

Recommendation 27

5.128 The Committee recommends that the Commonwealth Government should urgently increase the level of funding to Indigenous legal services in order to promote access to justice for Indigenous people. In doing so, the Government must factor issues of language, culture, literacy, remoteness and incarceration rates into the cost of service delivery.

Recommendation 28

5.129 The Committee recommends that the Commonwealth Government's 'Exposure Draft of a Request for Tender for the Purchase of Legal Services for Indigenous Australians' should be withdrawn and its underlying policy reconsidered.

5.130 Evidence presented to the Committee about the circumstances and needs of Indigenous women is particularly troubling. Chronic disadvantage in relation to access to legal services, awareness and legal rights, and a severe shortage of culturally appropriate domestic violence support services are some of the problems Indigenous women face. The Committee is also deeply concerned by the extremely high levels of violence within Indigenous communities which impact largely on women, and by evidence indicating that Indigenous women face significant impediments from within their own communities in attempting to exercise their rights and seek access to justice.

5.131 The Committee supports the calls by ATSIC and the NNIWLS for a comprehensive analysis of the needs of Indigenous women in the legal system. Pending the outcome of that review, however, it is clear that urgent steps must be taken to increase the assistance available to them. Appropriate measures include the

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146 Senator Amanda Vanstone, Minister for Immigration and Multicultural and Indigenous Affairs 'New service delivery arrangements for Indigenous affairs' *Media Release*, 15 April 2004.

147 The Hon Gary Hardgrave MP, Acting Minister for Immigration and Multicultural and Indigenous Affairs 'Improving services for Indigenous Australians' *Media Release*, 3o April 2004.

expansion of Family Violence Prevention Services which appear to be gaining increased acceptance in Indigenous communities; and funding for specialist Indigenous women's legal services and for ATSILS generally.

5.132 The Committee notes that in the recent Budget, the Government announced that it would be 'expanding' the Family Violence Prevention Legal Services by providing $22.7 million over four years.[148] The Committee notes that this represents a small expansion only taken on an annual basis, given the current $4.8 million provided in 2003/04, but welcomes the decision to continue funding of this important program. The Committee notes also that the Government has announced that it will support state/territory and local projects that address Indigenous family violence by providing a further $37.3 million over four years,[149] and welcomes that decision. However, more needs to be done.

Recommendation 29

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

Recommendation 30

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

Recommendation 31

5.135 The Committee recommends that the Government allocate sufficient funding to Indigenous legal services and Indigenous Family Violence Prevention Legal Services to enable adequate provision of effective legal services for Indigenous women in family law and family violence matters, including funding for additional culturally sensitive services in areas of highest need.

5.136 The Committee is also concerned about the problems faced by Indigenous people in remote communities. The problems arising from circuit courts in remote

148 Minister for Immigration and Multicultural and Indigenous Affairs 'Australian Government announces new initiatives in Indigenous affairs', *Media release*, 11 May 2004.

149 ibid.

communities, particularly the frequently reported lack of access to legal advice until the day of the person's hearing, have been well documented elsewhere. The Committee has also heard evidence of the problems of reliance on telephone services, particularly given the lack of privacy in community facilities where calls must often be taken, and the desirability of having face-to-face interviews with legal advisors and support workers.

Recommendation 32

5.137 The Committee recommends that the Commonwealth Government and state/territory governments address the serious problem of lack of access to justice for Indigenous people in remote areas by providing resources to support the expansion and development of available services.

5.138 Finally, the Committee considers, as it has concluded elsewhere in this report, that the provision of adequate legal services to Indigenous people can only be achieved if proper funding is provided on the basis of assessed need. Consequently, an analysis of the needs of Indigenous people should be undertaken on a national basis.

Recommendation 33

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

CHAPTER 6

LEGAL AID IN OUTER-METROPOLITAN, REGIONAL, RURAL AND REMOTE AREAS

6.1 This chapter discusses:

- the particular issues and barriers affecting those people living in outer-metropolitan, regional, rural and remote (RRR) areas of Australia in accessing the legal system; and
- what might be done to better provide access to justice for those living in RRR areas.

Particular issues facing people in rural, regional and remote areas

6.2 The Committee's inquiry into legal aid in 1998 identified a range of difficulties experienced by people living in RRR areas. While the Committee noted that many of the problems experienced by such people were similar to those experienced by people in metropolitan areas, additional problems were prevalent in RRR areas.[1] Some of the issues brought to the Committee's attention were similar to those raised by submissions and witnesses in the current inquiry. In its 1998 report, the Committee recommended that the Commonwealth and state/territory governments give priority to the provision of appropriate legal aid services to meet the specific needs of different communities, including RRR communities.[2]

6.3 Evidence received by the Committee in the current inquiry suggested that there are a number of issues affecting people living in RRR communities which are beyond the legal needs they share with people in metropolitan areas. Several submissions argued that the current arrangements for achieving national equity and uniform access to justice do not meet the legal assistance needs of RRR communities[3] and that any existing inadequacies in the legal aid system are greatly magnified in RRR areas.[4]

6.4 Although it has been recognised that there are common needs and experiences in different RRR communities, there is also a diverse range of issues facing individual members of these communities. People living in RRR communities may not

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1 Senate Legal and Constitutional Committee, *Inquiry into the Australian Legal Aid System*, Third Report, June 1998, pp. 164-165.

2 ibid, p. 166.

3 For example, see Northern Rivers Community Legal Centre, *Submission 22*, p. 2.

4 For example, see Darwin Community Legal Service, *Submission 56*, p. 2.

necessarily have uniform characteristics and needs. This is of itself important in developing an understanding of the services that are required in RRR communities.[5]

6.5 Some evidence suggested that diversity of, and within, communities means that any national guiding principles of legal aid must take into account the varied needs of community members. In the broader context, national equity and uniformity are not necessarily the same thing. Equity might in some circumstances require that individuals and communities be treated differently within the legal aid system. Indeed, individuals may have different needs even when faced with the same legal problem; such needs should be met in order for an individual to have equity of access when compared with other individuals.[6]

6.6 Several submissions received by the Committee identified a range of difficulties experienced by people with legal needs in RRR communities.[7] While it may be inevitable to some extent that those living in RRR areas will generally find it more difficult to access legal services than those living in more populous areas with greater resources, the Law Institute Victoria argued that problems for people in RRR areas are often unduly intensified:

> … chronic under-funding of legal aid services … exacerbates this problem. People living in rural and remote areas are disproportionately disadvantaged by gaps in the legal aid funding scheme.[8]

6.7 The Committee received evidence that one of the major barriers to access to justice is the fact that large geographical areas in Australia are not covered by legal aid or free legal services. For example, it was submitted that in NSW:

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5 J Giddings, B Hook and J Nielsen, 'Legal Services in Rural Communities: Issues for clients and lawyers', *Alternative Law Journal*, Vol. 26, No. 2, April 2001, pp. 57 & 58.

6 Community Legal Centres Association (Western Australia) Inc, *Submission 93,* p. 6. For example: '… a fluent Mandarin speaking person living in the metropolitan area seeking family law advice, might have different needs to a fluent Mandarin (only) speaking person living in a remote area of Western Australia': ibid.

7 See, for example, Riverland Community Legal Service Inc, *Submission 11*, p. 3; Northern Rivers Community Legal Centre, *Submission 22*, pp. 3-8; Murray Mallee Community Legal Service, *Submission 23*, pp. 1-3; Shoalcoast Community Legal Centre, *Submission 28*, p. 4; Blue Mountains Community Legal Centre, *Submission 38*, p. 2; Hawkesbury Nepean Community Legal Centre Inc, *Submission 46*, p. 2; Clayton Utz, *Submission 43*, p. 9; Gilbert & Tobin, *Submission 57*, p. 4; Legal Aid Commission of New South Wales, Submission 91, pp. 15-17; Legal Services Commission of South Australia, *Submission 51*, p. 16; Wirringa Baiya Aboriginal Women's Legal Centre, *Submission 89*, pp. 3-4; Community Legal Centres Association (Western Australia) Inc, *Submission 93,* p. 11; Australian Law Reform Commission, *Submission 26*, p. 5; J Giddings, B Hook and J Nielsen, 'Legal Services in Rural Communities: Issues for clients and lawyers', *Alternative Law Journal*, Vol. 26, No. 2, April 2001, pp. 58-60; B Fowler, Manager/Social Worker, Broken Hill Community Inc, 'Access to Justice in Rural and Remote Areas', Access to Justice Workshop July 2002, Law and Justice Foundation of NSW, www.lawfoundation.net.au/access/fowler.html, accessed on 21 January 2004.

8 *Submission 88*, p. 6.

> Legal Aid offices and community legal centres exist in some areas of the State, but they are spread too thinly in rural, regional and remote areas. Many services are operating beyond their resource capacity, particularly along the fast growth areas of the coastline where services cannot keep up with the demographic changes. In the more remote parts of each region, there are insufficient workers to cope with the level of demand. Outreach transport costs are high, with travel times making many outreaches unviable.[9]

6.8 Mr Greg Connellan from the Victorian Council for Civil Liberties told the Committee about the need for services in rural areas of Victoria:

> I was last year … looking at access to legal services in the eastern part of Victoria: the Latrobe Valley out to the New South Wales border. There was a community legal centre there, based at Morwell, servicing pretty much from Phillip Island right across to the New South Wales border. It is a huge area of Gippsland that they were servicing. They had, effectively, a staff of three. They tried to employ three lawyers to do that. They were down on resources and they were trying to run outreach projects right across that large area. So that is one example of an area of Victoria where there is a great need for further services.[10]

6.9 Mr Connellan said that the situation was similar in western Victoria:

> There is a community legal centre in Warrnambool and there is one in Ballarat, but they cover a huge area. That is not to say that there are not legal aid services in those areas—there are—but they do not always correspond completely; they do not always cover the same areas of work. But also there are situations, say, in family law with child protection stuff, where you have the legal interests of parents—perhaps more than one parent—and sometimes of grandparents and of children to be addressed, so you need multiple services to be able to address all those without conflict.[11]

6.10 The Committee heard that Western Australia also experiences difficulties:

> [WA] has in its rural and remote centres relatively large concentrations of at risk groups, including young families, aborigines and people from non-English speaking backgrounds. However Legal Aid offices are only found in four centres representing four regions (Bunbury (South West region), Kalgoorlie (Goldfields region), Port Hedland (Pilbara region) and Broome (Kimberley region) as well as a para legal outpost on Christmas Island. There are no Legal Aid offices in the Great Southern, Mid-West, Gascoyne or Murchison regions. In a number of centres, including Carnarvon where there is a magistrates court, there are no private lawyers. Access to legal

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9 Combined Community Legal Centres' Group NSW, *Submission 60*, p. 15. For example, there are no CLCs between Nowra and the Victorian border. For a further discussion on CLCs, see Chapter 11.

10 *Committee Hansard*, 9 February 2004, p. 8.

11 ibid.

> services is effectively out of reach of citizens seeking to resolve legal disputes or assert their legal rights.[12]

6.11 In the Northern Territory:

> There are no legal services based outside the urban centres of Darwin, Katherine and Alice Springs, other than the Miwatj Legal Service which is based in Nhulunbuy and provides services to indigenous people in that region.
>
> There are no private solicitors based outside the urban centres of Darwin, Katherine and Alice Springs.[13]

6.12 Other barriers in RRR areas include the geographic constraints in accessing legal assistance (for example, tyranny of distance, community and social isolation, limited or no public transport, lack of reliable private transport or dangerous roads) and the high costs of accessing services, including transport costs and STD telephone costs.[14] Even people in RRR areas who are successful in obtaining legal aid are disadvantaged since:

> … their costs of running a case are higher (due to additional travelling costs to attend counselling and expert appointments and court, or the need to hire town agents to make court appearances), yet legal aid payments do not take these additional expenses into account. In the case of family law, regional, rural and remote recipients of legal aid may reach the $10,000 funding cap more quickly than those in metropolitan areas.[15]

6.13 Those living in RRR areas also have problems obtaining legal advice and other associated services. Some specific difficulties include:

- lack of services for special needs groups (including Indigenous people and women);[16]
- lack of private lawyers in RRR areas willing to undertake legal aid work, due to restrictions imposed by LACs (preferred supplier regimes) and the well-documented departure of private practitioners from legal aid work in these areas;[17]

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12 The Law Society of Western Australia, *Submission 70*, p. 3.

13 Northern Territory Legal Aid Commission, *Submission 82*, p. 7.

14 See, for example, Northern Rivers Community Legal Centre, *Submission 22*, pp. 3-4; Wirringa Baiya Aboriginal Women's Legal Centre, *Submission 89*, pp. 3-4; Community Legal Centres Association (Western Australia) Inc, *Submission 93,* p. 11; J Giddings, B Hook and J Nielsen, 'Legal Services in Rural Communities: Issues for clients and lawyers', *Alternative Law Journal*, Vol. 26, No. 2, April 2001, pp. 58-60.

15 Professor Rosemary Hunter & Associate Professor Jeff Giddings, *Submission 24*, p. 3.

16 For further discussion, see Chapters 4 & 5.

17 Professor Rosemary Hunter & Associate Professor Jeff Giddings, *Submission 24*, p. 3.

- limited availability of legal and other services, as well as lawyers and courts;
- lack of access to ancillary services, such as counselling services;
- unavailability of quality experts to provide advice, reports and evidence in court; and
- inability to obtain interpreters for face-to-face appointments.[18]

6.14 The Committee also heard evidence about the lack of lawyers with specialist expertise in certain areas of law in RRR areas. For example, Mr Mark Woods of the Law Institute Victoria submitted that, in RRR areas of Victoria, expertise in certain areas of law does not exist:

> … it is simply not financially viable for us to have lawyers in the firm develop expertise in social security law, debt harassment law [disability support law and consumer protection law] … Likewise, there is not a sufficient number of people to justify community legal centres having lawyers who develop that field of expertise.[19]

6.15 There are also problems arising from the nature of small communities, such as:

- conflicts of interest;
- lack of privacy and compromise of confidentiality in small communities; and
- conservative attitudes that may make people reluctant to pursue their legal rights.

6.16 Several submissions and witnesses emphasised the significance of the conflict of interest problem. Many people are unable to access legal advice in their own regional centre or town because local legal aid services have already advised the other party to the matter. The only options available for advice might be to access a legal aid service over the telephone, or travel a significant distance to seek face-to-face legal advice. The conflict of interest issue may also mean that one of the parties to the matters has no choice but to self-represent.[20]

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18 See, for example, Mr Mark Woods, Law Institute of Victoria, *Committee Hansard*, 12 November 2003, p. 23; National Network of Women's Legal Services, *Submission 86*, p. 3; J Giddings, B Hook and J Nielsen, 'Legal Services in Rural Communities: Issues for clients and lawyers', *Alternative Law Journal*, Vol. 26, No. 2, April 2001, p. 59.

19 *Committee Hansard*, 12 November 2003, p. 23.

20 Community Legal Centres Association (Western Australia) Inc, *Submission 93*, p. 15. See further Chapter 10.

6.17 The Committee also heard that residents of RRR areas of Australia are in dire need of expanded resources for free legal assistance and that CLCs in RRR areas have large areas of unmet need due to their low-base funding levels.[21] Specific problems facing CLCs in RRR areas include:

- difficulties in recruiting and retaining experienced staff;
- a small "pool" of volunteers from which to draw;
- resource allocations which do not include adequate consideration of the additional costs of running outreach programs; and
- an expectation that CLCs with regional responsibilities will service their region with local level funding.[22]

6.18 In rural NSW, for example:

> Community Legal Centres … are in dire financial circumstances. In particular, those CLCs set up under the 1996 Commonwealth Justice Statement program receive less core funding than other CLCs in NSW. Most of those centres are in the more remote parts of the State. They do not receive a loading on their Community Legal Service Funding Program Grants for the additional transport and telecommunication costs incurred as a result of operating outreaches and 1800 FreeCall telephone advice services. Community legal centres in rural areas are further hampered by the fact that they cannot access the same numbers of law students and lawyer volunteers that some city centres are able to utilise.
>
> …
>
> The more remote the service, the greater the difficulty in attracting staff. Given the low pay on offer, many poorly funded community legal centres may take months to fill vacancies for solicitors. This is especially true for Rural Women's Outreach Services, which often have extreme difficulty in attracting experienced women family lawyers to the bush.[23]

6.19 Unique challenges may also be encountered by lawyers working in RRR areas. Some of these challenges include:

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21 Community Legal Centres Association (Western Australia) Inc, *Submission 93B (Submission prepared to the Family Law & Legal Assistance Division, Attorney-General's Department by the National Rural, Regional and Remote Network of Community Legal Centres, May 2002)*, p. 6. For example: '(t)here are still areas in rural and regional Victoria and outer metropolitan Melbourne without access to a community legal centre. For many people in these communities there is no access to justice': Ms Sally Smith, *Committee Hansard*, 12 November 2003, p. 45.

22 J Giddings, B Hook and J Nielsen, 'Legal Services in Rural Communities: Issues for clients and lawyers', *Alternative Law Journal*, Vol. 26, No. 2, April 2001, pp. 61-62. Other issues arising in relation to CLCs are discussed further in Chapter 11.

23 Combined Community Legal Centres' Group NSW, *Submission 60*, pp. 17-18.

- inflated costs;
- limited access to legal information resources and services;
- limited opportunities for specialisation;
- pressures of community attitudes and expectations;
- limited infrastructure (for example, limited access to court and tribunal facilities);
- difficulties in achieving economies of scale;
- significant ethical dilemmas such as conflict of interest and confidentiality issues; and
- geographic isolation.[24]

How to address problems in rural, regional and remote areas

6.20 Possible ways to address the problems experienced by those living in RRR areas include:

- current initiatives of the Commonwealth Government;
- use of technology;
- outreach programs;
- duty lawyer schemes;
- assistance for lawyers in RRR areas; and
- other measures.

These are addressed in turn below.

Current Commonwealth Government initiatives

6.21 While increasing attention is being paid to the needs and interests of people living in RRR areas, moves to actually enhance legal and legal-related services in such communities have been relatively limited.[25] While some Commonwealth initiatives have been implemented with the aim of improving services in RRR areas, the vast majority of submissions to the Committee in this inquiry claim that the

24 ibid, pp. 60-61.

25 ibid, p. 58.

Commonwealth Government has not done enough to adequately address the needs of those living in RRR communities.

6.22 In its submission to the Committee, the Attorney-General's Department recognised that people in RRR areas often encounter greater difficulty accessing appropriate legal services than people living in metropolitan centres due to geographic constraints and limited legal services. It also stated that in order to address these problems, the Commonwealth provides funding to over 30 community legal services in RRR Australia.[26]

6.23 The Commonwealth Government launched its Regional Law Hotline (the Hotline) in September 2001. The Hotline is a toll-free, confidential telephone service available to people living in designated RRR areas and its objective is to provide 'family law system information as well as general legal information and basic legal advice.'[27]

6.24 At the second public hearing in Canberra, a representative from the Attorney-General's Department indicated that it planned to expand the Hotline in the near future:

> … the Attorney-General has now made a decision that we want to expand the coverage of Regional Law Hotline. It has up to now been in 14 designated regions, and we want to fill in the gaps and make sure that all regional areas of Australia are covered. To do that we are expanding the role of the legal aid commissions in providing the legal advice component of the Regional Law Hotline and phasing out the involvement of the community legal services. They will continue to be involved until 30 June this year but after that the legal aid commissions we are talking to about taking over the full role will be providing the legal advice component. Up until now it has been a mixture of commissions and community legal services. That will enable us to expand the coverage of the service, and we will be able to do more work in making sure there is community awareness of the service availability.[28]

6.25 The Departmental representative continued:

> The hotline infrastructure will not change: it will continue to go to the same two regionally based call centres that are used for both the Family Law Hotline and the Regional Law Hotline. That will enable us to have national consistency for waiting times, and basic information about family law can be provided by the hotline service providers who first answer the call. It is when people need information about other areas of law or legal advice itself that they are referred to a legal advice provider. That is the role that some of

26 Attorney-General's Department, *Submission 78*, p. 9.

27 ibid, p. 11.

28 *Committee Hansard*, 9 February 2004, p. 17.

> the community legal centres have been playing. That will now be just the legal aid commissions.[29]

6.26 The representative also advised that the changes to the Hotline would not involve an increase in funding:

> It is the same funding but a more efficient use of the funding, because we are not spreading it around to the community legal services, which had quite limited geographical coverage when compared with the legal aid commissions.[30]

6.27 Some submissions and witnesses at public hearings questioned the viability of the Hotline as it currently operates. For example:

> It is the common view of [seven of the CLCs participating in the Hotline project] and the National Rural, Regional and Remote Network of Community Legal Centres, that the Regional Law Hotline project has completely failed to meet its stated objectives and the expectations of the Attorney-General's Department during its first year of operation.[31]

6.28 Mr Bill Grant of the Legal Aid Commission of NSW was equally blunt:

> [The Commonwealth LawOnline program and the Regional Law Hotline] is a total waste of money. It does not deliver the service it is supposed to deliver. We have had this discussion at officer level many times: if they rolled that money into LawAccess, we could provide a better service. We already provide an enormous amount of advice in Commonwealth family law through the LawAccess advice line. To have a competing service, if you like, is not complementary; it is confusing. We are all focusing on this one service, and that is the view of commissions right across this country. All the commissions either participate in or have a legal aid help line.[32]

6.29 The Hotline has also been described as 'a superfluous adjunct to the comprehensive telephone advice services already provided by many regional Community Legal Centres and Legal Aid Commissions directly to the residents of their catchment areas.'[33]

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29 ibid, p. 19.

30 ibid.

31 Community Legal Centres Association (Western Australia) Inc, *Submission 93B (Submission prepared to the Family Law & Legal Assistance Division, Attorney-General's Department by the National Rural, Regional and Remote Network of Community Legal Centres, May 2002)*, p. 6.

32 *Committee Hansard*, 13 November 2003, pp. 12-13.

33 Community Legal Centres Association (Western Australia) Inc, *Submission 93B (Submission prepared to the Family Law & Legal Assistance Division, Attorney-General's Department by the National Rural, Regional and Remote Network of Community Legal Centres, May 2002)*, p. 6.

6.30 The need to utilise resources in a more constructive way and innovatively overcome the barriers of distance and isolation in RRR areas is seen to be of greater importance than a telephone service where 'a solicitor is tied to a central office and its dedicated phone line' which 'does not allow the flexibility ideally sought by rural, regional and remote Community Legal Centres and the communities they serve.'[34] As Ms Julie Bishop from the National Association of Community Legal Centres told the Committee at the Sydney hearing:

> … we feel that, while the money provided to legal centres through the Regional Law Hotline has been effectively used, the model itself has not been particularly effective. This is where travel costs are related. It is the legal centres' experience rather than belief that the outreach services, while more expensive in the short term, are much more effective, both in terms of dollars spent and outcome, than trying to resolve particularly rural and regional issues through telephone calls.[35]

Use of technology

6.31 Several submissions received by the Committee made the point that the use of technology to address the problem of lack of legal and related services in RRR areas is not a solution in itself.[36] Instead, technology should be seen as being complementary to other more direct forms of legal assistance.[37] Technology for those living in RRR communities can be an unfamiliar concept and the delivery of services through technology might be viewed by some as impersonal and threatening. Issues of training, costs and ongoing support may arise since using technology is often not a part of life in RRR areas.[38]

6.32 Current strategies such as legal assistance telephone services and the internet are beneficial for some people and in some types of matters. However, some submissions and witnesses suggested that telecommunications services cannot adequately meet every need in RRR communities and should not be used as a replacement for face-to-face services and legal representation, particularly in more complex matters. For example, the Illawarra Legal Centre submitted that:

> It is the experience of this Centre that telecommunications solutions alone do not meet the need for legal assistance. Telecommunications services

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34 ibid, p. 7.

35 *Committee Hansard*, 13 November 2003, p. 42.

36 See, for example, Illawarra Legal Centre Inc, *Submission 12*, p. 2; Tasmanian Association of Community Legal Centres, *Submission 45*, p. 1; National Network of Women's Legal Services, *Submission 86*, p. 3. Indeed, rather than being a progressive development technology may even be a "backward step" in some RRR areas since there are some communities which, until a few years ago, were reasonably well-serviced by lawyers in private practice doing greater amounts of legal aid work: National Network of Women's Legal Services, *Submission 86*, p. 3.

37 National Network of Women's Legal Services, *Submission 86*, p. 3.

38 J Giddings, B Hook and J Nielsen, 'Legal Services in Rural Communities: Issues for clients and lawyers', *Alternative Law Journal*, Vol. 26, No. 2, April 2001, p. 62.

> cannot undertake preventative legal work (eg community legal education) and do not provide a visible presence in the community to establish trust and cooperative relationships with other human service organisations. They do not replace face to face contact with clients who for a variety of reasons do not or cannot use the telephone (those clients are more likely to experience disadvantage generally).[39]

6.33 The Tasmanian Association of Community Legal Centres made a similar observation:

> Telephone services are very beneficial for some areas of law and for some citizens, but for many a telephone call can be as confusing as a third year university reading text.[40]

6.34 While technology may allow a limited level of service delivery to some members of the community, it is not an appropriate vehicle for people experiencing multiple disadvantage.[41] Concern has been expressed about the capacity of many of those in need to access alternatives to face-to-face advice:

> I think there are some general accessibility problems with the Internet. Some of our people are in a chaotic state; they just would not get there. [42]

6.35 Some people will not have the skills or the capacity to act on the basis of "one-off quick advices" for a range of reasons, including poor literacy, limited education, poor English language skills, disability and lack of confidence to deal with the legal system.[43] Such people may only feel comfortable accessing legal services where they have developed a relationship of trust with the service provider.[44] Technology may be '… unfamiliar and the delivery of non-face to face services may be seen as threatening and unsupportive'.[45]

6.36 There may also be problems with the content of legal information that is available through technological means:

> … the difficulty is that there has not been the content there for people to utilise. They can use it for Internet banking and other general information services but there has been a limit—I mean in terms of the law—in access to plain language, accessible information covering a broad range of issues

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39 *Submission 12*, p. 2.

40 *Submission 45*, p. 1.

41 National Network of Women's Legal Services, *Submission 86*, p. 3.

42 Mr Sam Biondo, Fitzroy Legal Service, *Committee Hansard*, 12 November 2003, p. 51.

43 National Network of Women's Legal Services, *Submission 86*, p. 5.

44 ibid, p. 3.

45 J Giddings, B Hook & J Nielsen, 'Legal Services in Rural Communities: Issues for clients and lawyers', *Alternative Law Journal*, Vol. 26, No. 2, April 2001, p. 62.

> that specifically have a rural and regional theme, and that is essentially what we are trying to provide.[46]

6.37 The Law Institute Victoria made a pertinent point about why governments are pushing technology to "solve" the problem of lack of access to justice:

> Such developments are to be welcomed but it should not be forgotten that they are only necessary because of the gaps that exist in the legal aid system.[47]

6.38 Indeed:

> The concept of access to justice includes access to legal materials, information, advice, assistance in settling documents as well as assistance by way of representation. There is no doubt that improvements have been made in respect of improving access to legal materials, information and telephone advice. These improvements have, to a large extent, been facilitated by the widespread use of the Internet. In particular Victoria Legal Aid's (VLA) web-site provides a wealth of valuable information sheets that can be accessed free of charge.[48]

6.39 Despite the reservations many have about the capacity of technology to provide access to justice, some submissions acknowledged its potential benefit in some situations. The National Network of Women's Legal Services stated:

> Video-conferencing, internet access and hotline advice services are ways of providing legal services to communities and groups of women who were mostly unserviced in the past such as women living in regional, rural and remote communities.[49]

6.40 The Victoria Law Foundation argued that innovative ways of providing legal information 'can enhance equitable access to justice' and that:

> High-quality plain-language legal information should target areas of need, such as rural, regional and remote communities. Effective legal information supports self-help and eases the burden on legal services. Activities and projects that engage the public with law and the legal system are also important parts of a strategy to improve the quality and access to legal services for all Australians. [50]

6.41 Mr Sam Biondo from the Fitzroy Legal Service argued that videoconferencing facilities may be particularly meritorious in RRR areas if personal advice services are not available:

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46 Mr Richard Coverdale, *Committee Hansard*, 12 November 2003, p. 90.

47 *Submission 88*, p. 4.

48 ibid.

49 *Submission 86*, p. 3.

50 Victoria Law Foundation, *Submission 64*, p. 3. This is discussed further in Chapter 10.

> On the technology continuum, the first option would always be a live person to talk to, with an interpreter. Many of our clients have enough difficulty navigating their way around written pamphlets, let alone having the strength to walk in and talk to a lawyer. If the technology were available, because of the particular nature of the problems that people might have, I think videoconferencing might provide access in rural and remote areas. The Internet would provide some basic information for workers in agencies to access and distribute. Videoconferencing may have some suitable applications.[51]

6.42 Videoconferencing is likely to be more cost-effective than reliance on lawyers travelling long distances to more remote areas. It may also provide a more sensitive means of communicating with clients who find themselves with complicated and perhaps distressing issues than 'a disembodied voice over the phone'.[52]

6.43 Telephone advice services also have their place and may be beneficial in some circumstances, according to Mr Biondo:

> At a bare minimum, telephone accessibility would be a great assistance to people who might be in police custody, say. It is very difficult to get a lawyer at 10 o'clock on a Friday night or two o'clock on Saturday morning. People are not aware of their rights. You do not know what people's circumstances are, and they should be entitled to a legal adviser. There are schemes established in the United Kingdom for the provision of lawyers in police stations.[53]

6.44 A submission from the Victoria Law Foundation referred to its Rural Law Online project, which is 'an interactive website designed to provide access to free, user-friendly, plain-language information about law for primary producers and their families.'[54] In essence, the aim of Rural Law Online is to bring together information from a variety of media on relevant areas of the law, provide links to legal referral services and resources, and feature discussion forums on "hot topics" of immediate relevance to RRR residents so that residents in these areas can share their experiences, knowledge and expertise with each other.[55]

6.45 At the Melbourne hearing, Mr Richard Coverdale of the Victoria Law Foundation stated that the project:

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51 Mr Sam Biondo, Fitzroy Legal Service, *Committee Hansard*, 12 November 2003, p. 51.

52 Community Legal Centres Association (Western Australia) Inc, *Submission 93B (Submission prepared to the Family Law & Legal Assistance Division, Attorney-General's Department by the National Rural, Regional and Remote Network of Community Legal Centres, May 2002)*, p. 12.

53 Mr Sam Biondo, Fitzroy Legal Service, *Committee Hansard*, 12 November 2003, p. 51.

54 Victoria Law Foundation, *Submission 64*, p. 1.

55 ibid.

> … is essentially about providing an adjunct or support to the provision of direct legal advice support and should not be seen as being instead of the provision of direct legal support to individuals. But, having said that, it is important that people are empowered with information so that they can best make judgments themselves across a whole range of areas of law.[56]

6.46 Mr Coverdale also pointed out that the advantage of online services is that they can be updated regularly. The Victoria Law Foundation project is mainly targeted at farmers who 'are increasingly dealing with more and more complex regulations and legislation and … require information across a huge range of areas of law'.[57] However, the content of the service covers subjects such as family law and social security law 'which are generic and relevant to all regional, rural and remote communities'.[58] The Victoria Law Foundation has plans to expand the service to more broadly target RRR areas of Victoria.

Committee view

6.47 The Committee considers that, while the provision of legal advice by telephone is useful in some circumstances, it is of limited benefit more generally if not complemented by community legal education, community development projects linked to law and social justice issues, and outreach programs for face-to-face advice and assistance. The Committee questions the ability of initiatives such as the Commonwealth Government's Regional Law Hotline to provide people living in RRR areas with useful and effective legal advice that appropriately addresses their needs and concerns without corresponding face-to-face services.

6.48 Although face-to-face services are always preferable, the Committee considers that videoconferencing facilities would significantly improve access to legal assistance for those living in more remote areas of Australia. Such facilities would save travel time and costs, and would enable CLCs to provide services to areas which are currently beyond their reach.

Recommendation 34

6.49 The Committee recommends that technological initiatives such as videoconferencing and telephone advice services should be used by the Commonwealth Government and state/territory governments, legal aid commissions and community legal centres as part of an integrated approach to providing services in rural, regional and remote areas. The use of technology can

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56 *Committee Hansard*, 12 November 2003, p. 87.

57 ibid.

58 ibid, p. 89.

potentially provide practical solutions to those living in such areas, in conjunction with face-to-face legal services.

Outreach programs

6.50 Another suggested measure to address the lack of legal services in RRR areas is the use of outreach programs. People in remote areas of Australia suffer greatly because of the limited legal assistance options they have. Although they may be able to access telephone advice lines or the internet, often these forms of assistance are not adequate or suitable for the particular problems they encounter.

6.51 Outreach programs run from regional centres or major cities are a particularly effective way to provide face-to-face assistance, advice and representation to those who are not able to otherwise access this type of assistance due to their location. However, limited funding does not allow CLCs to provide outreach services to meet need and demand. For example:

> Outreach clinics are currently provided in only a few towns in outback South Australia because of problems with the high cost of providing such a service due to the enormous distances to be travelled to see relatively few clients.[59]

6.52 Ms Polly Porteous of the CCLCG told the Committee:

> Some community legal centres in New South Wales try to do outreaches where they do a circuit. They might travel, for example, from Broken Hill and go around communities. There are some people who have never seen a legal centre at all and have severe legal problems, so they are trying to get to those communities. Some of those circuits take so much time and money that they have done it once or twice and then realised that that has used up their entire travel budget. Their travel budget is not increased in recognition of the kind of work they have to do, so it is on a par with travel budgets in urban areas, which does not make sense.[60]

6.53 Further, the NSW LAC submitted that it must be recognised that:

> … a great deal of planning and community development work needs to go in to the establishment of [outreach] services which is not taken into account by funders. This includes liaison with the community and other service providers, the need to integrate … services with that of other community organisations, aligning services to court circuits, creating community awareness of the service and maintaining the service over the longer term.[61]

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59 Legal Services Commission of SA, *Submission 51*, p. 16.

60 Ms Polly Porteous, *Committee Hansard*, 13 November 2003, pp. 41-42.

61 Legal Aid Commission of NSW, *Submission 91*, p. 17.

Committee view

6.54 The Committee considers that increased representation and face-to-face legal advice services are required throughout RRR areas of Australia. Outreach services, operating from legal services in regional centres, are a valuable means of providing access to justice for people living in smaller RRR population areas. Governments need to provide adequate funding to LACs and regional CLCs to enable them to expand and develop their outreach programs to RRR areas where there are currently no outreach programs, or where demand for existing outreach programs is not being met.

6.55 The Committee emphasises that it is the responsibility of the Commonwealth Government as well as state/territory governments to provide this funding. It is imperative that LACs and CLCs have enough resources to provide outreach services to people living in the more remote parts of Australia to assist them in overcoming barriers of distance and isolation.

Recommendation 35

6.56 The Committee recommends that 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.

Recommendation 36

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

Duty lawyer schemes

6.58 A suggested way of addressing the lack of lawyers in RRR areas is to introduce a comprehensive duty lawyer scheme specifically targeted at those areas. The Legal Services Commission of South Australia suggested (in the context of that state) that such a scheme should be funded by the Commonwealth Government. The Commission suggested that the scheme should offer, amongst other things, a duty solicitor in every court of first instance (criminal, civil and family) provided by in-house lawyers and private practitioners, and legal advice and representation on pleas

of guilty, pleas of not guilty in appropriate matters, adjournments and applications for bail.[62]

6.59 The Committee notes that in Queensland, duty lawyer services are available in over 100 Magistrates and Children's Courts. However:

> The long term sustainability of duty lawyer services in some regional areas of Queensland remains problematic where such service depends upon the cooperation of 1-2 private practitioners in the region. Again, it is the fragility of the continued provision of such services in the bush that needs to be addressed immediately.[63]

6.60 While duty lawyer schemes are important in providing some level of legal assistance to people who would not otherwise be able to obtain any, they may not always be appropriate. Some question the ability of the schemes to provide adequate access to justice. For example, Mr Sam Biondo of the Fitzroy Legal Service asked:

> Is equal justice merely about a duty lawyer sharing five minutes of their time in a court foyer with a client whom they have never met?[64]

6.61 Ms Naomi Brown of the Community Legal Centres Association (WA) said:

> … in many towns there is not a magistrate who sits all of the time. The magistrate will visit on circuit and in between times many minor committal matters and intervention orders are heard by justices of the peace. The person may or may not have had the opportunity to speak face to face with someone prior to that, because the duty lawyers will only visit the town at the time of the Magistrate Court's circuit. So … you are still meeting the person at the court door. For many people who are from different Indigenous cultural and linguistic backgrounds, as well as other culturally and linguistically diverse backgrounds, that is very difficult. There is also not necessarily an opportunity to identify the need and get an interpreter, and there may well not be an interpreter that is available in that language in that area anyway.[65]

Committee view

6.62 The Committee considers that, while it may not be a complete solution, the RRR duty lawyer scheme suggested by the Legal Services Commission of SA could usefully be adopted in all states and territories. The Committee believes that the Commonwealth Government has a fundamental responsibility to lead by example in this area and to assist with the provision of funding to the LACs for a duty lawyer

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62 *Submission 51A*, p. 2. The Legal Services Commission also suggested that it would be best placed to investigate the most cost efficient method of providing such a service in cooperation with the Law Society, local practitioners, courts and local community legal services.

63 Legal Aid Queensland, *Submission 31*, p. 7.

64 *Committee Hansard*, 12 November 2003, p. 44.

65 *Committee Hansard*, 12 November 2003, p. 47.

scheme. It would also be appropriate for the state/territory governments to contribute funding to such a scheme.

6.63 However, the Committee does not consider it appropriate that the funding should be divided following the current Commonwealth/state dichotomy. A cooperative approach between the Commonwealth and the states/territories is preferable so that duty lawyer schemes can be set up in every court of first instance. The LACs would then be responsible for determining the most efficient and effective way of providing the service in each state/territory in conjunction with relevant state/territory bodies such as law societies, local practitioners, courts and local community legal groups.

6.64 Duty lawyer schemes are discussed further in the Committee's examination of, and recommendations about, self-represented litigants in Chapter 10.

Assistance for lawyers in rural, regional and remote areas

6.65 The Legal Services Commission of SA submitted that funding needs to be provided by the Commonwealth Government for a RRR subsidy to assist lawyers practising in RRR areas of Australia.[66] At present, evidence suggests that more and more lawyers are opting out of legal aid work, particularly in RRR areas, because the fees are so much lower than the fees that would be paid by private clients.[67] It is simply not financially viable for lawyers to engage in this type of work. A subsidy may be one way to attract and retain lawyers in RRR areas. Incentives considered necessary include:

- relocation costs to the country;
- assistance with housing costs;
- subsidised costs of attending further education seminars, including travel costs;
- additional allowances for travelling expenses, motor vehicle expenses, telecommunications expenses, and a cultural training allowance; and
- travelling costs incurred on a legal aid file.[68]

6.66 Another suggestion to ease the problem of lack of lawyers in RRR areas was presented (in the context of Victoria) at the Melbourne hearing by the Law Institute of Victoria:

> … a partnership between private lawyers, of which there are plenty in rural and regional Victoria, to undertake … casework on an individually funded

66 *Submission 51A*, p. 1.

67 Professor Rosemary Hunter & Associate Professor Jeff Giddings, *Submission 24*, p. 3.

68 ibid, pp. 1-2.

> basis. That would mean that there was at least some modest financial incentive for the development of expertise in those firms to ensure that the people in those areas are able to access the services that their city cousins can, whilst at the same time not breaking the financial back of law firms in regional and rural Victoria.[69]

6.67 Mr John North of the Law Council of Australia told the Committee of the dwindling number of lawyers in RRR areas:

> It seems to be particularly clear that the lawyers who are operating in the bush are getting older and there are becoming fewer of them. Just as it is with the medical profession and other professions, it is particularly difficult to entice young lawyers out into the country ... Our finding is now that, because of the crisis that occurred in legal aid a few years ago when the Commonwealth funding was effectively frozen, large numbers of experienced lawyers, many with more experience than me, are not taking part in legal aid work. This is not just a plea on behalf of the legal profession to increase funding; we really do face a problem of access to justice in rural and remote areas with a lack of lawyers on the ground.[70]

6.68 He suggested some ways of improving this situation:

> I think the only way we will be able to do anything about it is to start using people who actually live and grow up in the country and try and get them to become lawyers and to come back into the communities where they are from. When you can get somebody to come to the country, if they stay for a few years, they love it, and you get a lot of very dedicated and experienced lawyers.[71]

6.69 Mr Brian Withers from the Law Council of Australia noted that the demographics in rural areas were 'changing quite dramatically':

> … more disadvantaged people are moving there because of more affordable housing and the ability to live at a better level than they would be able to in the city and, hence, the pool, if you like, of those who would qualify for legal aid is probably increasing ...[72]

6.70 The Law Council representatives also explored the possibility of introducing government initiatives to attract more lawyers to RRR areas. Mr Withers noted that one of the recommendations in the Law Council's recent report, *Erosion of Legal Representation in the Australian Justice System,* was that:

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69 ibid.

70 *Committee Hansard*, 9 February 2004, p. 46.

71 ibid.

72 ibid.

> … there be innovative scholarship and subsidy schemes to encourage young people from rural and remote regions to become lawyers and that lawyers be encouraged generally to practise in rural and remote regions …[73]

6.71 Mr Withers commented that, although this 'is a fairly substantial undertaking', those people who grew up in RRR areas would be more likely 'to provide the long-term support and commitment that is needed in … remoter areas'.[74]

6.72 Mr North suggested a possible rethinking of the approach taken by law schools at a fundamental level:

> There is absolutely no reason why country campuses attached to universities should not be able to offer country people a legally based education. There must not be, when you look at things, this ridiculous situation that is in New South Wales where you need 99.8 or 99.6 in the Higher School Certificate to qualify. It should be on the basis of people being interviewed, having a reasonable score and being assisted to go through these degrees.
>
> …
>
> I would very much like to take it on board at the Law Council level to see if we can develop it because it takes out the problem of having to move the student from the country area to the city and then back again.[75]

Committee view

6.73 The Committee is greatly concerned about the apparent shortage of lawyers in RRR areas of Australia and urges Commonwealth and state/territory governments to take measures to encourage lawyers to live and work in those areas. The Committee considers that the provision of a subsidy or other incentives for lawyers may have merit.

Recommendation 37

6.74 The Committee recommends that the Commonwealth and state/territory governments, in conjunction with the law societies in each state/territory and the Law Council of Australia, fully investigate the viability of providing a subsidy (or any other relevant incentives), and developing a coordinated national approach, aimed at attracting and retaining lawyers to live and work in rural, regional and remote areas of Australia.

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73 Executive Summary, p. 3.

74 *Committee Hansard*, 9 February 2004, p. 47.

75 ibid.

Other possible measures

6.75 There is a clear indication in submissions that legal aid should be nationally consistent, that is, assistance should be provided to people in similar circumstances, regardless of where they live.[76] Legal aid should also be comprehensive in scope (covering the full spectrum of legal matters), adequately funded (giving the requisite degree of assistance to ensure cases are able to be prepared properly) and efficiently administered (so that public funds are expended efficiently and effectively).[77]

6.76 Any changes to the legal aid system in RRR areas must be properly coordinated and evaluated to take into account the wide range of experiences and varied needs of clients, communities and lawyers.[78] Community consultation is vital to determine where there are unmet needs and which services are required.[79] Needs analysis is important both for the improvement of service delivery in individual cases and to direct funds generally to cases, clients and geographical areas which experience particular disadvantage.[80] It has been suggested that a comprehensive national strategy is required in relation to the recruitment, selection and retention of lawyers in RRR areas in order to ensure the sustainability of legal services to people living in those areas.[81]

6.77 Focusing solely on legal need might exclude a range of other issues which are also important to consider, such as the particularities of different areas and work, geographical issues, transience of the population, and remuneration issues.[82] It is essential that an analysis of such issues be undertaken in order to identify the most appropriate mix of legal services required in a particular area.[83] The importance of a mixed system of service delivery has been emphasised, with private lawyers, legal aid agencies and CLCs all working together in a coordinated manner[84] to develop and achieve sustainable models of legal service delivery.

6.78 While many submissions argue that more funding is required to meet the demand for legal services in RRR areas, it has been submitted that simply moving

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76 For example, see Riverland Community Legal Service Inc, *Submission 11*, p. 6; Darwin Community Legal Service, *Submission 56*, p. 2.

77 Riverland Community Legal Service Inc, *Submission 11*, p. 6.

78 J Giddings, B Hook and J Nielsen, "Legal Services in Rural Communities: Issues for clients and lawyers", *Alternative Law Journal*, Vol. 26, No. 2, April 2001, p. 62.

79 ibid; Illawarra Legal Centre Inc, *Submission 12*, p. 2.

80 Australian Law Reform Commission, *Submission 26*, p. 4.

81 Legal Aid Queensland, *Submission 31*, p. 3; Community Legal Centres Association (Western Australia) Incorporated, *Submission 93*, p. 37.

82 Fitzroy Legal Service, *Submission 48*, p. 12.

83 National Legal Aid, *Submission 81*, p. 7.

84 J Giddings, B Hook and J Nielsen, "Legal Services in Rural Communities: Issues for clients and lawyers", *Alternative Law Journal*, Vol. 26, No. 2, April 2001, p. 62.

funding from metropolitan areas to RRR areas is not the answer.[85] The fundamental reality about legal aid is that there are insufficient funds across the board to adequately meet need.[86] Since the level of legal need in highly populated areas of metropolitan cities and surrounding suburbs is not being met by existing services, further spreading or diluting of resources, even if possible, would have the effect of severely impacting the existing network of service provision.[87]

6.79 While diluting funding is not desirable, the Committee received evidence in relation to some of the crucial factors which may need to be considered if any shift in location or reallocation of resources is required:

- population density which largely resides within metropolitan areas;
- higher concentrations of legal problems within urban areas;
- access to public transport;
- location of existing centres;
- access and availability of volunteer staff within particular communities; and
- the ability to attract and retain paid staff in particular areas.[88]

Committee view

6.80 Evidence presented to the Committee during the course of the inquiry clearly indicates that gaps in the legal aid system are greatly magnified in RRR areas. Overwhelmingly, the evidence suggests that the current arrangements throughout RRR areas of Australia are inconsistent and inadequate, and generally fall well below acceptable standards for achieving geographic equity and uniform access to justice. In fact, it appears as thought 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.

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85 For example, see Fitzroy Legal Service, *Submission 48*, p. 9; NSW Combined Community Legal Centres Group, *Submission 60*, p. 8; Marrackville Legal Centre, *Submission 53*, p. 6.

86 Fitzroy Legal Service, *Submission 48*, p. 9.

87 ibid. While relocating legal aid lawyers from major cities to smaller centres might constitute progress towards addressing the lack of legal aid resources in those places, it does so at the expense of the areas already serviced: George Giudice Law Chambers, *Submission 68*, p. 4.

88 Fitzroy Legal Service, *Submission 48*, p. 9.

6.81 The Committee strongly endorses the recommendation made in the Committee's *Third Report* that legal aid expenditure be closely monitored to determine if disproportionate expenditure in certain priority areas is having the effect of depriving other areas of appropriate funding. The Committee is particularly concerned about expenditure that may disproportionately favour metropolitan areas at the expense of RRR areas.

6.82 However, the Committee does not believe that any increase to funding in RRR areas should involve a decrease in funding to metropolitan areas. The Committee agrees with the view that shifting funds from one area to another is not a solution to the problem of lack of funding and services in RRR areas since it cannot be said that metropolitan areas are over-resourced in terms of legal aid funding. It appears that additional funding by the Commonwealth and state/territory governments is urgently required to address the problem of lack of legal and related services in all areas, but this is particularly the case in RRR areas where there are increased costs associated with providing legal services.

6.83 The Committee is of the view that the provision of legal and legal-related services to RRR areas of Australia is critical to the operation of an equitable legal system for all Australians. The Commonwealth and state/territory governments have a shared responsibility to ensure that people living in such areas have equitable access to legal aid. Governments need to respond in an integrated way to the range of legal problems experienced by many people in RRR areas and work to provide flexible and innovative solutions to the community need for assistance.

6.84 Further, the circumstances surrounding legal need are not fixed and require ongoing evaluation by governments. The Committee feels strongly that such evaluation would be able to allow an accurate assessment of service delivery in RRR areas and will result in developing more equitable, efficient and effective ways of delivering legal aid services in those areas.

Recommendation 38

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

Recommendation 39

6.86 The Committee recommends that any increase in funding for rural, regional and remote areas should not be at the expense of funding for metropolitan areas. Additional funding is urgently required to address the problem of lack of legal and related services in rural, regional and remote areas.

Recommendation 40

6.87 The Committee recommends that the Commonwealth Government and state/territory governments ensure that thorough consultation takes place with rural, regional and remote communities in order to determine the most appropriate legal and associated services required in particular communities. All consultations should occur before any establishment of any new services.

CHAPTER 7

MIGRANTS AND REFUGEES

7.1 This chapter discusses:

- the availability of free legal assistance for migrants and refugees; and
- obstacles for effective assistance to migrants and refugees

Availability of free legal assistance for migrants and refugees

7.2 Migrants and refugees who are unable to afford legal assistance in relation to immigration law matters have two sources of free legal assistance. The first is through legal aid; the second is through free advice and casework services offered by CLCs and services that are funded by the Immigration Advice and Application Assistance Scheme (IAAAS) through the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA).

Legal aid for migrants and refugees

7.3 There are various restrictions on the availability of legal aid assistance in immigration matters. Under the Commonwealth Guidelines, in addition to the applicant being subjected to the means and merits test, legal aid assistance can only be granted in migration matters where:

- there are differences of judicial opinion which have not been settled by the Full Court of the Federal Court or the High Court; or
- the proceedings seek to challenge the lawfulness of detention. A challenge to the lawfulness of detention does not include a challenge to a visa decision or a deportation order.[1]

7.4 The University of Technology Sydney Community Law and Legal Research Centre argued that these limitations ignore that immigration is a Commonwealth matter for which legal aid should be provided.[2]

7.5 Victoria Legal Aid argued that the restrictive nature of the Guidelines, which were introduced in the 1997 changes to legal aid, has caused a reduction in the level of legal aid available to migrants and refugees. That is because although the Commonwealth sought to supplement the services to migrants and refugees through the IAAAS scheme, some LACs have not successfully tendered for these contracts. As

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1 Victoria Legal Aid, *Submission 97*, p.11.

2 *Submission 65*, p.4-5.

a result, LACs are limited to only providing legal aid to those applicants who meet the guidelines.[3] This is discussed further below.

7.6 The Committee also heard that the high rate of legal aid refusal that these restrictions allow, leads to substantial pressure being placed on those services offered through IAAAS funding:

> The UTS CLLRC believes that based on the high rate of referrals for immigration matters there is a significant unmet legal need which is not adequately met by legal aid. The Immigration Advice and Rights Centre (IARC) is the only CLC which specialises in immigration matters in NSW and as such is a highly strained service. The Refugee Advice and Casework Service (RACS) is the only service in NSW which provides specialised advice for protection visas and refugees and is similarly over stretched.[4]

Immigration Advice and Application Assistance Scheme

7.7 Those migrants and refugees who are refused legal aid assistance may seek assistance from services delivered through IAAAS contracts. These services are delivered by LACs who have successfully tendered for IAAAS contracts, CLCs such as the Immigration Advice and Rights Centre (IARC), or specialist services operating under such contracts, for example, the Refugee Advice and Casework Service (RACS).

7.8 Victoria Legal Aid provides assistance under the IAAAS scheme:

> Under IAAAS, VLA can formally represent a limited number of particularly disadvantaged asylum seekers in applications to the Department of Immigration (DIMIA) and to the Refugee Review Tribunal (RRT). The IAAAS contract is a service for which VLA successfully tendered to DIMIA and it provides immigration applicants either in the community or in detention some level of representation.[5]

7.9 The IAAAS scheme also provides funding to some CLCs such as IARC to enable them to offer assistance to migrants and refugees. IARC funding is made up of Commonwealth and state funding (because of its role as a CLC under the program), funding from IAAAS and some self-generated funds.

7.10 Ms Suhad Kamand of the IARC explained at the Sydney hearing that of the drop-in advice it provides, 60 per cent would be covered by funding under the Commonwealth and state community legal centres funding program, 20 per cent

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3 Victoria Legal Aid, *Submission 97*, p.11.

4 UTS Community Law and Legal Research Centre, *Submission 65*, p.4-5.

5 Victoria Legal Aid, *Submission 97*, p. 11.

would be covered by self-generated funding, and 20 per cent would be covered under the IAAAS.[6]

7.11 The IARC argued that the IAAAS did not allocate sufficient funding for application assistance and immigration advice for non-protection visa immigration matters. In 2001/02 the total funding for such assistance was $111,000, of a total IAAAS funding for that year of over $6.5 million.[7] The IARC explained that $111,000 would fund 124 new visa applications. In the two years of 2000–02, the IARC provided full application assistance to 36 clients and opened 147 new files. However, in each year around 5000 people seek assistance in phone or by person.[8]

7.12 Ms Suhad Kamand explained that those it is forced to turn away due to lack of resources must usually proceed without assistance or representation:

> A large number of people that we have to turn away who do seek ongoing assistance are low to nil income earners. They have poor English language skills. They are unfamiliar with the way things are done in Australia and with government and tribunal processes. They are left without representation. They cannot go to commercial agents because they cannot afford commercial agents, and pro bono lawyers often do not offer migration advice because of the registration requirements—they are not registered to provide migration advice. Non-fee-charging agents simply do not have the capacity to assist them.[9]

7.13 Migrants' demand for legal assistance is illustrated by their level of representation in seeking assistance from CLCs generally (that is all CLCs, not just those receiving IAAAS funding). The NACLC gave the Committee figures indicating that for the 2002 calendar year, those who were born in a country other than Australia comprised 31.2 per cent of all clients seeking assistance from CLCs. Furthermore, those who were born in a non-English speaking country made up 22.2 per cent of all clients.[10]

7.14 Apart from LACs and CLCs that have been funded with IAAAS contracts, there are also several specialist services which are funded by IAAAS contracts to provide assistance to refugees.

7.15 An example of such a service is RACS, which is funded by IAAAS, grants from philanthropic organisations and community donations. RACS provides advice and assistance to refugees and asylum seekers. RACS explained that the support it is able

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6 *Committee Hansard*, 13 November 2003, p. 100.

7 IARC, *Submission 52*, p.5.

8 ibid.

9 *Committee Hansard*, 13 November 2003, pp. 99-100.

10 National Association of Community Legal Centres, *Submission 84A*, p.1.

to offer falls seriously short of meeting the needs of asylum seekers in NSW and remote detention centres throughout Australia.[11]

7.16 RACS stated that, since 2000, it has represented about 800 asylum seekers from over 50 countries, and that over 80 per cent of those have been granted refugee status.[12] A new and demanding area of work has been the provision of legal assistance to Temporary Protection Visa (TPV) holders. RACS explained that in the majority of these cases it does not receive government funding assistance.

7.17 In relation to the demand TPV holders make on CLCs and specialist services, the CCLCG noted that as the expanded TPV regime requires reassessments at 3 year intervals, and as such people are not eligible for legal aid, the pressure will become unrelenting:

> The Migration Amendment Regulations which commenced on 28th August 2003 broaden the TPV regime to all on-shore applicants seeking protection, whether arriving with or without documentation. The result will be to increase the number of people on TPVs, which will in turn increase pressure on limited community and legal services. As on-shore refugees will then be required to undergo status determination at three year intervals, the demand on legal services will be unrelentless (sic). This will put heightened pressure on already over stretched services such as the Refugee Advice and Casework Service. Given that TPV holders are amongst the most socially and economically excluded people in our society and are unable to access the private migration sector, legal aid limitations will likely result in significant hardship.[13]

Access to justice for migrants and refugees: obstacles for effective legal assistance

Background

7.18 The Committee heard of various obstacles to the effective delivery of legal assistance to migrants and refugees. These include:

- restrictions in the Commonwealth priorities and guidelines on the circumstances in which legal assistance can be granted to migrants and refugees;
- interpreter services;
- need for assistance at primary review stages;
- conflict of interest arising from DIMIA granting IAAAS funding; and
- Migration Agents Registration Authority compliance costs.

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11 RACS, *Submission 66*, p.2.

12 ibid.

13 CCLCG *Submission 60*, p.41

Restrictions in the Commonwealth Priorities and Guidelines

7.19 As explained above, the Commonwealth Priorities and Guidelines limit the availability of legal aid for immigration and refugee matters to cases that challenge points of law in either the Full Court of the Federal Court or the High Court. The Committee heard evidence from both LACs and CLCs, criticising the restrictions that the Commonwealth priorities and guidelines place on legal aid for migrants and refugees.

7.20 NLA argued that the requirement that there be a 'difference of judicial opinion' before legal aid can be granted for judicial review proceedings is very narrow and means that disadvantaged clients with meritorious cases are denied assistance.[14] Victoria Legal Aid noted that although it is able to offer assistance through the IAAAS funding, overall it now offers less assistance than it was able to previously because of restrictions in the Guidelines:

> Whilst pleased to act as one of the service providers under the IAAAS in refugee matters, VLA's capacity to respond to community demand in this area is significantly less than it was prior to the 1997 Commonwealth arrangements. The guideline allowing for legal aid for asylum seekers at primary application (DIMIA) and merits review (RRT) stages was taken out of the 1997 and subsequent Commonwealth funding agreements. The IAAAS contracts were then implemented and some legal aid commissions, not all, as well as some private law firms successfully tendered for these contracts. The result is that some commissions, those without IAAAS contracts, are now unable to assist these clients.[15]

7.21 The inability of IAAAS to meet the needs of those who are denied legal aid was reinforced by the NLA, which argued that the number of TPV holders far exceeds the current service levels possible under the IAAAS:

> The [IAAAS] administered by the Department of Immigration provides representation to only a small number of disadvantaged people in the community applying for visas to the Immigration Department or to review tribunals. Immigration Department statistics indicate that, Australia wide, in the financial year 2001-02, representation was provided under the scheme in 398 non-detention cases, Given that there are over 8000 Temporary Protection Visa holders applying for further visas, many of whom are unable to pay for representation, the current system clearly does not provide access to justice for this disadvantaged group.[16]

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14 *Submission 81*, pp. 17-18.

15 Victoria Legal Aid, *Submission 97*, p. 14.

16 *Submission 81*, p. 18.

7.22 RACS argued that assistance of migrants and refugees should be provided by legal aid, rather than leaving the majority of applicants to seek assistance through IAAAS:

> RACS submits that Legal Aid assistance in applying for a protection visa should be available for all asylum seekers who satisfy the means test and whose applications are not vexatious or frivolous or have no possible prospects of success. In addition, RACS submits that Legal Aid should be available for proceedings in the Federal Court or High Court where an applicant satisfies the means test, and whose claim has some merit, and is not vexatious or frivolous. RACS submits that this should include proceedings to challenge a decision about a visa or deportation order.[17]

Need for assistance at primary review stages

7.23 The Legal Services Commission of South Australia explained that the limited provision of legal aid in administrative law matters, such as social security matters, has a considerable impact on non-refugee migrants, as they may suffer from language difficulties, extreme social isolation, lack of understanding of the legal system, and a fear of authority. It noted that in regards to social security matters, the guidelines restrict aid to the Administrative Appeals Tribunal level or above and no legal aid is available at the preliminary stages.[18]

7.24 The Legal Services Commission of South Australia argued that AAT appeals are often hampered by evidence and comments made at the preliminary stages when the applicant was not represented. It noted that it would be helpful and efficient to assist at the early stages to try and prevent more costly appeals to the AAT. The Legal Services Commission of South Australia commented that it would support changing the guidelines to allow this, but such a change would require an increase in funding.[19]

7.25 Ms Suhad Kamand on behalf of IARC also made this point in relation to migration matters:

> [U]nrepresented applicants can undermine the processes that the department of immigration has in place. If the department receives an incomplete application, if an application contains errors or if it does not contain all of the evidence required, it is slowed down in its processing. Applications that could be decided on a positive basis by the department get rejected and they go to the Migration Review Tribunal, where fuller evidence is provided and the DIMIA decision gets set aside. Perhaps if those people had representation at the primary stage, the matter would not have gone to the [Migration Review Tribunal].[20]

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17 Refugee Advice and Casework Service, *Submission 66*, p.4.

18 Legal Services Commission of South Australia, *Submission 51*, p. 22.

19 ibid.

20 *Committee Hansard*, 13 November 2003, p.100.

Committee view

7.26 The Committee is concerned that the Guidelines introduced in 1997 have resulted in a reduction of available legal assistance for migrants and refugees. The Committee acknowledges that the Commonwealth Government has sought to meet this need with specialist funding under the IAAAS, but the Committee is concerned by evidence from LACs that this has not effectively met the need, and that overall LACs are now able to offer less assistance to migrants and refugees than they were prior to 1997.

7.27 Migrants and refugees are amongst the most disadvantaged groups in terms of access to justice. The Committee believes that, because of the special needs of this group due to language and cultural barriers, and due to the responsibility the Commonwealth has in this area, assistance should be provided to these persons by LACs. It is not appropriate that some LACs (those that have successfully tendered for IAAAS funding) are able to assist migrant and refugees in such matters whilst others are not.

7.28 The Committee is also concerned that the increase in demand caused by the introduction of TPVs is not being met by current IAAAS funding.

7.29 The Committee believes that if greater assistance were provided to migrants and refugees at the preliminary stages, it is likely that the need for complex and expensive review may be reduced. By assisting such people at an earlier stage through legal aid, the Commonwealth would not only meet its obligation for such persons, but may also reduce the cost and burden on the review system.

7.30 The Committee considers that the Commonwealth priorities and guidelines should be amended, to allow LACs to assist migrants and refugees at the preliminary and review stages where an applicant meets the means and merits tests, as was possible prior to 1997. Accordingly, the Commonwealth should provide additional funding to LACs to meet such demand.

Recommendation 41

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

Recommendation 42

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

Interpreter services

7.33 A issue frequently raised regarding access to justice for migrants and refugees was the lack of interpreter services available to CLCs and specialist services.

7.34 In order to deliver legal assistance to migrants and refugees, the ability to have access to translator/interpreter services is obviously of great importance. The translation service offered by the Commonwealth is the Commonwealth Translating and Interpreter Service (TIS). TIS provides free telephone interpreters and a limited number of face-to-face interpreters.[21]

7.35 QAILS explained that ordinarily TIS is a fee paying service, but to date CLCs have been given an exemption subject to certain limitations. These limitations include that services to Queensland CLCs are subject to a quota, and bookings are on a first come, first served basis. This often results in CLCs being unable to provide assistance to a client because the quota has been reached.[22]

7.36 QAILS also explained that the interpreter service does not extend to court representation, and that clients with significant language barriers have had to appear in court without an interpreter. This is a particular problem in civil matters, because unlike criminal matters, Queensland courts do not have the power to order interpreter services in civil proceedings.[23]

7.37 Both QAILS and the CCLCG explained in their submissions that TIS does not offer its services after business hours, which is when most CLCs hold their advice sessions.[24]

7.38 CCLCG noted that the limitations of TIS mean that it is the second choice for interpreter services for CLCs in NSW. The first choice is the NSW Community Relations Commission for a Multicultural NSW (CRC). CCLCG noted that prior to 1998, the NSW Ethnic Affairs Commission (as it was then) provided face-to-face interpreters to CLCs, on request for free. However CCLCG explained that in 1998, after the Commonwealth limited TIS to Commonwealth matters only, the NSW Government brought in a fee-for-service policy. CCLCG negotiated with the NSW Government for a limited exemption for CLCs. These limits to the exemption mean that the CRC service is not available for Commonwealth matters and equity/compensation matters.[25]

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21 Combined Community Legal Centres' Group NSW, *Submission 60*, p.28.

22 Queensland Association of Independent Legal Services, *Submission 73*, p.43.

23 ibid p.44.

24 ibid; Combined Community Legal Centres' Group NSW, *Submission 60*, p.28.

25 Combined Community Legal Centres' Group NSW, *Submission 60*, p.29.

7.39 CCLCG further noted that the lack of interpreter services was worse for regional areas, and gave the example that Illawarra Legal Centre has to travel to Sydney (an hour and half drive) to access CRC interpreters.[26]

7.40 In order to remedy the difficulties that CLCs face in accessing interpreter services, CCLCG proposed the creation of a 'one-stop-shop' for interpreter services.[27] CCLCG estimates that servicing unmet interpreter demand in NSW CLCs would cost around $100,000 (750 services at $130 per service). CCLCG suggested that as the provision of interpreters should be on a needs basis, the real cost should be established through a 12 month pilot program. Such a pilot should be funded with a $100,000 pool of funds from the Commonwealth and states/territories, and could be administered by the LACs.[28]

Committee view

7.41 Clearly it is essential for the provision of access to justice that persons are able to comprehend the advice they receive, and the matters to which they are a party. The Committee is concerned by evidence that those seeking to provide free migration advice face difficulties in accessing face-to-face interpreters and is even more concerned by the reported lack of interpreter services in court proceedings, particularly civil matters.

7.42 The Committee believes that the inefficiencies caused by the Commonwealth/state divide in funding also occurs in translation services. The Committee believes that translation services would be more efficient and effective if they were funded jointly by the Commonwealth and the states/territories and made available for all matters regardless of whether the matter relates to the Commonwealth or the states.

7.43 The Committee supports the CCLCG's suggestion that a pilot program be established, jointly funded by the Commonwealth and the states/territories. The Committee believes that the provision of $100,000 of funding for each jurisdiction, met jointly by the Commonwealth and the states/territories is a reasonable cost to test the viability of a 'one-stop-shop' for interpreter services.

Recommendation 43

7.44 The Committee recommends that the Commonwealth and states/territories should jointly fund a $100,000 pilot program in each jurisdiction to assess the viability of a "one-stop-shop" interpreter service for community legal centres and legal aid services, to be administered by the legal aid commissions.

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26 Combined Community Legal Centres' Group NSW, *Submission 60*, p.30.

27 ibid.

28 ibid, p.31.

Conflict of interest issues

7.45 It was strongly argued in submissions and evidence that a conflict of interest arises because the IAAAS system is administered by DIMIA, which also appears against applicants in immigration matters.[29]

7.46 Mr Tony Parsons from Victoria Legal Aid explained the difficulties:

> We are regularly confronted with the situation where we attend our clients in detention centres, they ask us what the problem is and we say, 'The department of immigration is trying to throw you out of the country.' Then they ask: 'Who is providing money for your legal services?' and we have to say, 'The department of immigration.' It is an appalling conflict of interest. That money should be administered by the Commonwealth Attorney-General's office at the very least. People accuse us of providing Third World justice with that kind of conflict.[30]

7.47 In addition to the conflict of interest that the IAAAS arrangements may cause, it was also noted by Ms Louise Boon-Kuo of RACS that its IAAAS contracts are currently in 6 month grants, which makes it very difficult to engage in long term planning.[31]

Committee view

7.48 The Committee believes that services for migrants and refugees would be best provided by legal aid, and consequently believes that the Commonwealth priorities and guidelines should be amended as suggested in recommendation 41. If, however, the Commonwealth continues to service the needs of migrants and refugees through IAAAS funding, the Committee believes it is inappropriate that this scheme is administered by DIMIA since this causes a clear conflict of interest and is unacceptable.

7.49 The Committee also believes that the length of IAAAS contracts (6 months) is too short to enable specialist service providers to engage in medium to long term planning, and that funding should at least be made annually.

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29 For example see New South Wales Legal Aid Commission, *Submission 91*, p.35; Mr Grant Williams, *Committee Hansard*, 13 November 2004, p.3. Mr Tony Parson, *Committee Hansard*, 12 November 2004, p.34.; National Legal Aid, *Submission 81*, p.17.

30 *Committee Hansard*, 12 November 2003, p.34.

31 *Committee Hansard*, 13 November 2003, p.100.

Recommendation 44

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

Recommendation 45

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

Migration Agents Registration Authority compliance costs

7.52 The Committee heard that compliance costs imposed by the Migration Agents Registration Authority (MARA) are an obstacle for CLCs or firms wishing to engage in pro bono legal advice regarding migration matters.

7.53 The IARC explained that the availability of free migration advice is limited by the requirement that those offering migration advice be registered migration agents. The IARC provided the Committee with a breakdown of the costs to gaining initial registration as a migration agent, which amounted to over $5,000.[32] It noted that no concession is available to non-fee charging agents for the MARA examination fee, and that the only concessions available for them are the registration fees. The initial registration fee is reduced from $1760 to $160 for non-charging agents, which reduces their total initial registration costs to around $3,400. Re-registration is reduced from $1050 to $105. [33] The IARC further noted that the ongoing cost of maintaining registration is in the order of $2,200 for non-fee charging agents (compared with $4,200 for commercial agents).[34]

7.54 The IARC expressed concern that the number of non-fee charging migration agents is decreasing and will continue to do so. The IARC noted that the 2001-02 MARA annual report stated that for that year there were 2773 registered migration agents, but of those only 270 were non-fee charging agents.[35] The Committee notes that the MARA annual report for 2002-03 indicates that as of 30 June 2003 the

32 Immigration Advice and Rights Centre, *Submission 52*, pp.2-3.

33 ibid, p.3.

34 ibid.

35 ibid, p.2.

number of overall registered agents had increased to 3084, but the number of non-fee charging agents remained static at 270.[36]

7.55 The IARC was also concerned by the recent continuing professional development (CPD) requirements imposed by MARA, which it argues will inevitably increase the cost of such training. It was concerned that this will reduce the numbers of non-fee charging agents, because unlike commercial agents, they are unable to pass the costs down the line to consumers.[37]

7.56 The IARC also explained that while it offers free or heavily discounted CPD seminars to other providers of non-profit migration advice, due to demanding administrative requirements from MARA regarding the provision of CPD courses (and limited resources on the part of IARC), it is unlikely that service providers such as IARC can continue to provide such free or discounted courses.[38]

Committee view

7.57 The Committee is concerned by evidence that the availability of migration agents who provide free services may be reduced by compliance costs imposed by the MARA. The Committee believes that all possible barriers should be removed for those who seek to practice as non-fee charging migration agents.

7.58 The Committee believes that in its role of regulating the migration industry, MARA has an obligation to ensure that there are no unnecessary barriers to those who seek to practice as non-fee charging migration agents.

7.59 The Committee believes that MARA should co-operate with those such as IARC who run free or discounted CPD courses for non-fee charging migration agents. Such co-operation could involve meeting the administrative costs experienced by IARC in providing such courses, and/or in subsidising the costs of running such courses.

Recommendation 46

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

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36 *Migration Agents Registration Authority Annual Report* 2002-03, p.13.

37 IARC, *Submission 52*, p.3.

38 ibid.

CHAPTER 8

OTHER GROUPS WITH PARTICULAR NEEDS

8.1 The Committee heard that several socially disadvantaged groups are currently being denied adequate legal assistance, and that this neglect is compounding their state of disadvantage. The specific groups that were brought to the attention of the Committee were homeless people, young people, and the mentally ill.

Legal needs of the homeless

8.2 The Committee was told that in 1996 the Australian Bureau of Statistics estimated that there were over 105,000 homeless people in Australia on census night.[1] The Committee heard that in many cases the law and access to justice arrangements cause or contribute to homelessness and that very few people become homeless without some interaction with legal or bureaucratic institutions. These include the Residential Tenancies Tribunal in the event of an eviction or Centrelink in the event of the reduction or cancellation of welfare payments.[2]

8.3 The circumstances of these people leave them neglected in terms of legal assistance, not simply because they are often unable to afford legal assistance, but because they are also often not in a position to identify their own need or effectively seek assistance. Such people will often need outreach services that can assist them to help themselves when faced with a legal matter.

8.4 The PILCH Homeless Persons' Legal Clinic explained that it has Homeless Persons' Legal Clinics in Victoria and Queensland, and a clinic is proposed in NSW. These clinics provide civil, administrative and some summary criminal legal services at crisis accommodation centres and welfare agencies to encourage direct access by clients.[3]

Barriers to accessing justice

8.5 The Committee heard that there are four major barriers for access to justice for homeless people. These are:

- the limited availability of legal aid for homeless people in respect of civil and administrative law matters;

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1 Mr Phil Lynch, Coordinator, Homeless Persons' Legal Clinic, *Committee Hansard*, 12 November 2003, p. 6.

2 ibid.

3 Homeless Persons' Legal Clinic, *Submission 13*, p. 10.

- lack of appropriately targeted and directed services for homeless people;
- lack of awareness on the part of homeless people that they may have a legal problem; and
- the lack of confidence or empowerment on the part of homeless people.[4]

8.6 Regarding the first barrier, the Committee heard that homeless people commonly experience civil or administrative law related matters such as fines and infringement notices, debts, tenancy issues, mental health law, discrimination, social security, and guardianship and administration.[5] In Victoria, legal aid will not be granted in administrative matters unless the amount of the claim is $5,000 or more (eg in the case of Centrelink pursuing debts or overpayments).[6] The Committee was told that in civil law matters, Victoria Legal Aid will only grant assistance if the person's sole place of residence is at immediate risk in the action and there is a strong prospect of success, which by definition excludes homeless people from obtaining assistance in a civil matter in which they are the defendant.[7]

8.7 In the case of the homeless person as plaintiff, legal aid will not be granted if the plaintiff could obtain assistance under a conditional costs agreement, notwithstanding that many 'no win – no fee' arrangements require that the plaintiff make an initial outlay of up to $2,000.[8]

8.8 Regarding the second barrier, the Committee was told that due to the pressing problems confronted by homeless people, legal issues are unlikely to be identified and addressed unless legal services are appropriately targeted and delivered in locations accessed by homeless people for more basic subsistence needs.[9]

8.9 The third barrier faced by homeless people is that they are often not aware that they have a legal problem or that they may have legal rights that are being infringed. The Committee heard that this lack of awareness is particularly evident among young homeless people, homeless people from culturally diverse backgrounds, Aboriginal and Torres Strait Islander homeless people, homeless people experiencing mental illness and homeless people with an intellectual disability.[10]

8.10 The Committee heard that the fourth barrier to access to justice for homeless people was their lack of confidence and empowerment to access legal services. This

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4 Mr Phil Lynch, *Committee Hansard*, 12 November 2003, p.6.

5 ibid.

6 Homeless Persons' Legal Clinic, *Submission 13*, p.21.

7 ibid.

8 ibid.

9 Mr Phil Lynch, *Committee Hansard*, 12 November 2003, p.6.

10 ibid.

may be due to mental illness, language barriers or the perception that legal services are expensive. This may be compounded by negative past experience with the legal and court system.[11]

Strategies to overcome the barriers to accessing justice

8.11 The Homeless Persons' Legal Clinic suggested five strategies to overcome the barriers that homeless people face in accessing justice. These were:

- the provision of pro bono civil and administrative law assistance;
- outreach service provision;
- court services;
- holistic advocacy and establishing relationships of trust and confidence; and
- community legal education.

8.12 The first suggested strategy was that the Commonwealth contribute funding to the operation of specialist homeless persons' legal services.[12]

8.13 The Committee was told of the operation and funding of the existing clinics in Victoria and Queensland. For the Victorian clinic, it was explained that services are provided on a pro bono basis by various law firms and in-house legal departments. For the period 1 October 2001 to 30 June 2003, the Victorian clinic was funded by the Victorian Department of Human Services in the amount of $76,000 and by the Victorian Department of Justice in the amount of $43,000. In this period the clinic provided free assistance to 580 homeless clients. It received no Commonwealth funding.[13]

8.14 In regard to the Queensland clinic, funding consists of a non-recurrent grant of $25,000 from the Queensland Law Society Grants Committee and in-kind assistance (in the form of a secondee solicitor) from Blake Dawson Waldron. Between 10 December 2002 and 10 June 2003 the clinic provided free assistance to 114 homeless clients. Again, no funding is provided by the Commonwealth.[14]

8.15 The second strategy suggested to overcome barriers for homeless people seeking access to justice was to improve outreach services. In order to effectively service the needs of homeless people, legal assistance needs to be offered in the places where they are likely to seek assistance for primary needs such as accommodation and food.

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11 Mr Phil Lynch, *Committee Hansard*, 12 November 2003, p.6.

12 Homeless Persons' Legal Clinic, *Submission 13*, p. 31.

13 ibid, p. 29.

14 ibid.

The Committee heard that both the Queensland and Victorian PILCH Homeless Persons' Legal Clinics operate services out of targeted locations such as charity offices and crisis centres. It was noted, however, that due to a lack of funding the clinics are unable to offer legal services to homeless people in rural or regional areas. It was noted that this is despite the 1996 Australian Bureau of Statistics Census indicating that in Victoria there were 17,840 homeless Victorians in rural or regional areas.[15]

8.16 The third strategy that was suggested related to court services. The Committee was informed that the accessibility and location of courts was an important factor for homeless people seeking access to justice. It heard that in Los Angeles U.S.A, a homeless persons' court sits monthly in the downtown area.[16] The focus of the sentencing in this court is rehabilitation and restoration, the idea being that rather than fining or incarcerating homeless offenders, the court refers them to an appropriate service provider to obtain vocational training, health care, housing, drug and alcohol treatment and so on.

8.17 The Committee was told that in Victoria, the Melbourne Magistrates' Court has recently adopted listing procedures in relation to people who have 'special circumstances' that contributed to them accruing unpaid fines. Such 'special circumstances' include mental illness, addiction, disorder or disability. The Special Circumstances List aims to identify and address the issues underlying the offending behaviour of people with special circumstances. The program which is funded by exclusively using state money, requires further funding to continue operating at current levels.[17]

8.18 The Committee heard that the Homeless Persons' Legal Clinic is currently preparing a discussion paper regarding the feasibility of establishing a homeless persons' court in Victoria. The idea being that the court could link misdemeanour adjudication with social service intervention to ensure that sentencing dispositions are tailored to address the underlying causes of such crime.[18]

8.19 The fourth strategy suggested by the Homeless Persons' Legal Clinic was to continue fostering holistic advocacy and establishing relationships or trust and confidence. In its submission, it explained that by dedicating each firm providing pro bono services to each specific outreach location, there is a holistic service delivery. This increases the seamlessness of service delivery, as well as improving the referral service for those matters that fall outside the civil, administrative or summary criminal area.[19]

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15 Homeless Persons' Legal Clinic, *Submission 13*, p.35.

16 ibid, p.35.

17 ibid, p.36.

18 ibid.

19 ibid, p.37.

8.20 The fifth and final strategy proposed, was to continue and improve community legal education. The Homeless Persons' Legal Clinic explained that it provides training and education for pro bono lawyers involved in the PILCH program, as well as education and training for welfare workers and homeless people themselves through a bi-monthly newsletter *Street Rights*.[20] The clinic suggested that the Commonwealth should increase funding to CLCs to enable them to provide enhanced community legal education, including through publications and newsletters where appropriate.[21]

Committee view

8.21 The Committee considers that improving access to justice is essential to breaking the cycle that leads to homelessness and poverty. The inherently disadvantaged status of both homeless and mentally ill people means that additional strategies and measures must be undertaken to ensure that adequate assistance is provided to this disadvantaged class of citizens.

8.22 The Committee recognises the invaluable work done by those firms and individuals who offer pro bono services (discussed further in Chapter 10). The Committee commends these firms and individuals for their involvement in the PILCH Homeless Persons' Legal Clinics in Victoria and Queensland. The Committee also acknowledges the hard work of those involved in administering and running the PILCH Homeless Persons' Clinics.

8.23 The Committee believes that due to the special disadvantage suffered by the homeless, and due to the need to break the cycle that leads to and compounds homelessness, the Commonwealth should help to support existing services that address their needs. Specialist programs such as that run by PILCH appear to be very valuable, but the Committee considers that the existing services provided by CLCs and LACs should be supported in terms of ensuring they have adequate funding to address the demands of their clients. The Committee considers the funding needs of CLCs in more detail in Chapter 11.

Mentally ill people

8.24 The Committee also heard from one organisation about the particular problems faced by mentally ill people in relation to their appearance before tribunals that have significant powers over them.

8.25 Advocacy Tasmania, a community-based advocacy organisation for people with a disability and those with a mental health disorder, amongst others, stated that legal aid was not available in Tasmania for appearances before the Mental Health

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20 Homeless Persons' Legal Clinic, *Submission 13*, p.39.

21 ibid.

Tribunal or the Guardianship and Administration Board. Those agencies had significant powers:

- A person can be deprived of their liberty indefinitely, in blocks of six month periods based on a decision of the Mental Health Tribunal
- A person can be forcibly treated without consent based on a decision of the Guardianship and Administration Board
- A person can have their right to make decisions for themselves taken from them and granted to another based on a decision of the Guardianship and Administration Board.

Of the 121 persons who appeared before the Mental Health Tribunal in 2002/01, only two persons had representation and both were represented by the Launceston Community Legal Centre.[22]

8.26 Advocacy Tasmania told the Committee:

> There are people in mental health facilities who have been involuntarily held there for over a decade. They have never had representation, and each time their matter is reviewed before the Mental Health Tribunal, they are not represented.[23]

8.27 By comparison, 'a person before the magistrate's court with a likelihood of a two month prison sentence can receive representation'.[24] Advocacy Tasmania argued that this was unjust and inequitable.

8.28 Advocacy Tasmania argued that in other jurisdictions there were 'funded organisations or Legal Aid specialist mental health units' to represent mentally ill people.[25] The Committee was also told that the Legal Aid Commission of Tasmania had stated that it would employ a specialist solicitor if Mental Health Services funded the position.[26]

Committee view

8.29 The Committee did not receive sufficient evidence during this inquiry to enable it to assess the extent to which mentally ill people are deprived of legal representation throughout Australia. However, it views the statements by Advocacy Tasmania in relation to the situation in that state with great concern.

8.30 As noted above, there is often a link between mental illness and homelessness or other social and economic disadvantage. Vulnerable citizens need access to proper

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22 *Submission 39*, p. 5.

23 ibid, p. 7.

24 ibid.

25 ibid, p. 5

26 ibid.

legal representation to protect and enforce their rights, whether that be in courts or other tribunals that can have a significant impact on their lives.

8.31 The Committee urges legal aid commissions and state and territory governments to ensure that appropriate services are provided.

Legal needs of young people

8.32 The Committee received submissions and evidence that highlighted the barriers that young people face in accessing justice. Submissions and evidence identified these barriers as well as outlining the difficulties that specialist youth legal services and CLCs are facing in trying to overcome these barriers.

8.33 One of the major submissions made to the Committee addressing the needs of young people, was made by the Youth Legal Service.[27] The Youth Legal Service is based in Western Australia, and seeks to develop and provide legal assistance and representation to young Western Australians by the following means:

- the provision of a state wide legal information and advice service (funded by the WA Department of Justice and the Commonwealth Attorney-General's Department);
- the provision of a metropolitan information and advice service based in Perth CBD (funded by the WA Department of Justice);
- the provision of legal representation in the main Perth Children's Court (funded by the Commonwealth Attorney-General's Department), and representation in selected metropolitan Children's Courts (funded by the Law Society of Western Australia – Public Purpose Trust).
- the provision of civil law services (funded by the WA Department of Justice and Commonwealth Attorney-General's Department); and
- the provision of an employment law service (funded through private sources).[28]

8.34 The Youth Legal Service is funded by both recurrent funding and non-recurrent funding. In terms of recurrent funding, it receives $68,752 from the Commonwealth and state funding of $117,875.[29]

27 Youth Legal Service, *Submission 1*.

28 ibid, p.5.

29 ibid, p.18.

Barriers to access to justice

8.35 The Youth Legal Service noted in its submission that there are numerous barriers for young people seeking legal assistance. These include:

- the prohibitive cost;
- their own lack of legal knowledge;
- the lack of knowledge of youth workers in accessing legal services;
- problems and limitations of duty lawyer schemes; and
- the alien nature of the court system.[30]

8.36 The Youth Legal Service argued in its submission that legal representation is crucial to children understanding why the criminal justice system operates as it does, and to help them understand their rights and responsibilities. It argued that if a child can see that their rights are being protected, and their responsibilities are clear, they are more likely to develop a lasting respect for the law.[31]

8.37 The Committee heard in evidence that as with homelessness, the inherently disadvantaged nature of young people can compound the negative experience that they have with the law. Ms Janet Loughman, Principal Solicitor, Marrickville Legal Centre, told the Committee that there is significant research indicating that children and young people in care experience poor life outcomes, which is reflected in:

- high levels of placement breakdown;
- lower levels of education;
- prevalence in the juvenile justice system;
- greater risk of homelessness;
- mental illness; and
- substance abuse and criminal activity.[32]

8.38 Evidence suggests that the rate of children in care is increasing. The Committee heard that at June 2001 there were over 7,000 children in care in NSW, which was a significant increase from just over 5,000 in 1997.[33]

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30 ibid, p.5.

31 ibid.

32 *Committee Hansard*, 13 November 2003, p. 93.

33 ibid.

8.39 The Committee also heard that the rate of Indigenous young people in detention is increasing, and that in NSW the percentage of Indigenous young people in detention has increased from 26 per cent of young people in detention in 1990 to over 35 per cent.[34] (These issues are also discussed in Chapter 5.)

Strategies to overcome the barriers

8.40 Various suggestions were made in relation to overcoming the barriers for young people seeking access to justice. These included:

- improving funding for outreach services;
- a holistic approach that takes into account the underlying social problems faced by young people;
- increased funding for specialist services for young people.

8.41 As with homeless people, the Committee heard that to effectively provide legal services to young people, an outreach or targeted service is required. It was explained that legal representation is important for young people, both because it can prevent them being caught up in the system to begin with, but also because it helps them understand the boundaries of acceptable behaviour and the need to accept responsibility. To support this point, the Youth Legal Service quoted the Chief Justice of the WA Supreme Court, who stated in correspondence to the Director General of the WA Justice Department:

> The provision of legal representation to young people plays an important role in preventing further crime. …the lack of legal representation and advice ..creates a danger of alienating young people, and thereby encourages further offences, in two ways.
>
> First, the absence of legal representation encourages young people to plead guilty, thereby drawing them into the criminal justice system. Secondly, representation and advice serve a role in explaining to individual young people the boundaries of acceptable behaviour and the need to accept responsibility.[35]

8.42 The Youth Legal Service submitted that there needs to be further funding of its service to be able to extend its outreach programs into areas of need. It noted that in the case of Western Australia, the majority of population growth is expected to occur in areas that are currently identified as areas where young people are at extremely high risk of offending.[36]

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34 ibid.

35 Youth Legal Service, *Submission 1*, p. 12.

36 ibid, p. 7.

8.43 As with homeless people, it was argued that the special needs and difficulties that are faced by young people mean that in delivering legal assistance a holistic approach that addresses the underlying social causes of certain behaviour is required. The Youth Legal Service noted that youth debt matters are becoming an increasing issue for it. It noted that in 2000/01 45 per cent of its work related to youth debt, but by the following financial year it had risen to 76 per cent.[37]

8.44 The Youth Legal Service noted that whilst the funding it receives has remained relatively stable, the matters referred to the service are becoming increasingly complex and serious. It also noted that with 66 per cent of its clients currently referred by WA Legal Aid, this trend is likely to continue.[38]

8.45 The Youth Legal Service argued that due to inadequate funding it is experiencing difficulties in relation to software needs, administration support, printing costs for publications, travel costs, staff training and development, and law library demands.[39]

8.46 Whilst the Youth Legal Service in Western Australia lamented the difficulties that insufficient funding was causing, the Committee also heard from the Marrickville Legal Centre that there is no Commonwealth funded youth advocacy service dedicated to NSW. It also lamented that state governments had failed to provide funding for such a service despite more than a decade of lobbying.[40]

Committee view

8.47 The Committee believes that as with the homeless, young people seeking legal assistance are a particularly vulnerable group, and need focused or directed outreach services to ensure they receive adequate legal assistance or representation.

8.48 The Committee commends the work performed by specialist services such as the Youth Legal Service. Such specialist services are well placed to break the cycle of poverty and institutionalisation that many young people, particularly those in care, can face.

8.49 The Committee believes that the Government should consult with state legal aid commissions over the need for increased Commonwealth funding for youth legal services.

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37 ibid, p. 15.

38 ibid, p. 16.

39 ibid, p. 18.

40 Marrickville Legal Centre, *Submission 53*, p. 8.

Recommendation 47

8.50 The Committee recommends that the Government consult with state and territory legal aid commissions about the need for increased Commonwealth funding to youth legal services.

CHAPTER 9

PRO BONO LEGAL SERVICES

9.1 One area in which there have been major changes since the Committee's last report is the provision of pro bono legal services. Over the last five years the provision of such services in Australia has been transformed from fractured and unstructured services, often delivered by lawyers in their private time, to services that are coordinated between community centres and law firms and performed by lawyers in structured in-house pro bono programs.[1]

9.2 This chapter discusses:

- developments in pro bono legal service provision since the *Third Report*;
- the lack of data on pro bono legal services;
- whether pro bono legal services are a substitute for legal aid funding;
- the mismatch of legal skills and community need;
- lawyers' conflicts of interests;
- limitations of lawyers' resources; and
- reducing the costs of litigation.

The Third Report

9.3 The Committee did not discuss pro bono services in great detail in the *Third Report*. However, the Committee considered that the Government had 'seriously misunderstood' the extensive involvement of the legal community in providing legal aid and pro bono services:

> In failing to understand the complex structure in which such services are provided, the Government may have thought that reducing funding to one part of the structure would be overcome by additional contributions from the other components. This view manifestly misunderstands that the amount of legal aid provided in the past has only been possible, on the whole, because of the substantial contribution of the legal profession.[2]

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1 National Pro Bono Resource Centre, *First Annual Report 2003*, p. 2.

2 *Third Report*, para 8.103, p. 157.

9.4 In particular, the Committee believed that the Government's restructure of legal aid administrative and funding arrangements were based on the Government's belief that:

> … a greater percentage of the overall legal aid load can be shifted to the legal profession.[3]

9.5 The Committee's conclusion was based in part on observations of members of the legal profession of the increasing legal aid burden and the profession's limited capacity to take up this extra burden.[4]

9.6 The Committee had recommended that the Commonwealth Government sponsor a National Legal Aid Council to advise Government on legal aid matters and provide a vehicle for communication between users and providers of legal aid.[5] The Committee recommended that this Council draft 'guidelines to cover the terms and conditions under which elements of the legal aid community provide legal aid and related services.'[6] Additionally, the Committee recommended that 'there be full recognition of the contribution made by the legal aid community to the provision of legal services for the community, especially within the past two years.'[7]

9.7 In responding to the Committee's report, the Commonwealth Government recognised the contribution made by the legal aid community[8] but rejected the other recommendations. The Government expressed the view that existing consultative mechanisms enabled it to receive advice on the legal aid system and that the Australian Legal Aid Assistance Forum had been established to promote communication within the legal aid community.[9]

Developments in providing pro bono legal services

9.8 There has always been some form of pro bono services in Australia's legal system. Individual lawyers have regularly offered their time, free of charge or for a reduced fee, to help individuals or organisations in need of legal assistance.

9.9 Mr Gordon Renouf, the former Director of the National Pro Bono Resource Centre, provided a brief overview of the history of Australian pro bono legal services in the Centre's first annual report.[10] Until the last decade, little attention had been given to the role of pro bono legal services in increasing access to justice. Since then,

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3 ibid, para 8.98, p. 156.

4 ibid, pp. 155-156; see also p. 21.

5 ibid, Recommendations 14 and 15, p. 135.

6 ibid, Recommendation 19, p. 157.

7 ibid, Recommendation 20, p. 157.

8 Government Response, *Senate Hansard*, 16 May 2002, p. 1773.

9 ibid, p. 1772.

10 National Pro Bono Resource Centre, *First Annual Report 2003*, 2003, p. 2.

a significant number of pro bono referral bodies have been established, with organisations such as the NSW Law Society, the NSW Law Foundation and the Victoria Law Foundation preparing reports or establishing pro bono projects. The Australian Bureau of Statistics first asked questions about pro bono work in its 1998/99 survey of the legal profession. Around the same time, several of the larger law firms began to establish structured in-house pro bono schemes or support for external services, often in partnership with community based organisations.[11]

9.10 Anecdotal information suggests that the law firms see the structured and supervised provision of pro bono legal services as an important corporate social responsibility—lawyers generally see the opportunity to work on pro bono matters as an invaluable way to perform community service and as a way of injecting variety into their working life.

9.11 In August 2000, the then Attorney-General, the Hon Daryl Williams AM QC MP, hosted a conference in Canberra on pro bono legal services.[12] Following that conference he established the Pro Bono Task Force to develop a strategy for implementing the conference outcomes. In 2001 the Task Force recommended five broad actions:

- establish an Australian pro bono resource centre to promote pro bono work throughout the legal profession, assist and support pro bono service providers and make available resources and information to pro bono providers;
- produce a best practice handbook for managing pro bono work within law firms;
- support client-focused research;
- develop national professional practice standards for pro bono legal services; and
- foster a strong pro bono culture in Australia.[13]

9.12 In August 2002, the National Pro Bono Resource Centre was established by the Public Interest Advocacy Centre in partnership with several other organisations and with financial support from the Commonwealth Government and the University of New South Wales. It focused its efforts on building networks and partnerships and producing resources of benefit to the legal profession and community sector.[14] The

11 ibid, p. 2.

12 *For the Public Good: The First National Pro Bono Law Conference.*

13 *National Pro Bono Task Force: Recommended Action Plan for National Co-ordination and Development of Pro Bono Legal Services*, June 2001.

14 National Pro Bono Resource Centre, *First Annual Report 2003*, 2003, p. 2.

Commonwealth Government's financial support consisted of a $1 million grant over four years, that is, until 2006.

9.13 In October 2003, the National Pro Bono Resource Centre hosted the Second National Pro Bono Conference in Sydney.[15] The conference brought together representatives from community organisations, legal professional organisations, academics and law students, state and federal government legal officers, partners and pro bono coordinators of law firms, members of the Bar and judges to share experience and discuss emerging issues in pro bono law.[16] The Attorney-General recognised the contribution of pro bono legal services in his speech at the Conference.[17]

Data on the extent of pro bono legal services

9.14 The Committee found it difficult to quantify the extent of pro bono legal services in Australia. This is partly because there is no universally accepted definition of what constitutes a pro bono legal service, although the term generally refers to a legal service that has been provided voluntarily and on a no fee or reduced fee basis. As the Australian Law Reform Commission explained in its 2000 report, *Managing Justice*:

> Some lawyers equate work done at legal aid rates as `pro bono' because of the low level of remuneration. Others include matters in which they have substantially reduced, but not waived, their fees. In some such cases, lawyers continue to act where paying clients run out of funds. Others lawyers apply a strict test that pro bono work is for the public good, such as `test case litigation', not simply work without or for reduced charges.[18]

9.15 Many firms and legal professional associations do not keep statistics on the quantity or value of the pro bono work they or their members undertake or coordinate.[19] There is also no nationally co-coordinated record-keeping of the services that are provided.

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15 *Second National Pro Bono Conference: Transforming Access to Justice*, Sydney, 20 October 2003.

16 Speakers from the US, South Africa, Argentina and England also attended the conference to provide their perspectives.

17 Commonwealth Government, *Senate Hansard*, 16 May 2002, pp.1767-1773; The Hon Phillip Ruddock, Attorney-General, *Speech at the Second National Pro Bono Conference: Transforming Access to Justice*, Sydney, 20 October 2003, available at http://www.ag.gov.au/www/MinisterRuddockHome.nsf/Alldocs/RWP16FDE03EBD917AF6CA256DD6001260E7?OpenDocument.

18 Australian Law Reform Commission, *Managing Justice – A review of the federal civil justice system*, Report No. 89, 2000, p. 305.

19 ibid.

9.16 The Australian Bureau of Statistics (ABS) estimated that in 2001-2002 solicitors and barristers in Australia provided a total of 2.3 million hours of pro bono work.[20] However, other sources estimate that the total is much higher. According to the Castan Centre for Human Rights Law, Australian solicitors and barristers perform 2.269 million hours of pro bono work each year.[21] The Attorney-General referred to a similar figure for 2001-02 (2.3 million hours) in late 2003.[22] The Pro Bono Resource Centre told the Committee of its concerns about the accuracy of the ABS statistics, pointing to sampling errors, disparity in record keeping practices and different opinions by law firms as to what constitutes pro bono work.[23] Nonetheless, whatever figures are used, it is clear that the legal profession's pro bono contribution is significant.

9.17 The Committee notes that comprehensive information on the types of clients and matters is also lacking. Submissions indicated that types of matters in which pro bono assistance is sought traversed a wide range of law, including commercial law, family law and criminal law. The statistics provided in submissions provided by community legal centres and law firms appeared to largely focus on particular areas of community need, largely reflected by the expertise of practitioners performing the work, rather than objectively indicating the total community need. Also, statistics provided by clearing houses indicate the community demand where no other help is available.[24]

9.18 The Legal Aid Commission of South Australia suggested that the demand for pro bono legal services was increasing.[25] However, this view could not be confirmed due to the lack of reliable statistics.

Committee view

9.19 The Committee considers that accurate records of pro bono legal service provision would assist government by informing policy development in providing access to justice. These records should include the type of matter in which assistance was sought, type of client, source of referral and approximate cost in market rates of assistance provided.

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20 Australian Bureau of Statistics survey, *2001-02 Legal Practices Australia*, 8667.0, tables 2.10 and 3.7.

21 Castan Centre for Human Rights Law, *Submission 76*, p. 8.

22 The Hon Phillip Ruddock, Attorney-General, *Speech at the Second National Pro Bono Conference: Transforming Access to Justice*, Sydney, 20 October 2003, available at http://www.ag.gov.au/www/MinisterRuddockHome.nsf/Alldocs/RWP16FDE03EBD917AF6CA256DD6001260E7?OpenDocument.

23 Mr Gordon Renouf, Director, Pro Bono Resource Centre, Paper presented at *Transforming Access to Justice – The Second National Pro Bono Conference*, 20 October 2003.

24 Public Interest Law Clearing House, *Submission 54*, pp. 18 & 23.

25 Legal Services Commission of South Australia, *Submission 51*, p. 4.

9.20 The Committee considers that the National Pro Bono Resource Centre is the most appropriate existing body to encourage a national approach to the collection of data on pro bono legal services. It notes that the Centre has noted this as a 'future challenge' in its annual report.[26] The Committee acknowledges that the Commonwealth government is providing the Centre with one million dollars over four years. However, the Committee considers that additional funding for the purpose of obtaining data collection would enable empirical data to inform the debate on this important aspect of the community's access to justice.

Recommendation 48

9.21 The Committee recommends that the Commonwealth government provide additional funding to the National Pro Bono Resource Centre to enable it to encourage and provide support to law firms, community legal centres, pro bono referral schemes and legal aid commissions in recording and reporting statistics on pro bono service provision.

Structured service provision

9.22 The National Pro Bono Resource Centre's submission outlined the current structures of pro bono legal service provision.[27] Generally, these are:

- in-firm pro bono (providing legal services in the same way as a paying client except that the service is offered for free or at a discounted rate);
- outreach services (lawyers providing legal advice at outreach locations, such as at the premises of community organisations);
- secondments to community legal organisations (generally the same as an outreach service except that the lawyer is supervised by a solicitor at the premises);
- specialist services (firms contributing resources to a specific community-based service—for example, the Shopfront Youth Legal Service in Sydney);
- volunteering (lawyers volunteering their time at community legal centres);
- multi-tiered relationships (providing resources, not necessarily legal resources, in partnership with other organisations to facilitate access to justice); and
- other pro bono opportunities.

26 National Pro Bono Resource Centre, *First Annual Report 2003*, p. 3.

27 National Pro Bono Resource Centre, *Submission 80*, pp. 5-6; Attachments 1, 2 & 3.

9.23 In larger metropolitan areas, law firms generally work in co-operation with community legal services or welfare organisations. One case in point is the PILCH Homeless Persons' Legal Clinic (HPLC), a co-operative effort of PILCH and the Council to Homeless Persons. PILCH employs a co-coordinator for the HPLC to organise lawyers from member firms who are willing to offer their services to crisis centres and welfare agencies which assist homeless persons.[28]

9.24 There are numerous examples of similar co-operative efforts and not all are restricted to providing legal services for the end user. Often, larger firms will offer legal assistance to organisations (contract or employment advice, for example) and /or offer other resources including office facilities, library and research resources, administrative assistance, transport, manpower and fundraising.

9.25 These new arrangements are referred to as 'multi-tiered'[29] and 'demonstrat[ing] a new strategy'[30] in providing pro bono services, by taking a co-operative and pro-active approach to working directly with and serving the community. The emphasis is on providing a service which meets a need in a practical and real way as opposed to providing what lawyers are prepared to offer.[31] It follows that if what lawyers are prepared to offer does not meet the stated need then steps need to be taken to ensure that lawyers are trained to provide skills which meet demand.

9.26 In the case of the ACT's First Stop Legal and Referral Service for Young People, the firm of Clayton Utz is one of four partner organisations whose focus is to assist people aged 12-25 by either helping to resolve legal matters or referring the young person to appropriate sources of assistance:

> Clayton Utz wanted to do more than provide basic funding assistance to the service. David Hillard, the National Pro Bono Director at Clayton Utz explains, "We had a lot of enthusiasm from our lawyers for being involved in First Stop, but to be honest, we did not have a great depth of experience in many of the legal issues that we knew would affect First Stop clients. So we took steps to get that experience and train our lawyers." Prior to the service opening, Clayton Utz lawyers attended tailored training conducted by Legal Aid lawyers on topics such as criminal and family law. Training

28 Ms Paula O'Brien, Public Interest Law Clearing House (Victoria) Inc, *Committee Hansard*, 12 November 2003, p. 1.; see also Chapter 8 for a general discussion of legal assistance for homeless people.

29 National Pro Bono Resource Centre *Working Together: Multi-Tiered Pro Bono Relationships Between Law Firms and Community Legal Organisations*, p.1.

30 'From conservatism to activism: The evolution of the Public Interest Law Clearing House in Victoria' in *Alternative Law Journal*, Vol. 28, No. 1, February 2003, p. 11

31 National Pro Bono Task Force: *Recommended Action Plan for National Co-ordination and Development of Pro Bono Legal Services*, p.12.

was also provided about specialist referral points in Canberra and referrals protocols were developed. [32]

9.27 The benefits of structured provision of pro bono legal services include delivering more effective pro bono services and increasing effective legal services to disadvantaged clients and communities.[33] However, pro bono referral schemes do not appear to exist in all jurisdictions.[34]

9.28 The Committee was interested to note a recent initiative in Victoria. The Victorian Attorney-General in June 2000 announced an initiative designed to increase the level of pro bono work undertaken by the private profession.[35] The Pro Bono Secondment Scheme Pilot which ran from March 2002 to December 2003 involved ten lawyers from six Melbourne law firms working for six months in nine centres (CLCs, specialist legal centres and one section of Victorian Legal Aid). A recent report has recommended the continuation and expansion of the scheme.[36]

Committee view

9.29 The Committee commends the legal profession for its increasing support of pro bono legal services and the National Pro Bono Resource Centre for supporting the legal profession in matching community need with appropriately skilled lawyers.

9.30 While noting the Commonwealth Government's contribution to funding over four years, the Committee is concerned that the Commonwealth Government has not assured on-going funding for the Centre.

9.31 The Committee also considers the role of community legal centres and clearing houses as essential to the efficient and effective provision of pro bono legal services.

Recommendation 49

9.32 The Committee recommends that the Commonwealth Government commit ongoing funding to the National Pro Bono Resource Centre past 2006 to enable it to continue its work to improve the provision of pro bono legal services.

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32 National Pro Bono Resource Centre, *Working Together: Multi-Tiered Pro Bono Relationships Between Law Firms and Community Legal Organisations,* p.6.

33 National Pro Bono Resource Centre, *First Annual Report 2003*, p. 2.

34 National Pro Bono Resource Centre, *Submission 80,* p. 6.

35 *Attorney-General's Pro Bono Secondment Scheme – Report on the 2002-2003 Pilot*, available at http://www.justice.vic.gov.au.

36 Pro Bono Secondments Steering Committee *Pro Bono Secondment Scheme: Report on the 2002-2003 Pilot Scheme*, April 2004, available at http://www.justice.vic.gov.au. Members of the Steering Committee included the Law Institute of Victoria, Victoria Legal Aid, the Department of Justice and the Federation of Community Legal Centres (Vic) and community and specialist legal centres.

Pro bono work as a substitute for legal aid funding

9.33 In its *Third Report*, the Committee referred to evidence that other parts of the legal system were subject to pressure and were 'increasingly unable, or in some cases, unwilling to fill the gaps caused by the Commonwealth's unilateral action' in changing the basis of legal aid funding.[37] The Committee called for 'full recognition of the contribution' of the legal aid community to providing 'legal services for the community, especially within the past two years.' [38]

9.34 Many submissions to this inquiry argued that pro bono legal services should not be seen as a substitute for legal aid funding. They included representatives from the Commonwealth government,[39] community legal centres,[40] law firms,[41] pro bono support groups,[42] professional associations,[43] academic organisations[44] and legal aid commissions.[45] The Castan Centre for Human Rights Law best articulated the basis for this view:

> Access to justice can never be dispensed in terms of right by pro bono assistance in the way that legal assistance can be guaranteed through [a legal aid commission] mandated with that obligation through legalisation, and adequately resourced by public funding.[46]

9.35 National Legal Aid also expressed concern over the Commonwealth Government's 'increasing tendency … to promote pro bono services as the answer to gaps in service provision'.[47] This tendency seems supported by the Attorney-General's recent statements:

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37 Third Report, p. xxiii.

38 ibid, Recommendation 20, p. 157.

39 A representative from the Attorney-General's Department at the Second National Pro Bono Conference, Sydney, 20 October 2003.

40 Fitzroy Legal Service, *Submission 48*, p. 33; Federation of Community Legal Centres (Vic) Inc, *Submission 50*, p. 5; Community Legal Centres Association (Western Australia) Inc, *Submission 93*, p. 18.

41 Blake Dawson Waldron Lawyers, *Submission 63*, p. 10.

42 Public Interest Law Clearing House, *Submission 54*, p. 23; National Pro Bono Resource Centre, *Submission 80*, p. 2.

43 The Law Society of New South Wales, *Submission 79*, p. 3; Law Institute of Victoria, *Submission 87*, p. 10 & 12; The Law Society of South Australia, *Submission 92*, p. 3.

44 Castan Centre for Human Rights Law, *Submission 76*, pp. 8-9.

45 National Legal Aid, *Submission 81*, pp. 20-21; Legal Aid Commission of New South Wales, *Submission 91*, p. 41.

46 Castan Centre for Human Rights Law, *Submission 76*, p. 8.

47 *Submission 81*, pp. 20-21.

> … pro bono is just one part of the delivery of justice in Australia. As well as pro bono work, legal aid, community legal services and fee for service all contribute to our justice system.[48]

9.36 The South West Sydney Legal Centre argued that the level of pro bono work offered had reached saturation point and that such services would be most unlikely to make up the shortfall in legal aid funding.[49] One of the larger law firms, Blake Dawson Waldron, stated that pro bono services could not fill the gaps:

> … even at full capacity and in conjunction with the pro bono programs of other firms, we are unable to have any great impact on the unmet demand for legal assistance from people who cannot pay for such assistance.[50]

Law students

9.37 The ALRC in its report, *Managing Justice*, recommended that:

> In order to enhance appreciation of ethical standards and professional responsibility, law students should be encouraged and provided opportunity to undertake pro bono work as part of their academic or practical legal training requirements.[51]

9.38 The ALRC noted that the legal profession generally supports properly supervised pro bono work as a compulsory part of undergraduate law studies,[52] although making the provision of pro bono legal services a requirement for practising law was opposed.[53] The ALRC noted that the universities of Sydney and Wollongong have already introduced pro bono work as part of their course requirement for law students.[54] The Government responded that requiring law students to undertake pro bono work as part of their academic or practical legal training requirements was a matter for the legal profession.[55]

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48 The Hon Phillip Ruddock MP, Attorney-General, *Speech at the Second National Pro Bono Conference: Transforming Access to Justice*, Sydney, 20 October 2003, available at http://www.ag.gov.au.

49 *Submission 34*, pp. 3-4; see also Northern Territory Legal Aid Commission, *Submission 82,* p. 17.

50 Blake Dawson Waldron Lawyers, *Submission 63*, p. 10.

51 ALRC, *Managing Justice – A review of the federal civil justice system*, Report No. 89, 2000, p. 308, recommendation 38.

52 ibid, pp. 307-308.

53 ibid, p. 306.

54 ibid, p. 308.

55 *Government response to Australian Law Reform Commission Report No 89 Managing Justice : A review of the federal civil justice system,* p. 19, available at http://www.law.gov.au.

9.39 Submissions to this inquiry noted that law students are currently used in some community legal organisations,[56] with some regarding this experience as valuable to the student's future professional development and work prospects.[57]

Committee view

9.40 The Committee considers pro bono legal services to be an important and growing part of the response to the need for legal assistance. However, it is neither a substitute for an adequately funded legal aid system nor a panacea for overcoming gaps in other publicly funded legal services. Pro bono by its nature is a voluntary provision of services that is motivated by a person's social responsibility.

9.41 The Committee also considers that exposing law students to pro bono work is an invaluable way of establishing a strong foundation of social responsibility and engendering their commitment to future pro bono work.

Mismatch of pro bono services and community need

9.42 Some submissions indicated that there is a mismatch of available legal skills and unmet community need in pro bono service provisions.[58] Often large law firms specialise in areas of commercial and corporate law, whereas community legal centres argue that the greatest need for pro bono services is in family, tenancy, credit, criminal and social security law.

9.43 Submissions argued that law firms are increasingly taking on high profile cases—for example, native title and migration matters—but other areas of need are not adequately addressed. As the Legal Aid Commission of New South Wales stated:

> [pro bono schemes] tend to be hit and miss, not targeted at the socially and economically disadvantaged but reflecting individual solicitors' priorities and interests.[59]

9.44 The Federation of Community Legal Centres added:

> … private lawyers are generally not experts in community law, they are often selective about the cases that they take on (eg often reluctant to do

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56 Aboriginal Legal Rights Movement Inc, *Submission 16*, p. 16; Inner City Legal Centre, *Submission 25*, p. 1; Marrickville Legal Centre, *Submission 53*, p. 3; Human Rights Committee of the New South Wales Young Lawyers, *Submission 59*, p. 1; Combined Community Legal Centres' Group NSW, *Submission 60*, p. 5; Redfern Legal Centre, *Submission 61*, p. 8.

57 Roma Mitchell Community Legal Centre Inc, *Submission 15*, p. 7; Southern Communities Advocacy Legal and Education Service, *Submission 47*.

58 Northern Rivers Community Legal Centre, *Submission 22*, p. 2; Liberty Victoria – Victorian Council for Civil Liberties Inc, *Submission 29*, p. 8; Federation of Community Legal Centres (Vic) Inc, *Submission 50*, p. 29; National Pro Bono Resource Centre, *Submission 80*, pp. 8-9; Blake Dawson Waldron Lawyers, *Submission 63*, p. 3.

59 *Submission 91*, p. 41.

> cases that take on government), they may prefer high profile cases rather than complex low profile family law matters, and they can withdraw assistance if paid work becomes more demanding.[60]

9.45 In response, Blake Dawson Waldron, one of the larger law firms, commented that:

> Due to conflict of interest or lack of expertise, the firm is frequently unable to act in areas of law where there is a strong demand for legal aid and pro bono services; namely immigration, family law, matters against lawyers or doctors, and matters against banks and insurance companies.
>
> Where a gap in legal services is identified to the firm (usually by lawyers in the community legal sector) and the firm lacks the skills to assist, from time to time the firm will provide training to enable its lawyers to act in those areas.[61]

9.46 Another large firm, Freehills, noted that it would only accept pro bono referrals where it had relevant experience.[62]

9.47 The National Pro Bono Resource Centre stated:

> The mis-match between the expertise of private pro bono lawyers, particularly in the larger firms where the potential for expansion of pro bono programs exists, and the most common areas of legal need (and to some extent the reluctance to accept instructions in matters involving significant levels of litigation) are key reasons why pro bono services are unlikely to make any significant dent in the demand for publicly funded legal services in key areas of need including criminal and family law.
>
> Nor are pro bono legal services likely to be able to provide routine assistance in many areas of civil law, especially those that require high levels of specialisation in the law and practice of the relevant area such as social security law, consumer credit law and migration law. It cannot be assumed that pro bono service providers will have the requisite level of expertise, capacity or resources, to take on any kind of matter, on a pro bono basis, at any given time.
>
> Firms can, and do, provide or organise training (often in partnership legal aid bodies or CLCs) to enable lawyers to take on matters in which they do not have expertise, and for which there is a clear demand for, and short supply of, assistance [63]

9.48 Ms Anderson, Acting Director of the National Pro Bono Resource Centre, told the Committee:

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60 *Submission 50*, p. 29.

61 *Submission 63*, p. 3.

62 *Submission 75*, p. 3.

63 National Pro Bono Resource Centre, *Submission 80*, p. 9.

> There are…a number of barriers that obstruct the provision of pro bono services, including conflicts of interest, disbursements and expertise, and the more general problem of the very limited resources of many legal practices, the rising costs of legal practices and the impact of tort reforms which have restricted important traditional practice areas.[64]

9.49 The mismatch between lawyers' expertise and legal needs is accentuated in rural, regional and remote areas. In its December 2003 newsletter, the National Pro Bono Resource Centre stated that it had received:

> … funding approval from the Law and Justice Foundation of NSW to undertake a project aimed at improving opportunities for and access to legal services for disadvantaged and marginalised people in regional, rural and remote (RRR) communities. The project will assist community legal centres and their clients in RRR areas of NSW and support the development of three pilot projects to deliver improved pro bono services in RRR areas.[65]

Committee view

9.50 As pointed out elsewhere in this report, the Committee notes that there is no comprehensive data on the community's need for legal services.

9.51 Ascertaining the extent of the mismatch between community need and available legal skills may be resolved by clearly identifying the areas of community need on the basis of reliable data and training lawyers willing to provide pro bono services in those areas of need.

Recommendation 50

9.52 In conjunction with Recommendation 11, the Committee recommends that the Commonwealth Government provide additional funding to allow community legal centres, clearing houses and other pro bono services to collect detailed information on the community need for legal services.

Conflicts of interest

9.53 The National Pro Bono Resource Centre highlighted two types of conflict which may impede the provision of pro bono legal services by law firms.[66] The first is a conflict of interest where the firm of the lawyer providing pro bono work may have a prior relationship with the other party—for example, a commercial lawyer who has acted for a telecommunications company assists people with credit problems with that company.

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64 Ms Jill Anderson, National Pro Bono Resource Centre, *Committee Hansard*, 13 November 2003, p. 78.

65 National Pro Bono Resource Centre, *Pro Bono News 6/2003 (December)*, available at www.nationalprobono.org.au/publications/index.html.

66 *Submission 80*, p. 7.

9.54 Larger firms are more likely to represent more clients and therefore the probability of conflicts increase—for example Blake Dawson Waldron stated that they are unlikely to be able to provide pro bono legal services in actions against doctors, lawyers, banks and insurance companies.[67] A law firm in areas with few legal service providers—for example, regional, rural and remote areas—also increases the probability of conflicts.

9.55 The second type of potential conflict occurs where the law firm has a commercial relationship with the opposing party and may perceive a disadvantage, for example, if a firm acts in a public interest matter against a government department with which they hope to provide other services.

9.56 The Public Interest Law Clearing House told the Committee that it had received a 'wide range of anecdotal evidence' from the legal profession that lawyers perceived a potential disadvantage to its commercial interests if it acts against its client or potential client and that:

> PILCH has also been informed about a government department directing lawyers on its panel who perform specialist work not to accept any work against the department in any other area of law.[68]

9.57 The National Pro Bono Resource Centre, in consultation with the legal profession, has asked the Commonwealth Government to consider a draft protocol which seeks to minimise conflicts of the second type.[69] This protocol seeks to prohibit government agencies from prejudicing or penalising legal service providers in any purchasing or procuring decisions relating to legal services where the service provider acted against the government in a pro bono matter. The Centre has suggested that the protocol be included in the form of Legal Services Directions issued by the Attorney-General under section 55ZF of the *Judiciary Act 1903*. The Attorney-General has stated that:

> It is important that governments address the perception amongst lawyers that providing pro bono legal assistance in matters against the Government makes it less likely they will be asked to undertake Government legal work.
>
> It is my belief that, subject to the usual conflict of interest rules, it is irrelevant whether or not legal providers have acted pro bono for clients against the Commonwealth.[70]

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67 *Submission 63*, p. 3.

68 *Submission 54*, p. 24.

69 *Submission 80*, Annexure 4.

70 The Hon Phillip Ruddock MP, Attorney-General, *Speech at the Second National Pro Bono Conference: Transforming Access to Justice*, Sydney, 20 October 2003, available at http://www.ag.gov.au.

9.58 The Committee notes that the National Pro Bono Resource Centre has also recently written to state and territory Attorneys-General advocating the adoption of its draft protocol.[71]

Committee view

9.59 The Committee agrees with the Attorney-General that, subject to the usual conflict of interest rules, provision of pro bono legal services in actions against the government is irrelevant to the provision of legal services to the government. However, the Committee is concerned that this view may not be shared by departmental officers and notes anecdotal evidence that suggests there is a very real problem of perceived commercial conflict of interest.

9.60 The Committee considers that this risk could be easily minimised by providing clear directions to government officers. These directions would also go some way to allaying the profession's concerns over potential commercial disadvantages in performing pro bono work. The National Pro Bono Resources' Centre's suggestion that such directions could be included in Legal Services Directions issued by the Attorney-General under section 55ZF of the *Judiciary Act 1903* would seem to have merit. State and territory governments should also consider adoption of such directions, preferably in the form of a binding instrument that governs the way in which government agencies conduct their legal affairs.

Recommendation 51

9.61 The Committee recommends that the Attorney-General issue binding directions to federal government agencies that the fact that a legal service provider has acted or is likely to act against the Commonwealth Government or its agencies in a pro bono matter is not to be taken into account to the detriment of the provider when decisions relating to the procurement or purchasing of legal services are made. The Committee urges state and territory governments to issue similar directions.

Limited resources of law firms

9.62 National Legal Aid summarised the fundamental pressure on law firms:

> Private practitioners are unlikely to pick up cases pro bono where there is little or no prospect of fee recovery or which are not sufficiently significant to attract publicity or attention to the firm – which is after all a business and must bring in enough to survive.[72]

71 National Pro Bono Resource Centre *Pro Bono News*, Issue 9, vol 3/2004.

72 National Legal Aid, *Submission 81*, p. 20; Federation of Community Legal Centres (Vic) Inc, *Submission 50*, p. 29.

9.63 Blake Dawson Waldron explained that its budget for pro bono work represents a percentage of its annual gross turnover.[73] The Northern Rivers Community Legal Centre, Blue Mountains Community Legal Centre Inc and Freehills all indicated that a rural or regional law firm's decreased capacity to deliver pro bono legal services because of the smaller profits of those firms in comparison to the larger city firms.[74] This reduced capacity exacerbates the problem of reduced pro bono legal service provision in rural, regional and remote areas.

9.64 The Committee notes that pro bono service providers may be unable or unwilling to meet the demands of a case that requires extended litigation. In family law matters in particular, there is a real risk that matters may be prolonged or unexpectedly raise complex issues. At the Second National Pro Bono Conference, members of the legal profession suggested that few firms will accept this risk by offering pro bono services in family law matters.[75]

9.65 Because a recipient of pro bono services may require legal assistance throughout the entire process, it is of concern that he or she may be denied adequate legal representation when most in need. It also raises the question of the quality of the service the person receives.

9.66 Specific costs may also erode a lawyer's capacity to deliver pro bono legal services—for example, the ongoing annual cost of registering with the Migration Agents Registration Authority in order to provide pro bono services in migration matters (discussed in Chapter 7).[76]

Proposed changes to Federal Court Rules

9.67 In March 2003, the Federal Court sought comments from the legal community on proposed Order 45 Rule 10 of the Federal Court Rules. This proposed rule is designed to ensure that the court knows the identity of any legal practitioner who may have prepared a document that is used by an otherwise unrepresented litigant.

9.68 The PILCH commented that the proposed rule would have an adverse impact on access to justice through discouraging the provision of some forms of legal services to

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73 Blake Dawson Waldron Lawyers, *Submission 63*, p. 2; Legal Services Commission of SA, *Submission 51*, p. 25; National Pro Bono resource Centre, *Submission 80*, p. 9; Blue Mountains Community Legal Centre Inc, *Submission 38*, p. 6.

74 Northern Rivers Community Legal Centre, *Submission 22*, p. 13; Blue Mountains Community Legal Centre Inc, *Submission 38*, p. 6; Freehills, *Submission 75*, p. 7 (note their view that the Women's Legal Services NSW was an example of successful pro bono legal service provision in regional areas).

75 *Second National Pro Bono Conference: Transforming Access to Justice*, Sydney, 20 October 2003.

76 Refugee Advice and Casework Service (Australia) Inc, *Submission 66*, p. 6; see also, Blake Dawson Waldron Lawyers, *Submission 63*, pp. 6-7; Liberty Victoria – Victorian Council for Civil Liberties Inc, *Submission 29*, p. 8.

people who are unable to afford legal representation.[77] The PILCH commented that the proposed rule may reduce pro bono legal assistance, as lawyers who provide assistance falling short of full representation may no longer be willing to provide any legal assistance or may significantly reduce the scope of their assistance. This may occur through:

- requiring voluntary legal advisors to disclose their involvement in a matter, where that involvement falls short of preparing court documents, for example where written advice is given to a client on points to be made in a submission
- requiring voluntary legal advisors, including lawyers in community legal centres, to record their name on a court document where that lawyer does not have any control over the final version of the documents
- increasing the time and cost required in providing assistance
- raising the expectation of the client, court and opposing parties of the lawyer's involvement in the matter
- not providing clarity as to the context in which the voluntary lawyer provided assistance.[78]

9.69 The Federal Court advised the Committee that, following consultations with the legal profession, it was decided not to proceed with this rule change.

Committee view

9.70 The Committee recognises the obstacles lawyers face in providing pro bono legal services. It considers that some of these impediments arise from the inability to separate the cost of offering free or discounted services from the costs of pursuing a commercial profit. However, some of these costs are able to be separately attributed and therefore may be addressed—for example, migration agent fees for non-profit organisations providing pro bono legal advice on migration law (discussed in Chapter 7).

Costs of litigation

9.71 Apart from lawyers' fees, other costs associated with legal actions, such as medical or other expert opinions, interpreter services and paying court filing fees, may be prohibitive. In some cases medical and other experts provide their services for free or their expenses are covered by access to a "disbursement fund".[79]

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77 Public Interest Law Clearing House, *Submission 54*, pp. 25-26; National Pro Bono Resource Centre's 25 April 2003 letter to the Deputy Registrar of the Federal Court – available at http://www.nationalprobono.org.au/publications/fedcourt.pdf.

78 Public Interest Law Clearing House, *Submission 54*, pp. 25-26.

79 ibid, pp. 28-31.

9.72 The National Pro Bono Task Force told the Committee that interpreter and transcript costs are a 'significant deterrent' to providing pro bono legal services and that the Australian Institute of Interpreters and Translators was unwilling to waive fees in pro bono cases because of the relatively low incomes of interpreters and translators.[80]

9.73 The Access to Justice Advisory Committee recognised that court fees and transcript costs were another obstacle.[81] While the courts can waive fees in cases of hardship, there is no 'regularized process for dealing with court fees in pro bono matters (as distinct from only hardship cases)'.[82]

9.74 The ineffectiveness of costs orders in pro bono matters may also indirectly increase the cost of litigation. A cost order generally requires the costs of a litigant's solicitor to be paid by an opponent who has unduly wasted time or raised irrelevant issues. Costs orders are a means of sanctioning certain conduct. However, because in pro bono matters a lawyer is not paid, a cost order is ineffective as a sanction.

9.75 Anecdotal information suggests that some lawyers use delaying tactics against clients who are represented on a pro bono basis. Order 80 Rule 9 of the Federal Court Rules, however, allows a solicitor providing pro bono services to recover amounts where a costs order is made. This rule does not apply to other jurisdictions and there does not appear to be any similar order in other jurisdictions.

9.76 The possibility of a costs order may also deter a litigant from enforcing his or her rights. The PILCH recommended that although the court will take public interest factors into account when considering costs orders, the Commonwealth and State governments should develop and publish a policy on seeking costs against litigants and legal advisers in public interest and other pro bono matters against the Commonwealth and state departments and agencies.[83]

Committee view

9.77 The Committee considers that more needs to be done to encourage other professions to provide pro bono services where necessary to pursue the rights of disadvantaged people.

9.78 The Committee acknowledges that the courts may waive fees in cases of hardship. However, this requirement may be too strict for improving the community's

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80 Pro Bono Task Force *Recommended Action Plan For National Co-Ordination And Development Of Pro Bono Legal Services*, 24 June 2001, p. 20; Refugee Advice and Casework Service (Australia) Inc, *Submission 66*, p. 6.

81 Access to Justice Advisory Committee, *Access to Justice an Action Plan (1994)*, pp. 382-387.

82 Pro Bono Task Force *Recommended Action Plan For National Co-Ordination And Development Of Pro Bono Legal Services*, 24 June 2001, p. 19.

83 Public Interest Law Clearing House, *Submission 54*, p. 31.

access to justice. The Committee considers that this issue should be subject to further study.

9.79 The Committee is also concerned at the suggestion that some members of the legal profession may use delaying tactics to affect adversely those litigants who use pro bono legal services. The Committee considers that these tactics may be deterred by providing for costs orders as order 80 rule 9 of the Federal Court Rules allows, and considers that this option should be available in all courts.

Recommendation 52

9.80 The Committee recommends that all courts consider amending their rules to allow lawyers who provide pro bono legal services to recover their costs in similar circumstances to those litigants who pay for their legal representation.

The Committee's conclusion

9.81 The increased provision of pro bono legal services through more efficient screening and referral structures and increased support from the larger firms is to be commended. In particular, the work of non-profit organisations in mobilizing the legal profession to better organize and coordinate its pro bono services is to be commended.

9.82 However, the Government cannot rely on pro bono services as either an answer to the current level of legal aid or as a panacea to overcome the current gaps in legal aid’s provision of access to justice.

CHAPTER 10

SELF-REPRESENTED LITIGANTS

> The current [legal aid] arrangements are unfair and do not make the justice system accessible. On the contrary the perception is that legal aid is broadly unavailable and most people are not able to instruct lawyers to represent them throughout the litigation process. The result is that many people abandon their legal rights and others will be forced to pursue them as litigants in person. Neither of these results is satisfactory.[1]

10.1 This chapter discusses:

- evidence of a growth in the number of self-represented litigants across the legal system;
- the extent of any link between the level of legal aid funding and the numbers of self-represented litigants;
- the adverse effects of lack of representation on access to justice; and
- measures to minimise any detrimental effects on access to justice.

Increasing numbers of self-represented litigants

10.2 A key issue for the legal system in recent years is the growing number of self-represented litigants and the impact that development is having on legal service providers and the administration of justice generally.

The Third Report

10.3 In its *Third Report*, the Committee commented that changes over time in the percentages of self-represented litigants could be used as indicators of how well the legal aid system is working.[2] The Committee noted that comprehensive data was not available on self-represented litigants, and recommended that the Government collect, analyse and publish data on unrepresented litigants in the Family Court, Federal Court, state and territory Supreme and District Courts and courts hearing appeals from those courts.[3]

10.4 The *Third Report* also noted that, while the Committee was relying on partial statistics and anecdotal information, the 'predominant view' in submissions to it was that there had been a significant increase in unrepresented litigants and that this was

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1 Law Institute Victoria, *Submission 87*, p. 13.

2 *Third Report*, p. 29, paragraph 3.21.

3 *Third Report,* Recommendation 3, p. 30.

largely attributable to restrictions on legal aid funding.[4] The Government's response stated that the Government was 'supportive' of the recommendation, but that implementation was a matter for the courts and tribunals and would depend on their respective processes.[5]

The current situation

10.5 In 2004 there is still no comprehensive information across the legal system on the number and proportion of self-represented litigants. However, attention to this issue has grown, with most of the federal courts reporting in various levels of detail on self-represented litigants in their most recent annual reports.[6]

10.6 While there is no comparative data, the court statistics that are available show an increase in self-represented litigants in recent years.[7] Anecdotal information supports that view. The Family Law Council concluded in August 2000 that 'there can be no doubt that the number of unrepresented litigants is increasing' in the Family Court.[8] The Committee heard similar sentiments from the Chief Justice of the Family Court of Australia in March 2004:

> When I came to this bench in 1988, it was comparatively rare to have a case go ahead with someone who was unrepresented. If it did, they would normally be someone who was deliberately wanting to be unrepresented, who really had a bee in their bonnet or thought that they could do better than anybody else. You did not find people of the sort we are talking about at the moment coming to the court unrepresented.[9]

10.7 The Chief Justice cited new statistics indicating that nearly half (about 47 per cent) of litigants in the Family Court were unrepresented at some stage in

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4 *Third Report*, p. 31, paragraph 3.27.

5 Government Response to *Third Report*, p. 6.

6 High Court of Australia, *Annual Report 2002-2003*, p. 9. Federal Court of Australia *2002-2003 Annual Report;* Federal Magistrates Court *2002-2003 Annual Report*. The Family Court of Australia did not provide statistics in its 2002-2003 annual report, but noted the release of the project report *Self-represented litigants: a challenge* in 2003. The first phase of the project has been completed and the development of a national strategy for ensuring access to justice is ongoing.

7 For example, the High Court of Australia, *Annual Report 2002-2003*, p. 9, which noted that the proportion of self-represented litigants in applications for special leave to appeal increased to 42 per cent from 40 per cent in 2001-02 and 33 per cent in 2000-01.

8 Family Law Council, *Litigants in person: A report to the Attorney-General prepared by the Family Law Council*, August 2000, p. 81.

9 *Committee Hansard*, 10 March 2004, pp. 5-6.

proceedings.[10] This represented a substantial increase from statistics provided to the Committee in the Family Court's earlier submission.[11]

10.8 The Federal Court of Australia noted in its most recent annual report that the 'growing number' of self-represented litigants in recent years had presented a range of problems, and that in 2002-03, about 38 per cent of matters involved at least one party who was unrepresented at some stage in proceedings.[12] This figure had steadily increased from about 28 per cent in 1998-99 to a peak of 41 per cent in 2001-02.[13]

10.9 An analysis of data collected in the Federal Magistrates Court since 1 July 2002 indicated that about 19 per cent of applicants seeking final orders in relation to children or property did not have a lawyer, while 60 per cent of applicants alleging that a child order has been contravened were not represented.[14] While no comparison with previous years was provided in that court's most recent annual report, the figures present compelling evidence of the extent of the problem, particularly in light of the implementation of measures to address the needs of self-represented litigants.

Is there a link with the level of legal aid funding?

10.10 The Committee notes that many submissions to this inquiry linked the growing number of self-represented litigants to restricted availability of legal aid funding.[15] Some of those submissions acknowledged, however, that certain

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10 *Committee Hansard*, 10 March 2004, p. 1.

11 Family Court of Australia *Submission 85*, p. 2, citing 1998 court-sponsored research conducted by Smith which found that 35 per cent of Family Court matters involved at least one party who was unrepresented at some stage in proceedings.

12 Federal Court of Australia *2002-2003 Annual Report*, p. 46.

13 ibid, p. 48.

14 Federal Magistrates Court *2002-2003 Annual Report*, p. 41.

15 Federation of Community Legal Centres (Vic) Inc, *Submission 50*, pp. 4-5; NSW Young Lawyers Human Rights Committee, *Submission 59*, p. 3; Law Council of Australia, *Submission 62*, p. 16; Castan Centre for Human Rights Law, Monash University, *Submission 76*, p.2; Australian Council of Social Service, *Submission 83*, p. 8; National Network of Women's Legal Services, *Submission 86*, p. 22; Law Institute of Victoria, *Submission 87*, p. 13; NSW Legal Aid Commission, *Submission 91*, p. 42; CLC Association (WA) Inc, *Submission 93*, p. 15; West Heidelberg Community Legal Service, *Submission 21*, pp.7-8; Family Law Practitioners Association of Tasmania, *Submission 37*, pp. 2-3; Tasmanian Association of Community Legal Centres, *Submission 45*, pp. 1-2; Fitzroy Legal Service, *Submission 48*, p. 16; Hobart Community Legal Service, *Submission 49*, pp.3-5; Welfare Rights Centre, *Submission 55*, p. 3; NSW Combined Community Legal Centres Group, *Submission 60*, pp. 13, 33; Women's Legal Service SA Inc, *Submission 72*, p. 6; The Law Society of New South Wales, *Submission 79*, p. 3; National Legal Aid, *Submission 81*, p. 15; CLC Association (WA) Inc, *Submission 93*, p. 20; Professors Hunter and Giddings, Griffith University, *Submission 24*, pp. 4-5; Queensland Association of Independent Legal Services Inc, *Submission 73*, p. 32; NT Legal Aid Commission, *Submission 82*, pp. 15, 17; Family Court of Australia, *Submission 85*, p. 3; National Network of Women's Legal Services, *Submission 86*, pp. 9, 14; CLC Association (WA) Inc, *Submission 93*, p. 30.

individuals may choose not to be represented, for reasons discussed later in this chapter.

10.11 In addition, several community legal centres and lawyers' associations referred to an increased demand for their services from people who have been denied or who have exhausted legal aid funding.[16]

10.12 Research to date also gives various possible explanations for the increase in self-representation. The Family Law Council observed in 2000 that no single cause could be identified. While changes to legal aid funding and an inability to afford a lawyer were significant reasons for being unrepresented, the Council suggested that more empirical data was needed to determine the reasons conclusively.[17]

10.13 As the ALRC explained in its 2000 report on the federal civil justice system, *Managing Justice*:

> Some litigants choose to represent themselves. Many cannot afford representation, do not qualify for legal aid or do not know they are eligible for legal aid, and are litigants in matters which do not admit contingency or speculative fee arrangements. They may believe that they are capable of running the case without a lawyer, may distrust lawyers, or decide to continue unrepresented despite legal advice that they cannot win.[18]

10.14 The ALRC commented that while both anecdotal evidence and qualitative research suggested the numbers of unrepresented litigants in federal civil jurisdictions were increasing, this increase was:

> … not entirely attributable to legal aid changes. Some of these unrepresented litigants might, under former guidelines, have secured legal assistance. Others are outside the means test for legal aid and are unable to afford legal services.[19]

10.15 The ALRC cited rising costs of litigation and simplification of court processes as contributing factors to the increase in self-represented litigants.[20] However, the report noted that more than half (54 percent) of respondents to the ALRC's 1999

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16 Macquarie Legal Centre, *Submission 9*, pp. 1-2; West Heidelberg Community Legal Servic,e *Submission 21*, pp. 7-8; South West Sydney Legal Centre, *Submission 34*, pp. 3-4; Family Law Practitioners Association of Tasmania, *Submission 37*, pp. 2-3; Tasmanian Association of Community Legal Centres, *Submission 45*, pp. 1-2; Fitzroy Legal Service, *Submission 48*, p. 16; Marrickville Legal Centre, *Submission 53*, pp. 6 and 9; The Law Society of New South Wales, *Submission 79*, p. 3.

17 Family Law Council, *Litigants in Person: A report to the Attorney-General prepared by the Family Law Council*, 2000, p. 82.

18 ALRC, *Managing Justice – A review of the federal civil justice system*, Report No. 89, 2000, pp. 359-360.

19 ibid, pp. 302-303.

20 ibid, p. 303.

survey stated that the main reason they did not have a lawyer was either their inability to pay or the unavailability or cessation of legal aid.[21] This shows a strong link.

10.16 The Family Law Council observed that even if a direct causal link between cuts to legal aid and the incidence of unrepresented litigants cannot be established, a perception has emerged in the legal and general community that there is such a link. Moreover, it is clear there have been indirect effects leading to hardship within the community.[22]

Other reasons for self-representation

10.17 Other factors that may cause people to appear without a lawyer include individual choice; the prohibition on legal representation in certain jurisdictions; and lack of available lawyers.

10.18 Each of these is discussed in turn below.

Individual choice

10.19 The NSW Legal Aid Commission suggested that the simpler initiating procedures in the Family Court are the reason for some self-represented litigants in that court.[23] Generally speaking, individuals are not required to have legal representation (subject to certain exceptions).[24] The Committee notes that in recent years, several courts have reported significant efforts to simplify their procedures, rules and information so as to improve access to justice.[25] In addition, some legal service providers run information sessions to assist individuals with low-level matters such as divorce applications and traffic infringements

10.20 Submissions also noted that people may perceive they will have a tactical advantage if they do not have a legal representative. They may hope to obtain a stay of proceedings indefinitely[26] or to exhaust the other party's resources.[27]

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21 ALRC, *Review of the Federal Civil Justice System - Discussion Paper 62*, 1999, p. 376.

22 Family Law Council, *Litigants in Person: A report to the Attorney-General prepared by the Family Law Council*, August 2000, p. 11. The argument about community perception of such a link is also referred to in the quote at the beginning of this chapter.

23 NSW Legal Aid Commission, *Submission 91*, p. 42.

24 Section 78 of the *Judiciary Act 1903* (Cth); *Collins (aka Hass) v R* (1975) 133 CLR 120 at 122 and *Burwood Municipal Council v Harvey* (1995) 86 LGERA 389; cf. *Bay Marine Pty Ltd v Clayton Country Properties Pty Ltd* (1986) 8 NSWLR 104 (CA) at 114 and O.69A r11 *High Court Rules*.

25 Chief Justice Nicholson*, Committee Hansard* 10 March, p.3.

26 Australian Institute of Judicial Administration, *Litigants in Person Management Plans: Issues for Courts and Tribunals*, AIJA, 2001, p. 7.

27 Family Court of Australia, *Submission 85*, p. 19; Fitzroy Legal Service, *Submission 48*, p. 16.

10.21 In criminal matters it is well-established that the accused person's right to a fair trial must be protected. Some defendants may perceive they will have a tactical advantage in refusing representation, since this may result in an unfair trial.[28]

Prohibition on representation

10.22 In some jurisdictions such as the Migration Review Tribunal, legal representatives may not appear. This prohibition attracted some criticism.

10.23 Some submissions noted that litigants who are corporate entities or government departments are not prevented from allowing an employee who is an in-house solicitor to represent them.[29] Thus there may be a disparity in power.

10.24 The Castan Centre for Human Rights Law noted that unrepresented complainants may be deterred from taking action in federal anti-discrimination matters because of the disparity of resources and the risk of costs orders against them:

> Many claims are brought against governments and large companies, who will have access to effectively unlimited resources in defending a claim, thus incurring a substantial legal bill which a losing complainant will be ordered to pay. This is too big a risk for most unrepresented complainants, and operates as a very substantial deterrent to any litigation.[30]

10.25 Advocacy Tasmania also pointed criticised the prohibition on legal representation where involuntary detention may result:

> Tasmanians who can be deprived of their liberty and involuntarily detained in mental health facilities and drug and alcohol facilities for period blocks of six months are not provided with representation but a person before the magistrate's court with a likelihood of a two month prison sentence can receive representation. This is unjust and inequitable.[31]

Unavailability of legal practitioners

10.26 The Community Legal Centres Association (WA) Inc commented that the lack of available lawyers in regional and rural areas may force litigants to represent themselves:

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28 Where an accused person refuses an offer of legal assistance, or otherwise chooses to be unrepresented this does not disentitle him or her to a fair trial and such lack of representation may still result in an unfair trial: *McPherson v R* (1981) 147 CLR 512. In order to protect the right to a fair trial, a trial for a serious criminal offence may be delayed or postponed until legal representation is available: *Dietrich v R* (1992) 177 CLR 292, 334-5.

29 NSW Combined Community Legal Centres Group, *Submission 60*, p. 41; Federation of Community Legal Centres (Vic) Inc, *Submission 50*, p. 26.

30 Castan Centre for Human Rights Law, Monash University, *Submission 76*, p. 3.

31 Advocacy Tasmania, *Submission 39*, p. 7. This issue is discussed in more detail in Chapter 8.

> Many people are unable to access legal advice in their own regional centre or town due to the fact that the legal aid services has already advised the other person to the legal matter. The options for advice might be to access a legal aid service over the telephone, or travel a significant distance to seek legal advice. This situation regarding conflict of interest can also lead to one person to a legal matter being represented, and the other having to self-represent.[32]

These issues are discussed in more detail in Chapter 6.

Committee view

10.27 The Committee notes that despite its 1998 recommendation that the Government collect, analyse and publish data on the levels of self-representation in courts and tribunals, there is still a lack of comprehensive data. Consequently, it cannot be proven that changes to legal aid funding in 1997 are directly and solely responsible for the increase in numbers of self-represented litigants.

10.28 However, there is much anecdotal evidence, both during this inquiry and the reports of the ALRC and the Family Law Council, to suggest that lack of access to legal aid is at least one of the major reasons for increased numbers of self-represented litigants.

10.29 The Committee commends those courts and tribunals that have adopted the ALRC's recommendation to report publicly on the numbers of self-represented litigants. However, the Committee is concerned that some courts and tribunals have not done so and considers it to be of the utmost importance that they do, in order to allow for a more comprehensive assessment of the extent and impact of self-represented litigants on the legal system.

Recommendation 53

10.30 The Committee recommends that all Federal courts and tribunals should report publicly on the numbers of self-represented litigants and their matter types, and urges state and territory courts to do the same.

Effects of self-representation on access to justice

10.31 Many submissions argued that self-represented litigants adversely affect access to justice by increasing the costs of litigation and impairing the efficient and effective administration of justice. For example, the National Council of Single Mothers and their Children Inc cited 1999 Family Court research which reported views amongst judges, judicial registrars and registrars that:

- 81 percent of the self-represented litigants would have benefited from representation;

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32 Community Legal Centres Association (WA) Inc, *Submission 93*, p. 15.

- 75 percent of represented litigants would have benefited by the other party being represented; and

- 80 percent of child interest cases would have benefited from representation.[33]

Increased costs

10.32 In the *Third Report*, the Committee commented that unrepresented litigants imposed 'significant additional costs on the courts and other parties in the proceedings, quite apart from whatever injustice they did to their own cause'.[34] The Committee recommended that the Government examine and report on whether savings made by denying legal aid are outweighed by the extra costs imposed on the public purse by unrepresented litigants.[35]

10.33 In response the Government stated that it was considering the findings of two reports published after the Committee's *Third Report*, the Family Law Council's *Litigants in Person* and the ALRC's *Managing Justice*.[36]

Economic cost not quantified

10.34 The two reports on which the Government response relied have not quantified the economic costs of self-representation. The ALRC commented in 2000 that any additional costs caused by self-representation 'remain unsubstantiated and unquantified'.[37] The ALRC suggested that further research may actually find that self-represented litigants impose fewer demands on lawyers for opposing parties or on judges, but noted judicial statements about the difficulties courts face where parties are unrepresented.[38] Similarly, the Family Law Council did not quantify the economic effect of self-represented litigants, but commented generally that in the Family Court they increased costs for the courts, other litigants and pro bono lawyers.[39]

10.35 In this inquiry, submissions to the Committee generally argued that self-represented litigants increased the costs of litigation by increasing the time spent by

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33 National Council of Single Mothers and their Children Inc, *Submission 19*, p. 4, citing Family Court of Australia *Study on the effects of legal aid cuts on the Family Court of Australia and its litigants,* Research Report no. 19, 1999.

34 *Third Report,* p. 33; Youth Legal Service of Western Australia, *Submission 1*, p. 18.

35 *Third Report*, Recommendation 4.

36 Government Response to *Third Report; Senate Hansard*, 16 May 2002, pp. 1767-1773, at p. 1769.

37 Australian Law Reform Commission, *Managing Justice – A review of the federal civil justice system*, Report No. 89, 2000, p. 304.

38 ibid, p. 304.

39 Family Law Council, *Litigants in Person - A Report to the Attorney-General prepared by the Family Law Council*, 2000, p. 34.

judicial officers, registry staff and opposing counsel on their cases, and the possible increased likelihood of further litigation.

10.36 However, the Committee found little evidence of attempts to quantify the costs. One submission from Westside Community Lawyers Inc estimated the additional costs of self-represented litigants in the South Australian court system at $4.8 million.[40]

Demand on court and registry time

10.37 In its *Third Report*, the Committee observed that self-represented litigants generally require more assistance from registry staff and often take more hours of court time to conduct their case. The Committee commented that the argument that extra costs imposed on the public purse due to the denial of legal aid outweigh the costs that would have been incurred in providing that aid was 'highly plausible', but there was no empirical study to confirm that argument.[41]

10.38 Subsequent research by Dewar, Smith and Banks confirmed that self-represented litigants are more demanding of the courts' time.[42] They commented that judicial officers may experience frustration in dealing with someone with lack of legal or procedural knowledge.[43] The Chief Justice of the Family Court of Australia gave the Committee an example of a recent case where extra assistance for one party was needed in court:

> … quite often the unrepresented litigant just has no hope of complying with the procedural requirements. I was sitting on a case in Cairns a couple of weeks ago in which the father had not sworn an affidavit—he had been given numerous opportunities to do so; obviously English was not his first language and he did not attempt to do it—and I thought the only thing to do was get on with it. I simply called him, took the evidence verbally … That is quite a difficult issue.[44]

10.39 The Federal Court reported that unrepresented parties 'often take more time to present their appeal than those who are represented'.[45] The High Court has recently estimated 'around 50 per cent of the time of the Registry staff is taken up with self-represented litigants'.[46]

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40 Westside Community Lawyers Inc, *Submission 58*, p. 2.

41 *Third Report*, pp. 33-35.

42 Dewar, Smith and Banks, *Litigants in Person in the Family Court of Australia*, 2000, p. 2.

43 ibid, p. 1.

44 Chief Justice Nicholson, *Committee Hansard*, 10 March 2004, p. 3.

45 Federal Court of Australia, *Annual Report 2001-2002*, p. 12.

46 High Court of Australia, *Annual Report 2002-2003*, p. 9.

Other parties' costs

10.40 Research has shown strong indications that a self-represented litigant also often wastes the other party's time.[47] Submissions to this inquiry stated that lawyers found communicating with self-represented litigants difficult on more complex issues and that judges tended to rely more heavily on the legal representatives present.

Committee view

10.41 The Committee is disappointed that the Government has not commissioned research to quantify the economic costs to the justice system of self-represented litigants. The ALRC and the Family Law Council reports to which the Government response referred do not quantify the economic effects of self-represented litigants.

10.42 The Committee is disappointed that the Government continues to avoid collecting empirical data on a fundamental issue in the legal aid funding debate: whether the costs saved by reducing legal aid funding are outweighed by the costs potentially caused by an increasing number of self-represented litigants. Certainly there is strong anecdotal evidence during this inquiry, as well as research, to suggest that such might be the case, particularly in complex matters and in higher level courts.

Recommendation 54

10.43 The Committee recommends that the Commonwealth and state/territory governments commission research to quantify the economic effects that self-represented litigants have on the federal justice system, including the costs these litigants impose on courts and tribunals, other litigants, community legal centres and the social welfare system.

Effective administration of justice impaired

10.44 Submissions to the Committee argued that self-representative litigants impaired the effective administration of justice by:

- potentially compromising the role of the judicial officer;
- being less able to assess the merits of their case objectively, or to enforce their rights;
- being less able to adduce relevant evidence and provide cogent argument;
- being less able to comply with accepted procedure without direction;
- forcing opposing counsel to act contrary to their own client's best interests; and

47 Dewar, Smith & Banks, *Litigants in Person in the Family Court of Australia*, 2000, p. 2.

- increasing the likelihood of appeal.

Compromising the judicial role

10.45 The judiciary must limit the assistance it gives to litigants to procedural matters. Dispute resolution in the courts relies on the adversarial system, 'a process in which each side, equally matched, presents its case in a non-interventionist judicial officer.'[48]

10.46 In cases involving a self-represented litigant judicial officers may need to take a more active role, one which could give rise to perceptions of impartiality:

> When only one party is unrepresented, a primary difficulty can be maintaining the perception of impartiality. Judges need to ensure that all relevant evidence is heard, relevant questions asked of witnesses, and that the unrepresented party knows and enforces their procedural rights. The represented party may see such judicial intervention as partisan, and judges must ensure they do not apply different rules to unrepresented parties. Where both parties are unrepresented, the parties may be difficult to control, the case disorganised and wrongly construed. The difficulties associated with lack of representation have been set down in several judgments and reports on the justice system.[49]

10.47 In the Family Court, the Full Court in *Johnson v Johnson* (1997) 139 FLR 384 laid down guidelines on the assistance that the trial judge should give to self-represented litigants. These are to: outline the procedures of the trial; assist by taking basic information from witnesses; explain the possible effect of requests for changes to normal procedure such as calling witnesses out of turn, and the party's right to object; advise the party of his or her right to object to inadmissible material; inform the party of his or her right to claim privilege if this may exist; to ensure as far as possible that a level playing field is maintained at all times; and to attempt to clarify the substance of the submissions of unrepresented parties'.[50]

10.48 However, the research by Dewar, Smith and Banks on self-represented litigants in the Family Court concluded that the guidelines in *Johnson v Johnson* 'were often seen as involving a conflict, or at best being hard to fit into the realities of the Court.'[51] This research also concluded that:

> Judicial officers and registry staff experience high levels of stress and frustration when dealing with litigants in person, because of … the

48 Australian Institute of Judicial Administration, *Litigants in Person Management Plans: Issues for Courts and Tribunals*, AIJA, 2001, p. 1.

49 Australian Law Reform Commission, *Submission 26*, p. 13.

50 Australian Law Reform Commission, *Review of the Federal Civil Justice System - Discussion Paper 62*, 1999, p. 380.

51 Dewar, Smith & Banks, *Litigants in Person in the Family Court of Australia*, 2000, p. 2.

> difficulty of holding a fair balance between the represented and unrepresented parties.
>
> The perceived tension between judicial impartiality and the need to help litigants in person meant that a number of judges and Registrars thought that their role as presiding officer was compromised by the presence of a litigant in person.[52]

10.49 The Family Court of Australia told the Committee that the significance of the impacts of self-represented litigants on the adversarial model of justice was 'considerable':

> The Family Court emphasises case management and primary dispute resolution techniques, and plays a more active role in proceedings involving children than it does when determining financial disputes. This can reduce some of the obligations and responsibilities placed on litigants in a strictly adversarial system, but a number of access to justice issues and concerns about a 'level playing field' remain.[53]

Objectivity in assessing own case and non-enforcement of rights

10.50 The High Court has stated:

> an unrepresented accused is always at a disadvantage not merely because they might lack sufficient knowledge or skills but because they can not assess their own case with the dispassionate objectivity as the crown.[54]

10.51 The Family Law Council stated that:

> Unrepresented litigants are often at a particular disadvantage in family law as direct emotional involvement in proceedings can impede the ability to reason clearly and objectively, and can also provide barriers to settlement.[55]

10.52 Submissions to the Committee echoed these views, arguing that self-represented litigants' lack of awareness of their rights and emotional attachment to their case can lead to them not enforcing their rights,[56] taking inappropriate action[57] or pursuing unnecessary litigation.[58]

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52 ibid, p. 1; Cairns Community Legal Centre Inc, *Submission 14*, p. 4.

53 Family Court of Australia, *Submission 85*, p. 6.

54 *McInnes v R* (1979) 143 CLR 575 at 590, cited in Legal Aid Queensland, *Submission 31*, pp. 21-22.

55 Family Law Council, *Litigants in person: A report to the Attorney-General prepared by the Family Law Council*, August 2000, p. 5.

56 Cairns Community Legal Centre Inc, *Submission 14*, p. 3; Homeless Persons' Legal Clinic, *Submission 13*, p. 24; Domestic Violence Advocacy Service, *Submission 18*, p. 4; Redfern Legal Centre, *Submission 61*, p. 6; Legal Aid Queensland, *Submission 31*, pp. 15-16; Kingsford Legal Centre University of NSW, *Submission 36*, p. 10; Professors Hunter and Giddings, *Submission 24*, p. 5.

Quality of evidence and argument

10.53 The adversarial process relies on competing litigants informing the decision-maker of all relevant facts and arguments. As the Kingsford Legal Centre observed:

> In many cases, clients really cannot properly put their submissions before the court without assistance from a lawyer due to language, comprehension and fear of the court system.[59]

10.54 The Chief Justice of the Family Court of Australia expressed similar views:

> … quite often the unrepresented litigant just has no hope of complying with the procedural requirements …When you go to the actual courtroom situation it depends so much on the capacity of the individual concerned.
>
> So often people are inarticulate; so often they are nervous. They may be fearful of the other party or they may be so emotionally engaged that they really cannot sit back and take an objective viewpoint. Indeed, you often find, where people are unrepresented, that the same buttons that they have been able to press during their relationship are pressed again in the course of the courtroom situation and you get quite confronting situations between the parties that are not of great help to the person determining the issue, so it is a real problem. Of course, once you put English as a second language into the context, it becomes worse. You may have someone who is not at the point of normally needing an interpreter but who really is not able to grasp the concepts as readily as someone who is a native English speaker, so there are a number of problems there. We supply interpreters where necessary but again that is of limited value if the person is not able to present their case.[60]

10.55 The Family Court's submission observed that in family law matters:

> Self representation is almost inevitably associated with parties who have poor knowledge of the substantive and procedural law. In disputes involving children, where the parties must present their cases in terms which best promote children's best interests recent research indicates that [self-represented litigants] find this difficult to do.[61]

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57 Illawarra Legal Centre, *Submission 12*, p. 3; Shoalcoast Community Legal Centre, *Submission 28*, pp. 6-7; Fitzroy Legal Service, *Submission 48*, pp. 16, 18; Hobart Community Legal Service, *Submission 49*, p. 3; Federation of Community Legal Centres (Vic) Inc, *Submission 50*, pp. 28, 30; Welfare Rights Centre, *Submission 55*, pp. 4-5; NSW Combined Community Legal Centres Group, *Submission 60*, pp. 32-33, 35, 41; Advocacy Tasmania, *Submission 39*, p.3.

58 NSW Combined Community Legal Centres Group, *Submission 60*, pp. 32-33; Professors Hunter and Giddings, *Submission 24*, p. 5; Australian Law Reform Commission, *Submission 2*6, p. 10.

59 Kingsford Legal Centre University of NSW, *Submission 36*, p. 8.

60 *Committee Hansard*, 10 March 2004, p. 3.

61 Family Court of Australia, *Submission 85*, pp. 9-10.

10.56 The National Council of Single Mothers and their Children submitted that the consequences for children in family law matters was significant:

> The National Council of Single Mothers and their Children continues daily to hear of situations where parents are unrepresented in very serious proceedings in the Family Court, where they believe their children are exposed to serious harm and they themselves are exposed to serious harm. Their capacity to do anything about that using the legal processes of the Family Court is very limited because they do not understand the legal proceedings. They do not understand how to get evidence into the court, how to subpoena evidence and get it produced. They do not know how to require certain procedures that would inform the court about the child's safety. The consequence is that the children—or any target of violence—continue to be exposed to serious harm. That is happening every day in the Family Court. It would be better for those people if they could at least have access to a lawyer who understood the proceedings and could help them.[62]

10.57 Other submissions also argued that inappropriate decisions can be made where one side is unable to put forward effectively all relevant evidence and argument.[63] As Advocacy Tasmania explained in relation to criminal law matters where only the most serious charges will qualify a person for legal assistance:

> This means that persons facing the courts on lesser offences are often unrepresented, poorly represented by themselves or plead guilty to put an end to the matter whether they consider themselves innocent or guilty.
>
> The consequences often are;
>
> - the increasing criminalisation of the disadvantaged
> - possible receipt of a financially burdening heavy fine
> - unnecessary social and family stresses
> - stigma associated with a prior record
> - loss of a just outcome through technicalities such as improper documentation
> - loss of employment
> - loss of good character and standing
> - loss of self esteem through failure to understand legal and judicial requirements

62 Dr Elspeth McInnes, National Council of Single Mothers and their Children, *Committee Hansard*, 11 November 2003, p. 2.

63 Cairns Community Legal Centre Inc, *Submission 14*, pp. 3-4; West Heidelberg Community Legal Service, *Submission 21*, p. 4; Public Interest Law Clearing House, *Submission 54*, p. 16; Refugee Advice and Casework Service (Australia) Inc, *Submission 66*, p. 6; Queensland Association of Independent Legal Services Inc, *Submission 73*, p. 32; Family Court of Australia, *Submission 85*, pp. 6-7, 9; Law Institute of Victoria, *Submission 87*, p. 7.

- disempowerment due to unfamiliar legalisms.[64]

10.58 The National Network of Women's Legal Services commented that inappropriate consent orders in family law matters lead to 'lengthy and intractable' litigation. The Network referred to research which examined 100 enforcement applications in 1999: 88 applications were to enforce a consent order, with 32 cases resulting in more restrictive contact arrangements. [65]

Counsel acting to disadvantage of own client

10.59 A legal practitioner has an overriding duty to the court which may require him or her to act more favourably to an opposing litigant who is unrepresented than he or she otherwise would.[66] For example, counsel has a duty to bring the court's attention authorities favourable to and evidence essential to the unrepresented litigant's case.

10.60 Dewar, Smith and Banks reported that judges, judicial registrars and registrars believed that in 41 per cent of family law cases where one party was self-represented the other party was disadvantaged.[67]

Minimising the adverse effects of self-represented litigants

10.61 The Committee heard many suggestions to minimise the adverse effects that self-represented litigants have on the justice system. These included re-prioritising and targeting legal aid funding (discussed in Chapter 2) and increased use of pro bono schemes (discussed in Chapter 9).

10.62 Other suggestions discussed in more detail below are:

- improving community information;
- expanding the duty solicitor scheme;
- unbundling legal services;
- increasing the use of lay assistance; and
- initiatives by the courts.

Improving community information

10.63 Self-represented litigants have access to a range of legal information to assist them - for example, self-help kits, telephone advisory services and websites. This

64 Advocacy Tasmania, *Submission 39*, p. 3.

65 National Network of Women's Legal Services, *Submission 86*, p. 21.

66 *Giannarelli v Wraith* (1988) 165 CLR 543.

67 Dewar, Smith & Banks, *Litigants in Person in the Family Court of Australia*, 2000, p. 2.

assistance is provided not only by community legal centres, legal aid commissions and law societies, but also various courts and tribunals.

10.64 The Federal Magistrates Court, for example, has employed a project officer to develop programs relevant to people representing themselves, as well as establishing a pro bono scheme similar to that operating in the Federal Court.[68] The Family Court has also recently reviewed information about court processes and procedures and amongst other measures has developed new brochures and launched a website with a step-by-step guide to court proceedings.[69] As the Chief Justice of the Family Court of Australia explained:

> … it always seems to me that you can help a self-represented litigant a lot by simplifying your procedures, which we are trying to do, and by giving them more information about how the system works. Again, we are trying to do that. We have a web site which has an interactive capacity with a lot of information on it and people are finding that very helpful. We also have pamphlets. For example, we recently put out a Family Court book in Chinese and Arabic.[70]

10.65 Submissions to this inquiry were divided on the benefits of improving the provision of legal information to self-represented litigants.

10.66 Supporters argued that such information goes some way to mitigate vulnerability by equipping self-represented litigants to run their case better.[71] However, critics pointed out that disadvantaged people are often unable to obtain or understand the information, let alone apply it to their specific circumstances.[72] For example, Professors Rosemary Hunter and Jeff Giddings commented that:

> Research on self-help services suggests that only some litigants in person are sufficiently educated and empowered to make effective use of such assistance (Giddings and Robertson, 2002b, 2003b) We believe that there may be a critical difference in the value of self-help services depending on whether the consumer has freely chosen to be a self-helper, or whether the 'choice' is thrust upon them. Self-help services are likely to be more

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68 Federal Magistrates Court *2002-2003Annual Report*, p. 15. The pro bono scheme is generally confined to migration matters.

69 Family Court of Australia *Self-represented litigants: a challenge*, 2003, pp. 6-7, 12-14.

70 *Committee Hansard*, 10 March 2004, p. 3. The Chief Justice noted, however, 'You can do all these sorts of things, but once you get to the actual courtroom it is a very different situation.'

71 See for example, Legal Aid Queensland, *Submission 31*, pp. 4, 22; Community Legal Service (Albury Wodonga), *Submission 41*, p. 4; Victoria Law Foundation, *Submission 64*, p. 3 and Victorian Legal Aid, *Submission 87*, p. 5.

72 Legal Aid Queensland, *Submission 31*, pp. 22-23; Shoalcoast Community Legal Centre, *Submission 28*, p. 10; Blake Dawson Waldron Lawyers, *Submission 63*, p. 6; Freehills, *Submission 75*, p. 5; National Legal Aid, *Submission 81*, p. 23; National Network of Women's Legal Services, *Submission 86*, p. 5; Petrie Legal Service, *Submission 88*, p. 2; NSW Legal Aid Commission, *Submission 91*, p. 3.

> successful when self-representation is freely chosen, but much less helpful to disadvantaged people for whom these services are a poor – and often the only – substitute for the services of experts (Robertson and Giddings, 2001; Giddings an Robertson, 2003b)
>
> Further, it seems clear that the provision of generic legal information on its own is of limited use to consumers. It makes many assumptions about the capacity of non-experts to interpret and deploy legal data in a legally meaningful way.[73]

10.67 QAILS also pointed to a review commissioned by Legal Aid Queensland on the provision of services by video-conferencing. The review found that these services needed to be supplemented with face to face meetings and recommended that circuit solicitors be used for this purpose.[74] The National Network of Women's Legal Services also pointed to USA evaluations which generally concluded that legal information services do not lead to the favourable resolution of legal problems.[75]

10.68 Mr Mark Woods on behalf of the Law Institute Victoria supported the provision of information and training in relation to simple matters, denying that it was a form of 'second-best justice':

> Victoria Legal Aid have for some time run excellent programs on divorce applications, traffic prosecutions and those sorts of cases where the ordinary paying member of the public would not necessarily decide they need a solicitor but what they do need is some assistance to understand what the hell is going on in the forum they are going to find themselves in. The programs are hugely popular and the people who give the instruction are well regarded. So people come to court in circumstances where they would not ordinarily need to go to the expense of a lawyer and they are able to properly present their case. They can understand the terminology that is used, the practice that is going to go on, the limits to what they can say in court and all those sorts of things. That obviously meets an unmet need, and it is crucial that those sorts of programs continue and indeed flourish.[76]

10.69 Mr Woods stated that he believed Victoria Legal Aid would like to expand those programs but ' they simply do not have the money'. However, he argued that such matters must be distinguished from more complex matters:

> Those cases should be contrasted with the sort of litigation for which an ordinary member of the public—who could afford it—would in fact engage a lawyer. Justice John Faulks of the Family Court, who has chaired in person the court's inquiry into litigants, has come to the conclusion that you have either got to get the person a lawyer, make them a lawyer or change

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73 Professors R Hunter and J Giddings, Griffith University, *Submission 24*, p. 5.

74 *Submission 73*, pp. 45-46.

75 National Network of Women's Legal Services, *Submission 86*, p. 5.

76 Mr Mark Woods, Law Institute of Victoria, *Committee Hansard*, 12 November 2003, pp. 29-30.

> the system, and no amount of instruction at a particular point in time in the law and the legal process will equip a person to properly litigate a family law matter to the nth degree.[77]

Committee view

10.70 The Committee believes that moves to simplify routine court processes and procedures and to improve public knowledge of such matters should be applauded. However, undue reliance on legal information services is ill-conceived without ongoing evaluation of the extent to which they actually assist self-represented litigants in resolving their matters. Such evaluation must focus on the extent to which they contribute to resolution of the legal problem and not merely the user's satisfaction with those services.

Recommendation 55

10.71 The Committee recommends that the Commonwealth Government fund and publish an evaluation of the legal information services that it funds, in order to determine the extent to which those services assist in resolving self-represented litigants' legal problems.

Recommendation 56

10.72 The Committee urges providers of legal information services to evaluate the contribution that those services make in resolving self-represented litigants' legal problems.

Expanded duty lawyer schemes

10.73 Duty solicitor schemes operate in some courts to provide advice to self-represented litigants on their matters. The Committee heard different views on the merits of expanding such schemes.

10.74 Legal Aid Queensland, in supporting the duty solicitor scheme, commented that self-represented litigants were better able to run their case where a duty solicitor had assisted.[78] The PILCH commented that duty solicitor schemes may alleviate problems with inadequate pleadings and preparation of evidence.[79] The Committee also notes the Federal Magistrates Court's description of the duty solicitor scheme as an 'essential adjunct to efficient operation of the Court'.[80] The Director of the Legal Services Commission of South Australia, Mr Hamish Gilmore, told the Committee:

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77 ibid, pp. 29-30.

78 Legal Aid Queensland, *Submission 31*, pp. 4 and 22.

79 Public Interest Law Clearing House, *Submission 54*, p. 24.

80 Federal Magistrates Court, *Annual report 2001-2002,* p. 12.

> There is an urgent need for the establishment of a duty lawyer advice scheme to operate in every family court registry and all magistrates' courts. The number of unrepresented litigants in both the magistrates' court and the Family Court is resulting in highly inefficient and potentially inequitable court proceedings, with court delays for everyone being inevitable.[81]

10.75 The Legal Aid Commission of NSW stated that in August 2002 it had established a pilot duty solicitor scheme at the Parramatta Family Court and Federal Magistrate's Service complex. A pilot at Newcastle was also commencing.

> The aim of these services is to assist a client on a particular day at court in drafting simple court documentation, assist in a simple court appearance, assist in negotiating a settlement of the matter if possible and/or refer the client to appropriate services.
>
> This can include alternate dispute resolution, counselling, and referral to a private practitioner or assistance with a legal aid application for continued representation by LACNSW.
>
> The scheme is quickly becoming a necessity, as demonstrated by the large numbers of matters that are being resolved on a final basis through the service. For many of those assisted, it also avoids all the associated personal cost and stress associated with ongoing litigation and saves the Court both time and cost.[82]

10.76 The Northern Territory Legal Aid Commission stated that it was considering implementing a duty solicitor scheme, but that potential conflicts of interest may make it hard to identify suitable lawyers to advise self-represented litigants.[83]

10.77 Due to limited resources, duty solicitor schemes cannot assist all self-represented litigants. Availability is often restricted, for example, to only those accused who are likely to be imprisoned if convicted. The Kingsford Legal Centre argued that the decision as to who should receive assistance should be left to the duty solicitor, as he or she would be best placed to determine which people could not adequately represent themselves.[84]

10.78 Other submissions argued for increased funding to enable duty solicitors to represent all matters at first instance and all family law cases.[85] However, the Legal Services Commission of South Australia noted that its duty solicitor scheme would need to be greatly expanded to advise all clients on their first occasion before the

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81 Mr Hamish Gilmore, Legal Services Commission of South Australia, *Committee Hansard*, 11 November 2003, p. 11.

82 Legal Aid Commission of NSW, *Submission 91*, pp. 30-31.

83 Northern Territory Legal Aid Commission, *Submission 82*, p. 17.

84 Kingsford Legal Centre, *Submission 36*, pp. 7-8.

85 The Law Society of South Australia, *Submission 92*, p. 2; Legal Services Commission of South Australia, *Submission 51*, p. 6 and 26; Law Council of Australia, *Submission 62*, p. 2; Riverland Community Legal Centre, *Submission 11*, pp. 4-5.

Magistrates Court. Of the 29,065 cases before the South Australian Magistrates Court in 2001, 16,579 involved self-represented litigants at some stage in the proceedings.[86]

10.79 Several submissions argued that reliance on the duty solicitor scheme to fill the gaps in legal aid funding was not a satisfactory solution.[87] Generally, their criticisms related to the lack of time that duty solicitors had to prepare their cases—some submissions cited five minutes—and the claim that because duty solicitors only assist with guilty pleas, pressure is therefore placed on self-represented litigants to plead guilty.[88]

10.80 The NSW Law Society observed that the rates for duty solicitors are significantly below market rates. This has two effects: junior solicitors with limited experience fill those positions and solicitors can assist clients with very little of their case preparation or negotiations.[89]

Committee view

10.81 The Committee considers that an expanded duty solicitor scheme would provide benefits to the justice system by assisting self-represented litigants to prepare their evidence better and narrow the issues in dispute. However, a duty solicitor scheme which merely performs a role as a mouthpiece, with solicitors consulted only minutes before the matter is heard, will not adequately address the problems raised by lack of legal representation.

10.82 As discussed in Chapter 6, the Committee considers that the duty lawyer scheme suggested by the Legal Services Commission of SA in relation to rural, regional and remote areas could usefully be adopted in all states and territories. The Committee believes that the Commonwealth Government has a fundamental responsibility to lead by example in this area and to assist with the provision of funding to the LACs for a duty lawyer scheme. It would also be appropriate for the state/territory governments to contribute funding to such a scheme.

Recommendation 57

10.83 The Committee recommends that the Commonwealth Government and the state/territory governments provide funding to establish a comprehensive duty solicitor scheme in all states and territories of Australia. The scheme should offer, at the very least, a duty solicitor capacity in courts of first instance (criminal, civil and family) and should provide legal advice and representation

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86 Legal Services Commission of South Australia, *Submission 51*, p. 26.

87 Victorian Legal Aid, *Submission 87*, p. 8; Federation of Community Legal Centres (Vic) Inc, *Submission 50*, p. 28.

88 Fitzroy Legal Service, *Submission 48*, p. 18; Federation of Community Legal Centres (Vic) Inc, *Submission 50*, p. 28.

89 New South Wales Law Society, *Submission 79*, pp. 6-9.

on all guilty pleas, not guilty pleas in appropriate matters, adjournments and bail applications, and assistance for self-represented litigants to prepare their evidence and narrow the issues in dispute.

Unbundling legal services

10.84 'Unbundling' legal services refers to giving legal assistance and support at various stages of proceedings without providing full legal representation. As the ALRC explained:

> Clients often prepare their own documents with the assistance and oversight of lawyers, gather their own evidence and appear for themselves at interlocutory case events. Such clients are more likely to reserve their limited funds for representation at the hearing if this becomes necessary.[90]

10.85 The Family Court of Australia described the potential advantage of unbundling:

> Limited legal assistance can then be applied most effectively and strategically … Availability of 'unbundled' services would increase access to advice and possibly targeted representation [for self-represented litigants].[91]

10.86 However, there are concerns about unbundling within the legal community. The Shoalcoast Community Legal Centre highlighted the following:

> - professional legal liability issues. Solicitors providing such services do not have full carriage and control of a legal matter and could expose themselves to the risk of a professional negligence where a client is unhappy with the ultimate outcome of a matter.
>
> - Ethical and Statutory Legal obligations on practitioners which do not currently recognise the concept of unbundled legal services. Lawyers have a duty to act in the best interests of their clients and under the NSW Legal Professional Act and the Civil Liability Act, a solicitor or barrister must not act for a client if there are not reasonable prospects of success. Such obligations may be difficult to ascertain and fulfil in the provision of limited or discrete task services.[92]

10.87 The Family Court referred to possible solutions explored by Professor Dewar, including amendment of lawyers' ethical rules and statutory immunity for work not

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90 Australian Law Reform Commission, *Submission 26*, p. 15.

91 Family Court of Australia *Self-represented litigants: a challenge*, 2003, p. 22.

92 Shoalcoast Community Legal Centre, *Submission 28*, pp. 10-11; Family Court of Australia, *Submission 8*5, pp. 4-5; National Legal Aid, *Submission 81*, p. 18; Australian Law Reform Commission, *Submission 26*, pp. 15-17.

covered by a retainer. The Attorney-General's Department is said to be 'actively considering' these matters.[93]

10.88 The Shoalcoast Community Legal Centre also referred to concerns about access to justice and the quality of legal services:

> Unbundled and self-help services are more suited to simple and/or standard form documents and discrete areas of work that can be completed in isolation.
>
> Moreover, we believe they are rarely suitable to most CLC clients who have difficulty in dealing with the legal system or self representing due to such factors as language and literacy skills, limited education and analytical skills and lack of resources to access such things at library research facilities and the internet etc. Some clients are facing particularly emotional issues concerning family law and domestic violence and need ongoing support to deal with the legal system. In our adversarial system of litigation, full service representation is still necessary for litigants to interpret and manage legal data and to properly adduce evidence.[94]

Lay assistance

10.89 Some jurisdictions specifically allow lay representatives to conduct matters.[95] In others, courts have the discretion to allow a 'McKenzie friend', that is, a lay person to assist an unrepresented litigant in presenting his or her case.[96] A McKenzie friend has no rights as an advocate or in relation to the litigation, and may be excluded by the court.[97] Applications for such assistance tend not to be received favourably if the litigant has not applied for or been refused legal aid.[98]

10.90 During this inquiry there was some criticism of reliance on these schemes. For example, the Fitzroy Legal Centre commented that the use of 'amicus curiae', or

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93 Family Court of Australia *Self-represented litigants: a challenge*, 2003, p. 22, referring to Professor J Dewar *'Unbundling (or 'discrete task representation'): Ethical and liability issues, a brief discussion paper,* 2002.

94 Shoalcoast Community Legal Centre, *Submission 28*, pp. 10-11; Family Court of Australia, *Submission 8*5, pp. 4-5; National Legal Aid, *Submission 81*, p. 18; Australian Law Reform Commission, *Submission 26*, pp. 15-17.

95 For example, section 42 of the *Workplace Relations Act* 1996 allows litigants to be represented in proceedings in the Australian Industrial Relations Commission by, amongst others, an employee of a peak council to which the litigant is affiliated. In others, litigants may be represented by an agent: for example, section 84B of the *Native Title Act 1993* allows parties to appoint an agent for the purpose of representing them in proceedings under that Act.

96 *Schagen* (1993) 65 A Crim R 500 and *Smith v R* (1985) 159 CLR 532 at 534.

97 *R v Bow Country Court; Ex Parte Pelling* [1999] 4 All ER 751 at 757.

98 Perry, *The Unrepresented Litigant,* AIJA 16th Conference, September 1998.

friends of the Court, and limited assistance through duty lawyer schemes were 'nothing more than a stop gap and measures of last resort'.[99]

Measures taken by federal courts

10.91 In recent years various courts have developed strategies both to assist self-represented litigants and to manage them more effectively.

10.92 In August 2002 the Federal Court adopted a Self Represented Litigants Management Plan that includes various strategies, including improving the collection of information; reviewing rules, forms, brochures and guides to ensure they are clearly written and simple to use; providing further staff training on dealing with self-represented litigants; and improving the rules and practices in relation to vexatious, frivolous or repeat litigants.[100]

10.93 As noted throughout this chapter, the Family Court of Australia has also devoted considerable time and resources to examining the needs of self-represented litigants and the measures that might assist them. As discussed in Chapter 4, the Chief Justice of the Family Court informed the Committee of a new trial that has been commenced in Parramatta and Sydney 'to experiment with a less adversarial method of conducting proceedings':

> That is not just driven by the unrepresented litigants; that is driven by the desirability of examining the way we conduct proceedings anyway to see if there are better ways of doing it. We have opened in Parramatta and Sydney a pilot which involves this less adversarial process. It started last week [March 2004]. Just to explain it briefly, it is done by consent; no-one is forced into it. If they agree upon it, it gives the judge much greater control of the way the case is conducted. The judge determines the issues and determines what evidence he or she wishes to hear, in consultation with the parties. The judge will, where necessary, direct that other evidence be obtained that parties may not have sought to call before the court, so it is a more inquisitorial process which has really borrowed to some extent from those in Germany and France—more so Germany. It does not exclude lawyers; in fact, we encourage lawyers to be involved. It is in its early days, because it has only been running for a week, but we have had about six references in Sydney and three in Parramatta. Most of them have been represented, so it suggests that there is a take-up by the profession, which I find heartening in the sense that this means the project will have a better chance of working.[101]

99 Fitzroy Legal Service, *Submission 48*, p. 13.

100 Federal Court of Australia *2002-2003 Annual report*, pp. 46-47.

101 *Committee Hansard*, 10 March 2004, p. 1.

10.94 The Chief Justice told the Committee that Professor Hunter would be evaluating the project based on the first 100 cases but that because of the take-up for the program to date, that figure might be revised.[102]

Committee view

10.95 There is much evidence to demonstrate a strong link between restrictions on legal aid funding and the growing numbers of self-represented litigants. The Committee is concerned about this increase and the impact it may have on the administration of justice. The Committee is also disappointed that the Commonwealth Government has not quantified the effect that self-represented litigants have on the administration of justice and whether this cost is outweighed by savings created by the limits imposed on legal aid funding.

10.96 The Committee considers the lack of empirical evidence on numbers of self-represented litigants, their matter types, their needs and the costs they add to the administration of justice is unacceptable. Effective policy development is impaired without a clear objective understanding of the areas of need.

10.97 The Committee urges governments to reconsider their commitment to legal aid funding in light of the true economic effects and adverse impact on the administration of justice that self-represented litigants impose.

102 ibid, p. 3.

CHAPTER 11

COMMUNITY LEGAL CENTRES

> Legal aid commissions and CLCs are barely able to provide a human facade to an inhuman legal system. CLCs and legal aid commissions have struggled to manage under the weight of increased community demand, reduced levels of government support and increased managerial demands. Access to free legal aid has been replaced by myriad conditions, shifting guidelines, financial caveats and exclusions that cover the provision of aid with the thick and sometimes impenetrable veneer of bureaucracy.[1]

11.1 This chapter discusses the role of community legal centres (CLCs) and the impact of current legal aid arrangements on their operation.

Introduction

11.2 CLCs are not-for-profit, independent, community-based organisations that provide a range of legal and related services, including legal information and referrals, legal advice and assistance, and some limited casework. CLCs also have a core role in providing community legal education and engage actively in policy and law reform work.[2] They have also tended to fill identified gaps in legal aid services in places of high need, providing complementary but different services to those provided by LACs and the private legal profession.[3]

11.3 There are over 207 CLCs in Australia[4] which provide services to approximately 350,000 clients per year.[5] For the most part, CLCs assist disadvantaged clients and client groups within the community, namely those persons who cannot afford private legal representation and who are unable to obtain legal aid funding in order to pursue legal avenues available to them.[6] CLCs are often the first point of contact for people seeking assistance or their last resort when all other attempts to seek legal assistance have failed.[7]

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1 Mr Sam Biondo, Fitzroy Legal Service, *Committee Hansard*, 12 November 2003, p. 43.

2 Community Legal Centres Association (WA) Inc, *Submission 93*, p. 4; Legal Aid Commission NSW, *Submission 91*, p. 40.

3 Legal Aid Commission NSW, *Submission 91*, p. 40; Queensland Association of Independent Legal Services Inc (QAILS), *Submission 73*, p. 13.

4 Community Legal Centres Association (WA) Inc, *Submission 93*, p. 5.

5 National Association of Community Legal Centres, *Submission 84*, p. 3.

6 Community Legal Centres Association (WA) Inc, *Submission 93*, p. 4; South West Sydney Legal Centre, *Submission 34*, p. 2.

7 National Association of Community Legal Centres, *Submission 84*, p. 3.

The Third Report

11.4 The Committee's *Third Report* found that CLCs tended to be the "bottom line" in the Australian legal aid system and had to bear the brunt of increased pressures and workloads as they try to pick up cases that are unable to be dealt with by LACs.[8] The Committee also noted that there were real limits to the capacity of CLCs to manage their increased workloads, given their limited funding and their reliance on volunteer assistance.[9]

The Commonwealth's contribution to community legal centres

11.5 The Attorney-General's Department informed the Committee that the Commonwealth Government will contribute approximately $20 million towards the Community Legal Services Program (the Program) in 2003-2004.[10] The Program is funded by both the Commonwealth Government and state/territory governments to deliver legal services to the disadvantaged in the community.[11] Over 100 CLCs are funded under the Program. The Program was described in the following way:

> Organisations are funded under the Program to provide legal advice, casework, information and referrals, community legal information, and to undertake law reform activities. Centres funded under the Program provide both generalist and specialist community legal services. The majority of community legal centres provide general legal advice in areas such as family, civil and criminal law. These organisations provide generalist advice, advocacy and representation across a wide range of legal issues, as well as participating in community legal education and law reform, and encouraging community participation in the legal system. Many centres involve volunteers from their community in the administration, management and delivery of services. [12]

11.6 The Attorney-General's Department submitted that the Commonwealth's support for the community legal sector is driven by three underlying principles:

- community service providers best meet the needs of their own communities;
- harnessing the contribution of volunteers provides community input to the provision of assistance; and

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8 *Third Report,* para 8.80, p. 150.

9 *Third Report,* para 8.83, p. 152.

10 Attorney-General's Department, *Submission 78*, p. 8.

11 The NSW and Victorian Governments contribute the highest levels of state funding to the Program, while WA and Tasmania do not provide a state contribution. This has led to inequitable funding levels and access to CLCs across Australia: National Association of Community Legal Centres, *Submission 84*, Attachment D, 'Budget submission to the Commonwealth Government 2004–2007: Community Legal Centres – An investment in value Investing in Community Law', August 2003, p. 14.

12 Attorney-General's Department, *Submission 78*, p. 8.

- providing services early in a dispute helps keep people out of court.[13]

11.7 The Department's submission also stated that after consultation with stakeholders and peak representative bodies, CLCs funded by the Commonwealth have moved from annual arrangements to three-year service agreements. According to the Department, the new agreements give CLCs the stability they need to plan for their futures and put long-term strategies in place.[14]

11.8 Departmental representatives, when questioned about decisions relating to the location of CLCs[15] and unmet legal need in certain areas, told the Committee:

> The department, together with the relevant state government and legal aid commissions, has undertaken a series of reviews on a state-by-state basis in relation to community legal centres. The New South Wales review is about to get under way. Those sorts of issues of location of new centres are ones that have been dealt with in those reviews on a state-by-state basis.
>
> …
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> Essentially, the review has Commonwealth and state representatives and community legal service representatives. In some cases it also has what we would see as a public interest representative. I think New South Wales has got that … The review looks at a range of issues, including demographics, and tries to identify areas of need in that way but also takes submissions and is a public process from the point of view of taking submissions.[16]

11.9 The representatives advised that Victoria, Queensland, SA and WA have completed their reviews, and these reviews were supplied to the Committee. For example, the Victorian review stated that some areas of metropolitan Melbourne and in regional and rural Victoria have little or no access to community legal services.[17] The WA review found that while CLCs are appropriately located and services are aligned to need, key gaps in coverage exist in four regional areas and in outer-metropolitan Perth.[18]

11.10 In relation to unmet legal need, the Department told the Committee that:

> The reviews have been the mechanism in the last few years, although I think there is also a general concern about regional areas. I think the

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13 ibid, p. 9.

14 ibid, p. 10.

15 For example, there are no CLCs funded under the Program between Nowra, NSW and the Victorian border.

16 Ms Philippa Lynch & Ms Sue Pidgeon, *Committee Hansard*, 9 February 2004, p. 22.

17 Attorney-General's Department, *Submission 78I*, Implementation Advisory Group, *Review of Commonwealth and State Government Community Legal Centre Funding Program, Final Report to the Commonwealth and State Attorneys General – May 2001*, p. 7.

18 Attorney-General's Department, *Submission 78E*, Community Legal Centre Review Steering Committee, *Joint Review of Community Legal Centres*, p. i.

> committee has expressed similar concerns today. So overarching the specific state-by-state reviews, which of course happen at different times, there is an overall concern to look at where there needs to be perhaps more regional support for community legal services.[19]

Impact of current legal aid arrangements on community legal centres

11.11 Evidence presented to the Committee indicates that current legal aid arrangements are having a serious adverse affect on CLCs. As Mr Sam Biondo of the Fitzroy Legal Service told the Committee at the Melbourne hearing:

> The recent waves of CLC reviews and Legal aid reviews have done little to contribute to a planned and orderly approach to meet community need for legal services. They have been squandered opportunities. Opportunities have existed in which planning and policy could have been developed, which would have enhanced existing services, and considered ways of going forward, in meeting legal needs in areas where there has been little or no service provision.[20]

11.12 Particular problems experienced by CLCs are discussed below:

- increased pressure due to reduced availability of legal aid;
- lack of funding; and
- staffing and operational issues.

Increased pressure due to reduced availability of legal aid

11.13 The Committee received evidence that, while CLCs form an important and unique part of legal service delivery within the legal aid system, they are not alternatives to a properly funded legal aid system.[21] Rather, CLCs should complement the broad range of legal aid services provided through formal legal aid structures and the private legal profession to address legal needs that might otherwise remain unfulfilled.[22] The South West Sydney Legal Centre argued that CLCs have a vital role to play:

> … there is no doubt that CLC's constitute the most significant vehicle to achieving national equity and uniformity through a network of "branches" highly attuned to their respective community's needs. Accordingly … any consideration of current arrangements must protect the integrity and enhance the capacity of CLC's.[23]

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19 Ms Sue Pidgeon, Attorney-General's Department, *Committee Hansard*, 9 February 2004, p. 24.

20 Fitzroy Legal Service, *Submission 48*, p. 32.

21 Queensland Association of Independent Legal Services Inc (QAILS), *Submission 73*, p. 21.

22 ibid, pp. 13-14.

23 *Submission 34*, p. 2.

11.14 However, increasingly it appears that CLCs are expected to pick up the shortcomings in the legal aid system where, for example, people have reached their legal aid "cap", where they have a legal matter for which legal aid is not available, or where they do not meet the means test despite being unable to afford a private solicitor.[24] The demand appears to be overwhelming many CLCs.

11.15 As the Federation of Community Legal Centres (Vic) Inc argued:

> Centres report an overwhelming level of demand for legal services from people who are no longer eligible for legal aid, can not afford a private solicitor, or have exhausted legal aid funding prior to their matter being resolved. There is nowhere else for these people to go. The pressure on centres results in them undertaking work that they are not resourced to do, often to the detriment of legal education and policy work. Even then, centres are unable to meet the demand for legal assistance.[25]

11.16 The Fitzroy Legal Service presented similar evidence:

> The gaps in service provision arising from the inadequate coverage of Victoria Legal Aid have over recent years been increasingly filled by generalist and specialist community legal centres, the courts, private practitioners doing pro bono work and self represented litigants. Because of resource constraints, which include physical, human and financial, CLCs don't have the necessary capacity to provide a comprehensive casework service. Centres are unable to always provide representation in court or tribunal proceedings and can only do so in a fraction of cases. [26]

11.17 The Legal Aid Commission NSW agreed:

> There is no doubt that the decline in legal aid funding has resulted in stark regional variations in the availability of legal aid, and a corresponding increased burden on community legal centres and other community organisations. Burnout is a serious issue for staff. The poor salaries paid to CLC staff, which also impacts on the ability of CLCs to retain experienced staff, only exacerbates this situation.[27]

11.18 The Hobart Community Legal Service noted that:

> It has experienced significant increases in the number of people presenting to [it] who have been denied legal aid. This results in enormous pressure on those staff and volunteers who already have extremely high workloads.[28]

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24 Mr Sam Biondo, Fitzroy Legal Service, *Committee Hansard*, 12 November 2003, p. 45.

25 *Submission 50*, p. 12.

26 *Submission 48*, p. 32.

27 *Submission 91*, p. 40.

28 *Submission 49*, p. 2.

11.19 The Cairns Community Legal Centre argued that such a situation would ultimately lead to reduced access to justice for a greater number of people:

> In the event that legal aid is not increased even greater demands will be placed on already stretched CLCs to provide more services across a broader range of areas of law, which in turn requires more staff, more time for professional development and more funds. If these requirements are not met, as is currently the situation, the service provided by CLCs will ultimately become narrower and more reliant on referring clients to private solicitors. If clients are unable to obtain legal aid and cannot afford private solicitors their avenue to justice thus becomes extremely limited, if not non existent.[29]

11.20 The Committee also heard evidence that coverage areas serviced by individual CLCs are ever-expanding due to lack of legal services generally:

> Our office was originally set up to cover the Blue Mountains greater government area but in fact our area of influence has had to expand to cover Lithgow, which is a town of about 5,000 people near the Blue Mountains, and as far as Bathurst, which is a major centre about two hours west of the upper Blue Mountains. Bathurst is a town of about 20,000 people that does not have a Legal Aid office, does not have a community legal centre and does not even have a Women's Domestic Violence Court Assistance Scheme. So our area of influence has had to expand because of a lack of services.[30]

11.21 The Committee received evidence that since changes by the Commonwealth Government to family law funding arrangements in the late 1990's, CLCs have experienced an increase in demand for family law services.[31] Queensland, for example, has 'experienced massive increases in the number of family law clients presenting for legal help, clients who, in the view of CLC workers, would previously have received assistance from Legal Aid Queensland.'[32] Further:

> … people with family law matters who now find themselves ineligible for legal aid are presenting at community legal centres with increasingly complex issues and problems. Such problems require significantly greater resources than can be brought to bear by a CLC which previously would have been able to provide an initial level of assistance before referring the client to legal aid for ongoing assistance.[33]

11.22 CLCs are experiencing an increasing demand for individual casework services from within the community, specifically in the area of family law:

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29 *Submission 14*, p. 3.

30 Mr Michael Crozier, Blue Mountains Community Legal Centre Inc, *Committee Hansard*, 13 November 2003, p. 92.

31 See also Chapter 4.

32 Queensland Association of Independent Legal Services Inc (QAILS), *Submission 73*, p. 26.

33 ibid, p. 28.

> The demands are particularly high for representation in courts and tribunals, where people have been rejected for a grant of legal aid, or aid is not available in the area of need. Family law representation in general and family law property matters have been cited as areas of increasing demand.[34]

11.23 This has serious flow-on consequences:

> Because of the increased pressure on CLCs to meet family law needs, there is now a reduced capacity for individual centres to choose to work in other areas of law (for example, in consumer law) and therefore limited or no opportunity for staff to develop competence in other areas of practice. For staff of generalist CLCs there are particular concerns about the potential "de-skilling" of staff and the effect that has on both professional development and employee satisfaction levels. Such centres are now providing unprecedented levels of assistance in family law matters but the assistance (by virtue of resources) is limited to the provision of advice and, in some cases basic document preparation. The work is intense and time consuming and leaves little time for staff to focus upon other areas of law in which staff members might have particular skills.[35]

11.24 There are also problems in relation to criminal matters. For example, QAILS contended that:

> At a practical level, Queensland community legal centres are daily called upon by clients to provide guidance as to their criminal matters in circumstances where they are ineligible for legal aid or have been refused assistance. Again, community legal centres are not in a position to fill the void created by inadequate funding of legal aid in criminal law matters.[36]

11.25 QAILS also commented on the lack of legal services in relation to administrative law matters:

> Many Queensland CLCs undertake some level of administrative law work … Several CLCs work almost exclusively within the province of administrative law, notably in relation to immigration, social security and prison issues. Without exception, these specialist services are grossly underfunded … Each is mandated to provide "state-wide" services but is barely funded to provide assistance to those in need within the south-east corner of Queensland.[37]

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34 Community Legal Centres Association (WA) Inc, *Submission 93*, p. 27.

35 Queensland Association of Independent Legal Services Inc (QAILS), *Submission 73*, p. 30.

36 *Submission 73*, p. 38.

37 ibid, p. 41.

Lack of funding

11.26 The Committee heard evidence of the funding crisis CLCs face. The Fitzroy Legal Service argued that despite overall increases in the Program's funding, existing CLCs 'have experienced significant erosion in real funding levels over the last decade.'[38] The National Association of Community Legal Centres (NACLC) noted that:

> Almost all of the growth in the total quantum of funds for the Commonwealth CLC program has been directed towards Program enhancements. While conferring benefits on previously poorly-serviced groups and regions, and contributing to better program management, these measures have not increased the capacity of most centres to undertake their core work.
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> …
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> After adjustments for new activities have been made, Commonwealth funding for community legal centres has increased by 2.45% per annum over the five years from 1997 to 2002. During this same period, Average Weekly Earnings rose by 4.5%. This discrepancy translates into 10.25% cumulative shortfall in the already low base line staffing budgets of CLCs.[39]

11.27 At the Sydney hearing, Ms Elizabeth O'Brien from the National Association of Community Legal Centres said:

> We have a number of innovative programs throughout the community legal sector in Australia. We provide, as you will hear from all of the states as you go around, a varying number of programs designed to ensure that people can maximise the very small legal aid dollar. However, we have arrived at a point where nobody in this sector—legal aid commissions or community legal centres—can do any more without further resources. We are now absolutely maximised. For all the things we may put forward as possible solutions—new ways of doing things and new ways of seeing things—the basic problem is that there is not enough money. The basic requirement is for more money.[40]

11.28 In Melbourne, Mr Sam Biondo from the Fitzroy Legal Service told the Committee that CLCs were facing a funding crisis:

> While the Commonwealth has allocated some new funds to CLCs, almost all of this has gone to new activities, leaving existing centres to fall further and further behind. In 2001-02 almost half the community legal centres in Victoria received less than the level of funding accepted as equivalent to

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38 *Submission 48*, p. 28.

39 National Association of Community Legal Centres, *Submission 84*, Attachment D, 'Budget submission to the Commonwealth Government 2004–2007: Community Legal Centres – An investment in value Investing in Community Law', August 2003, pp. 5 & 6.

40 Ms Elizabeth O'Brien, National Association of Community Legal Centres, *Committee Hansard*, 13 November 2003, p. 32.

> three full-time positions. This is despite the high level of demand and the need for centres to provide a range of legal services to disadvantaged communities and to provide legal advice and information, community legal education, community development and law reform.[41]

11.29 Mr Bill Mitchell from QAILS told the Committee that there are fundamental deficiencies in the consultation process when the Commonwealth Government and state/territory governments negotiate legal aid funding agreements. This has an inevitable flow-on effect on CLCs:

> It seemed to me and to many others in our sector that, once the Commonwealth and the states could no longer agree on the way in which legal aid funds should be spent in a kind of combined or holistic manner, the actual way in which clients were dealt with by a legal aid commission changed quite dramatically. One of the serious flow-on effects of that was the widespread move or referral of clients from legal aid commissions, where they would normally have been dealt with, to community legal centres as a first point of call, rather than, as they had been in most cases up until that point, a last point of call.[42]

11.30 Mr Mitchell argued that CLCs needed to be included in consultations:

> One of our real concerns is that, when large-scale agreements such as legal aid agreements between Commonwealth and state governments are being renegotiated or, in fact, reconceptualised at any level, there needs to be very widespread consultation with the stakeholders who are most likely to feel the real brunt and effect of the changes … certainly the impact of the changes on community legal centres has been, in my view, quite dramatic. However, because we are not really a part of that system, we do not have particular knowledge about the way that worked and the way that continues to work. We cannot really describe it in a way that is accurate. We cannot really describe what exactly happened at that time or what is happening now. We simply know that a very large increase in demand for those sorts of services has been placed on community legal centres and that demand was not as significant prior to the agreement breaking down.[43]

11.31 Mr David McKinnon of the Petrie Legal Service referred to a perceived lack of foresight in the application of the service agreement between the Commonwealth, the states and CLCs:

> … [T]he lack of administrative funding for both the implementation of and ongoing compliance with the new regime—have placed undue hardship on us. It needs to be borne in mind that the new service agreement applies equally to all community legal centres that receive Commonwealth funding. Petrie receive $6,000 from the Commonwealth, yet we must comply to the

41 *Committee Hansard*, 12 November 2003, p. 45.

42 *Committee Hansard*, 10 March 2004, p. 16.

43 ibid.

> same standards as a centre receiving $100,000. Such a centre would undoubtedly have an existing administrative structure.[44]

11.32 The NACLC's August 2003 budget submission to the Commonwealth Government for 2004-2007 recommended an increase of $23.561 million over three years to CLCs. The submission stated that this is to increase funds to existing CLCs across Australia, target rural and remote services and the poorest-funded urban CLCs, and to direct the rest of the money to the remainder of the CLCs in the Program.[45]

Staffing and operational issues

11.33 Several submissions and witnesses submitted that current legal aid funding arrangements heavily impact upon CLCs in their day-to-day operation. The Community Legal Centres Association (WA) submitted that, since CLCs are funded at a range of levels depending on the funding model or formula used for each particular CLC, staffing and overall operations of individual CLCs are affected in different ways. Consequently:

> … any consideration of adequate funding of CLCs to ensure equity of service to communities in different areas needs to take these funding models into account.[46]

11.34 Many submissions argued that CLCs experience particular difficulties in recruiting and retaining staff, particularly legal staff.[47] This is directly attributable to inadequate funding levels:

> The staffing quality and retention of staff at CLCs is also affected by funding levels and the resultant salaries and conditions that CLCs are able to offer their staff. The increasing demands on staff to do more and more casework but still continue their CLE and law reform objectives, also take their toll, leading to worker stress and potentially worker burnout.[48]

11.35 Low salaries are a genuine concern to CLCs:

> Centres report enormous difficulties in attracting and retaining qualified staff, in particular solicitors. This is due to the poor wages, lack of resources, overwhelming demand for legal assistance and work pressure. At full-time rates, a principal solicitor with at least 5 years experience earns on average $46,200 in a CLC compared to $75,000-$110,000 and increasing to $180,000 in private practice. However in reality few centres

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44 *Committee Hansard*, 10 March 2004, p. 21.

45 National Association of Community Legal Centres, *Submission 84*, Attachment D, 'Budget submission to the Commonwealth Government 2004–2007: Community Legal Centres – An investment in value Investing in Community Law', August 2003, p. 14.

46 *Submission 93*, p. 27.

47 National Network of Women's Legal Services, *Submission 86*, p. 36.

48 Community Legal Centres Association (WA) Inc, *Submission 93*, p. 28.

> can afford to employ solicitors full-time resulting in most solicitors being employed part-time and earning well below $46,200.[49]

11.36 Ms Julie Bishop of the NACLC told the Committee:

> There are a number of career paths, if you like, for people in CLCs. One of the submissions you have received talks about the impact of the increased HECS obligation on CLCs to recruit staff. That is because we regularly get fresh graduates. So fresh graduates who have large HECS debts are not able to accept our wages, because they want to pay off their HECS debts more quickly. However, there are some who work with us anyhow. They stay for a few years: generally, the work is exciting for them, it is interesting and they feel they are making a difference. They know they are not making money, but they feel their work is worthwhile—but then they have children or want to buy a house.[50]

11.37 Ms Bishop continued:

> It is as simple as that: there comes a point at which either they have a partner who earns a lot of money and subsidises them or, if they are the major breadwinner, they have to leave. A lot of our staff are at Legal Aid commissions in New South Wales, or they will go to tribunals, or they will go into the private profession. Often they will then become volunteer solicitors, so they will stay … there is a very strong volunteer culture in legal centres, and those who cannot afford to stay are regularly committed and come back as volunteers. But as to coming back to work again: maybe if they won the lottery they would. I do not know.[51]

11.38 The Legal Aid Commission NSW argued that rates of pay for CLC lawyers should at least parallel those offered in the Commonwealth Public Service.[52]

11.39 While it may be true that 'many people choose to work at community legal centres because they prefer the diversity of work and the philosophies that underpin the centres',[53] the Combined Community Legal Centres' Group NSW argued that the fact that lower salaries are generally on offer 'can only discourage people from staying in the sector, particularly where they have family or other major financial responsibilities.'[54] The NNWLS agreed that the long hours that CLC staff need to

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49 Federation of Community Legal Centres (Vic) Inc, *Submission 50*, p. 12.

50 Ms Julie Bishop, National Association of Community Legal Centres, *Committee Hansard*, 13 November 2003, p. 40.

51 ibid.

52 Legal Aid Commission NSW, *Submission 91*, p. 40.

53 Combined Community Legal Centres' Group NSW, *Submission 60*, p. 44.

54 ibid.

work to maximise the capacity of their CLC to provide services often comes 'at the expense (financial and emotional) of the family of the workers.'[55]

11.40 The CCLCG submitted that:

> Having attracted staff, CLCs then often face difficulties retaining those staff members. High demands caused by a never-ending caseload, and a lack of funding for paralegal support (the one-to-one administrative support which is taken for granted in private practice) mean that many solicitors face burn-out within a few years. In rural areas, travel to outreaches or to visit isolated clients or courts, can also take its toll.[56]

11.41 High staff turnover has adverse consequences:

> [It] is costly for an organisation in terms of the recruitment process and possibly locum costs. Staff loss is also detrimental to the communities serviced by the centre. Clients lose continuity, and relationships of trust and confidence built up between disadvantaged communities and particular workers are likely to be lost.[57]

11.42 The Committee also received evidence in relation to the inadequacy of premises and resources for CLCs, in terms of space requirements, basic facilities and research tools. For example, QAILS submitted that in the experience of it members:

> The stereotypical image of community legal centres as operating from overcrowded and run-down premises using second rate office equipment is regrettably not far from the truth …[58]

11.43 QAILS submitted further that, in as many as half of the CLCs in Queensland, lawyers are required to share office space and utilise space such as storage rooms and gardens to conduct interviews with clients. QAILS also noted that in most CLCs, basic heating and air-conditioning does not exist:

> I've interviewed clients in their cars because there's no room in the office. In the summer it's better anyway because they have air-conditioning.[59]

11.44 Mr Sam Biondo of the Fitzroy Legal Service informed the Committee that:

> The condition of centres' offices is so notoriously bad that in 2002 a competition for the worst office was held.[60]

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55 *Submission 86*, p. 36.

56 Combined Community Legal Centres' Group NSW, *Submission 60*, p. 44.

57 ibid.

58 *Submission 73*, p. 63.

59 Queensland CLC staff member, quoted in Queensland Association of Independent Legal Services Inc (QAILS), *Submission 73*, p. 63.

60 *Committee Hansard*, 12 November 2003, p. 45.

11.45 QAILS argued that '… reasonable working conditions are a necessary pre-condition to sustained delivery of high quality, accessible community legal services.'[61]

Committee view

11.46 The Committee strongly believes that CLCs have a vital role to play in helping to achieve a fairer and more effective legal aid system that is available and accessible to all Australians. It is important that CLCs are properly funded to enable them to provide services that can be responsive to community need. The Committee considers the difficulties CLCs are experiencing to be unacceptable. These difficulties appear to be a direct result of inadequate levels of funding and increased demand on CLCs, caused by restricted LAC funding. It is imperative that the Commonwealth and state/territory governments acknowledge existing shortfalls in funding and accept that a continuing deterioration in circumstances will inevitably lead to a severe crisis for CLCs.

11.47 The Commonwealth Government and state/territory governments should act to ensure adequate baseline funding for CLCs to enable them to attract and retain suitable staff, and to have appropriate facilities and resources to adequately perform their functions. There should also be an allocation of additional funding for new CLCs in designated areas of need. The Commonwealth Government and state/territory governments should engage in ongoing consultation with LACs and CLCs in order to accurately ascertain the particular problems experienced by CLCs and in order to identify areas where improved service provision is most needed.

11.48 The Committee acknowledges and endorses the 27 recommendations contained in the submission from QAILS[62] in relation to how CLC funding should be enhanced. The Committee supports such recommendations as, for example, recognition that there are increased costs associated with CLCs providing legal services to people living in RRR areas;[63] acknowledgment that CLCs are unable to provide their staff with basic and necessary training to upgrade skills and remain abreast of legal changes;[64] and the provision of funding for a study to be conducted by the National Association of Independent Legal Services into the levels and types of workplace stress and burnout for staff, and potential methods of reducing or alleviating such conditions.[65]

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61 *Submission 73*, p. 11.

62 ibid, pp. 4-8.

63 Recommendation 6, p. 4.

64 Recommendation 20, p. 7.

65 Recommendation 23, p. 7.

Recommendation 58

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

Recommendation 59

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

Recommendation 60

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

Recommendation 61

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

Recommendation 62

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

Policy advocacy

11.54 A final issue raised with the Committee was the impact of the exposure draft of the Charities Bill. The draft, released on 22 July 2003, is intended to codify the existing common law meaning of a charity and expand it to encompass certain child

care organisations, self-help bodies and, closed or contemplative religious orders.[66] Sub-clause 8(2) of the bill provides that a body will not be considered as a charity if it were to undertake activities that 'seek to change the law or government policy'.

11.55 The CCLCG was concerned that if the exposure draft were to become law, community legal centres who advocate policy change on behalf of their clients or members would not be considered a "charity", would lose taxation concessions and therefore may not be able to function:

> Loss of [fringe benefit tax and income-tax exemptions] would have a devastating impact on the already under-resourced state of community legal centres.[67]

11.56 The CCLCG argued that:

> Peak organisations such as the Combined Community Legal Centres Group are most at-risk under this proposed legislation. If CCLCG lost charitable status, the reduction in funding would seriously undermine our capacity to contribute to Senate Inquiries such as this one…
>
> Systemic advocacy, including law reform initiatives and lobbying of governments on behalf of our client groups, is part of the core business of community legal centres. Indeed, advocacy and lobbying for law reform are essential elements of any democracy. [68]

11.57 The Committee notes that the Board of Taxation's report on the consultation on the definition of a charity was submitted to the Treasurer on 19 December 2003. The report was released publicly on 11 May 2004 when the government announced its response.[69] The Government's response indicated that it had taken advice from the Board of Taxation that the draft legislation did not achieve the level of clarity and certainty that was intended to be brought to the charitable sector. As a result, the Government announced that it had decided not to proceed with the draft Charities Bill. The response indicated that, rather than introducing a legislative definition of a 'charity', the common law meaning would continue to apply, but the definition would be extended by statute to include certain child care and self-help groups, and closed or contemplative religious orders. The Government stated that it intended to introduce legislation to give effect to this proposal as soon as practicable.[70]

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66 The Hon Peter Costello, Treasurer, *Press Release 59 of 2003 Release of Charities Definition Exposure Draft*, 22 July 2003.

67 *Submission 60*, p. 49.

68 ibid.

69 See http://www.taxboard.gov.au, accessed on 17 May 2004.

70 The Hon Peter Costello, Treasurer, *Press Release 31 of 2004 Final Response to the Charities Definition Inquiry*, 11 May 1004, available at http://www.treasurer.gov.au/tsr/content/pressreleases/2004/031.asp

Committee view

11.58 The Committee notes that the Government has decided not to proceed with the draft Charities Bill. However, the Committee is nevertheless concerned that community legal centres should not be prevented from providing advocacy policy services. Non-profit organisations that advocate law reform on the basis of their experience are an invaluable source of information for government to make informed and balanced policy decisions. Additionally, community legal centres are closest to areas of community need and their input into policy development is essential to formulate balanced policy and check that its implementation achieves the policy aims.

Recommendation 63

11.59 The Committee recommends that any legislation in relation to the definition of charities ensure that organisations involved in the provision of pro bono legal services are not prevented from providing advocacy policy services.

Senator the Hon. Nick Bolkus
Chair

MINORITY REPORT BY GOVERNMENT SENATORS

INTRODUCTION

1.1 This broad and far ranging enquiry into legal aid and access to justice arrangements across Australia, has demonstrated some areas of considerable need and Government senators acknowledge the importance of an examination of that need and the development of solutions, both funding and practical, to address that. However, it is clear that that need is not clearly quantified, either through government, commissions or other providers and to that end we support in principle the Report's suggestion that much better statistical and practical information is required.

1.2 Of the 63 recommendations in the Report, at least 11 call for some form of research, evaluation, review, needs analysis, survey or study of both needs and demand, and services either currently provided or required. Government senators suggest that these recommendations could be effectively refined to examine need and service delivery in 3 key areas, drawing from the recommendations of the Report.

1.3 In relation to the provision of services: a national survey of demand and unmet need for legal services and identification of the obstacles to service delivery, which would include the impact of self represented litigants on the system, the value and effectiveness of government legal information services and the extent to which legal aid funding arrangements impact upon the work of Community Legal Centres.

1.4 Many submissions and witnesses raised very specific concerns in relation to discrimination against women in terms of legal service delivery and support. Government senators agree that all Australians are entitled to access to legal services without discrimination. In light of the concerns raised we support research into the perceived gender bias in access to legal services, including consideration of the specific service needs of women, particularly indigenous women and women in rural regional and remote Australia.

1.5 It is also clear from the evidence received that indigenous Australians and people living in rural, regional and remote Australia face separate and different challenges in terms of access to legal services. Government senators acknowledge that these are areas of different and diverse concern, and both questions merit examination to ensure that services that are being delivered are meeting their aims and objectives and where they are not, what can be changed to achieve more effective service delivery.

Commonwealth government support for legal aid

Legal aid funding and agreements

1.6 The Australian Government is providing $599 million over the next four years to provide legal aid for Commonwealth law matters in each State and Territory from 1 July 2004 (Budget papers 2004-05). This is an additional $52.7 million in new money over four years, including $1.3 million for program administration.

1.7 The new funding includes a component to provide a new duty lawyer service to assist those people who seek to represent themselves before the Family Court and the Federal Magistrates Court. Legal aid commissions will be invited to provide the new service.

1.8 A further component will assist commissions to pay a minimum rate of $120 (GST exclusive) per hour to solicitors undertaking Commonwealth family law matters. Funding will also be provided to assist commissions to bring the hourly rates for veterans' matters to the same rates as those paid for family law matters in all States and Territories.

Legal aid renegotiations

1.9 The current agreements for legal aid services provided by State and Territory legal aid commissions are due to expire on 30 June 2004 and negotiations are currently underway with States and Territories and legal aid commissions for replacement agreements to operate from 1 July 2004. If new agreements are not signed by the end of June the current agreements will continue until the new agreements are in place.

1.10 Additional funds will be available to State and Territory legal aid commissions when they enter into new legal aid agreements from 1 July 2004. Those funds do not include payments for duty lawyer services. $3.3m is available for the provision of duty lawyers should Legal Aid Commissions take up the Commonwealth invitation to provide the service.

Policy issues

Women and access to legal services

1.11 As noted previously, Government senators support an examination of perceived gender bias in access to legal services. In relation to matters involving Commonwealth and state laws, particularly family law matters which also include domestic violence issues, Government senators are concerned that administrative constraints or arrangements in cost allocation by Legal Aid Commissions may add to the complexities in providing legal services in such matters.

1.12 Government senators note that separate solicitors for family law and criminal law aspects of the same matter are not required under the Commonwealth legal aid agreements. Government senators would encourage the Attorney General's Department to work with Legal Aid Commissions to resolve cost allocation issues to ensure the most effective representation for those women seeking legal services in such circumstances.

Pro Bono Legal Services

1.13 Government senators acknowledge the valuable contribution made by the legal profession in Australia in provision of pro bono legal services. Government senators also support the observation in the report that pro bono legal services should not be seen as a substitute for legal aid funding.

1.14 In the last 4 years the Commonwealth government has strongly supported pro bono efforts including establishment of the National Pro Bono Resource Centre. The centre was provided with seed funding based on the government expectations that it would become a private sector body, fully supported by the private sector.

1.15 Government senators note that concerns were expressed in submissions and evidence that private sector lawyers may be discouraged from acting pro bono in matters against the Commonwealth if they perceived they would subsequently be prejudiced in the selection of legal service providers by Commonwealth agencies. It is important to note that the Commonwealth Attorney General stated at the 2nd National Pro Bono Conference in 2003

> "It is my belief that, subject to the usual conflict of interest rules, it is irrelevant whether or not legal providers have acted pro bono for clients against the Commonwealth"

Government senators encourage the inclusion of a statement clarifying this matter in the Legal Services Directions.

Community Legal Centres

1.16 Government senators are concerned at the evidence received by the committee in relation to community legal centres, both in terms of staffing and working environments. The community legal centres play an important part in the provision of legal services to many disadvantaged Australians and that contribution cannot be disregarded.

1.17 In 2004-05 recurrent funding for the Commonwealth Community Legal Services Programme will be $23.3 million, a funding increase of more than 50% since 1996. This includes the establishment of 11 new community legal centres in regional, rural and remote Australia since 1998. In 2002-03 a new 3 year model service agreement was introduced, providing some stability and greater certainty to ongoing

funding arrangements for centres. This is a demonstration of ongoing Commonwealth support for the programme.

1.18 It is notable that although community legal centres provide a mix of legal services relating to Commonwealth and State matters, state funding is very varied. It ranges from 43% in one state to no contribution at all in others, specifically Tasmania, the ACT and the Northern Territory. Government senators encourage state and territory governments to more strongly support the work of community legal centres.

Report Recommendations

1.19 Government senators provide the following responses and comments on particular recommendations in the Chair's report.

Recommendations 1 and 2

Government senators note that the Attorney General's Department has advised that a new funding model was developed as part of the process of formulating legal aid agreements with the states, which was used to assist in the distribution of legal aid funds. The model was developed with assistance from the Commonwealth Grants Commission and in consultation with legal aid commissions.

Recommendation 3

Government senators support this recommendation.

Recommendation 4

Government senators support this recommendation.

Recommendation 5

Government senators do not support this recommendation.

Recommendation 6

Government senators recommend that this initiative be considered and costed by the Attorney General's Department and considered for development between the Commonwealth and the states and territories.

Recommendation 7 and 8

Government senators do not support these recommendations. The evidence is not persuasive that these recommendations are practical, nor the impact on services as described properly quantifiable.

Recommendation 9

Government senators do not support this recommendation.

Recommendation 10

Government senators support consideration of this recommendation.

Recommendations 11, 50, 54, 55, 56, 58, 59

Government senators support a national survey of demand and unmet need for legal services and identification of the obstacles to service delivery, which would include the impact of self represented litigants on the system, the value and effectiveness of government legal information services and the extent to which legal aid funding arrangements impact upon the work of Community Legal Centres.

Recommendations 12, 15, 25, 26, 30, 31

Government senators agree that all Australians are entitled to access to legal services without discrimination. In light of the concerns raised we support research into the perceived gender bias in access to legal services, including consideration of the specific service needs of women, particularly service funding and support for indigenous women and women in rural regional and remote Australia.

Recommendations 13 and 14

Government senators note the vexed nature of identifying which areas of spending on legal aid receive greater priority than others, and whether by definition that makes such spending 'disproportionate'. Evidence to the committee suggested that these aspects of legal aid funding do merit examination.

Recommendation 16

Government senators support this recommendation.

Recommendation 17

Government senators support this recommendation.

Recommendation 18

Government senators are concerned that administrative constraints or arrangements in cost allocation by Legal Aid Commissions may add to the complexities in providing legal services in such matters.

Government senators note that separate solicitors for family law and criminal law aspects of the same matter are not required under the Commonwealth legal aid agreements. Government senators encourage the Attorney General's Department to

work with Legal Aid Commissions to resolve cost allocation issues to ensure the most effective representation for those women seeking legal services in such circumstances.

Recommendation 19

Government senators support this recommendation.

Recommendation 20

Government senators support this recommendation**.**

Recommendation 21

Government senators support this recommendation.

Recommendation 22

Government senators suggest that this recommendation be reviewed when the results of the monitoring called for in recommendation 21 are known**.**

Recommendation 23

Government senators support this recommendation.

Recommendation 24

Government senators support this recommendation.

Recommendations 27, 29, 32, 33, 36, 38, 39, 40

Government senators note that it is clear from the evidence received that indigenous Australians and people living in rural, regional and remote Australia face separate and different challenges in terms of access to legal services. Government senators acknowledge that these are areas of different and diverse concern, and both questions merit examination to ensure that services that are being delivered are meeting their aims and objectives and where they are not, what can be changed to achieve more effective service delivery. After the report of such examination is produced consideration should be given to increasing funding levels.

Recommendation 28

Government senators do not support this recommendation but reiterate the need for such a tender to include appropriate cultural considerations.

Recommendation 34

Government senators support this recommendation.

Recommendations 35, 60, 61, 62

Government senators note the support of the Commonwealth government for community legal centres and the rural and regional initiatives introduced and continued by the Commonwealth. Government senators encourage state and territory governments to more strongly support the work of community legal centres. However, it is clear that existing community legal centres are operating under significant financial difficulties impacting on their capacity to retain staff, the quality of the working environment and consequently their levels of service delivery. Government senators acknowledge that this funding situation will require review by the Commonwealth government in the near future.

Recommendation 37

Government senators do not support the provision of a subsidy but support the development of a coordinated national approach between Commonwealth and state and territory governments and law societies, in conjunction with university Law Schools, of attracting and retaining lawyers to work in rural, regional and remote areas.

Recommendations 41, 42

Government senators do not support these recommendations.

Recommendation 43

Government senators support this recommendation.

Recommendation 44

Government senators do not support this recommendation.

Recommendation 45

Government senators support this recommendation.

Recommendation 46

Government senators support this recommendation.

Recommendation 47

Government senators support this recommendation.

Recommendations 48, 49

Government senators note that the National Pro Bono Resource Centre was provided with seed funding based on the government expectations that it would become a private sector body, fully supported by the private sector.

Recommendation 51

Government senators support this recommendation.

Recommendation 52

Government senators support this recommendation.

Recommendation 53

Government senators support this recommendation.

Recommendation 57

Government senators note that Commonwealth funding was provided in the 2004-05 budget for duty lawyer services and encourage state and territory governments to provide funding support for duty lawyer schemes.

Recommendation 63

Government senators support this recommendation.

Senator Marise Payne
Liberal Party
Deputy Chair

Senator Nigel Scullion
Country Liberal Party

APPENDIX 1

SUBMISSIONS RECEIVED

Sub No	Submittor
1	Youth Legal Service of Western Australia
2	Katherine Regional Aboriginal Legal Aid Service Inc
3	Brimbank Community Legal Centre
4	Legal Access Services Pty ltd
5	Coalition of Aboriginal Legal Services NSW
5A	Coalition of Aboriginal Legal Services NSW
6	Minter Ellison
7	North Australian Aboriginal Legal Aid
8	Australian Network of Environmental Defenders Offices
8A	Australian Network of Environmental Defenders Offices
9	Macquarie Legal Centre
10	Western Suburbs Legal Service
10A	Western Suburbs Legal Service
11	Riverland Community Legal Service Inc.
12	Illawarra Legal Centre Inc
13	Homeless Persons' Legal Clinic
14	Cairns Community Legal Centre Inc
15	Roma Mitchell Community Legal Centre Inc
16	Aboriginal Legal Rights Movement Inc.
16A	Aboriginal Legal Rights Movement Inc.
16B	Aboriginal Legal Rights Movement Inc.
16C	Aboriginal Legal Rights Movement Inc.

Sub No	Submittor
17	Australian Plaintiff Lawyers Association
18	Domestic Violence Advocacy Service
19	National Council of Single Mothers and their Children Inc.
20	Sole Parents Union
21	West Heidelberg Community Legal Service
21A	West Heidelberg Community Legal Service
22	Northern Rivers Community Legal Centre
23	Murray Mallee Community Legal Service
24	Griffith University
25	Inner City Legal Centre
26	Australian Law Reform Commission
26A	Australian Law Reform Commission
27	Woman's Legal Service Victoria Inc., Domestic Violence and Incest Resource Centre and Victorian Women's Refuges and Associated Domestic Violence Services
28	Shoalcoast Community Legal Centre
29	Liberty Victoria – Victorian Council for Civil Liberties Inc
30	Border Attorneys
31	Legal Aid Queensland
32	School of Law and Legal Studies
33	Supreme Court
33A	Supreme Court
34	South West Sydney Legal Centre
35	Miwatj Aboriginal Legal Service
36	Kingsford Legal Centre University of New South Wales

Sub No	Submittor
37	Family Law Practitioners Association of Tasmania
38	Blue Mountains Community Legal Centre Inc
38A	Blue Mountains Community Legal Centre Inc
39	Advocacy Tasmania Inc
40	Eastern Community Legal Centre
41	Community Legal Service (Albury Wodonga)
42	Northern Territory Department of Justice
43	Clayton Utz
44	Legal Aid Western Australia
45	Tasmanian Association of Community Legal Centres
46	Hawkesbury Nepean Community Legal Centre Inc.
47	Southern Communities Advocacy Legal and Education Service (SCALES)
48	Fitzroy Legal Service
48A	Fitzroy Legal Service
49	Hobart Community Legal Service
50	Federation of Community Legal Centres (Vic) Inc
50A	Federation of Community Legal Centres (Vic) Inc
51	Legal Services Commission of South Australia
51A	Legal Services Commission of South Australia
51B	Legal Services Commission of South Australia
52	Immigration Rights and Advice Centre
53	Marrickville Legal Centre
53A	Marrickville Legal Centre
54	Public Interest Law Clearing House

Sub No	Submittor
55	Welfare Rights Centre
56	Darwin Community Legal Service
57	Gilbert and Tobin
58	WestSide Community Lawyers Inc
59	NSW Young Lawyers Human Rights Committee
60	NSW Combined Community Legal Centres group
60A	NSW Combined Community Legal Centres Group
61	Redfern Legal Centre
62	Law Council of Australia
63	Blake Dawson Waldron Lawyers
64	Victoria Law Foundation
65	UTS Community Law and Legal Research Centre
66	Refugee Advice and Casework Service (Australia) Inc
66A	Refugee Advice and Casework Service (Australia) Inc
67	Victorian Aboriginal Legal Service Co-operative Ltd
67A	Victorian Aboriginal Legal Service Co-operative Ltd
67B	Victorian Aboriginal Legal Service Co-operative Ltd
68	George Giudice Law Chamber
68A	George Giudice Law Chamber
69	The Victorian Bar
70	The Law Society of Western Australia
71	Faculty of Health Sciences
72	Women's Legal Service SA Inc.
73	Queensland Association of Independent Legal Services Inc

Sub No	Submittor
73A	Queensland Association of Independent Legal Services Inc
74	Top End Women's Legal Service
75	Freehills
75A	Freehills
76	Castan Centre for Human Rights Law Monash University
77	Department of Family and Community Services
78	Attorney-General's Department
78A	Attorney-General's Department
78B	Attorney-General's Department
78C	Attorney-General's Department
78D	Attorney-General's Department
78E	Attorney-General's Department
78F	Attorney-General's Department
78G	Attorney-General's Department
78H	Attorney-General's Department
78I	Attorney-General's Department
78J	Attorney-General's Department
78K	Attorney-General's Department
79	The Law Society of New South Wales
80	National Pro Bono Resource Centre
80A	National Pro Bono Resource Centre
81	National Legal Aid
82	Northern Territory Legal Aid Commission
83	Australian Council of Social Service

Sub No	Submittor
84	National Association of Community Legal Centres (NACLC)
84A	National Association of Community Legal Centres
84B	National Association of Community Legal Centres
85	Family Court of Australia
85A	Family Court of Australia
86	National Network of Women's Legal Services
87	Law Institute Victoria
88	Petrie Legal Service
89	Wirringa Baiya Aboriginal Women's Legal Centre
89A	Wirringa Baiya Aboriginal Women's Legal Centre
90	National Network of Indigenous Women's Legal Service Inc
91	New South Wales Legal Aid Commission
91A	New South Wales Legal Aid Commission
92	The Law Society of South Australia
93	Community Legal Centres Association (Western Australia) Incorporated
93B	Community Legal Centres Association (Western Australia) Incorporated
94	Family Law Council
95	Yilli Rreung Regional Council
96	Western Australian Government
97	Department of Justice
97A	Victoria Legal Aid
97B	Victoria Legal Aid
98	Aboriginal and Torres Strait Islander Commission
99	Arltarlpilta Community Government Council

Sub No	Submittor
100	Nyirranggulung Markrulk Ngadberre Regional Authority
101	People with Disability Australia Incorporated
102	Circular Head Aboriginal Corporation
103	Wallace Rockhole Community Government Council
104	Amoonguna Community Incorporated
105	Yuelamu Community Council Incorporated
106	Gurungu Council Aboriginal Corporation
107	Belyuen Community Government Council
108	Areyonga Community Inc
109	Alpurrurulam Community Government Council
110	Coomalie Community
111	Aboriginal and Torres Strait Islander Services
111A	Aboriginal and Torres Strait Islander Services
112	Warndu Watlhilli-Carri Ngura
113	Australian Legal Assistance Forum
114	Western Suburbs Legal Service Inc.
115	Timber Creek Community Government Council

Published correspondence

Ms Sue Pidgeon, Family Law and Legal Assistance Division, Attorney-General's Department, 3 May 2004.

Mr Gary Burlingham, Legal Assistance Branch, Attorney-General's Department, dated 9 February 2004.

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Port Augusta, Tuesday 11 November 2003

National Council of Single Mothers and Their Children

Dr Elspeth McInnes, Convenor

Ms Yvonne Parry, Executive Officer

Ms Marie Hume, Volunteer

Legal Services Commission of South Australia

Mr Hamish Gilmore, Director

Ms Gabrielle Canny, Policy and Research Officer

Mr Peter Duffy, Regional Manager (Whyalla)

Aboriginal Legal Rights Movement Inc.

Mr Neil Gillespie, CEO

Mr Chris Charles, General Manager

Australian Network of Environmental Defenders Offices

Mr Mark Parnell, Solicitor, EDO, South Australia

Westside Community Lawyers

Mr David Bulloch, Managing Lawyer

Warndu Watlhilli – Carri Ngura

Aboriginal Family Violence Legal Service

Mr Mark Forth, Senior Solicitor

Ms June Lennon, Chairperson

Women's Legal Service SA Inc

Ms Marilyn Wright, Acting Coordinator/Solicitor

Ms Zita Adut Ngor, Solicitor, Rural Women's Outreach Program Port Augusta

Roma Mitchell Community Legal Centre Inc

Mr Patrick Byrt, Convenor of volunteers

Mr Tom Trevorrow, Volunteer and Chair, Ngarrindjeri Land and Progress Association

Rev Sid Graham, Archbishop's Chaplain to Nungar Ministry

Melbourne, Wednesday 12 November 2003

Public Interest Law Clearinghouse

Homeless Persons' Legal Clinic

Ms Paula O'Brien, Co-Executive Director

Ms Samantha Burchell, Co-Executive Director

Mr Phil Lynch, Homeless Persons' Legal Clinic

Castan Centre for Human Rights Law

Associate Professor Beth Gaze

Ms Carola Schmidt, Research Assistant

Law Institute of Victoria

Mr David Farram, Former President

Mr Mark Woods, Council Member

Victorian Government/Victoria Legal Aid

Mr John Lynch, Department of Justice

Mr Tony Parsons, Managing Director, Victoria Legal Aid

Federation of Community Legal Centres (Vic) Inc

Ms Sally Smith, Project Worker, FCLC

Fitzroy Legal Service

Mr Sam Biondo, Community Development Worker, Fitzroy Legal Service

Community Legal Centres Association (WA) Inc

Ms Naomi Brown, CLCA (WA) Inc

Women's Legal Service Vic

Ms Kate Seear, Solicitor

Ms Sarah Vessali, Principal Lawyer

Ms Joanna Fletcher, Law reform and Policy Lawyer

Ms Libby Eltringham, Domestic Violence and Incest Resource Centre

National Network of Indigenous Women's Legal Services

Ms Leanne Miller, Board Member

Ms Winsome Matthews, Spokesperson

Victorian Aboriginal Legal Service

Mr Frank Guivarra, CEO

Ms Kate Hairsine, Research Officer

National Legal Aid

Mr Norman Reaburn, Chairperson

Victoria Law Foundation

Mr Richard Coverdale, Director of Publishing

Ms Aileen Duke, Project Manager

Sydney, Thursday 13 November 2003

Legal Aid Commission of NSW

Mr Bill Grant, CEO

Ms Judith Walker, a/g Director Family Law

Australian Law Reform Commission

Professor David Weisbrot, President

National Association of Community Legal Centres

Ms Julie Bishop, Director

Ms Liz O'Brien, National Convenor

Ms Lea Anderson, Manager, Women's Law Centre WA

Combined Community Legal Centres Group NSW

Ms Polly Porteous, Advocacy & Human Rights Officer

Mr Simon Moran, Board Member

Coalition of Aboriginal Legal Services NSW

Mr John Boersig, Coordinator

Law Society of NSW

Mr Robert Benjamin, President

Wirringa Baiya Aboriginal Women's Legal Centre

Ms Trisha Frail-Gibbs, Coordinator

Welfare Rights Centre

Ms Linda Forbes, Casework Coordinator

Ms Jacqueline Finlay, Principal Solicitor

National Pro Bono Resource Centre

Ms Jill Anderson, A/g Director

Ms Jenny Lovrich, Project Officer

Professor Paul Redmond, Board Member

Freehills

Ms Annette Bain, National Pro Bono Coordinator

Blake Dawson Waldron

Ms Anne Cregan, National Pro Bono Coordinator

Refugee Advice & Casework Service

Ms Louise Boon-Kuo, Coordinator

Immigration Rights & Advice Centre

Ms Suhad Kamand, Director/Principal Solicitor

Marrackville Community Legal Centre

Ms Janet Loughman, Principal Solicitor

Blue Mountains CLC

Mr Michael Crozier, Principal Solicitor

Canberra, Monday 9 February 2004

Liberty Victoria – Victorian Council for Civil Liberties

Mr Greg Connellan, President

Attorney-General's Department

Ms Philippa Lynch, First Assistant Secretary,

Family Law & Legal Assistance Division

Ms Sue Pidgeon, Assistant Secretary, Family Pathways Branch

Aboriginal & Torres Strait Islander Commission/

Aboriginal & Torres Strait Islander Services

Mr Lionel Quartermaine, Acting Chairman, ATSIC

Mr Cliff Foley, Commissioner NSW, ATSIC

Mr Rodney Dillon, Commissioner Tas, ATSIC

Mr Darren Farmer, Commissioner WA, ATSIC

Mr Bernie Yates, Acting CEO, ATSIS

Mr Les Turner, Acting Group Manager, Culture Rights & Justice Group, ATSIS

Law Council of Australia

Mr Brian Withers, Chair, Access to Justice Committee

Mr John North, Member, Law Council Executive

Northern Territory Legal Aid Commission

Ms Susan Cox, Director

Ms Jenny Hardy, Business and Policy Manager

Canberra, Wednesday 10 March 2004

Family Court of Australia

The Hon Justice Alastair Nicholson, Chief Justice of the Family Court of Australia

National Network of Women's Legal Services

Ms Zoe Rathus, Co-ordinator

Queensland Association of Independent Legal Services

Mr Bill Mitchell, Convenor

Petrie Legal Service

Mr David McKinnon, Administration Manager