CHAPTER 6

Alternative means of delivering justice

6.1 Term of reference (e) addresses ways in which people can access justice using means other than legal representation and/or the judicial system.

6.2 This chapter discusses the following means raised in the inquiry:

- early intervention and prevention;
- alternative dispute resolution;
- restorative justice;
- justice reinvestment;
- clinical legal education; and
- Indigenous specific issues.

Early intervention and prevention

6.3 According to National Legal Aid (NLA):

> [Early intervention sets] matters on appropriate, efficient, and cost effective pathways through or away from the justice system.[1]

6.4 The Attorney-General's Department (department) acknowledged that such 'triage' could result in costs savings to the Australian justice system, and enhanced access to justice for members of the Australian community. Its evidence referred to in-built 'triage' mechanisms in the *Strategic Framework for Access to Justice in the Federal Civil Justice System*:

> What we were trying to get to in the framework and over time hoped to see implemented through the various reforms that government might consider is a concept of triage embedded in the system itself: all players in the system would have a responsibility—and, indeed, the opportunity—to work out the best way to deal with an issue. Rather than accepting instructions to initiate recovery action, we would like to see…a situation where parties and their representatives think, 'What's the best way to resolve this issue?'[2]

6.5 The subject of early intervention and prevention elicited comment in specific areas, including: the benefits of a holistic approach; and the value of community legal education programs.

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1 National Legal Aid, *Submission 34*, p. 26; and Mr Matt Minogue, Assistant Secretary, AGD, *Committee Hansard*, Canberra, 27 October 2009, p. 39.

2 Mr Matt Minogue, Assistant Secretary, AGD, *Committee Hansard*, Canberra, 27 October 2009, p. 39.

The benefits of a holistic approach

6.6 In evidence, the committee heard that the holistic approach, or co-location of legal aid service providers and non-legal aid service providers, would benefit those persons most likely to experience multifaceted and complex problems (for example: the homeless; sole parents; persons suffering chronic illness and disability; and Indigenous peoples).[3] Those submissions also reflected on the deleterious effects of allowing people's legal disputes to escalate.

6.7 The West Heidelberg Community Legal Service, for example, attested to a strong link between anxiety and stress caused by legal problems, and emergent or exacerbated health problems. It argued that the significant impact on a person's health enforces arguments in support of access to legal representation, and a holistic approach to early intervention and prevention.[4]

6.8 Associate Professor Mary Anne Noone and Ms Kate Digney cited national and international research evidencing the benefits of providing client-focussed holistic services. The research revealed that: there is a significant association between a person's experience of a justiciable problem and their health status; most people do not seek or receive legal advice for their justiciable problems; non-legal services are most often the first point of contact; and people rarely seek assistance from more than one source for each legal issue.[5]

6.9 The Women's Legal Service (SA) Inc. also supported addressing the root causes of legal and non-legal problems. Its submission argued that such resolution reduces clients' further involvement with the legal system, thereby promoting costs savings throughout the judicial system, as well as directly benefiting individuals on a personal level.[6]

6.10 Assoc. Prof. Noone & Ms Digney acknowledged the many challenges to developing an integrated service delivery approach, and their submission called for: appropriate support in policy development and resource allocation; a shared purpose, high level of trust, good communication, leadership and mutual responsibility at the organisational level; and integration of professional practices.[7]

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3 For example, Aboriginal Family Violence Prevention & Legal Service Victoria, Answers to Questions on Notice (22 July 2009) pp 3 & 7; and Gilbert & Tobin, *Submission 45*, pp 7-8.

4 West Heidelberg Community Legal Service, *Submission 37*, pp 9-10; and Aboriginal Family Violence Prevention & Legal Service Victoria, *Submission 38*, p. 10.

5 Assoc. Prof. Mary Anne Noone & Ms Kate Digney, *Submission 7*, pp 2-4; and Central Queensland Community Legal Centre Inc., *Submission 47*, p. 3.

6 Women's Legal Service (SA) Inc., *Submission 59*, p. 15.

7 Ms Mary Anne Noone, *Committee Hansard*, Melbourne, 15 July 2009, p. 94.

6.11 Central Queensland Community Legal Centre Inc., one of the holistic models operating in Australia, shared this view, arguing that, in areas of high disadvantage, community services need to employ a collaborative approach to service delivery:

> No individual service alone can target the multi-levelled problems that exist for people who live in areas of high disadvantage. A holistic approach between all services, both social and legal, and both Commonwealth and State funded, needs to be established.[8]

6.12 Based on this evidence, the committee concludes that a holistic approach to the provision of legal and related services might well be a sound, long-term approach to helping disadvantaged Australians resolve issues. The committee commends centres such as the West Heidelberg Community Legal Services for their client-focussed endeavours.

6.13 Evidence addressing term of reference (e) supported a holistic approach to early intervention and prevention as a means of obtaining justice.

The value of community legal education programs

6.14 Another means of obtaining justice without involving the judicial system is community legal education, which aims to inform people of their legal rights, responsibilities and options prior to or at the outset of any legal problem. These programs intend to not only prevent legal disputes but also assist in the early resolution of existing legal disputes.

6.15 Both the Law Council of Australia (Law Council) and the Law Society of NSW supported an inter-related topic, early issues identification, with the latter submitting that this could better inform strategy development in the legal aid system:

> A system of legal assistance which includes improved support for those who need a lawyer to assess their matter at an early stage would allow clients to make an informed decision on the merits of proceeding to court or exploring other dispute-resolution avenues. In turn, they would not be taking up valuable court resources on matters which have little chance of successful litigation.[9]

6.16 Legal Aid Commissions (LACs) and Community Legal Centres (CLCs) are at the forefront of providing community legal education programs. Programs are also delivered by legal professional associations and organisations such as the Law and Justice Foundation NSW.

6.17 The West Heidelberg Community Legal Service submitted that community legal education is critical to informing people about how they can better navigate or

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8 Central Queensland Community Legal Centre Inc., *Submission 47,* pp 3-4.

9 Law Society of NSW, *Submission 41*, pp 2-4.

understand a complicated legal system, and should be delivered on an on-going basis and within a community development framework.[10]

6.18 The importance of delivering community legal education and legal resources in an appropriate form (for example, in plain English; a variety of languages; pictorially; etc.) was also drawn to the committee's attention.[11]

Alternative dispute resolution

6.19 In recent years, there has been a shift toward recognising alternatives to litigation, including alternative dispute resolution (ADR) as a means of delivering justice.

6.20 ADR is the resolution of disputes by an impartial third party independent of judicial determination. The main types of ADR are mediation, conciliation, arbitration and expert referral. ADR can occur by way of court order, or encouragement, and by choice, and is delivered through one of three mediums: a private mediator or arbitrator; a court-authorised scheme; or through community-based services.

6.21 Legal professional associations also provide avenues for legal practitioners to deliver or access ADR services. The Law Society of NSW, for example, offers: accreditation through the Law Society Mediation Program; access to experienced commercial arbitrators; nominations to Supreme, District and Local Court arbitration panels; and a low-cost Early Neutral Evaluation Service.

6.22 For some people, ADR is an attractive option for the resolution of legal disputes, and in its submission, the Australian Lawyers Alliance described the benefits of ADR as follows:

- it is more cost effective for parties;
- it provides a more flexible forum for people to express their concerns and grievances;
- parties are able to tailor the resolution of their issue to their individual circumstances;
- alternative dispute resolution proceedings can remain confidential;
- other parties can be present or participate, if required; and
- it can refine issues in dispute.[12]

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10 West Heidelberg Community Legal Service, *Submission 37*, p. 7.

11 Ms Elizabeth Snell, NSW Young Lawyers, Human Rights Committee, *Committee Hansard*, Sydney, 11 September 2009, p. 5.

12 Australian Lawyers Alliance, *Submission 27*, p. 16.

6.23 In Western Australia, the Industrial Relations Commission offers a voluntary, free mediation service for the resolution of employment-related disputes by an Industrial Relations Commissioner. The Employment Law Centre of WA (Inc.) cited this service as an example of a successful ADR scheme which enhances access to justice via an alternative means:

> The WAIRC mediation service is ideal because it offers the parties an informal forum to discuss their dispute with the assistance of an independent mediator with specialist skills in mediation as well as legal expertise in employment law. And as there is no charge to the service, it is a service which is accessible to anyone regardless of their financial means.[13]

6.24 There are instances when ADR is not appropriate, for example: in situations where there has been domestic violence and/or family violence; situations in which there is a significant power imbalance between the parties (such as franchising or securities matters); where conflict between parties is entrenched; or where the issues requiring resolution are highly technical and complex.[14]

6.25 For this inquiry, submissions focused on court-facilitated ADR. In Australia, ADR has been used by courts as a case management tool where it plays an important role in reducing the length and complexity of litigation by narrowing the issues in dispute, and improving the efficiency of the courts.[15]

6.26 The Law Council supported the development of court processes which enhance the use of ADR, recommending that ADR options: be presented in a way which maximises their efficient and effective use; be accompanied by clear guidelines outlining the advantages and disadvantages of each option, as well as the types of disputes to which each option is most suited; and identify clearly categories of matters which may not be suitable to ADR.

6.27 However, the Law Council cautioned that courts' referral criteria and methods of referral are 'crucial to the effective provision of ADR services', and at present, require significant development:

> The potential exists for the future implementation of streamlined processes, designed to direct disputes through the appropriate ‘door’ - the most appropriate form of ADR - from the time of filing with the court or earlier.[16]

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13 Employment Law Centre of WA (Inc.), *Submission 26*, p. 4.

14 Women's Legal Service (SA) Inc., *Submission 59*, p. 16; Mr Scott Cooper, *Submission 16*; and Family Court of Australia & Federal Court of Australia, *Submission 31*, p. 2.

15 Federal Court of Australia, *Submission 57*, p. 3; Family Court of Australia & Federal Magistrates Court, *Submission* 31, p. 15; National Legal Aid, *Submission 34*, p. 30; and Australian Lawyers Alliance, *Submission 27*, p. 17.

16 Law Council of Australia, *Submission 12*, p. 32.

6.28 Dr Andrew Cannon, a court officer and legal academic, favoured also a diverse system of ADR, but warned that it should not be an obstacle to accessing the courts and therefore a compulsory precondition to litigation (as is the case in some family law matters):

> The control that ADR gives people over their own destiny, its potential to repair damaged relationships and the ability to manage sensitive matters in private all offer incentives and good reasons for using ADR rather than courts, without the necessity of it being compulsory.[17]

6.29 Chapter 5 refers to current legislative proposals to strengthen and clarify the case management powers of the Federal Court of Australia (Federal Court), including granting the court discretion to refer civil matters to ADR and the power to penalise parties who unreasonably refuse to participate in ADR opportunities.[18] The Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 is currently awaiting Royal Assent.

6.30 Some state/territory legal professional associations promote the use of ADR as an alternative means of obtaining justice, requiring their members to advise clients about ADR options.[19] The Law Council submitted that all Australian jurisdictions should consider similar obligations for legal practitioners (both barristers and solicitors).[20]

6.31 In early 2009, the Australian Government publicly recognised that access to justice is an important issue, in which ADR plays a key role.[21] It is currently awaiting results from a National Alternative Dispute Resolution Advisory Council (NADRAC) inquiry, whose terms of reference included:

- whether mandatory ADR should be introduced;
- changes to cost structures to provide incentives to use ADR or remove barriers to the use of ADR;
- changes to civil procedures to provide incentives to use ADR or remove barriers to the use of ADR;
- the provision and quality of ADR services, and whether they should be provided inside or outside the courts or both; and

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17 Dr Andrew Cannon, *Submission 15*, p. 8; and Mr Mark Blumer, Australian Lawyers Alliance, *Committee Hansard*, Sydney, 11 September 2009, p. 14.

18 Proposed section 37N of the Access to Justice (Civil Litigation Reforms) Amendment Bill 2009

19 For example, NSW Bar Association, Rule 17A

20 Law Council of Australia, *Submission 12*, p. 33.

21 The Hon. Robert McClelland MP, Attorney-General, 'Encouraging access to justice through alternative dispute resolution', Media Release, 26 March 2009

- the use of techniques derived from ADR to enhance adjudication in the courts, including judicial dispute resolution.[22]

6.32 NADRAC was due to report on 30 September 2009, and the committee awaits its findings and recommendations with interest.

6.33 In relation to the evidence raised in the inquiry, the committee accepts that ADR is a valuable and alternative means of delivering justice, but reiterates its previous findings that ADR is not an appropriate means of delivering justice in certain matters, including those involving victims of domestic violence.

6.34 The committee understands that ADR is an established process in some court practices and procedures, but is not fully developed in all Australian jurisdictions. The committee encourages all courts to consider, introduce and expand ADR options with clear criteria, guidelines and methods of referral.

6.35 The committee endorses efforts to enhance the use of ADR as an alternative means of delivering justice, but refrains from pre-empting the findings and recommendations of the NADRAC inquiry.

Restorative justice

6.36 Restorative justice refers to a range of justice practices which actively involve offenders, victims and the community in the criminal justice process. The aim of restorative justice programs is to repair the harm caused by crime, divert offenders from the court process, and reduce recidivism.

6.37 Restorative justice programs are available in situations where an accused pleads guilty to a criminal offence and the victim(s) of the crime agrees to participate in the program. It is designed to create a forum for an accused to articulate his/her remorse and, as an alternative to victim impact statements, is a means by which a victim can express the impact that the crime has had on his/her life.[23]

6.38 Submissions which addressed this topic argued that restorative justice programs are an alternative, and more capable, means of delivering justice than the traditional criminal justice system.

6.39 Justice Action testified that restorative justice is 'a winner', enabling matters to be handled within the community and independent of the court process.[24] The Australian Lawyers Alliance agreed that greater consideration must be given to a

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22 Attorney-General's Department, *Submission 54*, p. 5 & Attachment C.

23 Attorney-General's Department, *Submission 54*, p. 6; Australian Lawyers Alliance, *Submission 27*, p. 18; and Dr Andrew Cannon, *Submission 15*, p. 9.

24 Mr Brett Collins, Co-ordinator, Justice Action, *Committee Hansard*, Sydney, 11 September 2009, p. 73.

criminal justice system which focuses on better outcomes for accused, victims and the community: 'Restorative justice is a core feature of any such approach.'[25]

6.40 Witnesses indicated to the committee that restorative justice programs would greatly benefit Indigenous people, who, as mentioned in Chapter 8, are vastly over-represented in the criminal justice system. In Western Australia, for example, 41 per cent of the adult prison population and 75.5 per cent of youth held in custody are Indigenous people.

6.41 At the Perth public hearing, Dr Dorothy Goulding and Dr Brian Steels equated prison to a 'rite of passage' for young Indigenous people, stating that restorative justice programs should be more widely used in Australia. They did not consider restorative justice to be an 'easier' option:

> It is much easier for someone to go into court, plead guilty and get it over and done with than it is for them to face the person that they harmed. They cannot then depersonalise their crime…It is much tougher and much more effective to have to make an apology or reparation in front of people who mean something to you and with them you have a sense of belonging. So it is not a soft option but, in fact, a much more effective option.[26]

6.42 The Centre for Restorative Justice agreed that there is a need to examine different and more effective processes for dealing with crime and criminal behaviour. The centre argued that restorative justice, comprising re-integrative shaming (shaming carried out within a continuum of respect and support) and restorative processes (which focus primarily on well being) might be an additional means of delivering justice. Its submission presented what it suggested would be the features of an appropriate and successful restorative justice model:

- programs should run alongside the criminal justice system;
- involvement and referral should be encouraged through victims, offenders, courts, police and other interested agencies;
- involvement should be voluntary and while encouraged, there should be no coercion or plea bargaining;
- involvement would not attract mandatory reductions in sentence etc;
- all ‘agreements’ reached could be submitted to court where they can be ordered accordingly;
- the state/territory would ensure that follow through as per the 'agreements' is encouraged and supported; and
- all restorative practices should be facilitated by independent neutral personnel.[27]

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25 Australian Lawyers Alliance, *Submission 27*, p. 17.

26 Dr Dorothy Goulding, *Committee Hansard*, Perth, 13 July 2009, p. 62.

27 Centre for Restorative Justice, *Submission 22*, pp 7-8.

6.43 Internationally, some countries have begun applying restorative justice principles to not only juvenile but also adult criminal matters, including in the context of serious crimes. In the United Kingdom, restorative justice programs have been found to: reduce the frequency of re-conviction; save money by lowering the rates of offending; and satisfy parties involved in restorative justice processes. These results have reportedly been mirrored in Canada.[28]

6.44 At present, the Australian Government funds restorative justice programs in the context of juvenile justice, Indigenous justice and family law through the Prevention, Diversion, Rehabilitation and Restorative Justice Program, and through the Aboriginal and Torres Strait Islander Legal Services.[29]

6.45 In light of international experience, the Australian Lawyers Alliance submitted that restorative justice programs should be more widely available in Australia. At the West Heidelberg Community Legal Service, the use of restorative justice approaches to resolve or avert disputes is being considered, but the service agrees that restorative justice principles should be applied generally to: youth crime; issues where criminal consequences are not the only solution; educational issues around exclusion and suspension; and use of public space and housing issues.[30]

6.46 The committee considers that the concept of restorative justice bears closer investigation. If restorative justice programs are as cost-effective and successful as suggested, both in this inquiry and by international experience, then they could form an invaluable and appropriately focussed means of delivering justice.

Recommendation 20

6.47 The committee recommends that the Australian Government consider funding a number of restorative justice pilot programs in areas where there is an over-representation of minor offenders in the criminal justice system.

Justice reinvestment

6.48 Justice reinvestment is a new concept in the Australian Justice system. The Australian Human Rights Commission (AHRC) explained the concept and its brief history as follows:

> The concept of justice reinvestment originated in the United States. It was initially developed by the Open Society Institute in 2003 but has since been taken up in 10 states in the US (Arizona, Oregon, Connecticut, Kansas, Michigan, Nevada, Pennsylvania, Rhode Island, Texas, Vermont and Wisconsin).

28 Australian Lawyers Alliance, *Submission 27*, pp 18-19.

29 Attorney-General's Department, *Submission 54*, p. 6.

30 Australian Lawyers Alliance, *Submission 27*, p. 20; and West Heidelberg Community Legal Service, *Submission 37*, p. 8.

> Justice reinvestment is a criminal justice policy approach that diverts a portion of the funds spent on imprisonment to the local communities where there is a high concentration of offenders. The money that would have been spent on imprisonment is reinvested in programs and services that address the underlying causes of crime in these communities. It is not just about tinkering around the edges of the justice system – it is about trying to prevent people from getting there in the first place.
>
> Justice reinvestment retains detention as a measure of last resort for dangerous and serious offenders, but actively shifts the culture away from imprisonment.[31]

6.49 Although justice reinvestment has undergone only limited trialling in the United States, the AHRC proposed it as a possible solution to the over-representation of Indigenous people in the Australian criminal justice system. In addition to costs savings elsewhere in the system, the AHRC submitted that the appeal of justice reinvestment lies in its efficacy:

> In Kansas where justice reinvestment has been implemented, there has been a 7.5% reduction in their prison population; parole revocation is down by 48%; and the reconviction rate for parolees has dropped by 35%....These changes have prevented Kansas from the need to build a new prison and have saved that state about $80 million over a five-year period.[32]

6.50 At the Canberra public hearing, the AHRC told the committee:

> We need to look to new ways to address longstanding and intransigent problems that we simply have not made any progress on. It is quite clear: Indigenous overrepresentation has been a matter of serious concern for 20 or 30 years and the rates not going down; they are continually increasing or have stabilised and plateaued. We cannot continue to do the same thing and expect we are going to get a different result. We are clearly not going to. This is a completely different take on how you might approach these issues and it is something that could be given priority consideration by the Commonwealth, whether that is working through the Standing Committee of Attorneys-General, whether it is separately through looking at opportunities for priority communities through the Northern Territory intervention, whether it is through other processes that may exist.[33]

6.51 In response to questions from the committee, the AHRC argued that sufficient data exists to consider trialling justice reinvestment in Australia:

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31 Australian Human Rights Commission, *Submission 70*, p. 9.

32 Australian Human Rights Commission, *Submission 70*, pp 9-10; Mr Darren Dick, AHRC, *Committee Hansard*, Canberra, 27 October 2009, p. 10; and Mr Mark Woods, Law Council of Australia, *Committee Hansard*, Canberra, 27 October 2009, pp 25-26.

33 Mr Darren Dick, AHRC, *Committee Hansard*, Canberra, 27 October 2009, p. 13.

> Preliminary analysis of information supplied for the Social Justice Report by the state and territory departments responsible for corrections and juvenile justice identifies a number of communities with high concentrations of Indigenous incarceration. These communities are in urban and remote locations and include places like Blacktown, Dubbo, Port Augusta, Broome, Halls Creek, Darwin and Alice Springs. This data is very preliminary but it does suggest that there are Indigenous communities that could benefit from justice reinvestment strategies.[34]

6.52 However, additional mapping would be required, and given that over-representation of Indigenous peoples in the criminal justice system is a federal, state and territory issue, the AHRC called for a collaborative approach between governments:

> It is going to be a suite of measures. Once you get into preventative processes and other things, sometimes you are going to slip into programs that are traditionally funded through the federal government as opposed to services provided by the state, but clearly one can impact on the other. It is probably ultimately more of a state responsibility, but it is also probably something where some sort of trialling could be done in a collaborative way.[35]

6.53 The AHRC also suggested that matters could immediately be improved if states/territories were to review policies and laws which have the effect of increasing imprisonment. The AHRC specifically mentioned the new mandatory sentencing laws in Western Australia, and the NSW Law Society commented also on inappropriate sentencing in relation to minor traffic offences:

> In NSW a person's licence is often cancelled for fine default. The licence expires and is not renewed and the person is subsequently charged for driving whilst unlicensed. A person convicted for a second offence of driving without a licence is automatically disqualified for a three year mandatory period. Due to the long period of disqualification, this often snowballs into a driving whilst disqualified conviction and can result in a prison term.[36]

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34 Australian Human Rights Commission, *Submission 70*, p. 11; and Mr Darren Dick, AHRC, *Committee Hansard*, Canberra, 27 October 2009, pp11-12.

35 Mr Darren Dick, AHRC, *Committee Hansard*, Canberra, 27 October 2009, p. 12.

36 Law Society of NSW, *Submission 41*, p. 4; and Tom Calma, Commissioner, AHRC, 'Investing in Indigenous youth and communities to prevent crime', (Speech to Indigenous Young People, Crime and Justice Conference, Australian Institute of Criminology, 31 August 2009, pp 8-10.

6.54 In response to questions from the committee, the department indicated its hope that the states/territories would recognise 'the impact of changes in the state criminal law which impact disproportionately on Indigenous people', but stated that it is fundamentally an issue for the states and territories. The department was not aware of any federal intentions regarding justice reinvestment.[37]

6.55 The committee is persuaded that justice reinvestment is worth trialling in the Australian context after completion of further mapping. The committee notes that Recommendation 1 should provide the necessary information to enable a targeted justice reinvestment pilot program.

Recommendation 21

6.56 In conjunction with Recommendation 1, the committee recommends that the federal, state and territory governments recognise the potential benefits of justice reinvestment, and develop and fund a justice reinvestment pilot program for the criminal justice system.

6.57 The committee also urges state and territory government to review laws which have the effect of increasing rates of incarceration with a view to ensuring that relatively minor offences do not result in custodial sentences. The committee considers that this would result in decreased need for funding of gaols and those funds could then be applied toward justice reinvestment programs which would, in turn, reduce involvement with the criminal justice system. The committee encourages state and territory governments to recognise this causal link and take steps to ameliorate the problem at its root cause.

Clinical legal education

6.58 Clinical legal education is a legal practice-based method of legal education. It is a form of experiential learning where students are placed, under supervision, in the role of a solicitor in legal practice or a solicitor in a policy environment. Students are thereby provided with the opportunity to link theory with practice, with a key feature being the provision of legal assistance to disadvantaged people within the community.

6.59 Submissions from CLCs described various clinical legal education programs, and highlighted these programs' role in delivering access to justice. The SCALES Community Legal Centre added that clinical legal education imbues students with a sense of social responsibility and a life-long commitment to pro bono and social justice work:

37 Mr Kym Duggan, Acting First Assistant Secretary, AGD, *Committee Hansard*, Canberra, 27 October 2009, p. 52.

> However, these longer term benefits of our clinical program are only possible if it is properly resourced and able to provide support and parallel pedagogical guidance for our students. Clinical programs need the support of both Universities and government to ensure adequate funding and realistic benchmarks, or they fall prey to the demands of casework that can swamp and compromise clinical supervision. They should not be seen as a cheaper form of legal service delivery.[38]

6.60 The short- and long-term objectives of clinical legal education featured also in the submission from the West Heidelberg Community Legal Service, which similarly provides clinical legal education in conjunction with a local law school.[39]

Indigenous specific issues

6.61 As discussed in Chapter 8, Indigenous people are a highly disadvantaged group within the Australian community, with an inclination not to access the mainstream legal system due to previous experiences of racism and discrimination.[40]

6.62 Under term of reference (e), submissions raised family law proceedings as a problematic yet alternative means to accessing justice. These submissions argued that Indigenous people have difficulty accessing the family law courts.

6.63 In 2001, the Family Law Pathways Advisory Group reported that 'Indigenous families encounter particular barriers' that impede their ability 'to access and benefit from the family law system.'[41] Its key recommendations included the expansion of the FCA's existing programs for Indigenous people, and reform of the *Family Law Act 1975* (Cth) to ensure that the court was more able to respond to the needs of Indigenous families.[42]

6.64 The Australian Government responded to these recommendations by:

- amending the *Family Law Act 1975* (Cth) to place a much stronger emphasis on the rights of Indigenous children to be aware of and participate in their culture and heritage; and
- establishing a national network of family relationship centres to provide outreach services to Indigenous communities through the employment of Indigenous advisors.

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38 SCALES Community Legal Centre, *Submission 39*, p. 10.

39 West Heidelberg Community Law Service, *Submission 37*, p. 3.

40 Ms Megan Davis, *Submission 17*, p. 1; and Aboriginal Family Violence Prevention & Legal Service Victoria, *Submission 38*, p. 6.

41 Attorney-General's Department, *Out of the Maze: Pathways to the future for families experiencing separation*, July 2001, pp 4 & 91-92.

42 Family Court of Australia & Federal Magistrates Court, *Submission 31*, p. 17.

6.65 According to the Family Court of Australia (FCA) and Federal Magistrates Court (FMC):

> These initiatives effectively provide 'a front door' through which Indigenous families enter the family law system and eventually find their way to the Family Law Courts.[43]

6.66 However, the Aboriginal Family Violence Prevention & Legal Service Victoria continued to express dissatisfaction with Indigenous peoples' entry into the family law system, a view with which the family law courts agreed.[44] The service suggested additional measures to improve access to the family law system, including making Indigenous legal services the entry point.[45]

6.67 Furthermore, the Aboriginal Family Violence Prevention & Legal Service Victoria questioned whether recent changes to the family law system (emphasising family dispute resolution) would create barriers to Indigenous women accessing legal assistance and support.

6.68 In early 2006, NADRAC published a report, *Indigenous Dispute Resolution and Conflict Management*, examining the effectiveness of Indigenous dispute resolution and conflict management services. Among its findings was that evaluation methods and performance indicators must consider the complex and overlapping nature of many Indigenous disputes, and the fact that conventional methods may not provide a reliable or valid picture of effectiveness.[46]

6.69 In response to these findings, the Federal Court, in collaboration with NADRAC and the Australian Institute of Aboriginal and Torres Strait Islander Studies, conducted a scoping study to determine how case study research could be used to identify examples of best practice in Indigenous dispute resolution and conflict management.[47] The department advised that the Case Study Project is currently being considered by NADRAC.[48]

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43 Family Court of Australia & Federal Magistrates Court, *Submission 31*, p. 17.

44 Family Court of Australia & Federal Magistrates Court, *Submission 31*, p. 16.

45 Aboriginal Family Violence Prevention & Legal Service Victoria, *Submission 38*, pp 6-7.

46 National Alternative Dispute Resolution Advisory Council, *Indigenous Dispute Resolution and Conflict Management*, January 2006, p. 1.

47 National Alternative Dispute Resolution Advisory Council, *Indigenous Dispute Resolution and Conflict Management*, January 2006, p. 16.

48 Attorney-General's Department, *Submission 54*, p. 5.