COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCES COMMITTEE

Reference: Access to justice

TUESDAY, 27 OCTOBER 2009

CANBERRA

BY AUTHORITY OF THE SENATE

INTERNET

Hansard transcripts of public hearings are made available on the internet when authorised by the committee.

The internet address is:

http://www.aph.gov.au/hansard

To search the parliamentary database, go to:
http://parlinfo.aph.gov.au

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS

REFERENCES COMMITTEE

Tuesday, 27 October 2009

Members: Senator Barnett *(Chair)*, Senator Crossin *(Deputy Chair)*, Senators Feeney, Fisher, Ludlam and Trood

Participating members: Senators Abetz, Adams, Back, Bernardi, Birmingham, Bilyk, Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Jacinta Collins, Coonan, Cormann, Eggleston, Farrell, Fielding, Fierravanti-Wells, Fifield, Forshaw, Furner, Hanson-Young, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Ludlam, Lundy, Ian Macdonald, Marshall, Mason, McEwen, McGauran, McLucas, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Pratt, Ronaldson, Ryan, Scullion, Siewert, Sterle, Troeth, Williams, Wortley and Xenophon

Senators in attendance: Senators Crossin, Fisher and Ludlam

Terms of reference for the inquiry:

To inquire into and report on:

Access to justice, with particular reference to:

(a) the ability of people to access legal representation;

(b) the adequacy of legal aid;

(c) the cost of delivering justice;

(d) measures to reduce the length and complexity of litigation and improve efficiency;

(e) alternative means of delivering justice;

(f) the adequacy of funding and resource arrangements for community legal centres; and

(g) the ability of Indigenous people to access justice.

WITNESSES

Committee met at 4.13 pm

ACTING CHAIR (Senator Crossin)—I declare open this public hearing of the Senate Legal and Constitutional Affairs References Committee in our inquiry into access to justice. This is the fourth and final public hearing of this inquiry. It was referred to the committee by the Senate on 16 March 2009. In conducting the inquiry, the committee is required to have particular reference to the ability of people to access legal representation, the adequacy of legal aid, the cost of delivering justice, measures to reduce the length and complexity of litigation and improve efficiency, alternative means of delivering justice, the adequacy of funding and resource arrangements for community legal centres and the ability of Indigenous people to access justice. The committee has received 70 submissions to the inquiry, and all of those submissions have been authorised for publication and are available on the committee's website.

I remind all witnesses that, in giving evidence to the committee, they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of giving evidence to the committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee. We prefer all evidence to be given in public under the Senate's resolutions, but witnesses do have the right to be heard in camera. If you want to do that, you need to make a request to the committee and we will give that some consideration. If a witness objects to answering a question, they should state the ground upon which the objection is taken, and then the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. You can also choose to answer those questions in camera.

[4.15 pm]

McALARY, Ms Margot, Solicitor, Hunter Community Legal Centre Inc.

PINNOCK, Ms Elizabeth, Principal Solicitor, Hunter Community Legal Centre Inc.

Evidence was taken via teleconference—

ACTING CHAIR—Welcome. Do you have any comment to make on the capacity in which you appear?

Ms McAlary—I was the acting principal legal officer at Hunter Community Legal Centre at the time the submission was made.

ACTING CHAIR—Thank you. We have your submission. We have numbered it 48 for our purposes. Before I ask you to make an opening statement, do you have any amendments or alterations you want to make to that submission?

Ms Pinnock—No.

ACTING CHAIR—We invite you to make an opening statement and then we will go to questions.

Ms Pinnock—First of all, I would like to thank the committee for the opportunity to appear and give evidence at the inquiry today. As you will see from our submission, the Hunter Community Legal Centre is based in Newcastle and it provides free legal advice and assistance to disadvantaged people in the Newcastle and Hunter region. It covers 13 local government areas, a geographic area of over 29,000 square kilometres and a population of almost 700,000 people. The centre's area of operation covers a mix of both urban and rural and remote areas, and it is recognised as an area of significant socioeconomic disadvantage.

The centre is funded in equal proportions by the state and federal Attorney-General's departments. Briefly, the services that we provide under our recurrent funding arrangements include telephone advice, which we provide twice a week—and we provide in the region of 120 to 170 telephone advices per month—and face-to-face advice with clients of approximately 15 per month. We have approximately 52 cases open whereby we provide ongoing legal advice assistance and casework to clients. We provide monthly legal outreach clinics to organisations in Newcastle and outside Newcastle; namely, the Hunter Women's Centre, the Northern Settlement Services—formerly the migrant resource centre—and we also provide a legal outreach clinic to Taree.

We also provide legal representation in court. We provide a duty service at Toronto Local Court and we also on an occasional basis provide representation to clients at Newcastle Local Court. We also provide community legal education through community organisation such as the family relationship centre and, again, the Hunter Women's Centre and Northern Settlement Services. We also engage in law reform activities. We have recently provided a submission to the

review into community based employment advice services. We provide an advice session on Thursday evenings provided by members of the local legal profession on a voluntary basis.

Part of our state funding is provided for the purposes of the Hunter Children's Court Assistance Scheme, which is the court support scheme provided at the Broadmeadow Children's Court. A breakdown of the areas of law we cover, in order of size, would be: family law and children's matters, which would be the largest proportion of the matters that we deal with; we also deal with a large proportion of traffic matters, AVOs, credit and debt matters, and employment and discrimination.

I would also like to mention briefly a couple of other programs which we are running which are not part of our recurrent funding. One of those is from some funding we received from the Law and Justice Foundation which enables us to provide face-to-face legal advice clinics at outreach locations at Port Stephens, Dungog and Raymond Terrace, all of which are within about an hour's drive of Newcastle. These are areas where there was a need for these legal services which was identified to us by other organisations such as local neighbourhood centres. Those clinics run monthly, and they provide an important service to disadvantaged members of those communities who are unable to travel to Newcastle for face-to-face advice. The funding we have received for those projects is only for six months, so at the end of the six months, unless that funding is secured from elsewhere, those services will no longer be provided.

Also, in May of this year we were lucky enough to receive a one-off grant of $200,000 from the Commonwealth Attorney-General to provide a duty lawyer service at the Newcastle Family Court. This service is essentially to provide legal representation to unrepresented parties who appear at the family court and to provide associated one-off or ongoing legal advice and assistance services to disadvantaged parties in family law disputes. Again, this is a pilot program and will continue for a period of 12 months only. This funding has enabled us to employ one full-time and one part-time family law specialist solicitor and one part-time administrative assistant.

In addition to those two programs, we have applied but not yet received funding for two other projects from the Commonwealth Attorney-General, both of which have a family law connection. The recurrent funding that we receive enables us to employ 2.8 full-time equivalent solicitors and two full-time administrative staff. I think it is fair to say that our current level of recurrent funding does not enable us to adequately meet the demand for our services within our geographic area. We invite any questions relating to our submission.

ACTING CHAIR—Thank you and thank you very much for your submission. You have actually answered my first question. I was going to ask in what area the majority of your cases fall, but you provided us with a good breakdown and also some good pie charts. I have a couple of questions on your submission. You suggested that community legal aid centres should be able to charge a contribution fee, as Legal Aid does. Please tell us why you have that recommendation there and how community legal centres could manage that.

Ms Pinnock—As Margot explained, she was the acting principal legal officer at the time this submission was put together, so I might defer to her on that question, if she does not mind.

Ms McAlary—I should say that, at the time we were putting the submission together, we had suggestions from other solicitors at the centre. This was a suggestion from a solicitor who is not present today. It was trying to answer the question of how we can better resource our centre to provide services. The contribution fee was raised as a measure to address that. How it would work has not been investigated, but it was just a suggestion to help to address our financing situation and how we can finance the centre to provide services to such a wide area.

ACTING CHAIR—Would that be on the basis that, despite the income of the client, there is an expectation that they would make some contribution towards the service they receive from you?

Ms McAlary—Yes, in accordance with their financial means.

ACTING CHAIR—Currently everyone who walks through your door gets the service for free, do they?

Ms Pinnock—Yes.

ACTING CHAIR—No matter what their capacity is to pay is.

Ms Pinnock—If I can interject, basically we will provide limited telephone advice to anybody who calls the centre for telephone advice. We will then provide a certain amount of ongoing legal advice and assistance to certain people, and we apply criteria with regard to means, merit and disadvantage in determining whether we will provide that ongoing legal assistance. Whilst it is true to say that anybody can phone us for legal advice, if we ascertain from that phone call that they have substantial assets or substantial means then we will only give them limited telephone advice and then refer them on to somewhere else.

ACTING CHAIR—I would also like to ask you about another recommendation you have made, and that is about providing you with software that ensures equality of access to family law news. I assume you are talking about more than just an online newsletter. Are you talking about a database of cases and outcomes?

Ms McAlary—Yes. That recommendation was based on the need that has been identified by people who come in to the centre as locum solicitors. We do not have a precedent base. We do not have legal software that matches that of the private legal firms where there is consistency in the sorts of advice and precedent matters. We thought of it in terms of all CLCs being provided with a similar precedent base. It would also allow us to deal with matters in a quicker fashion. At the moment, each individual solicitor it would be fair to say has to rely on their own resources to find precedents and get through the sort of paperwork that has to be done to get matters to court or to help people with letter writing. We just thought if we could access a precedent base we could get through the work quicker and it would help to have a consistent output in legal centres.

ACTING CHAIR—Is this something that other legal centres have got and might have paid for out of their limited funding or is it something that no legal centre has got?

Ms McAlary—From the inquiries that I made of the national and state legal centre groups, nobody was aware of any legal centre that actually had this kind of facility.

ACTING CHAIR—I am assuming that the funding you get does not go far enough to provide you with the means to be able to purchase this. Is that right?

Ms McAlary—That is right.

ACTING CHAIR—Is that because the funding prohibits spending on software or computers, or is it that you have made a decision to allocate those funds in other areas?

Ms Pinnock—I would not say that we are prohibited by our funding bodies from spending money on software but it is fair to say that most of our funding is expended on salaries, essentials like rent and phone expenses and other administrative costs. We do not have much money left at the end of the day to spend on software which has, probably stoically, been regarded as a luxury in community legal centres. The other point I would make about the issue of software is that, because of the growth in demand for our services, it is now the case that solicitors who work in community legal centres have to be able to deal with matters involving many different aspects of law. From that point of view, it would be really useful for community legal centres to be set up with proper databases to enable them to deal with a debt matter in the local court or the application for a contravention order in the Family Court and do all those sorts of things. At the moment they are not properly set up to do that. It is the diversity of the legal matters that come through the door that creates the need for a very comprehensive software system.

ACTING CHAIR—I understand.

Ms McAlary—We do not have admin staff. The solicitors have to do their own typing. So that is where it would also be helpful to have access to software to make that easier.

Senator LUDLAM—I will follow on from there because a few people have raised this. It would help if you could explain to us the kind of licensing that software is available under. I assume it is case law that you are looking for. Is that mainly what you are after?

Ms McAlary—It includes case law but it is also a precedent base of letters for all different areas of law—the standard sorts of letters and correspondence that would go out for a matter. Everything is already available; you basically press a button and fill in the details and amend it appropriately. That would apply to all sorts of court documents as well.

Senator LUDLAM—Can you describe that for us? If it is complex you can take it on notice. Can you describe for us what is available in the marketplace at the moment? What would the costs be? What sort of licensing is it offered under?

Ms Pinnock—The one I am aware of at the moment is a software program called LEAP. I do not know whether you have heard of it. It is commonly used by solicitors in private practice. It has a number of aspects to it. It has a fairly comprehensive file management system, which is probably not appropriate for community legal centres. It has a comprehensive accounting and billing system, which again is probably not appropriate for community legal centres. But one aspect of the package which would be very useful for us is that they have step-by-step guides for every type of legal matter that might come into a legal centre—for example, as I mentioned earlier, the matters that are commonly dealt with in the local court, matters that are commonly

dealt with in the Family Court or matters that are commonly dealt with in tribunals such as the CTTT. It has a step-by-step guide to running a matter in those different courts and tribunals. That is the kind of thing that Margot is saying would be really useful because as community lawyers we have to turn our hands to these different areas of law very quickly and it would be very useful to have that kind of precedent system set up on our computers. It would mean that we could assist more people because we could do it more efficiently, basically. As far as the cost goes, it is difficult to be specific because I think the cost is worked out on the basis of each solicitor that uses the service. I did a rough costing, and to provide LEAP into our community legal centres would cost us about $7,000 over a period of about three years.

Senator LUDLAM—It is licensed by the number of people who would be able to access it?

Ms Pinnock—That is right.

Senator LUDLAM—I think that is something we can usefully pursue. Thank you. You have given us an overview in your submission of the regional area that you represent. I presume you are actually based in Newcastle physically.

Ms Pinnock—Yes, we are.

Senator LUDLAM—You are servicing a fairly extensive hinterland. Can you give us your insights into what that looks like? Do you give legal clinics in the region outside Newcastle? What sort of regional barriers do you have to overcome?

Ms Pinnock—Obviously the largest regional barrier is the distance. We cover an area which goes as far west as Merriwa. The legal outreach clinics that we provide at the moment go as far north as Taree, which is about three hours drive north from here. Apart from that we provide three legal outreach clinics at Raymond Terrace, Dungog and Port Stephens, all of which are within about an hour's drive. We do not go very far south and we do not go very far west simply because of the impact on our resources of having legal staff travelling to somewhere like, for example, Muswellbrook, which is three hours drive to the north west. It has a significant impact on our ability to provide our other services, which are basically the telephone advice, the case work, the CLE and the Law reform. If we had more funding we would probably be looking at providing legal outreach services in those areas which are further away. At the moment we simply cannot do that because of the burden it places on our resources.

Senator LUDLAM—And because you do not have the resources, the burden is then obviously placed onto the people who have to come to you.

Ms Pinnock—That is right. To be fair, we are able to provide limited assistance to those people because they can always phone us and we can give them legal advice over the phone. But for some people who need court presentation or whom you need to see face to face or who have large numbers of documents that need to be looked at or drafted then the fact that they live in Muswellbrook probably precludes them from getting a comprehensive legal service.

Senator LUDLAM—You have made the point in your submission that you do a large amount of family law work. One of your recommendations is that there be some sort of threshold test. Your words are:

A requirement be established that parties seeking to bring family law disputes to the court must seek legal advice from a qualified practitioner before the matter is placed on a court list.

Can you spell out for us your rationale for proposing that sort of test?

Ms Pinnock—I will make a brief statement, then I might defer to Margot, who is our family lawyer within the centre. Essentially, I think that recommendation arose from a realisation that many matters which end up at the Family Court are matters in which either one or both parties have not had either the opportunity or the resources to obtain legal advice and representation before they make their application or before they turn up at court on the day of their hearing. What that means is that both parties have no understanding of their legal rights or their legal responsibilities under the Family Law Act. If they have no understanding of their rights and responsibilities, they are not able to enter into negotiations for settlement of the matter and they are not able to understand the basis on which the court might make orders against them or in their favour.

Whilst there is a process for those parties to seek assistance in resolving their matters through mediation at the family relationship centre, that process also does not necessarily enable them to get a good understanding of the legal rights and responsibilities which they have in their individual case. There are moves afoot to change that. We have been asked to make a submission to receive funding to provide family law legal advice directly into family relationship centres, but my understanding is that at the moment there are still significant numbers of parties involved in family law disputes who have not obtained legal advice or representation before they appear at the Family Court. Does that answer it, Margot?

Ms McAlary—Yes. That is a fairly accurate summary of the situation.

Senator LUDLAM—I am still wondering what the consequences of that would be if that recommendation were to be taken up. Where are people going to find this kind of advice, particularly people on low incomes who are likely to be seeking support from a CLC in the first place? How are they going to jump that hurdle in order to get into the system?

Ms Pinnock—Initially, they would seek advice from a community legal centre such as ours. Obviously it would significantly increase the demand for our services if we were to be giving legal advice on an individual basis to all those people who were subsequently going to be involved in court proceedings.

Senator LUDLAM—It is a proposal that would reduce the amount of time we spend tying up the courts, but in order to get that benefit we need to resource the CLCs or the other legal advice avenues in advance.

Ms Pinnock—That is right.

Senator LUDLAM—Okay. Thank you. We have heard from a number of CLCs and representatives of community legal centres in the course of this inquiry. They have submitted to us that funding is provided on quite an ad hoc basis and that makes it very difficult to plan, to employ staff, to retain good staff. You are nodding, so obviously this sounds familiar to you. I am just wondering whether you could tell us what a sustainable funding basis would look like.

Without shooting for the moon, what would it require to really put you on a sustainable basis, where you are not continually wondering how you are going to make up your next budget?

Ms Pinnock—I think the first point to make about funding—and this is just my personal view; it is not reflective of our management committee or staff—is that it is better to fund community legal centres on a proper basis and recurrently because unless you do that you cannot, as you have already mentioned, provide proper accommodation for staff if you do not know where your funding is coming from or whether it is guaranteed. You cannot recruit staff and retain staff to do the jobs that you need them to do. All of that affects your ability to provide the services that you are supposed to be providing.

So one-off or ad hoc funding is welcomed but it is not the way to fund community legal centres on a long-term basis. At the moment we have a significant number of projects at our community legal centre which, as I have mentioned, are under threat of not being continued simply because they are one-off grants which enable us to do something for six months or 12 months. It is very difficult to employ people in that situation when you cannot guarantee them employment for longer than 12 months. We do not even have accommodation for them for that period of time and we cannot get accommodation for them because we cannot guarantee the funding. So it is a bit of a catch-22 situation.

As far as shooting to the moon goes, I think what we need to do is undertake a legal needs analysis of our area and that needs to be done on a community legal centre basis because community legal centres are reflective of their communities. Community legal centres need to undertake a needs analysis of their own community, decide where the unmet legal need is and then fund the legal centre according to that particular need. I suspect that in our case that would involve employing at least one other full-time solicitor whose job would be to go out into the outlying areas that we cover that we just cannot reach at the moment and provide some sort of basic legal outreach service. That would be the basic first step that I would suggest we should have for our centre because at the moment there is a large proportion of our community that does not get access to the full thrust of legal services simply because they live in remote areas.

Senator LUDLAM—Thank you for your time this afternoon. It is greatly appreciated.

ACTING CHAIR—There are only the two of us here this afternoon. Thank you very much for your submission and for making yourselves available for us to question you about it this afternoon. It is much appreciated.

[4.42 pm]

BALSAMO, Ms Fabienne, Acting Director, Strategic Policy Team, Australian Human Rights Commission

DICK, Mr Darren, Director, Policy and Programs, Australian Human Rights Commission

KISS, Ms Katie, Acting Director, Aboriginal and Torres Strait Islander Social Justice Unit, Australian Human Rights Commission

ACTING CHAIR—I welcome the representatives from the Australian Human Rights Commission. It is always a pleasure to have you with us. We have with us your submission which we have numbered 70 for our purposes. Before I ask you to speak to that, do you need to make any amendments or alterations to it?

Ms Balsamo—I want to make a correction to paragraph 25 which is on page 8. It should read that in Western Australia the ALS is the auspice body of some of the family violence prevention legal services and in South Australia the health service auspices the family violence prevention legal services.

ACTING CHAIR—Do you want to make a short opening statement? Then we will go to questioning.

Mr Dick—The commission welcomes the opportunity to appear before the committee today. We send the apologies of Commissioner Tom Calma who could not come at such short notice. We acknowledge that access to justice is an issue for all Australians and that raises issues of human rights. Our submission and the evidence are largely addressed towards the ability of Indigenous Australians to access justice, and the submission primarily refers to equitable Indigenous access to the criminal justice system and in relation to family violence.

Indigenous Australians, as we all know, are much more likely to come into contact with the criminal justice system as both victims and offenders. These are not discrete categories either with many offenders having experienced victimisation through violence and abuse, especially women. The commission is concerned about some of the barriers that exist for Indigenous Australians to access justice. In particular, we are aware of a significant under resourcing of Aboriginal and Torres Strait Islander legal services compared to Legal Aid. I think you have before you research conducted by Professor Chris Cunneen and Melanie Schwartz on the situation in the Northern Territory on this point.

The disparities between Legal Aid and ATSILS are exacerbated by the complex needs of Indigenous clients in accessing legal services such as relating to language, cross-cultural issues and social exclusion as well as through lower levels of educational attainment and higher levels of hearing loss, disability, mental health issues and so on. Given the sheer burden of numbers, many Aboriginal and Torres Strait Islander Legal Services are under considerable strain to meet the needs of the community. The commission has recommended that the level of funding to

ATSILS be increased to achieve parity with Legal Aid commissions and to reflect the complexities of the work that they do.

Indigenous women also face barriers in accessing legal services. Because of the work of Aboriginal and Torres Strait Islander Legal Services is predominantly criminal law focused, the greater part of available legal service is directed to Indigenous men who constitute a larger proportion of the Indigenous population who are charged with criminal offences. There are also too many gaps in our knowledge about the provision of legal services for Indigenous women and for this reason we have included a recommendation about a comprehensive audit about the existing provision of legal services to Indigenous women.

The recent expansion of Family Violence Prevention Legal Services to 31 units across Australia has increased the options for Indigenous women; however, the majority of these units are concentrated in regional and remote locations leaving a gap in services for urban Indigenous women. There is also a gap in terms of preventative measures and education which is due to the limited funding that is available for community legal education aspects of the work by family violence services. We see family violence prevention as being an essential part of an Indigenous family violence service.

The commission also recognises that often inquiries like this are faced with a lot of problems and barriers but often the best contribution they can make lies in being able to identify some of the solutions. One proposal that we have put forward in our submission, which is the focus of the forthcoming social justice report by the commissioner, is on the concept of justice reinvestment. This is a concept that emerged in the United States and now through the social inclusion approach in the United Kingdom. It has been implemented across 10 states in the United States including some of the most conservative states. It diverts a proportion of funds spent on imprisonment to local communities where there is a high concentration of offenders and then the money that would have been spent on imprisonment is reinvested in programs and services at the community level based on the needs of the communities. It builds social cohesion and the resilience of communities.

We note that the cost of delivering justice is one of the terms of reference for the inquiry. We think that the justice reinvestment concept is a way of ensuring that public money is spent on services that will decrease crime over time. We know that imprisonment has not prevented high levels of recidivism and has had a negligible impact on crime rates generally particularly in Indigenous communities. Justice reinvestment would identify where offenders are coming from, look at the legislative and policy reasons for high incarceration rates and put in place a targeted program of reducing imprisonment so that the funds can be reallocated to crime prevention services in those communities.

The preliminary evidence from the United States shows that the justice reinvestment concept is proving effective. For example, in the state of Kansas they have had a 7½ per cent drop in their prison population in the past two years with revocations of parole down by 48 per cent and the reconviction rate for parolees dropping by 35 per cent. 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.

The evidence on justice reinvestment shows that it is a viable alternative in Australia, especially with Indigenous communities that have high levels of imprisonment and would benefit from an additional crime prevention focus. Unlike many other proposals, this one has the potential to save taxpayers money by cutting the hugely expensive imprisonment costs that are a constant across all states and territories. We welcome any questions you might have about the submission.

Senator LUDLAM—Thank you for coming in. One of the reasons I was really keen to get you in was that I saw Commissioner Calma speak about justice reinvestment at a presentation, at the AHRC conference, in Sydney a couple of weeks ago. It was great—he really held the room. I want to focus a few questions around that. To go to the examples you just mentioned: you said preliminary results are in. How long have these sorts of programs been running in the US?

Mr Dick—They have been running for about five years now in a number of the states, starting largely in places like Kansas and Texas.

Senator LUDLAM—I think that was the thing that was most surprising to me, that they started in some of—to an outsider's perspective—the harshest state law enforcement regimes in the Western world. How did they get it started? Was there a political or cultural shift, and are we ready for that sort of concept here in Australia?

Mr Dick—We had a number of meetings with some of the originators of this process when we were attending other meetings in New York. I think part of it was the frustration that we all know about these issues. We all know about the overrepresentation of minority groups in the US, largely African Americans. What the initial proposal had done was try and provide a different way of looking at the issue. In that instance, it was more of a geographic mapping, where you could actually look at the circumstances of a particular community and identify what the crime impact was on that community. It was a visual way of representing what was already known. They came up with—what you may have heard, if you heard Commissioner Calma speak—million-dollar blocks. The idea was that in some communities when you calculated the costs of imprisonment and crime—physically, over a block of a city or something—it came to multimillions of dollars.

One example is a place called The Hill, in Connecticut, where $20 million was spent in one year to imprison 387 people in one block. The idea was that if you know specifically where the crime is occurring, a localised response to that crime—by putting in alternative preventative measures in the first place—can actually prevent the crime. Obviously prevention, as we know anecdotally and through a lot of research, is a lot cheaper than the cost of imprisonment and, in many cases, the cost of building or servicing new prisons.

That is a very live issue here in Australia, with a new prison being built in the Northern Territory and with research showing that there will need to be a new prison built in New South Wales every two years from 2015 to keep up with the growth of the prison population.

Senator LUDLAM—How well-mapped is Australia, as far as those indicators go that were started in the United States? If we put this proposition to the government, that this approach be tried here, would they say, 'Come back in 10 years when that is all mapped,' or are we ready to get started?

Mr Dick—We do not have the level of information that is needed at the moment, but we certainly have the start of it. We have, for example, Professor Tony Vinson's study called *Dropping off the edge: the distribution of disadvantage in Australia*, where he analyses different indicators of disadvantage by postcode. So you have some information there. Similarly, there is research that has recently been published by the Centre for Aboriginal and Economic Policy Research which is based on data from the Australian Bureau of Statistics and is called the *Socio-Economic indexes for areas*. That, again, gives you some basic mapping information. It is incomplete, but is the sort of information that could be developed, with some focus. A third source—which may be a bit controversial to suggest—is the Northern Territory Emergency Response, where we have had some instances of fairly comprehensive mapping. There has been a lot of auditing and identification of the level of services that are available in those communities. I do not think it is focused specifically on criminal justice and imprisonment issues, but it has certainly crossed over to all the other issues that affect that. So you have a range of data that may provide an appropriate basis on which to start doing this and to trial some models.

ACTING CHAIR—This is incredibly interesting, given what you say about the need to build more jails—and you have already reiterated what we know, and that is that the Territory government are planning to build a new jail. If we are going to divert some of the funds that are currently used in that area, aren't we really saying to the states: 'You need to divert your funds'? Or are you suggesting that maybe the Commonwealth could trial a few areas initially and assist to prove it is worth while?

Mr Dick—It clearly does cross over jurisdictions. Part of the justice reinvestment is that it is not simply about diversionary programs, for example. You do the mapping and the auditing of the services that exist, which would be everything from the overcrowding in communities to the health and education services through to the reasons why people are going into prison. We know in the Northern Territory, for example, that it is estimated—this may well even be in the submission by the Northern Australian Aboriginal Justice Agency—that you have 450 Indigenous offenders serving short sentences for traffic offences. In that instance, a change to the law may be required to bring those laws into basically the same sort of territory that they are in in other states, because that is one area in which they are clearly not. So 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.

Senator LUDLAM—I think that is really the key question as to what recommendations the committee might make to the Commonwealth government. How did they get around that in the United States? What contribution did the US federal government make to programs like this, or was it devolved to the individual states concerned?

Mr Dick—As I understand it, it is largely at a state level because the states run the processes. But there are also some instances where you have prisons that are run by the federal government there and the costs of imprisoning people are then charged back to the states, so you have a different sort of cost dynamic in that instance. The other thing here in terms of this is that you do have now, through the Council of Australian Governments, a fairly significant new set of

architecture for federal-state relations around Indigenous issues, with the National Indigenous Reform Agreement and several of the national partnerships, including the national partnership to Close the Gap. It may well be that it is an appropriate subject matter for inclusion within national partnerships, to actually look at co-funding arrangements.

Senator LUDLAM—Have you put this proposal to SCAG, for example?

Mr Dick—We have not, no. There will be much more detailed analysis of rolling out the justice reinvestment concept in the forthcoming social justice commission report, which will probably be tabled in parliament early next year, I would have thought, and will include recommendations on that.

ACTING CHAIR—Is Mr Calma's speech that Senator Ludlam was referring to on your website?

Mr Dick—Yes. We can provide that.

ACTING CHAIR—That would be great. Are you aware of whether or not our Attorney-General has picked up justice reinvestment and is raising it at SCAG, or is this just starting to enter the debate about imprisonment rates now?

Mr Dick—It is something we have certainly put into submissions to the Attorney-General's Department in the development of the national Indigenous justice framework. I do not think it has been picked up as yet. We have consistently raised it for the last 18 months to two years but, as the research in the US and the UK is starting to become more available, we have certainly given a lot more attention to it, and Commissioner Calma has flagged it as one of the priority areas that he wanted to continue to raise in the remainder of his time.

Senator LUDLAM—I have just got one more on that and I will move on and ask about some of the other issues that you raise. If you could phrase it has clearly as you could, what recommendation would you want to flow from what you are proposing today for actions that the Commonwealth government should take to move these ideas forward in Australia?

Mr Dick—It is probably a combination of things. First of all it would be acceptance that justice reinvestment is worth trialling in Australia—that 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. I have one that just went out of my head. I will try and recall what it is. There are a number of opportunities. The Coordinator-General for Remote Indigenous Services, for example, would be another. There are a number of priority areas that are identified nationally, not just in the Northern Territory, where the mapping may well show that they are areas of high need.

Senator LUDLAM—Absolutely. I can think of places in WA. A lot of different people have come to us in the course of this committee and offered suggestions that cost various amounts of money. I think you are among the first to propose a funding base for some of the services that are so desperately needed. That is greatly appreciated. Can you explain why there has been such a dramatic increase in the rate of incarceration of Aboriginal women?

Mr Dick—Yes. We have done a range of research on this that started with the social justice reports from 2001, 2003, 2004. Most of our general analysis comes from those reports and also recent research. We know that the increase in the rate of Indigenous women being imprisoned nationally has been a 46 per cent increase between 2000 and 2008. We think this is a combination of factors. One is the situation of disadvantage that many Indigenous women face. They are among the most disadvantaged Australians in the country, with high levels of unemployment, low levels of education and often an extensive history of engagement with the criminal justice system. The statistics show that approximately 60 per cent of Aboriginal women who end up in prison have been involved in juvenile justice. So a lot of the issues coming at a fairly early stage in that cycle.

There is a very high level of correlation between victimisation of Indigenous women and offending behaviour. There is research in New South Wales that shows that 70 per cent of Indigenous women who are imprisoned have been sexually assaulted as children or have suffered other forms of abuse. There are 78 per cent who say they had been victims of violence as adults as well. Ninety-eight per cent of women who were sexually assaulted as children state that they have had drug problems as well. There is a clear connection between them being victims of family violence and abuse primarily leading on to criminal behaviour themselves.

We know from research that the commission has conducted as well that when Indigenous women leave prison they have very limited options upon release, often leaving them without housing and without other forms of support. It is often unsafe for them to return to their communities if they have suffered violence and so on. On top of that you add the parenting responsibilities that they have. This results in higher recidivism rates of Indigenous women coming out of prison going back into prison. It is a fairly complex cycle of issues that Indigenous women face.

The other fact of it, though, which can be attributed to some of the change, has been things like changes to bail legislation, increasing use of remand and the greater use of custodial sentences for certain offences, which has meant that Indigenous women have been increasingly captured in the net of the system, for want of a better word.

Senator LUDLAM—We heard from ALS in Perth and a number of other witnesses early on. You, too, have raised in your submission conflict of interest issues arising from the different agencies that will find themselves quite often representing men in domestic violence cases, which then leaves them unable to represent women. Can you sketch for us your thoughts on how that issue can be addressed? There are a few proposals that have come forward so far.

Ms Balsamo—I first say that the capacity in which we speak about, say, the Family Violence Prevention Legal Services is because the commission ran training for community legal education workers in 2008. We keep fairly regular contact with those services, with coordinators and with solicitors. We have heard mixed things. For example, we have heard that in South Australia the

ALRM—Aboriginal Legal Rights Movement—provide services to the complainant before they will provide a service to somebody who is potentially a defendant.

Senator LUDLAM—Are they the only one you know of who offer that sort of precedence? I have not heard that before.

Ms Balsamo—That is the only one that I know of. In South Australia, though, the situation is quite different. On the positive side, in WA we have heard that the support of the Aboriginal Legal Service for the family violence units there has improved their access to solicitors and the standard of solicitors who are going out to these family violence units. Some of them are happy to have the support of the ALS, but there are the conflict of interest problems that you have heard. Some of it in South Australia is that the health service is the auspice body. Access to information and file sharing has not been made clear between the health service and the family violence unit. This has been an issue and even though they have an MOU in place there has been some difficulty. They have had to clarify. I am not aware of the specifics in WA, though.

Senator LUDLAM—That is okay. One of the proposals that we heard was that there should be a dedicated legal service for Aboriginal women. It was not actually a criticism of the ALS at the time; it was just that this was how it evolved. Do you have any views about whether that is oversimplifying? Would that work around the country? Is that a proposition that you have come up with yourselves?

Ms Balsamo—I think it is definitely an ideal situation. For example, in Port Lincoln the family violence service runs out of the community council. There is a safety issue there for women who are accessing the service and for other people who might be there at the community council. I think they have set up a screen—they have done what they can about safety—but generally those issues are there for women.

Senator LUDLAM—I have a couple more and then I will throw to some of the other senators. Your submission recommends that ATSILS funding should be increased until it reaches parity with legal aid. Do you have any idea how much funding that would require?

Mr Dick—No. We know that in 2003 ATSIC estimated there was a shortfall of approximately $25.6 million per year. I do not think there has been any more recent analysis than that. We know that, since then, there has been limited real increase in the level of funding for Aboriginal Legal Services and also an increase in the workloads that they are facing, so it is likely to be more than that amount. We are not in a position to accurately estimate what it would be beyond that. Ideally, it may be that you are looking at consistent funding formulas as the way it is worked out. You could show a parity in treatment rather than the amount.

Senator LUDLAM—And obviously the CLCs also have submitted that they operate under enormous budget constraints as well. So would you include community legal centres more broadly in that request for funding?

Mr Dick—Certainly community legal centres do have the history also of providing services to Indigenous people. As you have said, there has also been a preference for specific services for women. The issue for community legal services, for legal aid and others is really around cultural competence and the appropriateness and security of those legal services, so Aboriginal people

wanting to use them as well. But they certainly have taken a strong role in supporting Indigenous clients.

Senator LUDLAM—I will wrap it up there. I greatly appreciate it that you could come in this afternoon.

Senator FISHER—I have one question. I understand that resource constraints mean you have confined your submission largely to issues for Aboriginal and Torres Strait Islander people. I want to ask you about access to justice rurally and regionally. I note your observation in the context of Aboriginal and associated concerns. I think you have essentially expressed the view that there is less service urban-wise than there is regional-wise in that respect. Your people have experience. Do you have any broader contribution that you can make whilst you are here in respect of access to justice rurally and regionally?

Mr Dick—I think they would be very broad. Recently we have had the release of the report by the National Consultation Committee on Human Rights, the Frank Brennan report. They visited a lot of communities nationally, received a record number of submissions and so on. It is very clear that the further away you get from cities the less access to justice there is. That is a very central finding of that report, as well as the lack of understanding people have generally about their human rights, but I think you could say also about their legal rights. So I do not think it is a stretch to say that the services do become less comprehensive the further out you get from the cities. But that is a very broad finding.

Senator FISHER—Does the report drill down into it in any further detail? Is there anything you would point the committee to? You may not be that familiar with it.

Mr Dick—We would have to have another look but we can certainly send through any further information. The Attorney-General's Department will probably be more across it and I think they are appearing later.

ACTING CHAIR—I have a couple of areas I want to ask about. On Indigenous women's legal services, in Darwin there is a Top End women's legal service. Is it your view that there should be an audit of women's legal services across the country to see when the gaps are, and/or where there is a women's legal service in operation should it be expanded to have capacity to cope with Indigenous women in a culturally appropriate way?

Mr Dick—The way the recommendation is drafted is a comprehensive audit to identify where the gaps are for legal services for Indigenous women. I think we had four parts to the recommendations around information about the areas where legal services exist, information about areas where there are no services or limited services, profiles of the locations from which women are being incarcerated and the types of crimes which would enable that justice reinvestment mapping and recommendations around better provision of legal services. We have not gone to the level of whether they ought to be specific or more broadly applicable services. I think if they are more broadly applicable they would have to be culturally appropriate as a main criterion obviously.

ACTING CHAIR—But your recommendation is that essentially we need to actually find out what is out there and where are the gaps, to start with.

Mr Dick—Yes, and we know, for example—Fabienne might speak to this—that there are gaps in services some of which are fairly inexplicable really. Do you want to give the examples that we have there?

Ms Balsamo—Yes. For example, sometimes a family violence unit might want to provide a service to an area where they know there is no service, and they have been told that they are unable to or that they are not to go out and extend that service even when they have found provision in their budget, they have a car and they have found petrol money to go out there. So there are gaps we have heard of, specifically in the Northern Territory—in the Barkly region—and also in South Australia around Yalata.

ACTING CHAIR—What about the criticism we have had in this inquiry—some people have submitted it—that the Family Violence Legal Prevention Service has become more concentrated on the perpetrator or offender rather than the victim and that there is now a need to look at a service that assists the victims? The view is that the family violence services have not so much changed focus but have re-emphasised their support for the offender. Is that something that you are hearing or that you have picked up in your research?

Ms Balsamo—I think what is happening is that family violence units are trying to do more community legal education. They are not actually providing a legal service to perpetrators; what they are trying to do is increase public information in communities through Aboriginal people going out and working with families, including men and women, with the realisation that so many of the women go back to their partners, that children are at risk and that the only way to resolve or change this situation is through, firstly, educating perpetrators about what is a crime under Australian law—that includes whole families, including perpetrators, and men within the community generally—and also running public information campaigns about remedies. I think people have said that they are providing services for perpetrators, but that is not actually the case in terms of legal services.

ACTING CHAIR—I see. I just needed to clarify that. I do not think we have any other questions this afternoon, so I thank you once again for your submission, your evidence and your expertise in assisting this committee with its deliberations. Thank you.

[5.20 pm]

RHEINBERGER, Mr Luke, Spokesman and Immediate Past President, Law Society of Tasmania

Evidence was taken via teleconference—

ACTING CHAIR—Welcome. The Law Society of Tasmania has sent a submission to us, which we have numbered 67. Did you need to make any changes or alterations to that?

Mr Rheinberger—I do not. The only question I would ask is whether the submission that came with that is going to be tendered as well with my submission of 11 August.

ACTING CHAIR—We have currently a one-page document, back and front.

Mr Rheinberger—There was with the submission a submission of Toomey Maning and Co dated 12 May 2009. They are referred to in the second last paragraph of the submission.

ACTING CHAIR—I see. You say that you enclose one submission from the Hobart firm Toomey Maning and Co. Yes, we do have a copy of that.

Mr Rheinberger—I would appreciate it if that could be part of my submission.

ACTING CHAIR—So it is not a separate submission; it is actually included as part of the Law Society of Tasmania's submission to us?

Mr Rheinberger—Yes.

ACTING CHAIR—So I guess that when you check on the website the two are not linking; is that right?

Mr Rheinberger—I could not find the latter one on the website.

ACTING CHAIR—Thank you for clarifying that for us. Monica from the secretariat has gone to get us a copy of that. We will make sure that the website is corrected and it is linked for the purposes of this inquiry. Thank you for drawing that to our attention. Our apologies there. Would you like to make an opening statement about your submission before we go to questions?

Mr Rheinberger—I preface my submission by noting the amendment to the Federal Court of Australia Act that was moved in the Senate today. That is an amendment to section 34 of that act. In effect, if that amendment passes the House of Representatives and becomes law then that is the thrust of my submission I suppose—asking for a registrar for the Federal Court on a full-time basis. So I preface my submission by saying that I may be preaching to the converted to some extent. Nevertheless, I will press on because it, of course, is not a sure thing that that amendment will carry through in the end.

Principally, I want to say that, as a matter of principle, the society believes that the matters that it has raised in its submissions impact on access to justice in this state. That matter of principle is one that I am confident that, in particular, senators of the Australian parliament will understand. That proceeds from the basis that, in a federation of states of differing sizes and differing strengths, with respect to certain federal institutions and with respect to certain matters, there ought to be an equality of treatment for each state. The thrust of my submissions on that matter of principle is that having a dedicated Federal Court registrar in this state and the services that he or she provides are, both from an organisational or institutional perspective and from a provision of services perspective, matters which ought not to be compromised. With the recent changes to the Federal Court structure in Hobart, it is the Law Society's view is that those matters have been compromised.

In short, we say that the Tasmanian District Registry ought to have a resident, legally qualified registrar. Leading from that, to say that the level of service of the court will not be adversely affected if there is not a registrar present and on the ground on a full-time basis is, quite frankly, illogical. The submission that we have made is that the service as it stood at the time of the submission to this committee was able to provide a timely, convenient and personal service. That submission was backed up in 2005 by the review of services of the Administrative Appeals Tribunal by the Federal Court. This matter of principle, if I can say so, is one that is being studiously ignored by those I have made submissions to in respect of this issue.

There are a number of other issues, obviously. They are set out in the society's letter of 11 August 2009. I will not go through them in any great detail. In short, the society considers the review itself to be flawed, particularly in respect of supposed cost savings and failure to consider other options. Apart from those matters, the society broadly accepts the submissions of Toomey Maning and Co. that were attached to the submissions. That is all I wish to say at this stage.

ACTING CHAIR—I come from the Northern Territory, so I think we suffer the same fate when it comes to attention for Federal Court registrars.

Mr Rheinberger—Yes. You have had a time of it, as have we.

ACTING CHAIR—In this internal review conducted by the Federal Court of Australia, I am assuming they looked at the number of cases and the complexity of cases during that review?

Mr Rheinberger—They did. They looked at the number of filings. I do not know if they went too much deeper than that in the review. If I take a step back, the difficulty with the review from the start was it began with the review team setting up four options for change and, discounting three options for change, picking the one that would leave Tasmania without a district registrar, as well as the Northern Territory. Then they said, 'Now we'll consult.' So you can imagine that from our point of view there was a feeling that the review was done the wrong way around. In other words, you should consult and then make a decision, rather than make what appears to be a decision and then consult. We thought we were behind the eight ball from the word go. The answer to your question is, yes, they looked at the number of filings, but we would say they did not look at a number of other relevant matters such as the other tasks that the registrar here carries out in particular. But, yes, that is one of the things they looked at.

ACTING CHAIR—Did the Law Society make a submission to the Federal Court or, as you say, was your submission only accepted after they had pretty much made their decision?

Mr Rheinberger—We made a submission on the consultation paper. That, as I say, was the paper that had the preferred model in it. Yes, we made a submission to that. I wrote to the Chief Justice of the Federal Court as well on two occasions, I think. I am aware that, for example, the Attorney-General here, Senator Brown, Senator Abetz and Duncan Kerr, all wrote either to the Attorney-General or to the Chief Justice on the issue.

ACTING CHAIR—So, no doubt, in the view of the Law Society, firstly, there is enough cases filed to warrant somebody down there full time and, secondly, I take it from your submission that the apparent savings of $200,000 does not take into account the fact that you are now going to fly somebody up and down from the mainland? Is that your view?

Mr Rheinberger—Perhaps if I can deal with the first question first. I do not know whether there are enough cases to keep a registrar in Tasmania busy, for want of a better word, on a full-time basis. However, no other options, it appears to me, were seriously looked at. That, for example, includes that the case registrar at the time this review was being carried out would go to Melbourne and assist in backlogs and work in Melbourne. There was no, for example, looking at whether there might be a registrar here on a 70 per cent basis or an 80 per cent basis or something of that nature. I do not have a detailed knowledge to be able to say that there are enough cases to keep a registrar busy on a full-time basis.

In the answer to your second question, yes, one of the flaws in the review process was that there was a saving put with a different model of staffing in the Hobart registry, but there was no costing of what it would cost for Melbourne registry staff to provide the same level of services to Hobart. I think the registrar has given some evidence to Senate estimates about that.

ACTING CHAIR—All right. Thank you.

Senator LUDLAM—Thank you very much for providing your evidence, with acknowledgement that this is being debated today and may well be on its way to resolution, all being well.

Mr Rheinberger—Yes.

Senator LUDLAM—That being the case, because in your submission you state that Tasmania should receive no less standard of service than any other state—or territory, I guess—are there any ways that you believe Tasmania is being overlooked in the context of the terms of reference of this inquiry?

Mr Rheinberger—I suppose I have only concentrated in preparation on this one issue of the Federal Court. There would probably be people who might be better qualified than me, for example, in terms of legal aid or Indigenous access to justice, who could probably answer your question far better that I can. I suppose my answer to your question is that I do not think there is anything at the moment that is either so pressing that I think I need to mention or that I think I am up to speed enough on to be able to give evidence about before the committee.

Senator LUDLAM—That is okay. Thank you very much.

Senator FISHER—Three court offices in separate country locations in South Australia, Kadina, Coober Pedy and Ceduna—must be the C or the K word—have been targeted for closure. In my backyard we have some insight into the sorts of problems that you are contemplating. It is not only about access to justice for people being restricted or denied by the closures of a court. Do you have a view on the consequent impact of that on the supply of lawyers in country areas? Closure of a court is hardly going to be an incentive for more lawyers to come or to stay.

Mr Rheinberger—I know the Law Council will address you shortly. It has certainly been identified for a long time, and more particularly this year, by the Law Council that access to justice in country areas is at a real risk. That is because of problems in attracting and retaining lawyers. If you take courts out, of course, it makes it less attractive to practice somewhere and that does affect lawyers wanting to practice in an area if there are not other institutions there. From my point of view from my own backyard, one of the dangers with the downgrading of the registry, if you like, is that there is a risk that litigants may feel, if their registrar is in Melbourne and they are on videolink to and from Melbourne, that they ought to instruct lawyers from where the court is sitting. That is one possible long-term downside that I see. The other argument is the thin end of the wedge argument. From my point of view that would go something like 'We lost our registrar during a global financial crisis. In seven years time when there is another financial crisis, it could be the case that the court says if a hearing is only going for one day, you can fly from Hobart to Melbourne.' You would not only lose a registrar but then people would be expected to travel long distances. They are all dangers and they potentially affect my members.

Senator FISHER—Thank you.

ACTING CHAIR—Thank you very much for your attendance this afternoon and your ability to make yourself available for this inquiry. Can you please pass on our thanks to the Tasmanian Law Society for their submission?

Mr Rheinberger—Thank you to the committee for providing the opportunity.

Senator FISHER—Apologies again from Senator Barnett. He will be very sorry that he has missed your presentation.

Mr Rheinberger—Thank you.

[5.38 pm]

EDWARDS, Mr Peter, Policy Lawyer, Law Council of Australia

WOODS, Mr Mark, Chair, Access to Justice Committee, Law Council of Australia

Evidence was taken via teleconference—

ACTING CHAIR—I welcome the two representatives from the Law Council of Australia. Our chair, Senator Barnett, is not available this afternoon and sends his apologies. The bells for the Senate are ringing which you will be able to hear and we have to go to vote in a division. We will be back as soon as we can to continue with the hearing.

Proceedings suspended from 5.40 pm to 5.48 pm

ACTING CHAIR—We have the Law Council of Australia's submission which you lodged and we have numbered 12 for our purposes and records. Before I ask you to make an opening statement, do you need to make any changes or alterations to that?

Mr Woods—I do not think so, Senator, thank you.

ACTING CHAIR—If you would like to start with a short opening statement we will then go to questions.

Mr Woods—The Law Council, as the Senate is aware, is the peak body representing lawyers throughout Australia. We have some 50,000 members through the law societies and bar associations around the country, and we thank the Senate for the opportunity to appear before it. The Law Council has noted the speeches made by a number of members of the government and indeed the opposition during the course of the past decade about enhancing access to justice to Australians. We are mindful that there is presently a move afoot to enshrine some of the rights of Australians in a human rights charter. But the reality is that, because of the matters that we set out in our submission, there is a real lack of access to justice for many Australians at the present time. In other words, they have rights already but they simply cannot pursue them in far too many cases.

The Law Council believes this committee's inquiry comes at a crucial time for all of those people concerned with access to justice. The Law Council notes that we have had some 10 years of ineffective access to justice policies and that they have produced, amongst other things, cutbacks in funding, an unproductive concentration on the so-called Commonwealth-state divide in legal aid funding and a serious reduction in the number and seniority of practitioners prepared to undertake legal aid work.

We have had the opportunity to read the transcripts of other witnesses who have appeared before the committee, and every organisation that has provided evidence to this committee highlights the fact that the legal assistance sector is chronically underfunded. It follows that access to justice by Australians is seriously impaired. The Law Council says that there is now

irrefutable evidence that the low rate of remuneration paid to practitioners is turning lawyers away from legal aid work. That has been consistently demonstrated in reports produced by TNS Social Research that was commissioned by the government back in 2006-07 and a report by PricewaterhouseCoopers which was commissioned by a number of constituent bodies of the Law Council. As an example of the rate of remuneration currently being paid to practitioners, may I draw your attention to page 19 of our submission. That demonstrates that legal aid fees have fallen far short of the 80 per cent that has been considered a fair proportion of private fees in the past. At their highest, legal aid rates in this example from Victoria do not even reach 50 per cent of average private fees and in most areas fall significantly short of this, sometimes as low as 15 per cent. The Law Council says that it is unreasonable to expect that the profession will continue to prop up the legal aid system if rates of remuneration are not improved. We say that in the context of the published figures about the amount of pro bono, or for free, legal work that is undertaken by the profession. That has been published recently by the National Pro Bono Resource Centre. That indicates that the profession is putting in in real terms almost as much as governments are for those people who cannot afford legal services, as well as being chronically underpaid by the legal aid system.

The Commonwealth government, we have to say, has been largely responsible for the stagnation in legal aid funding over the past decade. The figures in the submission made by the Law Council show that in 1996-97 the Commonwealth contribution to legal aid in Australia was $128 million out of a total income for legal aid commissions around the country of some $264 million. That was about 50 per cent of the funding given by governments one way or the other. As a result of the 2009-10 budget, the Commonwealth contribution has dropped to roughly 33 per cent of that total income. It is clearly an unsatisfactory arrangement.

We say that the system is in crisis for a number of reasons. One of the contributing factors that I concede is not really a federal matter but has to be looked at as part of the access to justice system in Australia is the likely significant decrease in public purpose funding during the course of the coming 12 months. You will be aware, Chair, that public purpose funding results in the garnisheeing of interest on trust accounts around the nation being paid into a central fund, invested and then used for a variety of public purposes, one of which is legal aid. In effect it subsidises the contributions made by state governments. Our fear is that if state budgets become tighter then they will rely more on public purpose funding, and the reality is that that funding simply will not be there as a result of the current state of interest rates and of commercial activity out there in the economy.

The Law Council believes that an injection of funding into community legal centres is necessary to allow CLCs to continue to act as an essential tool of social inclusion. Funding levels, we say, should reflect the fact that the CLCs are at the forefront of developing policies and programs to ensure fairness and access to justice. It is widely acknowledged that dedicated Indigenous legal providers are the most underfunded sector of all legal aid service providers, notwithstanding the recent slight increase in funding as a result of the last budget. The reality is that some lawyers are being asked to work in circumstances in regional and remote Australia where they are paid less than a junior secretary would be paid in the capital cities.

Our submission also includes some very important structural reforms that we suggest. The first is developing a mechanism to break down this rather hideous Commonwealth-state funding dichotomy; the second is the creation of a truly national legal aid means test; and the third is the

restoration of funding for and the establishment of a civil legal aid system. The cold hard facts are that in 2007 the Commonwealth contributed about $8 per head of population on legal aid and access to legal assistance. In 2009 it is under $7 per head, which is a 12½ per cent decrease in Commonwealth commitment to access to justice. It is for that reason that we say the situation is dire and needs to be addressed. I think that is probably all I need to say. I am happy to take your questions.

ACTING CHAIR—Thank you. You have got a suggestion that there should be the creation of a truly national legal aid means test. A number of submitters have put to us that perhaps community legal centres ought to be able to charge some sort of fee such as Legal Aid does. Is that where you are heading? Are you talking about a fee for the client or are you talking about standardising the cost of services?

Mr Woods—The means test standardisation really relates to having a means test which means that, no matter where you live in Australia, you are tested on the same basis as to your eligibility for legal aid. I will give you a simple example. I am a regional and rural practitioner in eastern Victoria, and the current legal aid means test says that if a person has more than $100,000 worth of equity in their primary residence then they will be ineligible or only partially eligible for legal aid. That is a means test which is silly in Melbourne or Sydney or Brisbane because, although you can have a very small household income per week, you might have a house which is worth a lot more than it would be in regional Victoria. There is a need to standardise that, taking into account the cost of housing and those sorts of expenses across the nation.

ACTING CHAIR—What do you think about introducing a structure whereby all clients who access community legal centres contribute some cost based on a means test?

Mr Woods—A lot depends on whether the contribution is going to be worth its collection. I will explain what I mean by that. We had a system in Victoria probably a decade or so ago which obliged people to contribute at least $30 to each piece of legal work that was being undertaken on their behalf. What the legal profession working within the commission as salaried lawyers and outside the commission found was that that simply was not worth collecting. You would spend more collecting the money from the person than the $30 that you ultimately got.

The second issue is whether it should be tied to the total value of the legal services that are provided by the CLC, or anyone else for that matter, or it should be tied to that person's income. If it is tied to that person's income then the issue of equity is satisfied, but it does not do much to assist the total funding pool for legal aid or CLCs. In other words, if I am running a bail application for somebody's son in a magistrates court and the costs of the legal service is $500 and that person is assessed as having to pay $50, that is okay, but if I am running a bail application for the same person in the Supreme Court and the costs are $1,000 then their $50 contribution is not going to go anywhere towards increasing the funding pool available. Then there is the issue of it being collectable.

There has been an argument which says that CLCs ought to be able to collect funds from people who are non-pensioners—in other words, people who would otherwise not be eligible under legal assistance guidelines. The problem with that is that it simply then pits CLCs against private lawyers for remunerative work. That is not a desirable thing in the interests of access to justice because those CLC lawyers who were there simply to look after people who cannot

afford private lawyers should not thereby be acting for those who can really afford private legal representation.

Senator LUDLAM—You have spoken at some length about how to break down the state-Commonwealth funding divide. Can you describe for us what that mechanism would look like in an ideal world or an ideal federation at least?

Mr Woods—There are a number of ways in which it can be done. In the early 1980s the late Senator Murphy, as he then was, set up a system which described people as 'Commonwealth persons'—they were persons who were in receipt of a Commonwealth pension or benefit, who are or were members of the military services, who are Indigenous Australians and so on—and said that the Commonwealth should provide sufficient legal aid funding amongst those groups of people who need legal aid. That was the Murphy vision. Thereafter there was an understanding that there were some significant areas of Commonwealth legislation which would require the Commonwealth to inject funding into legal aid because of the increased legal services that were necessary by virtue of that legislation. For that reason there were legal aid commentaries, if you like, on pieces of legislation.

Primarily, the law council's submission is that the Commonwealth is the greatest gatherer of tax revenue and that it follows therefore that it ought to provide the majority of the funding for the legal services that are provided by legal aid. We give the example of the family law situation. Where there has been domestic violence there are obviously issues arising under Commonwealth legislation as well as issues arising under state crimes legislation. It is absurd for us to be having a funding mix based upon the fact that one level of government is responsible for one piece of legislation and one for another.

Senator LUDLAM—Yes; I think 'absurd' is being polite. We have certainly been given some case studies of just how badly that works in some cases. It is great that you have had a chance to look at some of the other submissions, so I would like to bounce some proposals off you that have come up in the course of this inquiry because, rather than just produce another set of recommendations that most of us probably know off by heart, we are trying to come up with some very strong proposals on how to turn the situation around. Are you familiar with the proposal from the Australian Human Rights Commission, which this committee just heard from—in particular from Commissioner Tom Calma, who is promoting a system known in the United States as 'justice reinvestment', where you divert resources that are going into areas of very high incarceration and put them into the kind of resources that divert people from the justice system and from imprisonment? Have you come across that notion and do you have any views?

Mr Woods—I have not had the opportunity to read the specific submission to which you refer but I am aware of it. It broadly comes under the whole idea of restorative justice, as I understand it. It comes from the proposition that victims of crime in particular might be sated, to some extent, by throwing someone into the slammer for a period of time, but ultimately that does nothing for the future victims of that particular person, who is not rehabilitated, nor does it do anything for the victims themselves once they have calmed down from the idea that the perpetrator of the crime has been incarcerated. And keeping people locked up is a massive cost to the community—an absolutely massive cost. Diversions are one method of both promoting rehabilitation and ensuring that the taxpayer's dollar for responding to criminal spending is well

spent. There are a number of variations of that system working at state level around the Commonwealth as we speak. I am Victorian and I am aware of the Victorian diversion system in the lower courts, as well as a number of diversion type programs in the trial courts of this state.

Senator LUDLAM—I acknowledge that you said you have not had time to review that proposition in detail. I have found it to be one of the more coherent ways, with some case studies behind it, because it has been tried in the United States in some very conservative jurisdictions. If you have time to review those concepts within the reporting timetable of this committee it would be beneficial to hear any additional thoughts you may have, simply because it is a proposition that appears to be eminently viable and it ties together a number of different concepts that we have heard of.

One of the other propositions which has been put to us at various times is to initiate some kind of legal clearing house to do two things. The first thing is to keep the people out of courts, particularly the Family Court, if they do not have some kind of actionable case. It was put to us earlier that perhaps people should be able to go to a clearing house to get some pro bono advice, some free legal advice, that says, yes, there is something here for you in the formal justice system, or, no, this is not ever going to go anywhere in court. Have you come across any similar proposals and would you be supportive of that sort of setup?

Mr Woods—I cannot concede that there is any reason why that sort of triaging of potential litigants should be done by the legal profession on a pro bono basis, but I am aware of clearing houses in a variety of areas of the law. The best and probably most public example of course is the Public Interest Law Clearing House, which is a model that invites those who believe they have a meritorious claim to take someone on in the courts in a public interest matter; the staff of the clearing house review the evidence, make a preliminary view as to whether or not this potential litigation ought to go ahead—in other words, whether it has merit—and then refer it to a member firm of the clearing house. That is something that has been successfully operated by the organisation, colloquially known as PILCH, during the course of the past decade or so, I would say.

We have to understand that, for every 100 people who think they have a legal problem that needs to be resolved judicially, only five will ever end up having their cases decided by a judge. Those are the unanswerable statistics in every area of the law, including family law. The key is to look at what point in the road from the dispute arising to it being judicially resolved should the legal system intervene—and there are a number of ways in which that happens. The first is that people go and get some competent legal advice and understand that their case is hopeless or that it should be sent off to a more appropriate forum for dispute resolution. This sort of thing happens all the time.

In relation to those who have chosen not to see a lawyer—that is, those who become litigants in person—the Law Council has done a significant amount of research in relation to why that is the case. The least common reason as to why people have not seen a lawyer is that they do not want one. The most common reason is that they think they cannot afford it. Whether that is a real position or not, they just believe that they cannot. So we would support absolutely the idea of triaging cases at a very early stage, but we do not see any reason why the legal profession should be doing that for nothing.

Senator LUDLAM—Thank you. That is helpful. I have two more questions for you. Again, these are both proposals that have popped up during the course of hearings to date. One of the community legal centres that we heard from earlier raised the point, as others have, that access to comprehensive databases of case law and procedural forms and so on would be incredibly helpful and that they do not have enough of a commercial footing to afford them. Have you made any recommendations in the past about some kind of state or perhaps Commonwealth funding of a licence for all community legal centres. This would potentially save quite a lot of money across the sector so that all community legal centres and all solicitors working in that field would have access to that sort of information?

Mr Woods—I am not sure whether we have previously submitted on that specific issue. Senator, you are talking about two different things. The first is legislation and precedent cases. The source for those is obviously the parliaments and the courts around the country—publicly funded institutions. The Law Council has been strongly supportive of the website called austlii, which, from memory, was started by the University of New South Wales. It has now developed into a very significant database, which includes all Commonwealth legislation and subordinate legislation. It includes the legislation and regulations from all of the states and territories. And it includes the reported decisions of the High Court, each of the other federal courts, the state supreme courts and a variety of tribunal decisions. That is free and that is able to be accessed by anyone. I do it myself in my own office. Austlii is currently funded by the university. There are a number of private benefactors who pay, as well as most of the law societies and bar associations around the country. The Law Council is currently looking at, and in discussions with those concerned about, the best business model for that. I would be surprised if that were not a real feature of the legal practice landscape during the course of the coming years.

The second aspect is the question of precedence. By that I understand you to mean particular forms and draft documents that someone has had to physically draft up and it simply means that a lawyer in his or her office can proceed very efficiently. The current providers of those are commercial operators, corporations who are generally legal publishers who are in this to make money. The issue therefore of whether a licence could be obtained—because a lot of these services are online—by the national or state bodies for CLCs would be a matter that the Law Council would certainly support, no question about that. We would be happy to act in a liaison role, to see whether or not those publishers are prepared to provide those sorts of banks of precedents in a timely fashion and in a fashion where they can afford it.

The other thing I might say to you, Senator, is that the Law Council has actively sponsored the secondment of experienced lawyers from law firms on a pro bono basis to a variety of CLCs around the country. One of the things they do when they get to those CLCs is to assist in the establishment and maintenance of precedent banks.

Senator LUDLAM—That is helpful. I think one of the most useful things we could do in the very short term is come up with some proposals around licensing in the public interest, for the sorts of outfits unlikely to be able to afford these systems off their own bat. The last question I had was around proposals—which you have probably read a bit about—on separate legal services for Aboriginal women, to get around some of the issues that have been raised on conflict of interest and so on. Do you have a view on that proposal?

Mr Woods—The Law Council strongly supports appropriate legal organisations to represent Indigenous people, be they women or men. You are quite right, Senator. May I beg your indulgence to speak from my experience in regional Victoria. The reality is that the Victorian Aboriginal Legal Service—which runs a number of outreach programs to Indigenous people in the shires and regional towns—can only act for one side of a dispute. There is no question about that. The current system means that Indigenous women and men who cannot be represented by the Victorian Aboriginal Legal Service have to go and find some alternative representation. That creates a problem, culturally.

I am not here to pretend that every solicitor who practises in areas where there is a high Indigenous population is so culturally sensitive that they would understand the difficulties that Indigenous women face; nor should they be expected to, because they do not come across it. It follows therefore that any proposal which is going to establish a legal organisation to provide that sort of assistance in an empathetic way—by lawyers who have been well-trained in the legal issues—is something that we would certainly support.

There is the Violence Against Aboriginal Women program in Victoria, which I think has three offices throughout the state at present. That is going some way to alleviating this dreadful problem of conflict. Again, it is one of those projects that is subject to a year or two's funding and we are not sure what is going to happen when that funding runs out. But if that is recommended by the committee, it will certainly have the Law Council's absolute support.

Senator LUDLAM—Thank you very much for your time and your expertise this afternoon.

Senator FISHER—Gentlemen, your submission talks about increased incentives for the provision of legal services and, in particular, for lawyers to move to and practise in rural and remote areas. Does the closure of court offices—for example, in my South Australian backyard of country places like Kadina, Coober Pedy and Ceduna—increase incentives?

Mr Woods—No, it does not, Senator, and I had the benefit of hearing part of the evidence given by my colleague from Tasmania, just before we commenced. It acts as a serious disincentive. If there is no effective Federal Court registry operating within a particular part of Australia then we simply cannot expect young lawyers—or for that matter older lawyers—who are used to or who want to practise in those Federal courts, to go to that particular part of the world. They simply do not get the opportunity of undertaking the work that they have trained for.

We saw this at the state level to our cost during the past 20 years in New South Wales with the closure of local courts—that is, the Magistrates Courts—and in Victoria where I think about 30 courts closed down. That simply meant that those solicitors who were involved in litigation just left. They are not going to be replaced by anyone. It is a bit like closing a hospital and then expecting heart surgeons to live in that area.

Senator FISHER—Indeed. I understand that you provided a budget submission to the government early this year that, if I understand it correctly, largely reflected many of the recommendations or incentives that you have outlined in your submission—for example, HECS-HELP for students, government scholarships, bonuses and tax breaks. You put to the government a budget submission. I understand that in June-July you also put to the government and to the Attorney-General in particular a report following your survey of practitioners into the needs of

rural, regional and remote areas to access justice. What response have you had from the government to both of those approaches and your recommendations in particular?

Mr Woods—To my knowledge the law council has not had an official response from the government, although I can say that the Attorney-General's access to justice strategy team, which is presently travelling around the country interviewing humble rural practitioners like me, have taken on board some of the matters that the law council has raised. It is my understanding that we have not had any official response from the government.

Senator FISHER—The Attorney-General is reported in the *Financial Review* of July of this year as telling the Bendigo Law Association in June:

> One of my key priorities … is to ensure all the parts of the system work together to create an effective civil justice system that is accessible to the broader Australian community it serves.
>
> This is particularly important in regional, rural and remote Australia.

Are you seriously saying that you have not had a formal response from the government or from the Attorney to your budget submission, which was, as I understand it, in early 2009, and to your report in June-July this year as to the findings of your survey of rural and regional practitioners?

Mr Woods—Yes, that is what I am saying. The secretary of the committee has received the apology of the secretary-general of the law council. I shall take on board that question. I am not aware of any response. If the secretary-general has received a response, I will make sure that you are advised of that in the next 24 hours.

Senator FISHER—Thank you. In terms of your survey, I gather some 40 per cent of the lawyers who responded were Victorian based. Do you think that skews it at all?

Mr Woods—The reality is that in the most remote parts of Australia there simply are not law firms anyway. The person who headed the inquiry is the current President of the Law Institute of Victoria, Danny Barlow, a solicitor from Shepparton. He urged members of the profession to respond. Whether that had something to do with it or not, I am not sure. We were told by the ABS that the fact that there were more Victorians was not statistically significant.

Senator FISHER—In terms of the reasons for which lawyers actually leave country areas, I understand that the survey found that retirement was significant. Your commentary talks about family and lifestyle reasons motivating people to move to the city. Call me biased but, being a country girl, I would go the other way for family and lifestyle reasons. It says that that was the main reason and then it says that the least common reason was isolation. Did you provide people with multiple-choice reasons or were they, in legal speak, leading questions?

Mr Woods—As in all of these surveys, there was the question: is it (a) money, (b) remoteness (c) something else? You then had an option to make your own comments. To that extent they simply reflected the anecdotal evidence that we had.

Senator FISHER—All right; thank you. You have mentioned pay and it certainly factors in your survey and in your opening comments. If I understand you correctly you said in effect that

some country lawyers are paid less than a junior secretary in the city. I could not discern from your survey what percentage of lawyers suggested that they found themselves in that category. I think I tallied up about 30 per cent who got either significant salaries or about $50,000 or $60,000, arguably with an equivalent in the city, so what sort of percentage are in the bracket to which you referred, being paid the same as a very talented—I am sure—junior secretary in a city firm?

Mr Woods—My reference to the junior secretary was in relation to those solicitors working for Indigenous legal services in remote Australia. We received information that solicitors were being paid as low as $34,000 for working in some of the most extraordinary conditions. That has been addressed to some extent by the most recent budget but they will still have extraordinary trouble getting people to work there.

Senator FISHER—With regard to the federal government's Award Modernisation Program, it has been suggested that there will be a new, modern award that could potentially cover parts of the legal profession where there has never been an industrial award covering those workplaces in the past. If that were to be the case there would be new minimum wages across the sector. Is that the answer? What is the Law Society's view about the impact of award overhaul?

Mr Woods—There are two problems with it. The first is from an access-to-justice point of view. If the legal work that we are asking those solicitors to do does not become more remunerative, then the legal firm simply cannot afford to pay a solicitor what the new award will specify. We cannot have a situation where we want people to do Legal Aid work in the country—and then demand that legal firms pay them significantly high wages—whilst not being prepared to fund the firm at an appropriate level, and, in fact, continuing to decrease the amount of income that goes to that firm for Legal Aid purposes. I appreciate that your question is a little wider because you are not talking simply about Legal Aid work when we talk about retention and recruitment of lawyers. There are other issues at play; for example, government purchase of legal work that should be done out in regional and rural areas has been centralised in capital cities; it has not been afforded to the legal firms that are perfectly capable of doing it out there in regional and remote locations.

Senator FISHER—What sort of government work are you referring to?

Mr Woods—As you would be aware, governments—state, federal and municipal—are one of the largest purchasers of legal services from the private profession of any clients. Over the last decade or so there has been a concentration of legal service purchasing in the capital cities.

Senator FISHER—Are you seeing a proliferation of that with the recent stimulus spending in any way? Has that had any impact consistent with what you are talking about? Has that government work gone to city firms, off the back of, for example, the Building the Education Revolution program?

Mr Woods—Government legal work goes to firms that have made it onto the government panel, and it is a matter of record that most of those are in the capital cities.

Senator FISHER—Has the society voiced to government its concerns about the endpoint of the award modernisation process? If so, when and how?

Mr Woods—We have not as yet, because the various law societies and bars need to look at the impact on their individual members. Part of the problem is that there are vast—

Senator FISHER—There is not a lot of time, Mr Woods. It is going to hit the deck on 1 January 2010.

Mr Woods—That is quite right. But there is no reason why the various state law societies cannot make those submissions themselves. Practices across the states and territories have quite distinct and different income levels.

Senator FISHER—What about voicing your views directly to government through the Industrial Relations Commission processes? Have you done that? If so, how and when?

Mr Woods—No, and one of the reasons is that the Law Council represents both employer and employee solicitors. To some extent, this is an industrial issue, if I can use that term. No doubt there are a significant number of employee solicitors around Australia who are going to be delighted at the prospect of a pay rise and an equal number of employer solicitors who will be dismayed. The reality is that the Law Council represents both, and we have never taken on the role of advocating a particular industrial policy as between employers and employees in our sector.

Senator FISHER—I appreciate that tension, but the Deputy Prime Minister seems to have contemplated managing the same tension herself by instructing the Industrial Relations Commission to make sure that its award modernisation process neither disadvantages workers nor increases costs to employers. She has made that promise. We would say that she is failing to keep it, but that is how she has managed that tension.

ACTING CHAIR—Senator Fisher, we do actually have an inquiry before us called 'Access to justice'. Perhaps your questions along those lines would be better addressed to the Employment, Education and Workplace Relations References Committee the next time it meets. I remind you of and ask you to refocus on the topic that we have before us.

Thank you, Mr Woods and Mr Edwards from the Law Council of Australia. We always appreciate your submissions and the fact that you make yourselves available for us to do the work that we undertake on the committee.

Mr Woods—Thank you for the opportunity, Chair.

Senator FISHER—Thank you, gentlemen.

[6.33 pm]

WEBSTER, Mr Anthony, Senior Adviser, Federal Finances, Commonwealth-State Relations Division, Treasury

ACTING CHAIR—I welcome our representative from Treasury, Mr Webster. I remind senators that the Senate has resolved that an officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer either to someone superior or to the minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about how and when policies were adopted. Mr Webster, I remind you that any claim that it would be contrary to the public interest to answer a question must be made by a minister and should be accompanied by a statement setting out the basis for the claim.

Treasury has not lodged a submission with the committee, but Mr Webster is here to answer specific questions about legal aid funding which will be paid under the new federal financial relations framework.

Senator FISHER—Given the frame of reference for Mr Webster's presence here I will ask this question, but he may not be able to answer it. Mr Webster, you were in the room at the time the Law Council gave its submission. Are you aware of the recommendations that it made to the government as part of the budget process early this year for initiatives to attract and retain legal talent in rural and regional areas, and are you aware of how the government responded to those recommendations, if at all?

Mr Webster—I am not personally aware of that, no.

Senator FISHER—Are you able to take that on notice?

Mr Webster—Whether Treasury was aware of it?

Senator FISHER—Yes, and whether you can advise as to any progress that might have been made or not.

Mr Webster—I can advise you of whether the submission was received and the process it would have gone through, yes.

Senator FISHER—Also, can you advise on whether there has been any process to consider to responding thereto, particularly to those recommendations?

Mr Webster—I can advise whether there was a response, yes.

ACTING CHAIR—Mr Webster, did you have an opening statement you want to make? I am remiss: I forgot to ask you that.

Mr Webster—As you mentioned, I was invited to answer questions. Maybe if I just give a bit of context.

The reason we are here is that the Council of Australian Governments agreed on a new framework for federal relations, which commenced on 1 January 2009 and covers pretty well the full spectrum of financial relations with the states. The payment arrangements for that are in a new Federal Financial Relations Act, which commenced on 1 April this year. Under that framework the Treasurer is responsible for policy in relation to federal financial relations and also payments to the states—we make all payments to the states through Treasury, but portfolio ministers and their departments are responsible for the policy aspects of those payments.

So I can answer questions about the federal financial framework, national agreements or national partnership agreements under the framework or payment arrangements under the framework. Questions about policy, including funding adequacy, would be more in the realm of the Attorney-General's Department.

ACTING CHAIR—We are hearing from them after the dinner break.

Senator LUDLAM—Is it possible to provide an indication of total Commonwealth legal aid funding and community legal centre funding if I give you two dates—for example, 1990 versus today?

Mr Webster—The Attorney-General's Department might be in a better position to do that, but I am sure we can do that between us. Certainly total funding is fine. Whether we can disaggregate it is another issue.

Senator LUDLAM—To whatever degree you are able to disaggregate it, that would be helpful, because very strong claims have been made, of which you would probably be aware, of a relative decline in Commonwealth legal aid and CLC funding over the last 10 years or so. If it was possible for you to quantify that, it would be very helpful.

You said before that you would be able to help us out with questions about agreements between the Commonwealth and the states and territories. We have heard strong evidence from the witness directly before you—and I believe you were in the room—about getting around the split between state and federal funding for these sorts of matters, where the states would be responsible for funding one kind of assistance for a certain kind of state matter and the Commonwealth for another, and often we are not meeting in the middle. Has anything come from Treasury in the recent past that would resolve some of those things?

Mr Webster—This is an issue that is not uncommon across policy areas. In fact, one of the reasons that the Council of Australian Governments agreed to the new federal financial framework was to try to address the issue of roles and responsibilities—to clarify what the role of each government was under the framework and in each program. While I cannot answer it in respect of Legal Aid, and the Attorney-General's Department might be able to, I can say that the new framework is explicitly designed to try to put a framework in place that allows agreements under the new framework to address those issues more coherently.

Senator LUDLAM—I suppose I am most familiar with the way that that is working in the housing portfolio, where we have abolished a whole a pile of these special purpose payments, and now the states and territories are free to meet certain benchmarks with a bit less hands-on involvement from the Commonwealth. Is that envisaged or underway at the moment in this sector, or are we a way behind?

Mr Webster—COAG has not yet looked at that issue in a formal sense. The funding arrangements still operate under existing funding agreements between the Commonwealth and the states.

Senator LUDLAM—Is this an area of potential reform that has been earmarked or anything that has come across your desk that we might be in the process of reviewing the way that that works?

Mr Webster—The framework envisages that as all these agreements expire they will naturally roll into new style agreements, most likely a national partnership agreement under the new framework. Until the current funding agreement runs out it will continue as is.

Senator LUDLAM—Okay. I was not trying to ask a hypothetical question but your response did come across as a bit hypothetical. Is there anything underway at the moment that would set those processes in train or are you predicting that that may be the way it goes when we finally get started?

Mr Webster—I have not actually had any discussions with the Attorney-General's Department this year on that issue.

Senator LUDLAM—All right. For our benefit, can you just explain the breakdown for who, in the Commonwealth, is responsible for the following, or if you do not know we can refer these to the AG's. Responsibility for policy matters for community legal centres?

Mr Webster—Policy matters are with the Attorney-General.

Senator LUDLAM—Treasury's role in disbursing payments to the CLCs directly—you still do have a role in disbursing payments?

Mr Webster—Yes. Under the current funding deed that provides the payment arrangements, the Attorney-General's Department advises Treasury how much needs to be paid every month. In fact, I think these payments are made quarterly. Treasury now makes those payments directly to state treasuries and then state treasuries distribute them to the relevant bodies in the state.

Senator LUDLAM—You are not playing an active policy role, though, in that. Who is responsible for putting forward expenditure proposals? In this sector would that be more likely to come from the Attorney-General?

Mr Webster—New policy proposals are the responsibility for the Attorney-General. That would be standard in the budget process and they would work that up along standard budget guidelines.

Senator LUDLAM—We have heard from a number of the community legal centres that what they are really craving is recurrent funding that they can actually plan on and do some forward budgeting on; whereas at the moment what they have is very stop-start and they are continually not sure where their next meal is coming from. What has to happen from a budgetary point of view to make that occur? Is that something, for example, that you are aware of as the people who are handing out the money?

Mr Webster—I think that is an issue for the Attorney-General's Department. Again, it gets back to the funding agreements between the Commonwealth and the states, and what the funding agreements provide for. If there was a desire to provide additional funding it would have to be considered by the government in the budget context as a new policy proposal.

Senator LUDLAM—I will not put too many of these questions to you if Treasury in this case is not too much more than a post box. It sounds like you get the funding requests via the A-G's Department, you write the cheques and you do not have a great deal of involvement in—

Mr Webster—We work with agencies in developing national partnership agreements, but that is usually once the government has taken a policy position.

Senator LUDLAM—You just told us that is not yet underway in his portfolio.

Mr Webster—I am not aware of that. That is something you would have to ask the department about.

Senator LUDLAM—Would you take that on notice? Or does your not being aware of it mean that it is not happening?

Mr Webster—There are always policy discussions between departments. I am not aware if it is on that particular issue. I can say that once Attorney-General's is ready to implement a new policy position they would come to us naturally and we would work collaboratively on working up a new agreement.

Senator LUDLAM—Can you tell us a bit about the Expenditure Review Committee. Is the Attorney a member of that?

Mr Webster—Not that I am aware of. I do not think so.

Senator LUDLAM—Do you have the membership? I presume that is not a secret.

Mr Webster—No, I do not. I am not closely involved with the ERC.

Senator LUDLAM—Could you take that on notice for us? I am specifically interested to know whether the Attorney is a member of that committee.

ACTING CHAIR—I think I know the answer to that one.

Senator LUDLAM—Perhaps I will ask the chair. The National Association of Community Legal Centres and some other advocates have given advice and evidence to us that, and I quote:

For every dollar of funds provided to a CLC produces, at minimum, $100 in benefits to the community and savings to government.

That claim is made on the basis of assumptions about the benefits of providing legal advice early, the sort of triaging that we heard about before, helping people manage debt and so on. Does Treasury or the Expenditure Review Committee have any space in the calculations for that sort of cost-benefit analysis where spending money upfront on these sorts of services can save a lot down the track?

Mr Webster—That is typically the sort of information they are interested in considering in general, yes.

Senator LUDLAM—The criteria for determining the funding of each state and territory—is that anything to do with Treasury or does that all happen outside?

Mr Webster—No. Again, that is a policy issue in most cases. There are some types of agreements that are the responsibility of Treasury, but in this case if it was a national partnership it would not be, it would be a policy issue with a department. If there were some other form of payment then that could very well be with Treasury.

Senator LUDLAM—Do you have any ideas or evidence about the amount of funding that CLCs spend on administration, given that they are having to keep untangled the complexity of keeping themselves out of state matters and state funding matters and so on? The proportion that they spend on administration versus the proportion they spend on the provision of legal advice and their core functions—is that anything that you are aware of or are interested in?

Mr Webster—No, that would be for Attorney-General's as well.

Senator LUDLAM—I will leave it there, thank you.

ACTING CHAIR—Thank you, Mr Webster, for making yourself available for us this evening. Our apologies for keeping you waiting a little bit longer than we anticipated.

Proceedings suspended from 6.48 pm to 7.57 pm

ARNAUDO, Mr Peter John, Assistant Secretary, Indigenous and Community Legal Services Branch, Attorney-General's Department

DUGGAN, Mr Kym, Acting First Assistant Secretary, Social Inclusion Division, Attorney-General's Department

MINOGUE, Mr Matt, Assistant Secretary, Justice Improvement Branch, Access to Justice Division, Attorney-General's Department

SMRDEL, Dr Albin, Assistant Secretary, Legal Assistance Branch, Attorney-General's Department

ACTING CHAIR—I welcome representatives from the Attorney-General's Department. The department has lodged a submission with us which we have numbered 54. Do you need to make any changes or amendments to that before you begin?

Mr Minogue—No changes or amendments, just an update which was communicated to the committee. When the report of the Access to Justice Taskforce was launched by the Attorney-General, we did provide a copy of that to the committee. That is the only additional item.

ACTING CHAIR—Sure. Do you have an opening statement or do you want us to go straight to questions?

Mr Minogue—What I might do, if it is helpful to the committee, is just explain briefly what the Access to Justice Taskforce was about, what the process was, what it led to and how that informs other government decisions, because I heard some of the committee discussion earlier today in terms of the committee putting concrete proposals to government. The strategic framework has now been adopted by government as government policy, so that is the kind of framework through which proposals would be examined, whether they come from within the government, from the private sector, from service providers or from a parliamentary committee. So if it is helpful I might just give you a quick rundown of that process.

ACTING CHAIR—I think that would be helpful.

Mr Minogue—In January of this year the Attorney established the Access to Justice Taskforce within the Attorney-General's Department. The background to it was a sense that reforms to the justice system and attempts to overcome barriers to justice tended to be developed in an ad hoc way. They reflected one-offs or how things had been done historically. So the genesis to it was to try and come up with some sort of overarching look at the justice system that would better inform how government makes decisions into the future. The approach the task force took was to look at the demand and supply aspects of access to justice, taking a slightly different approach. What we were particularly interested in on the demand side was, 'Who uses the justice system?' and probably more importantly, 'Who doesn't?' We then looked at, to the extent that people use it or do not: what are the factors that influence that use or non-use? For example, if people were not accessing the justice system, why not? What were the sorts of factors that led to that? On the supply side we were looking at what options there were for overcoming those issues and at the

types of services that are provided, ranging from the formal justice sector—that is, the courts—across the whole spectrum through tribunals, ombudsmen and complaint-handling systems, all the way through to how government administrators conduct their daily work. So we were taking a very broad view of what the justice system entailed.

Overall, our findings included that the justice system is generally in good shape. You could not say there is a crisis across the board. Having said that, there were some key areas where access to justice was a real problem. One of the features they came out very strongly was that information failure was a significant issue. Without that real entry point into what legal issues are and how to understand them, people became further disenfranchised and disadvantaged through the whole process. That shows up in the type of research that has been conducted in Australia through organisations such as the Law and Justice Foundation in New South Wales and also internationally, with UK and US research seeming to follow the same pattern—that is, people who tend to experience one legal event go on to experience two or three. So, even though across the board the system is okay, there are real pockets of disadvantage that tend to experience legal events.

That sort of work informed our central recommendation for a strategic framework for access to justice. What we proposed was that policymakers should take a system-wide approach to justice by applying this strategic framework to all decisions affecting access to justice. We thought that would help government best target resources and reform priorities across the whole system to get away from that ad hoc approach. The government has agreed to that strategic framework, so that will now guide decisions about the justice sector from now into the future. While of great interest to the Attorney-General and Attorney General's Department officials, one of the features of it is that, being government policy, it applies to all portfolios and ministers. As proposals—that have hopefully a positive impact but possibly some negative impact on access to justice, broadly defined—are developed within the normal machinery of government, the framework will enable the Attorney-General and us, as officials, to work with agencies and portfolios to overcome those issues or better reinforce some of the really positive things that are already happening.

ACTING CHAIR—When you sent us the access to justice documents at the start of the inquiry, did that have the strategic framework in it?

Mr Minogue—No, our submission did not have that. The task force had not completed its work at that stage.

ACTING CHAIR—Is that something you need to send us?

Mr Minogue—You have it now. It was launched by the Attorney on 23 September and has been provided to the committee since then.

ACTING CHAIR—Okay, sorry.

Mr Minogue—Essentially, the elements of the framework build on five principles: accessibility, appropriateness, equity, efficiency and effectiveness. But underneath those is what we call a methodology that translates those broad principles into action. The key ones include information, and by that we mean enabling people to understand their position and the options

they have in deciding what to do. That is designed to get over the information failure that right from the start disadvantages people. What we found was that the three most commonly reported barriers to obtaining justice have a sense of disempowerment about them. They were things like not knowing what to do, not knowing where to go or not doing anything because it would make matters worse. Those are classic disempowerment things. So better access to information and support was one of the key things we thought was appropriate.

Action and early intervention were some of the key things we thought would overcome some of the chronic problems of access to justice. Early intervention can help prevent problems occurring in the first place—or, indeed, escalating or becoming entrenched. We were quite interested in some of the work that the committee has already had before it and discussed. It is much more expensive to fix something up at the back end of a legal problem through litigation or court work. It is much more cost-effective if it is possible to treat that issue early and upfront, either through the provision of information or through some early-intervention support service. The type of example that always came up in our work and discussions about it with people was a civil debt issue where someone gets a letter of demand. One of the things about information failure is that it is not just knowing what to do; it is also not knowing what the consequences of doing nothing can be.

You get the letter of demand. You do not know what to do, so you do not do anything. The next steps can be either a recovery action, which can be quite disastrous, or—the appropriate alternative in many cases—opening a dialogue or negotiation with the creditor. None of that gets in the way of the merit of the legal issue, which is, 'Do I have to repay the money or not?' but it does lead you down a very different course of addressing that situation. Through that simple example, we were very interested in proposals about early action and early intervention.

Triage was one of the principles that we thought was important.

Senator FISHER—Can you explain 'triage' in this context?'

Mr Minogue—Certainly. Essentially, what we are interested in there is what the best way is to treat the legal issue that has arisen. The civil debt example is quite a good one. If it is treated through a normal recovery action process, that can be quite disastrous. If it is treated through negotiation and opening a dialogue with the creditor it can lead to very different consequences. 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—for example, in the debt case—a situation where parties and their representatives think, 'What's the best way to resolve this issue?'

One of the things that came to us was that to some extent there is an issue not so much of how people make contact with the justice system but of how the system makes contact with them. Again the debt example shows that. Another example would be recovery of fines for Indigenous people. While not the main legal issue that those communities experience it is reported as being an increasing issue. Recovery of fines is inherently civil, inherently administrative and inherently negotiable; but, left unattended and without understanding the reasons why, the calls

and the letters of explanation might not be attended to. That can lead to a very different outcome than that from a negotiable administrative matter.

At the heart of any justice system, though, is the access to fair and equitable outcomes. Part of the framework is directed to resolving disputes without going to court unless absolutely necessary and, even when court is necessary, ensuring that the judicial process is accessible, fair, affordable and as simple as possible. One measure that is consistent with that is the Access to Justice (Civil Litigation Reforms) Amendment Bill 2009 that was in the Senate today.

Cost is a key issue, and ensuring that the cost of resolving disputes is proportionate to the issues. We were interested in looking at a justice system that did not rely on access to expensive institutions or sources of advice. Again, that is one of the other things that fed into an attraction to information and early intervention.

Another element that came out of our work, and which we built into the framework, was the concept of resilience. The reason we talk about building resilience in this context is that legal issues and disputes are, at their heart, about resolution of conflict and disputes. Conflict resolution may come intuitively to some of us, but for many of us that is a skill, and a skill that can be learnt. One of the things we were interested to bring out there was to throw a torch on some of the programs in a whole range of non-legal environments that attempt to address conflict resolution and to build up that capacity, to show government and agencies, in particular, how a lot of the work that is already going on can have a positive impact on access to justice and to give that a further impetus to go forward.

The last plank of the framework is inclusion. The government has a committed social inclusion agenda, and we were very keen that the legal dimension and the access to justice dimension feature in the concept of social inclusion.

That is, essentially, the discussion of the framework. In addition to the framework, which has been adopted by government, the task force made a number of other technical recommendations as to how we, the task force, thought this framework could be implemented. They are in the process of being assessed by government and we expect some will be picked up. We are doing an additional round of consultation at the moment, and it is directed to trying to work out what the priorities might be. Not all recommendations can be picked up on from day 1, so we are quite interested in what people's views of priorities for government should be—picking up those technical recommendations for decision by government later on down the track.

One of the key things in the *Access to justice* report relates to legal assistance. That has always been the heart and soul of any discussion about access to justice, and continues to be so. My colleagues from the Social Inclusion Division are currently working in relation to the design and delivery of legal assistance programs, so in terms of questions of detail they will be able to assist the committee.

I will make a few general points. This financial year the government has committed in excess of $263 million in base funding for legal assistance services. Over the last two years the government injected, on top of the base funding, an additional $54 million in funding to address immediate pressures in service delivery areas. Consistent with the framework, better collaboration across the justice sector, including within the legal assistance sector, is also

important. One of the things that the task force were concerned about was attempting to avoid duplication and the costs that imposes, particularly on the community sector, where funding is tight and a lot of it is based on the communities themselves. Even if things do not cost money, but cost a volunteer's time, that is a large part of a resource, so we were quite interested in trying to highlight the importance of overcoming duplication so that various services are complementary, rather than competing with each other.

We think the joint Commonwealth-State Community Legal Services program is a good example of how an effective three-way partnership can work. And because the framework is now government policy, that will influence the Commonwealth's approach to the renegotiation of the new national partnership arrangement in relation to legal assistance.

Those are the initial comments that I wanted to make.

ACTING CHAIR—I think that is very useful. Thank you very much for that.

Senator LUDLAM—Thank you very much for coming in and thank you for bringing such a large team from the different parts of the department. That is appreciated. Can we start where you left off, on the new national partnership arrangement. We had Treasury directly before and they were not aware of quite where that process is up to. Can you sketch for us your understanding of how that is going to roll out?

Dr Smrdel—Part of the process for negotiating a new national partnership agreement has been for the Commonwealth to settle its broader access to justice policies. That has now been released, so I think the Commonwealth is now at a stage where it can formally commence negotiations on the national partnership. The Attorney-General wrote to his state and territory colleagues last year. The legal aid agreements nominally expired at the end of 2008, but he proposed a 12-month extension or whatever period it would take to settle the new national partnership agreement. Now that we are in a position where the Commonwealth has settled its broader access to justice policy, I would be anticipating that the Attorney would be writing to his state and territory counterparts in the very near future with a view to having a proper discussion on the national partnership agreement at the next meeting of the Standing Committee of Attorneys-General, which is on 5 and 6 November, next week.

Senator LUDLAM—The portfolio that I am more familiar with where this has been rolled out is housing, where we had a national partnership agreement quite some time ago. Why has it taken so long to get around to rearranging the access to justice portfolio or the legal aid portfolio? Why are we talking about this in 2010 and not in 2008?

Dr Smrdel—As I alluded to earlier, it was not just looking at legal aid policy and funding in isolation, it was very much undertaking this broader access to justice process, which Mr Minogue has just spoken about. That was quite a comprehensive process that the task force undertook and then presented their report to government, and the Access to Justice Taskforce report has only just been released. Following on from that, the department has been moving to implement the principles contained in the access to justice report to inform the legal aid national partnership agreement. As I said, I would be fully expecting the Attorney to be writing very shortly to state and territory attorneys-general to start discussions at SCAG next week.

Senator LUDLAM—Does the Attorney have an indicative timetable of when he would like to have these new financial arrangements in place?

Dr Smrdel—We would like to think that, once the Attorney writes to his state and territory counterparts, discussions could be productive. I am sure they will be robust as well. We are certainly looking at a timeframe of it coming into effect next year. The precise date for that will really be left to the Attorney to discuss with his counterparts next week.

Senator LUDLAM—Okay. I want to ask a couple of general questions and then I have got a few for you on some specifics of a number of issues you touched on in your opening remarks. Mr Minogue, you made a comment before that you think that, all in all, the justice system is in pretty good shape and there are a few areas where we could do better. I do not know how closely you have been following the work of this committee, but words like crisis and catastrophe and disaster have actually followed us everywhere we have gone, particularly in the community legal sector. People providing services to Aboriginal people and to some of the most disadvantaged in the country probably would take issue with your comment that things are in reasonably good shape. I trust that is not what you meant overall. We have obviously focused on the areas that are not working and so that is mainly what I will be asking you about tonight.

Mr Minogue—I think that is right. We certainly agree with that. What I was saying is that overall the system is in good shape, but there are areas of great need and great disadvantage. So one of the objectives in this strategic or overall approach was to better target the resources to where the need is—so not at the expensive back end, but at the front end where people really need the help.

Mr Arnaudo—Can I also add that, in terms of community legal service as well as Indigenous legal services, a lot of the one-off funding that has been announced by the Attorney in recent financial years has been directed at those areas to try and address those needs, particularly because of the increasing demand, for example in Indigenous legal services. That has been the focus of the department's and the Attorney's attention in recent times. I know that is not a long-term solution to those sorts of issues, but it is very much a recognition that those issues are important and that the government and the Attorney in particular wish to address them as best we can.

Senator LUDLAM—A lot of people have put to us that the one-off injection of funding was appreciated. It was not thrown back in your face or anything but it is not a sustainable way to fund this sector which is obviously very stretched. Do you believe there is a will in this portfolio to increase funding for that sector in real terms and in a sustainable way into the future?

Mr Arnaudo—That is clearly an issue that the government is going to consider in the context of the budget, developing budgets and future plans like that. But I can say that the attorney is definitely very conscious of the calls, particularly in the community and the Indigenous legal sector, not only in terms of the increasing demand for their services but also the particular challenges that some of those services face in the rural, regional and remote areas. I know that is another area you have heard of, too. That is one of the things that we are very conscious of as a department and I know that the attorney is very conscious of in terms of forward planning.

Senator LUDLAM—It sounds like you have heard of that, so that is a good place to start. If we can get specific, what is considered your best practice model in assisting self-represented litigants? We have heard a lot of evidence around that. You would be very well aware of some of the disadvantages not only for the litigants but also for the people trying to run the court system. Is there any plan to roll out some sort of best practice model? Is there any research or anything you can point to that shows where your thinking is there?

Mr Minogue—Not in terms of a best practice model, and in fact research was one of the things that we highlighted as being something that needs to be done in a better way to assist better decisions being made into the future. Some of the things that resonated with us through the task force work on self-represented litigants were, as you say, not only the cost and the distress to litigants but also the impact on other parties. At the court end of things one of the issues we were looking at was making the procedures much simpler and directed to resolving the issue. By that I mean we know that most matters do not go to final judicial determination as the outcome. One way or another matters drop out. But most of the court rules and procedures pretend you are preparing for a judge to hear the matter. All of those things impose costs, distress, time and expense, so we proposed that as a general issue court procedures should be directed to resolving the issue. We had a big attraction to procedures being directed to alternative dispute resolution, simplifying the issues and making it much more accessible on that front. We found that access to duty lawyer schemes was quite beneficial and helpful and so we made a specific recommendation about that.

One of the things we also looked at was a recommendation about early consideration of the merits of self-represented litigants and the merits of their claims. That would give rise to a consideration as to whether they could be referred for further assistance. We were interested in quite a few of those. At a general level it also gets back to our interest in better information and earlier support upfront so that even if someone is still going to be a self-represented litigant they would do so on the basis of much better information and much better support. That would hopefully reduce not only the cost and distress to them but also the cost and impact on the justice system as a whole. But we did not propose one specific model.

Dr Smrdel—Through the Legal Aid program the Commonwealth already funds the duty lawyer program. Following the 2004-05 budget we rolled out a family law duty lawyer service in each jurisdiction which the evaluation found was a very successful program. It is certainly in keeping with the Access to Justice Task Force's strong recommendation for focusing on early intervention and prevention services. There are a variety of reasons why people come to court self represented, particularly in those instances where people miss out on Legal Aid, the duty lawyer service I think provides a very good model to assist those people.

Senator LUDLAM—I have a number of questions to get through. I will try to keep the questions brief also if you are able to be reasonably concise or point us to places where we can go or take various things on notice if you like. I do not know whether this is a question or a proposition, so take it as you will. We heard in a number of cases from some of the community legal centres that lack of access to up-to-date computer databases of legal practice precedent, procedural forms, form letters and so on was actually quite a serious barrier for some of these very stretched community solicitors in doing the work. Have you considered the possibility of the Commonwealth government taking out a licence right across the whole community legal sector and negotiating to provide that kind of software to the sector?

Mr Arnaudo—It is an issue that I am aware of that has come up from time to time in some of the centres. I think there is a bit of a variety because, of the 120-odd community legal centres that we fund, there is a wide range from women's legal services to the environmental defenders offices to welfare rights centres. There are quite a variety of centres out there. That is one of the issues in terms of the complexity of trying to say, for example, that there is only one program. Maybe if it is family law precedents that would be useful for the range of services that are out there. I think it is definitely something that we could explore further in negotiations with the community legal centres but also I think it is another example of where there is potential there for collaboration between those providers where they can get together and perhaps increase their efficiency and buying power I suppose for those sorts of things too. That is something that I think the government would encourage generally as a good practice in terms of collaborating across a range of services to enhance the value of the funding that government provides but also in terms of the services that they provide.

Senator LUDLAM—I am putting back to you I suppose the proposition that that is something that could be even better done at the departmental level so that those people can get on with their core roles. The Commonwealth has a lot of clout in terms of buying power.

Mr Arnaudo—Yes. My immediate reaction to that is that we need to bear in mind the complexity and variety of those sorts of organisations that are there, but it is something that we can explore. I am sure that as those issues are raised with us in terms of ongoing management of the program they are things that we could take into account.

Senator LUDLAM—Victoria Legal Aid operated with quite a substantial deficit in 2007-08, New South Wales Legal Aid apparently returned a surplus. Do you have available statistics that you could table for us regarding funding deficits and surpluses for the legal aid groups across Australia over the last few years? Do you redistribute deficits and surpluses, do you bank them, what happens?

Dr Smrdel—We could certainly get that information and take the question on notice and provide it to you. We expect Legal Aid Commissions to operate in accordance with their budget and so not get into a deficit situation. They would need to take appropriate steps to operate within their budget. In terms of surpluses commissions are allowed to build up a surplus of up to 25 per cent of operating Commonwealth revenue in the course of any one year. If they exceed that then they need to speak to us to see what they can do with it. For example, in the Victorian Legal Aid situation they had quite a strong surplus a number of years ago and we used part of that funding to establish the Expensive Commonwealth Criminal Cases Fund 19 years ago. Since then we have not taken any action to reclaim any operating surpluses that commissions have had but we would think that having a small surplus is a healthy state of affairs.

Senator LUDLAM—They carry those over then?

Dr Smrdel—Yes.

Senator LUDLAM—If I could ask for that to be taken on notice and the information tabled that would be appreciated.

Mr Arnaudo—Could I just add very briefly to that answer I gave earlier. There is an example of this sort of collaborative approach to community legal centres and that is in the area of buying insurance for professional indemnity. The National Association of Community Legal Centres has actually negotiated a package, I understand, for professional indemnity insurance. That is an example where it could be applied to other sorts of services that those community legal centres would use.

Senator LUDLAM—Not to labour the point but the reason I threw that back to you before in your earlier response is that I am looking for ways of taking work off their plate. I do not know how close you have been tracking the evidence we have been taking but they are people who are stretched to the limit. They are very underpaid compared with their colleagues, and the more we can take off their plates the better.

Mr Arnaudo—Yes, I appreciate that.

Senator LUDLAM—That is a valid example. There are a number of submissions that have argued to us that there is a need for the restoration of a national civil law program. Do you agree? Are there any plans in place to implement such a plan?

Dr Smrdel—By a national civil law program, you are referring to the fact, I presume, that some submissions have said that as a result of the Commonwealth funding policy—where the Commonwealth funds Commonwealth matters and the states fund state matters—the Commonwealth scenario has largely been to cover family law and for the states to cover criminal law. There have been suggestions that civil law has fallen through the cracks to some extent. It is certainly something that the Commonwealth has considered. The Commonwealth and state funding policy is, I think, something that the Attorney-General is looking at closely.

I think it is probably unfortunate that we are talking about it this week rather than after SCAG. I think the Attorney will, in raising the national partnership agreement with the states and territories, want to discuss it. The Commonwealth funding policy is one of the key issues, clearly, and the Attorney will need to promulgate what the Commonwealth wants to do in that area. I would be expecting something to be said in the context of the Attorney's contact with the state and territory attorneys-general.

Senator LUDLAM—I presume if a communiqué makes its way out of that SCAG meeting then it would find its way to the committee. Maybe there will be some more information contained there. Quite a number of submissions have also recommended that a national legal aid eligibility test be applied, some kind of threshold test. Are there any plans to adopt such a test?

Dr Smrdel—We certainly have a project at the moment with National Legal Aid in terms of getting a uniform means test. It is something that I think we all aspire to. I think some time back there probably was some closeness in how the means tests operated. There has been some divergence there. With the means test looking at both income and assets, I think some jurisdictions have taken the approach that if you are a full Centrelink pension beneficiary then you are eligible under the income component. Other jurisdictions go through a more elaborate process.

Senator LUDLAM—Are you thinking about harmonising those difficult kinds of tests?

Dr Smrdel—Again, it is something that the Attorney will want to seek through the national partnership process.

Senator LUDLAM—Can you tell us how funding for CLCs is determined at the moment? The Commonwealth obviously does not provide funding for all of them, but how exactly do you determine who will or will not be funded, against the backdrop of what seems a great deal of unmet need by people who are really very stretched?

Mr Arnaudo—The current approach to funding for the community legal centres is very much based on history and different requests being made at different times. The program has got quite a long history, with involvement from different levels of state and territory governments, as well as the Commonwealth. For example, it started off very much as a grant based application. Over time different centres have received different amounts of funding, given the different types of roles that they would play. For example, some centres have a state-wide approach to providing services. Other centres are a lot more specialised and focus on particular areas. There is quite a large range in the amounts of money that are funded on an annual basis to those centres, reflecting the variety of services that they provide.

Senator LUDLAM—Within that diversity, which we certainly would acknowledge, the figure of $500,000 has popped up quite a number of times for the baseline funding that would be required to run a CLC to a basic level of competency, so that the remuneration for the staff there at least in some way relates to what people could get in the rest of the industry. In 2006, which are the latest figures I have got, the department acknowledged that the average baseline funding was about $173,000. Can you confirm for us—on notice, if you like—whether that figure is still roughly accurate and what we do with that enormous gap?

Mr Arnaudo—I do not know that figure off the top of my head or have it in my briefing papers here. The figure for 2006 was?

Senator LUDLAM—$173,000 or thereabouts.

Mr Arnaudo—Was that the baseline funding?

Senator LUDLAM—Acknowledged average baseline funding of CLCs across the board.

Mr Arnaudo—I will have to take that on notice. The figure of $500,000 has come up from time to time. We have consulted with the National Association of Community Legal Centres in the development of a new funding allocation model that we could use to allocate funds across the program. It is their view that $500,000 would be the minimum to employ, say, five staff. I think that is a valid argument. You also have to bear in mind that for some centres $500,000 would actually represent a reduction—

Senator LUDLAM—A huge cut. I am not suggesting we pull everybody—

Mr Arnaudo—Also, if you go the other way then there is a significant increase in funding that is required for the program as well to operate. The other question you have to ask is whether each centre really needs five staff for the type of work they do or whether they would need a different makeup of their staff. There may be centres in rural, regional and remote areas where

staffing would be different perhaps because the costs of operating in those areas is a lot more expensive. We know that because of firsthand knowledge in Indigenous legal aid and community legal services.

I can see that the baseline figure of $500,000 has some attraction, but I caution that it probably does not take into account the wide variety of factors and variations that can occur within the program. I am very happy to take on notice the 2006 figure as well.

Senator LUDLAM—If we can get a sense of where it lies in 2009—and I am not denying the diversity in the sector and the diversity of needs, but that actually is a big gap—

Mr Arnaudo—The department does not have a view as to what is a minimum level. In terms of the development of the funding allocation model we have looked at what would be a base amount of funding to operate a centre but recognising there is a need to cover that variety and spectrum of services that are there. The funding model is still being developed. We have gone out to consultation and we are still in the process of developing it—and I am happy to take on notice what we said in 2006—but I do not think we have a view that this is the bare minimum that you have to have in terms of operating a CLC.

Senator LUDLAM—That is fine. We heard over and over again though that, on the basis of remuneration alone, the community legal sector cannot afford to retain people for very long and there is a hierarchy from legal aid to mainstream CLCs to Aboriginal legal support services, who appear to be at the bottom of the pile, face enormous churn in staff and so on.

Mr Arnaudo—Again, I think there is a lot of variation between those organisations as well. I know, for example, some Indigenous legal aid organisations pay the same rate as a mainstream legal aid organisation would.

Senator LUDLAM—Which is roughly half what you could get in commercial practice.

Mr Arnaudo—That is true. That also reflects I suppose the nature of the work they are performing and the types of services that they are providing as well.

Senator LUDLAM—It is a sector that runs on love I guess.

Mr Arnaudo—I think that is something that is recognised by the government and by the Attorney. Some community legal centres use that one-off funding to top up salaries. It is an issue we are very conscious about and are aware of. It is again a question of how you can best make do with the funding that is available.

Senator LUDLAM—I want to change tack a little bit. We have heard a few submissions from the Aboriginal legal sector that language barriers are a substantial problem for Aboriginal people, who may speak English as their third or fourth language. This reflects a little on some of the comments you made in your opening statements. You get a letter from a law firm asking you something and before you know it you are enmeshed in process, you have lost your drivers licence, you are in hock or whatever. Can you provide us with statistics on the use and accessibility of interpreter services for Aboriginal people in particular? There does seem to be an enormous gap.

Mr Duggan—There are a variety of services provided around the country. We would need to take that on notice. Just as an example, though, the department provided $550,000 to the Northern Territory Aboriginal Interpreter Service last year to encourage the use of interpreters in the Northern Territory, and that service has expanded significantly. It is also funded by the Department of Families, Housing, Community Services and Indigenous Affairs. There are other state bodies which fund Aboriginal interpreter services, so if we could take that question on notice, Senator.

Senator LUDLAM—Yes, I would appreciate that—if you can provide us with your understanding of what is available in the various states and territories. I am particularly interested, from a parochial point of view, in what is available in the north-west of Western Australia. They are facing similar issues, I suspect, to Central Australia and the NT, where again we have got some of the highest rates of Aboriginal incarceration in the country and people are often quite simply unaware, on the basis of language, what kind of trouble they are in. So if you could let us know that and, to the best of your ability, if there is matching funding coming from elsewhere.

Mr Duggan—Much of the funding will be from the states and territories. We will do the best we can. Where there are gaps, we will obviously indicate to you that there are gaps.

Senator LUDLAM—Okay. That is much appreciated. I might pause there.

ACTING CHAIR—Senator Fisher, we might go to you for your questions and then we will come back to Senator Ludlam. We will finish at nine.

Senator FISHER—Thanks, Chair. Gentlemen, thanks for this task force report. It is very good and interesting. I think I am about halfway through it. Mr Arnaudo, you correctly picked my concern, and it is not mine alone, about access to justice in rural and regional areas. So far I cannot find specific references to that in the report.

Mr Arnaudo—Sorry, it is on page 146. There is recommendation in there as well.

Senator FISHER—I haven't got there yet.

Mr Arnaudo—It is definitely there. But I will leave that with you.

Senator FISHER—Good. Thanks. I will have a look at that in a minute. Can I take you to page 35, under chapter 3, 'Supply of justice'. The report talked earlier about how the nature of the dispute can help indicate where it should be resolved and talked about employment disputes. The table on page 35, 'Gross Commonwealth justice system expenditure 2007-08 to 2008-09', shows that the Industrial Relations Commission, at nearly $59 million, has roughly 10 per cent of the total expenditure of almost $600 million for 2008-09. In the top tiers of gross Commonwealth systemic expenditure—and I may have got the ranking wrong—not unexpectedly, you have got the Family Court as top of the pops, then the Federal Court and then the Federal Magistrates Court, at $74 million. The Industrial Relations Commission comes out pretty much in the middle, at No.4, and then you have got a rump of three or four between $32 million and $39 million—the migration and refugee tribunals, the Insolvency and Trustee Service, and the Administrative Appeals Tribunal. Do you have any comment about expenditure

on the Industrial Relations Commission being some 10 per cent of the gross Commonwealth justice system expenditure for the period that you have looked at?

Mr Minogue—I do not have a specific comment on that. What we were looking to do there was map the system as best we could—where the expenditure is and where the resources go. What we also tried to do on the other side was work out how people use the system and see whether there was a mismatch, and we thought there was. A lot of money goes to the formal institutional arms of the justice system, but that is not how people use it. Clearly that expenditure reflects an element of demand as well. What we were essentially looking to do was work out where people go, how people use the justice system—broadly defined—and what is supplied to meet those demands. It was in that mismatch of supply and demand that we thought the gaps were. That is the comment I would make: that what we were looking at was how the system looks today, what people use, what people need from their justice system, what services are provided—institutionally or otherwise—and whether there is a way to reconcile a mismatch.

Senator FISHER—What is your specific reflection on the Industrial Relations Commission in terms of that mismatch, and how would you reconcile it?

Mr Minogue—I do not have a specific comment on that.

Senator FISHER—Does anybody else? Okay. In your document, on page 37 you have a table setting out the cost to government of service provision. Helpfully, at the end of that table you have attempted to work out the number of services provided per million dollars, which I suppose is an aggregation of the supply data. But whilst you have put those figures there for most of the bodies listed and the table two pages before, I cannot find the Industrial Relations Commission. Is there a reason for that?

Mr Minogue—I do not think there is. I think it was essentially a matter of trying to make the graph fit the page.

Senator FISHER—Sorry!

Mr Minogue—I think we were trying to demonstrate the points we were making in graph form as well as table form.

Senator FISHER—But the table goes over to the next page. The table on page 37 is continued on page 38.

Mr Minogue—Sorry, I am looking at the graph on page 39.

Senator FISHER—I was going to ask the same question about the table on page 39.

Mr Minogue—Apart from the point about the graph, no, I do not think there is a particular reason that we did not include the Industrial Relations Commission in that table.

Senator FISHER—So you would have had the data available to use, would you?

Mr Minogue—I honestly do not know. I suspect we would have, but I just do not know. I do not recall.

Senator FISHER—Can you please provide an answer to that question on notice? That is, why is there not the same sort of figuring done in that table and in following tables and graphs—the graph on page 53, as best as I can work it out. Sorry, I am not being critical; I am just trying to get a feel for this. The graph on page 53 seems to be a graph of the information in the table on page 37, but in between you have a whole host of tables and graphs attempting to evaluate your supply and demand information. I am trying to get a snapshot of where the bang for the buck is in terms of, for example, the Industrial Relations Commission and its resplendent no-show. It would be interesting to have that information. So: why are they not there, do you have the data available and, if you do, can you provide us with a table that puts them there with everyone else? And not just in that table.

Mr Minogue—Certainly. We will look at that. There certainly would not have been any attempt to hide or spirit away the Industrial Relations Commission.

Senator FISHER—No. I am hoping you have the data.

Mr Minogue—I will certainly check. I just cannot recall, but I will take it on notice.

Senator LUDLAM—I have not had a chance to read this document properly, but thanks again for providing it. We have been going through it over the last couple of days. Can you tell us where in here we can find a clear statement of your intent or the Attorney-General's intent with regard to Aboriginal access to justice, given the quite rapid and radical increase in the proportion of the incarcerated population of Aboriginal people? Where can we find a really clear statement of principles as to how that will be reversed and addressed?

Mr Minogue—One of the things we were very conscious of was the national Indigenous framework, which was under way. We have made quite a number of references throughout the course of the report in relation to the particular needs of Indigenous people. In the chapter on building resilience, we have specific reference to meeting the needs of Indigenous Australians. That makes reference to the objectives and the work undergoing in the National Indigenous Law and Justice Framework. We did not seek to replicate that work but to link in with the work which was already going on.

Mr Duggan—The principles of the National Indigenous Law and Justice Framework were adopted by the Standing Committee of Attorneys-General on 6 August. The framework itself is now before governments for final sign-off. A number of governments have signed that off and we await one or two others, including our own, to complete that process.

Senator LUDLAM—Including our own?

Mr Duggan—Including the Commonwealth. The Commonwealth is about to sign it as well. Essentially, the other thing which happened at that 6 and 7 August meeting is that the states agreed to develop closing the gap targets in relation to justice issues for Indigenous people, in their jurisdictions. There will be work in relation to framework and in relation to these closing the gap targets as well.

Senator LUDLAM—Can we expect some report on that in any communique coming from the forthcoming meeting or is that going to be too late?

Mr Duggan—It is a bit early for that. We do not yet have a completed time frame in relation to closing the gap targets. There will not be one at next weeks meeting of SCAG. It is more likely to be in the new year.

Senator LUDLAM—Do you acknowledge—I presume it is not a controversial proposition in terms of access to justice in Australia—that Aboriginal people are right at the bottom of the pile and their legal representatives are greatly stretched. Is there a will, in the forthcoming budget, to at least bring Aboriginal legal services up to scratch with the rest of the sector in the pay they can offer their people?

Mr Arnaudo—As outlined before, there is a recognition that there are funding pressures throughout the community legal services sector and the legal assistance areas, particularly Indigenous legal assistance. In this report, recommendation 11.4 on page 144 recommends that:

The Commonwealth should consider options for improving access to culturally appropriate legal assistance services for family and civil law matters for Indigenous Australians.

That part of the report focuses a bit more on it—around pages 144 and 143.

Senator LUDLAM—I will have to get back to it, but that is a recommendation which is carefully worded not to recommend anything at all—'consider options'.

Mr Arnaudo—But taking it back to that one-off funding which was being provided, there is recognition there by government that there are funding pressures on these services and one-off funding, as we discussed before, might not be the complete solution to these issues. It is an acknowledgement that these services have faced increased demand, particularly in criminal law areas. In another area, Indigenous legal aid, states and territories make very little contribution, if any, to this. A large proportion of the work provided by Indigenous legal aid services is in the criminal law area, particularly state and territory crime. Issues such as more court circuits or changes in criminal law policies or procedures have a direct impact on the supply and the demand for those legal services as well. That is something we are exploring with the states and territories as well, in seeking further funding for those services. That is again a recognition that the government recognises that those services are facing some pressures but the one-off funding has helped address those pressures. For example, in the Indigenous legal aid context, some of that one-off funding has assisted in the purchase of accommodation for solicitors to live in rural and remote areas. That provides a tangible long-term benefit to that service, rather than providing money to pay for rent. Those are the sorts of examples of the way that the one-off funding can be used to assist the long-term viability of those services.

Senator LUDLAM—What short term strategies do we put in place to immediately begin reversing that awful notion that in a country with about two per cent of the population made up of Aboriginal people, across the average of the entire country, that in some places nearly half of the prison population are black people? While we are busy working out the large-scale frameworks behind the scenes, when do we see those indicators begin to fall?

Mr Duggan—Part of the work of the Standing Committee of Attorneys-General in working to develop the framework we talked about was to work towards a set of principles. Those principles deal with issues relating to incarceration. We are hopeful that when the targets I talked about earlier are developed by states and territories there will be some recognition of the impact of changes in the state criminal law which impact disproportionately on Indigenous people. The Attorney is keen to engage with his counterparts in relation to that issue, but it is fundamentally an issue of state and territory law under which Indigenous people are incarcerated at the rates you have mentioned.

Senator LUDLAM—I will put final question to you. Not only are we short of time but we have run half an hour over it, so I appreciate that you have stayed back. Are you aware of a presentation that was made this evening and has been made before by Aboriginal Human Rights Commissioner Tom Calma around a proposal for, at the bare minimum, a pilot of the justice reinvestment model that has been pioneered in the United States over the last five or six years? Is that a concept that you are familiar with and is it something that you are investigating as a way of finding the funding that virtually every witness who has appeared before us has agreed is needed?

Mr Duggan—It is a concept that I am aware of. I heard Commissioner Calma speak at a recent conference in that regard. It is something that Commissioner Calma has communicated to government. I am not aware at the moment just where that has got to in relation to individual governments. I just reiterate that primary responsibility in this area is with the state and territory governments and of course we cannot comment on their behalf. Indigenous prisoners are almost entirely imprisoned under state and territory law.

Senator LUDLAM—But, as the representatives at the table of the Commonwealth Attorney, is there any intention to put those ideas as strongly as possible, if you believe that they have merit, at the forthcoming meeting of state and Commonwealth Attorney-Generals?

Mr Duggan—I am not aware that there is a current intention in that regard. Nor am I aware that there is no intention. We will seek the Attorney's view and relay it to the committee.

Senator LUDLAM—Could I put a very strong request on the record and on notice to you and to the Attorneys that those propositions be considered at that meeting as a matter of urgency. There is merit there, and not just theoretically. In fact, these proposals have been tried and been found to very successful at targeting the areas where imprisonment is greatest in some of the most conservative jurisdictions of the United States. I know you do not need me to lecture you guys about this; you do it for a living. But I would find it odd, to say the least, it were not on the agenda next week.

ACTING CHAIR—So you are happy to put the rest of your questions on notice, Senator Ludlam?

Senator LUDLAM—Yes, I will put a few matters on notice. Thanks for your time tonight, gentlemen.

Senator FISHER—Mr Arnaudo, thank you; I have found the recommendation on page 146. I feel a bit let down, though, because it is half a page in 160 pages for rural, regional and remote

Australia. It talks about legal services, publicly funded or otherwise, becoming increasingly difficult in rural, regional and remote areas. But the recommendations go largely to the extent that there are some in the next two paragraphs. Recommendation 11.7 goes pretty much to publicly funded and government assisted avenue, doesn't it?

Mr Arnaudo—There is some work that we are doing within the department—for example, I think the Law Council of Australia was here before talking to you about some of their proposals to us as well—

Senator FISHER—You have taken me to my next question: where was the consideration in this of the sorts of propositions?

Mr Arnaudo—That is being considered within government as well. It is very much an issue that the publicly funded services that we provide have appropriately qualified staff in rural and regional areas. In my area, for example, of community legal centres, Indigenous legal aid and family violence prevention legal services, they are very much in rural and remote areas. If they cannot get good quality staff and keep them there then they are not delivering the service. That is from my perspective, where I am focusing on the publicly funded services, but clearly you also need a good strong private sector legal professional there to provide services as well.

Senator FISHER—So where is the reference to that in here?

Mr Arnaudo—There is a reference there to the Regional Innovations Program for Legal Services, which Dr Smrdel can talk a bit more about. There are other programs, such as the Country Lawyers Program of Western Australia that Legal Aid Western Australia runs. We support that through our Family Violence Prevention Legal Services program and our Indigenous Legal Services program. It is in its early days but it is providing some good solicitors in regional Western Australia where before it was very difficult to attract and recruit solicitors.

We had a meeting last month with some Northern Territory legal service providers, not just the publicly funded ones but the Northern Territory Law Society attended as well. We tried to discuss some basic ideas about how lawyers, legal firms and legal practices, can attract and retain solicitors. I think the issue is not just about the money but the conditions and the support that you provide people in remote areas. That is definitely something that we are looking at in terms of the work we are doing on the management of our programs, but it also fits in with the broader structure of how access to justice is working across Australia, not just in metropolitan areas but also in rural and remote areas.

Senator FISHER—I would like one further clarification. You talk in here about developing strategies to address the legal assistance needs of disadvantaged Australians living in rural, regional and remote areas. Call me silly, but are you saying they are disadvantaged in a legal sense by dint of living in rural, regional and remote areas or are you saying that disadvantaged is a subset of that population?

Mr Arnaudo—I suspect that it is probably the subset. I did not write that but it is very much a subset. There are people who are disadvantaged across Australia but who happen to live in rural and remote areas as well. I do not think it necessarily follows that you are automatically disadvantaged—

Senator FISHER—All right. I guess my final bit of input in this discursive process is that I hope you would also consider access to justice for those who may not be perceived as disadvantaged in your sense, but who are also in rural, regional and remote Australia. Thank you.

Mr Arnaudo—Definitely.

ACTING CHAIR—I thank the four of you very much for giving up your time this evening and assisting us with our inquiry. There may be some questions on notice and you have some answers that you are going to provide for us. I now declare this public hearing finalised. This is the last public hearing.

Committee adjourned at 9.02 pm