
COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

# SENATE

## LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE

**Reference: Legal aid and access to justice**

WEDNESDAY, 12 NOVEMBER 2003

MELBOURNE

BY AUTHORITY OF THE SENATE

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**SENATE**

**LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE**

**Wednesday, 12 November 2003**

**Members:** Senator Bolkus *(Chair)*, Senator Payne *(Deputy Chair)*, Senators Greig, Kirk, Scullion and Stephens

**Participating members:** Senators Abetz, Bishop, Brandis, Brown, Buckland, Carr, Chapman, Crossin, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Harradine, Harris, Humphries, Knowles, Lees, Lightfoot, Ludwig, Mackay, Mason, McGauran, Murphy, Nettle, Sherry, Stott Despoja, Tchen, Tierney and Watson

**Senators in attendance:** Senators Bolkus, Greig, Ludwig and Payne

**Terms of reference for the inquiry:**

To inquire into and report on:

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

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

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

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

**WITNESSES**

**Committee met at 8.59 a.m.**

**BURCHELL, Ms Samantha Elizabeth, Co-Executive Director, Public Interest Law Clearing House (Victoria) Inc.**

**LYNCH, Mr Philip Alan, Coordinator, Homeless Persons' Legal Clinic, Public Interest Law Clearing House (Victoria) Inc.**

**O'BRIEN, Ms Paula Louise Frances, Co-Executive Director, Public Interest Law Clearing House (Victoria) Inc.**

**CHAIR**—I declare open this second public hearing of the Senate Legal and Constitutional References Committee's inquiry into legal aid and access to justice. The inquiry was referred to the committee by the Senate on 17 June and the committee is to report by 3 March next year. Our terms of reference, copies of which are available from the secretariat and on the web site, focus on the capacity of current legal aid and access to justice arrangements to meet the community need for legal assistance. They include uniform access to justice across Australia; the effect on particular types of matters, such as family law and civil law matters; and the impact of current arrangements on community and pro bono legal services, court and tribunal services and levels of self-representation.

The committee has received 96 submissions to this inquiry, all of which have been authorised for publication and are available on the committee's web site. Witnesses are reminded of the notes that they have received relating to parliamentary privilege and the protection of official witnesses. Witnesses are also reminded that the giving of false or misleading evidence to the committee may constitute contempt of the Senate. We prefer that all evidence be given in public but, under Senate resolutions, witnesses do have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera.

I welcome representatives of the Public Interest Law Clearing House. You have lodged submissions Nos 54 and 13 with the committee. Is there any need to amend or alter those submissions?

**Ms O'Brien**—There is one point that we would like to draw to the committee's attention. The statistics in the PILCH submission were in draft at the time we lodged the submission. Those statistics can now be treated as final.

**CHAIR**—Would you like to make an opening statement?

**Ms O'Brien**—Thank you for giving us the opportunity to address the inquiry on the relationship between access to justice, government legal aid and pro bono work. PILCH is the major pro bono referral agency in Victoria. It coordinates the provision of pro bono legal assistance through four complementary pro bono schemes: the Public Interest Law Clearing House scheme, the Victorian Bar legal assistance scheme, the Law Institute of Victoria legal assistance scheme and the Homeless Persons' Legal Clinic. None of these schemes receives Commonwealth funding.

The schemes administered by PILCH predominantly assist individuals with legal issues where they do not have the means to access the legal system and where legal aid or assistance from a community legal centre is not available. In the past financial year, PILCH received approximately 1,100 requests for assistance and referred 326 of those requests to lawyers to act pro bono. Through its pro bono efforts, the Victorian legal profession demonstrates a remarkable commitment to the principles of access to justice and equality before the law. We wish to state clearly our view that the significant pro bono efforts of the private legal profession are no substitute for proper government funding of legal aid and community legal centres.

On the issue of government funding of legal aid we note that the 2001-02 Victoria Legal Aid annual report records that VLA had accumulated significant cash assets which were 'predominantly due to VLA being unable to expend funding provided for Commonwealth law matters'. This is money which has been earmarked by the Commonwealth for spending on legal assistance and representation for those who cannot afford it. This money is not being spent, yet there are many people in the community who need legal assistance but cannot afford it and therefore go without it.

A lack of legal advice makes a significant difference to the way in which a person's legal problems are resolved. This in turn may impact on other aspects of the person's life and their wellbeing. In this respect, we draw your attention to recommendation 4 in our submission, which is that the Commonwealth and Victorian governments immediately implement strategies to expend funds supplied by the Commonwealth to Victoria Legal Aid on needy clients who would otherwise be without legal assistance.

In the absence of sufficient legal aid, the private legal profession has attempted to meet the needs of people who would otherwise go unrepresented. In doing pro bono work, the profession has been enthusiastic, dynamic and very responsive to client needs. However, we must acknowledge that as things currently stand there are limits to the legal assistance which can be provided pro bono. I wish to highlight three matters with which the Commonwealth can assist.

The limits to the capacity of pro bono are bleakly evident in the area of family law, which is within the jurisdiction of the Commonwealth. Legal aid is available for family law matters up to a cap of $10,000. PILCH receives many applications for assistance in family law matters, particularly those relating to children, where the legal aid cap has been met. We have little or no success in referring family law matters for pro bono advice and representation. Many family law practitioners do a significant amount of pro bono as part of their practices and do not have the capacity to take on more. Family law matters tend to come with long and complex histories and cannot be neatly packaged as a discreet one-off issue with which a pro bono lawyer can assist. Where a family law client meets all our eligibility criteria but we cannot find a lawyer willing to take the matter pro bono, we have no choice but to turn the client away. Legal aid has a role to play in assisting such clients.

We also had difficulties with firms not accepting pro bono matters which raised indirect or commercial conflicts. These can be in any area of law. We would not expect any lawyer to act where there is a direct or legal conflict. However, although there is no direct conflict, a lawyer may perceive a potential disadvantage to their commercial interests if they act against a client or potential client. PILCH has received anecdotal evidence of law firms and barristers declining to act on this basis.

Government departments and agencies often engage private lawyers to provide legal services, through a tendering process. PILCH has specifically been informed about a Commonwealth government department which selected lawyers, through a tender, to be on a panel to perform specialist work and which instructed lawyers not to accept any work against the department in any area of law. This is clearly a huge obstacle to these firms' performance of pro bono work against that government department.

A strategy to minimise the possibility of law firms and barristers declining to act for pro bono clients due to an indirect or commercial conflict with a government client is set out in our recommendations 5, 6 and 7. This proposes that the government adopt a policy dealing with indirect and commercial conflicts. Most significantly, the policy should ensure that, with the exception of cases of direct conflicts, a lawyer will not be discriminated against or penalised in relation to a government client's decision to purchase legal services if the lawyer represents the client on a pro bono basis in a matter against that government client.

In addition to asking that the government does not prejudice lawyers who act against it pro bono, we also seek that the government positively fosters the doing of pro bono work in Australia. One example, which we urge the Commonwealth to follow at recommendation 8, is the Victorian government's adoption of a policy to take into account the value of pro bono performed by law firms in tenders for government legal work and to include the value of pro bono as a key performance indicator for panel firms. There are positive aspects to the Victorian model which could be implemented and refined at a Commonwealth level.

**ACTING CHAIR (Senator PAYNE)**—Thank you very much, Ms O'Brien. Ms Burchell, did you wish to add anything at this point?

**Ms Burchell**—Yes, there are three matters that I would like to address the committee on very briefly. They are: the accessibility of pro bono services in outer metropolitan, rural, regional and remote areas, which I will refer to as RRR areas; the particular concerns relating to the provision of legal services for asylum seekers in the practice of migration law; and the issue of costs. I will deal first with the RRR issue.

My comments are based on the Victorian experience and are in particular about the adequacy of existing arrangements to meet the needs of clients in those areas. We acknowledge that there is a disparity in the availability and type of pro bono assistance available to clients in RRR areas. Much is done for clients in need in RRR areas by local lawyers; however, there are limitations. For example, there are fewer lawyers in RRR areas and greater potential for conflicts of interest. Most of the organised pro bono schemes in Victoria are CBD based and the preponderance of large pro bono service providers, such as the large law firms, are also CBD based. In addition, the Victorian bar is Melbourne CBD based, limiting accessibility to the pool of specialist and independent advocates. Many court proceedings also take place a considerable distance from the homes of RRR clients.

We also work on the assumption that the provision of legal services, particularly the taking of instructions or the imparting of legal advice, is best done by at least some face-to-face or person-to-person contact. There is also unequal access to technology as a tool to help overcome geographical barriers due to, for instance, the unavailability of some telephone and Internet services in RRR areas and affordability issues.

There are a number of strategies that we would suggest the committee might want to consider in addressing some of these issues. The first is to find incentives or ways to attract more lawyers to practise in RRR areas in the way that such strategies have been investigated in relation to doctors and medical practitioners. The second recommendation set out in our submission is that the government should consider providing funding for disbursements, including legal practitioners and travel expenditure to facilitate the provision of pro bono legal assistance to people who would not otherwise have access to legal assistance due to geographic barriers. The third suggestion is for investigation of the use and implementation of video link technology in RRR areas for use not just by courts but by legal practitioners in interviewing clients. Recently we attended the national pro bono conference that was held in Sydney and there was quite a bit of discussion about this issue from Queensland legal aid.

PILCH is exploring ways of extending the availability of organised pro bono services into RRR areas. The focus may be on how some of the existing resources and skills can be applied in these various areas or on working cooperatively with existing services in a particular geographic area. There may also be the simple process of education about what pro bono services are available in the CBD area and how they can provide services to RRR areas, notwithstanding geographical barriers. To the extent that governments are called upon to support or resource such initiatives of the private legal profession, they should be encouraged to do so.

The second area that I want to briefly outline is the issue of services to asylum seeker clients in the migration law area. PILCH is a generalist service provider. It does not specialise in any particular area of law. However, we are able to identify trends, and one of the most indisputable facts is the current unmet demand for legal assistance in migration matters, particularly for asylum seeker clients and those in detention. This must be one of the most vulnerable and disadvantaged client groups in terms of accessing legal assistance of any kind. Many clients are held in remote parts of the country with little or no access to legal assistance. For instance, we have been informed that there is no formal or accurate information made available to people held within detention centres as to the legal services available to them. Many such people have significant language barriers with limited access to interpreter and translation services. Needless to say they are also generally of very limited means.

The legal framework in which their claims are made must be one of the most complex and technical, and for that reason that justifies the need for skilled legal assistance. Finally the ramifications of the outcome of their legal proceedings are some of the most significant and life-impacting imaginable. The federal Attorney-General, the Hon. Philip Ruddock, has recently announced a review of migration litigation. The focus of the review is on migration applications in the Federal Court and the Federal Magistrates Court at the judicial review stage. As was said by the Attorney-General in his news release, it was prompted by the concern 'about delays in the resolution of migration cases and the very low success rate of applicants'; in other words, matters that are considered 'unmeritorious' being lodged in the courts.

We have concerns about the focus of this review, the assumptions on which it is based and the terms of reference—in particular to the extent that they raise serious issues about access to justice and the role of lawyers in assisting such clients. It is important that all government and tribunal decision making is fair and transparent and there should be a basic entitlement to challenge government when it is beyond power. Our experience is that many are concerned about the decision making process at the merits review stage or at the RRT. We cannot comment

about whether or not this is true, but unless there is a real perception of fairness and transparency there will be the propensity to seek further review—hence the need for readily accessible, early and proper legal assistance to ensure the best possible outcome at the merits review stage in migration matters.

Once matters of procedures of the judicial review stage are in the courts, the need for legal representation and advice is again pronounced. There should be no added barriers or disincentives to lawyers who seek to provide such assistance. On the contrary, there should be more resources devoted to ensuring the capacity for legal assistance in migration matters is increased. Hence, our recommendation 3, which says:

*The Commonwealth government should provide further resources to pro bono schemes administered by the Federal Court and Federal Magistrates Court.*

Our experience is that these schemes operate very effectively in Victoria. Anecdotally, that is not necessarily the case elsewhere. However, such schemes should be equitable and not just available in certain states. Similarly there is a pilot program—which is referred to at page 15 of our submission—that is run by DIMIA in the Federal Court in Sydney, whereby barristers are paid a fee to make a merits assessment of a client's case. We understand that program may be expanded, and that is perhaps something that should be seriously considered.

One of the terms of reference for the migration litigation review is to inquire into the existing framework for ensuring migration agents and members of the legal profession do not encourage the bringing of unmeritorious migration cases. Legal practitioners are already subject to professional regulation and ethical rules and, unless a case is patently unarguable or without foundation, a legal practitioner is entitled to act on behalf of an applicant in relation to such proceedings. It is difficult to know what is being proposed by the review, which is due to report before Christmas, but, to the extent that there is any proposal to introduce or extend a regime of costs penalties available against practitioners who act pro bono in migration matters, we strongly urge against it.

A related issue, which I will touch on very briefly, is one of costs and particularly the applications by the Commonwealth or state governments in public interest matters for an order as to costs. This is an issue that was raised in the *Tampa* litigation. I draw your attention to our recommendation 9, which says:

*The Commonwealth and State governments should develop and publish a policy on seeking costs against litigants and legal advisors in public interest and other pro bono matters against Commonwealth and State departments and agencies.*

This is particularly so because such matters have the potential to affect a large number of people and the potential to provide certainty in unresolved areas of law.

**ACTING CHAIR**—Thank you very much, Ms Burchell. Mr Lynch, I assume you have some comments you wish to offer. The only observation I would make is that the longer your opening statements take the less time we will have to ask questions.

**Mr Lynch**—I will speak very briefly about the relationship between homelessness and access to justice. Homelessness is one of the most serious socioeconomic issues confronting Australia.

In 1996 the Australian Bureau of Statistics estimated that there were over 105,000 people experiencing homelessness across Australia on census night. The causes of homelessness are complex and varied. They include structural causes, such as a lack of affordable housing; fiscal and social policy causes, such as the pegging of social security payments below the Henderson poverty line; and individual causes, such as mental illness or drug and alcohol addiction.

In numerous cases the law and access to justice arrangements also cause or contribute to homelessness. In fact, very few people become homeless without some interaction with legal or bureaucratic institutions, such as the Residential Tenancies Tribunal in the event of an eviction or Centrelink in the event of social security payments being reduced or terminated. Moreover, very few people are able to move out of homelessness without successfully navigating such institutions, whether by negotiating with a public housing authority to waive rental arrears or appealing a Centrelink decision to cut payments.

While even the most zealous legal advocacy cannot operate as a panacea to homelessness, access to justice arrangements can therefore contribute very directly to preventing or resolving a person's homelessness. In my view there are four key barriers faced by people experiencing homelessness in accessing legal services, courts and tribunals. First, the availability of legal aid for homeless people in respect of civil and administrative law matters, including such common matters as fines and infringement notices, debts, tenancies, mental health law, discrimination, social security, and guardianship and administration, is extremely limited. Second, given the pressing problems that many homeless people confront, such as lack of housing, legal issues are unlikely to be identified and addressed as a priority unless legal services are appropriately targeted and delivered at locations already accessed by homeless people for more basic subsistence needs.

Third, many homeless people are not aware that they have a legal problem or that they have legal rights that are being infringed. This lack of awareness or knowledge is particularly evident among young homeless people, homeless people from culturally diverse backgrounds, Aboriginal and Torres Strait Islander homeless people, homeless people experiencing mental illness and homeless people with an intellectual disability.

The fourth barrier is that many homeless people lack the level of confidence or empowerment necessary to access legal services. This may be due to factors including mental illness, language barriers or the perception, at least, that legal assistance is costly. Previous negative experiences with the law, law enforcement officers and the court system, including associating the court system with imprisonment, may also dissuade homeless people from accessing legal assistance.

It is our view that the Commonwealth could contribute significantly to the removal of these barriers and the prevention and resolution of many people's homelessness in three key ways. First would be properly funding specialist homeless persons' legal services—which currently receive no Commonwealth moneys—to outreach by homelessness agencies to provide civil, administrative and also summary criminal law assistance to and advocacy on behalf of people experiencing homelessness. Second would be properly funding legal aid and existing community legal centres to increase their outreach capacity to people experiencing homelessness. Third would be to increase funding to courts and tribunals for the operation of specialised lists and the development and implementation of parallel services to support people experiencing homelessness.

In addition to confronting barriers to accessing legal services and the courts, people experiencing homelessness confront multiple barriers to accessing substantive justice—that is, participating in such a way to ensure that the formulation and application of the law is just and fair. In my view, this is attributable to homeless people's lack of participation in public and social policy formulation and decision making processes. I will set out briefly the reasons for and some proposed solutions to this lack of participation. First, many homeless people are not registered or are unable to register to vote. Up to 80,000 homeless people did not vote at the 2001 federal election. The itinerant voter provisions of the Commonwealth Electoral Act should be amended so that people who do not have safe and secure housing can register to vote in the electorate with which they have the closest connection. The Australian Electoral Commission should, in conjunction with homelessness service providers, conduct a campaign targeted at homeless voter education, enrolment and participation.

Second, many homeless people face difficulties obtaining social security payments due to proof of identity issues and maintaining payments due to onerous activity agreements or mutual obligations. At present, social security payments are pegged at a level well below the poverty line, meaning that many recipients have to focus principally on survival rather than participating in and engaging with civil and political society. The Commonwealth should amend the Social Security Act to include an integrated package of social security assistance to people who are homeless or at risk of homelessness that includes housing, employment assistance and personal support to ensure sustainable outcomes and facilitate public participation.

Third, discrimination on the grounds of social status, including homelessness, joblessness or being a social security recipient, is lawful at a Commonwealth and state level across Australia. The Howard government has recently announced that it proposes to amend the Disability Discrimination Act to permit discrimination against drug users. Drug use and discrimination are major causal factors of homelessness. Equal opportunity and antidiscrimination legislation at both Commonwealth and state levels should be introduced or amended to prohibit discrimination on the basis of a person's social status.

The final barrier and strategy is that there is no Commonwealth legislation dealing with the rights of people experiencing homelessness. Further, there is no complaints body or mechanism equipped to deal specifically with violations of the rights of people experiencing homelessness. Following the very inspiring lead of the Victorian government, the Commonwealth should, in consultation with homelessness service providers and people who are homeless or at risk of homelessness, develop a charter of rights for homeless people. Further, the Commonwealth should consider appointing an independent and impartial homeless persons' commissioner to promote and protect the rights and interests of homeless people, possibly as an adjunct to the Commonwealth Ombudsman's office, as has been the case in New South Wales. This office could also assist homelessness service providers to achieve best practice standards and to critically examine proposed legislation for the purpose of assessing its potential impact on people experiencing homelessness.

In my view, these policy initiatives would substantially increase access to and also the administration of both procedural and, importantly, substantive justice for people experiencing homelessness. Having regard to the close correlation between access to justice arrangements and the prevention or resolution of homelessness, they could substantially decrease the incidence of homelessness itself.

**CHAIR**—I will start by apologising for having to be dragged out for a few minutes, but I have read the submission and so I know what you are about. We will start with questions from Senator Payne.

**Senator PAYNE**—I want to take up the reference that Ms O'Brien or Ms Burchell made to the National Pro Bono Conference that was held in Sydney recently. Was the Attorney-General's Department in attendance at that conference?

**Ms Burchell**—Yes, Mr Ian Govey was at the conference.

**Senator PAYNE**—In the context of those discussions, were issues such as the conflict issues raised in your written submission taken up with the Attorney-General's Department?

**Ms Burchell**—I am unable to say.

**Ms O'Brien**—I cannot recall whether that was the case at the conference, but Mr Govey met with PILCH probably about two months ago in Melbourne and we did raise those issues with him at that point.

**Senator PAYNE**—Have you had a response?

**Ms O'Brien**—No, we have not had a formal response.

**Senator PAYNE**—I assume the reason you have not identified the government department to which you refer on page 24 is that you are protecting the lawyers that you—

**Ms O'Brien**—That is right.

**Senator PAYNE**—That makes it hard for us to do anything about it.

**Ms Burchell**—If I could add to that, the National Pro Bono Resource Centre has developed a protocol on conflicts. It has provided that to the Attorney-General's Department, and it is currently being considered by the department.

**Senator PAYNE**—I guess we can take a fishing net approach and ask all departments what their approach is to dealing with pro bono matters. That might get us some answers; then again, it might not. Mr Lynch, you identified a whole range of barriers to accessing justice faced by people experiencing homelessness. One finds it difficult to imagine who would be in a worse situation. What would you identify as the largest single barrier?

**Mr Lynch**—If you are talking about access to procedural justice—that is, access to legal services in the court and tribunal system—

**Senator PAYNE**—Yes.

**Mr Lynch**—I think that the crucial issue is that if you or I receive a fine for travelling on a tram without a valid ticket resolving it is probably going to be a reasonable priority for us, because we understand the ramifications of not resolving it. In the context of a homeless

person's life, that is just not a priority. Homeless people have far more pressing concerns that need to be addressed on a day-to-day basis. Having regard to that, I think it is crucial that legal services be targeted and delivered at locations at which those more basic subsistence needs are met. So I think the most crucial strategy is to fund community legal centres and Legal Aid to outreach to homeless agencies, crisis accommodation shelters, domestic violence refuges and soup kitchens in order to meet homeless people on their own turf and assist in identifying and addressing their legal issues.

**Senator PAYNE**—I assume that is where you would suggest that an AEC campaign of the nature that you identified would also be conducted?

**Mr Lynch**—That is exactly right.

**Senator LUDWIG**—You identified effectively, as I understood it, that pro bono work is not a substitute for legal assistance. I guess this question is to either Ms Burchell or Ms O'Brien. If that is the case then, what area is marked out for pro bono work, in your view?

**Ms Burchell**—Probably historically, most work has been done in the civil area, because that is really where there has traditionally been less legal aid. Also, a lot of the work that we do currently—and it is work that we have always done since the organisation began about 10 years ago—is transactional work for not-for-profit organisations. That is something that has quite a bit of benefit for the community ultimately. It is work that lawyers can do very easily and it has quite a far reach, because the organisations that then tap into large numbers of people within the community in providing services to those people do not have to expend their resources on legal assistance. That is an area in which I certainly think the legal profession is very comfortable to continue, and similarly in the civil area. But it is very difficult for the legal profession to then move into the sorts of areas where there is individual need, like family law, crime and migration. The profession is much better at dealing with organisations in the civil area, rather than assisting individuals on an ad hoc basis. I think the impact can be greater if it is done where there is maximum reach into the community.

**Senator LUDWIG**—As I understand it, legal aid is capped in family law areas and in many instances it is only for the worst criminal offences that it is raised. So are you saying that there is a burgeoning gap between where pro bono work would traditionally go or is capable of going—because they may pick cases that are easy or less resource intensive or less time intensive—and those at the other end of the spectrum where legal aid will fill perhaps only the worst cases? Is there a growing gap in the middle? Is that what you are putting to us?

**Ms Burchell**—There is certainly a gap in the middle, but I do not know whether legal aid is even meeting the needs of some of the most difficult cases. For instance, if there is a family law cap, the most difficult and most entrenched cases are often those where, ultimately, legal aid dries up very quickly.

**Senator LUDWIG**—Yes, so there is a gap on the other end as well. I guess I should qualify that. I appreciate the point that you made in your submission.

**Mr Lynch**—In relation to criminal law, legal aid is generally only available for indictable offences where the probable outcome is incarceration in the event of a finding of guilt. For most

of our clients, the criminal law matters they face are summary criminal law matters, particularly in relation to fines and infringement notices. If those fines and infringement notices remain unpaid they can result in a period of imprisonment under the legislation for a period of up to one day per $100. Ordinarily, those matters do not qualify for legal aid, despite the very significant impact they will have on a person's liberty and despite the fact that in many cases our clients have fines of up to $50,000 or $100,000 for such basic offences as begging or drinking in a public place.

**Ms O'Brien**—The areas of expertise of the lawyers who are doing pro bono work often do not closely match the areas of need that clients have. Whilst we have embarked upon a number of training strategies to try and skill lawyers in the areas where the need is, there still are some areas where the lawyers' skills just will not match—like family law and crime, which are two very specialist areas in law where lawyers in commercial firms usually will not do pro bono work.

**CHAIR**—Does that present a problem in terms of your recommendation 8, which looks to the level of pro bono assistance when a company tenders for government work? I think that we on this side of the table are somewhat interested in the concept. Could you elaborate a bit further on how you would see that working, both in respect of government contracts and that recommendation and also in respect of government agencies. I suppose that you would quite often find inappropriate skills. Has it been piloted in Victoria? What is its status at the moment? If we were to pursue this idea, how would you recommend we do that?

**Ms Burchell**—It has been piloted in Victoria. Certainly the contracts came into effect at the beginning of this year, and I think the actual tender process took place during the last calendar year. In tendering for government work and being considered for being part of the government panel for legal services, firms had to demonstrate their commitment to pro bono work. They also had to undertake that a certain percentage of the value of the work they would get from government would be for pro bono services. The pro bono services that the firms were to provide would not necessarily relate to the area of law in which the firms would be providing assistance to government departments. For instance, a firm might well be doing something like providing, say, property law services to government, but they would be fulfilling their pro bono commitment by seconding lawyers to a community legal centre or to PILCH. There is not necessarily a correlation—if I have understood the question correctly.

**CHAIR**—My concern was actually that the skills might not be appropriate to the sorts of things needed by the pro bono system, but I think you have answered that.

**Ms Burchell**—Yes, and I think that, with the exception of some highly specialised areas like crime and family law, lawyers in private practice are doing a lot to skill themselves up—even in the migration area—when they want to do work in that area. But to a large extent their skills are adaptable to doing work for pro bono clients. The scheme in Victoria is currently in operation. The panel has been selected and it is being administered through the Department of Justice. It is our view that it would be very valuable if there was some form of formal and open evaluation of the scheme in Victoria to see whether or not it has in fact built capacity. That was really the Attorney-General's intention when he announced the scheme in Victoria. It was intended to actually encourage firms to do more work, above and beyond what they were already doing—the incentive being the likelihood of getting work for government. Whether or not that has in fact

happened would be very interesting. It certainly caused a flurry of activity when it was announced.

**Mr Lynch**—The other point to make about that tender requirement is that, while the definition of pro bono is very broad, there is no prescription as to what kind of pro bono work a firm should undertake. Despite the fact that there may be an increase in the incidence of pro bono as a consequence of that tender process, it does not necessarily fill the service provision gaps.

**CHAIR**—The other part of the question was about the pro bono work done by government lawyers. Is there any progress on that? Is that a recommendation of yours that needs to be—

**Ms Burchell**—It is a recommendation.

**Ms O'Brien**—We have been approached by a number of lawyers who work for government who have indicated that they would like to be involved in pro bono work, other than outside work hours. They would like the same opportunities that you get in most firms or corporate legal departments to do some pro bono work. It was an issue that was raised at the National Pro Bono Conference, to see how this could best be done, given the range of conflicts that spring to mind. I think we can say that there were not any substantive solutions to the problem, except that maybe those kind of lawyers could be involved in providing training—as instructors at training sessions and in those kinds of capacities—as opposed to direct client service provision. I do not think you can say it has been progressed successfully with government.

**Ms Burchell**—We are very keen on the idea of secondments, too. That has worked very effectively in the private sector. There is no reason it could not be extended to some of the lawyers who work in the many different facets of government as well.

**Ms O'Brien**—On that note, in dealing with conflicts secondees we have at PILCH may have, we apply the same policies that they would apply in the firm. So, if a file comes to us where there is a direct conflict, the secondee will not act. We could see that that same policy could easily be applied to government lawyers to avoid some of the difficulties that they might have.

**CHAIR**—The other issue you raise is disbursements and the level of pro bono work done by other professions. Can you elaborate on that point and on where you think we can take that issue in terms of encouraging other professions to assist?

**Ms O'Brien**—We have a very clear view that many of the clients' problems require a holistic solution. Lawyers can take things so far, but there is usually a requirement for the involvement of other professionals. It is seen very clearly through the homeless clinics, usually with the involvement of medical practitioners to provide medical evidence of disability or injury. The unavailability of medical professionals to provide pro bono reports can be a huge hurdle to making applications and being able to substantiate applications to the court for revocation of fines and things like that. One of our member firms, on behalf of PILCH, has had some preliminary discussions with the AMA about trying to develop a pro bono program within the medical profession. But this has not been progressed. Any assistance that we could obtain from government in progressing that policy would be very welcome.

**Ms Burchell**—One of the areas in which the legal profession is probably a leader is organised pro bono schemes, which have really proliferated and grown in Australia—and in Victoria in particular—in the last 10 years. I do not think there is any other profession in Australia which organises its pro bono work in the same way. Clearly the medical profession does it, but it is probably done in a very ad hoc way, and it is very difficult for members of the public or other professions like the legal profession to access those services except through personal contact.

**Senator GREIG**—I was wondering whether you had given consideration, in the question of disbursements for pro bono work, to forms of assistance other than what I assumed in your submission to be cash assistance. I am thinking of things like pro bono work contributing, if it does not already, to some kind of accreditation program for a lawyer looking for career advancement or future opportunities and/or perhaps a tax break on money spent on pro bono work.

**Ms Burchell**—I have not really ever heard it put in terms of a tax break before, although, for instance, some of the firms that belong to PILCH pay many thousands of dollars a year just to be members. The large firms, for instance, will pay close to $20,000 a year for membership of PILCH in Victoria. That becomes a business expense for those firms, and so it is deductible to that extent. Unfortunately, we do not have PBI status and so any financial contribution that is made to PILCH is not deductible. That is certainly the first suggestion that I have heard of any personal tax break for pro bono work.

**Senator GREIG**—I was thinking more on an individual basis: if a lawyer were to travel to one of your RRR areas, the flight costs or travel costs and accommodation costs might perhaps be claimable.

**Ms Burchell**—That would certainly be very worth while, certainly for barristers, because barristers are essentially sole practitioners and they personally take on any out-of-pocket expenses that they incur as a consequence of doing pro bono work. We have heard stories of barristers paying personally for translators and interpreters in migration matters.

**Senator GREIG**—Ms Burchell, I think it was you who spoke of, to paraphrase, the lack of information or absence of information for asylum seekers in terms of their legal rights and opportunities—or was that their opportunities for potential legal aid and potential assistance outside the system? Is it the case that the government does not fully inform asylum seekers of these rights and responsibilities or is it the case that there is no information?

**Ms Burchell**—We have certainly heard anecdotally—and Paula may be able to elaborate—that there is no available material within detention centres as to the availability, for instance, of pro bono schemes or specialist services that can provide legal assistance to asylum seekers. It is anecdotal evidence, but that is what we have been told.

**Ms O'Brien**—When we met with Mr Govey and Ms Moore from the Attorney-General's Department, we raised this issue with them. They have undertaken to get back to us and explain exactly what the situation about delivering information to detention centres is and what the current availability of information is. What we see is people who receive information very, very late in the day. That means that the way their matter has progressed is very different from the way it would have or may have progressed if there had been legal assistance.

**Ms Burchell**—It may be that some people in detention centres receive information about the availability of migration agents who assist at the merits review stage. But certainly the information we have is that once it is beyond the tribunal stage—once it is into the judicial review stage, where you require more substantive legal assistance and, typically, pro bono assistance—that is where the dearth of information is.

**Senator GREIG**—Is there an opportunity for advocacy and support groups for asylum seekers to provide written, translated information about the opportunities for pro bono work to those people seeking help?

**Ms O'Brien**—That was exactly the issue that Mr Govey and Ms Moore were going to report to us on, to see—if it was possible—who was the most appropriate person to send the information to for distribution. Was it the department or the private operators of the detention centres?

**Ms Burchell**—One of the issues for us is that a lot of the people in detention centres who we ultimately see have been on a bit of a merry-go-round. They are seeking advice sometimes not necessarily in the most appropriate directions. So it is important that whatever information is provided to them is accurate, so that, as best as possible, they make their inquiries in a well-directed way.

**Ms O'Brien**—We see early intervention in these matters as a real key to streamlining the progression of them. What seems to be a concern about delays and the laborious nature of these matters may in fact be resolved if there is early information and early intervention for these clients.

**Senator GREIG**—Mr Lynch, you spoke of enfranchising homeless people—bringing them into the electoral system—and advocated a government campaign to assist with that. But you spoke also of the systemic problems underlying much homelessness, including drug and alcohol abuse, mental illness et cetera. How then do you reach out to people with an information campaign like that?

**Mr Lynch**—As with the provision of legal services, you need to meet the people where they are located for their primary needs. The best way to distribute information is via existing homelessness networks—via existing homelessness service providers. In relation to voting, for example, it would be a very progressive strategy for the AEC to meet with a range of homelessness agencies to discuss strategies for the dissemination through caseworkers to their clients of information about the importance of voting—to educate those caseworkers on how they can enrol their clients to vote—and then on voting day to locate polling stations at crisis shelters, welfare agencies or other places accessed by homeless people so they can participate in the electoral process.

**CHAIR**—Why can't they walk to the local polling booth?

**Mr Lynch**—They can walk to the local polling booth. The issue for many people is that they have a range of very complex needs, including mental illness, drug and alcohol addiction and severe social dysfunction. Unless the service is provided on site, it is just not a priority. As an example, we provide services at the Salvation Army Flagstaff Crisis Accommodation Centre,

which is up in North Melbourne. It is run by the Salvation Army. It is directly across the road from North Melbourne Legal Service. When North Melbourne Legal Service began outreaching to and providing services at Flagstaff, the demand for services increased fourfold. Many of these issues maintain a person's state of homelessness. For example, if you have a debt with the Office of Housing, you are ineligible for public housing. When North Melbourne began outreaching to Flagstaff they were able to identify and start to address those issues and resolve people's homelessness.

**CHAIR**—I am not an expert in this field but psychologically wouldn't it be better to get them out of the cocoon rather than take all the services to them?

**Mr Lynch**—That is a good point and it is a service delivery issue. But it has to be an incremental approach. The basic fact is that many of these issues will not be addressed unless you take the services to them. Once they have surmounted that barrier—once they are happy to go out on the street or they are happy to give their address to Centrelink, because they are no longer fearful that the sheriff is going to try to execute warrants on $100,000 worth of fines—then perhaps they will start going out into the community.

**CHAIR**—Thank you very much, and thank you for your submissions.

[9.48 a.m.]

**GAZE, Associate Professor Beth, Member, Castan Centre for Human Rights Law**

**SCHMIDT, Ms Carola, Research Assistant, Castan Centre for Human Rights Law**

**CHAIR**—Welcome. You have lodged a submission for the committee, which we have numbered 76. Is there any need to amend or alter it?

**Prof. Gaze**—No. There is nothing I need to alter in it.

**CHAIR**—Would you like to start with a statement?

**Prof. Gaze**—Yes. I thought I would draw out some of the main points and arguments that are made in the submission. I will try to be brief. Our focus in this submission, arising out of teaching and research interests over many years, was on the impact of legal aid in federal antidiscrimination law matters. Just as a fundamental argument, this is an important federal responsibility because there are obligations under the international conventions that the federal government has ratified to legally protect the right to non-discrimination. That is a fundamental requirement of the human rights treaties.

Our argument is that the legal aid provision at federal level—and at state level; but for this purpose focusing on the federal level—in antidiscrimination matters is not adequate and the aid criteria need to be addressed, as well as the amounts of money that are available. We understand that antidiscrimination at present comes at the bottom of the hierarchy of legal aid priorities. So, crime is there at the top; family law is the next priority; and then other civil matters come below that. Our argument is that that is not an appropriate place to relegate antidiscrimination matters to. We would argue that antidiscrimination claims are inherently a matter of public interest, as human rights matters. Society as a whole has an interest in ensuring that people do not suffer disadvantage purely on the basis of status, over which they have no control.

There I would underline a lot of what Philip Lynch has been saying about people who are homeless—it is the same problem. The complainants in antidiscrimination matters tend to be from amongst the disadvantaged in the community, frequently not very well resourced, frequently not very familiar with the legal system and so on. They are the employees rather than the employers. The disputes have an asymmetrical nature. Finally, in 2000, enforcement in federal antidiscrimination matters was moved from the Human Rights and Equal Opportunity Commission, which was a tribunal where there was no awarding of costs, to the Federal Court and Federal Magistrates Court, where costs now are awarded in most matters against the losing party.

We looked at the sources of legal aid for antidiscrimination matters. The Commonwealth does fund community legal centres and some specialised centres which are expected to aid in these matters, and they are an important source of assistance, but it is limited. They can provide advice. They cannot reach everybody who is affected by an antidiscrimination matter. The ability

to provide representation is very limited. That means that a lot of people will proceed unrepresented with an antidiscrimination matter.

There is the more recent response of setting up pro bono schemes and attempting to secure representation through those. Again, there is a lack of reported information on that—there is a lack of published information on the progress of the pro bono schemes. But they, like direct legal aid funding, impose an extra public interest test on assistance and so they do not regard an antidiscrimination matter in itself as a matter of public interest. They say, 'You have to meet further criteria to show a strong public interest and effect on a section of the public,' which sort of suggests that discrimination matters do not generally affect a section of the public. Also, I would say, that sort of public interest test is not imposed on criminal law or family law matters where legal assistance is being sought.

The other comment to make there is that, in the federal antidiscrimination jurisdiction, once a complaint has been terminated—in other words, once the Human Rights and Equal Opportunity Commission says it cannot be conciliated, for whatever reason—the applicant has only 28 days to make a decision about whether to take legal action. A lot of applicants may have difficulty even getting legal advice on whether they should proceed. That is an extremely short time. It may be very difficult to get any legal advice on whether to proceed with the claim in that time, let alone organise any representation.

This has created a lot of problems for antidiscrimination law in terms of development of the jurisprudence, and we have ended up with a situation where a lot of the cases that actually do go to court tend to be directed by respondents. Respondents are in a position to settle cases that they think may create unfortunate precedents, and the cases that go forward may be ones that are not as strong as they otherwise could be. So the jurisprudence, I think, is both thin in the courts and also not very balanced because of the legal weakness of the complainants.

I have found in research and we found in putting this submission together that there is extremely little published information on allocation of legal aid to various civil matters. One of the things we strongly recommend is that federal and state legal aid bodies start keeping data about what sort of assistance and how much of it is provided to the various civil matters, because without that information it is impossible to do anything other than be anecdotal about what the fate of legal aid is in antidiscrimination matters.

We have pointed to the fact that plenty of other models exist for providing assistance. It is not necessary to do this only through funding the costs of private practitioners to represent in legal aid. In both Western Australia and South Australia the Equal Opportunity Commissioner has a scheme for providing representation to complainants. In Queensland the Legal Aid Commission has a unit to provide assistance in antidiscrimination matters. In Canada, for example, all federal antidiscrimination litigation is resourced by the Canadian Human Rights Commission. So there are plenty of other models around. But we need to think about how antidiscrimination will be assisted at the federal level.

**CHAIR**—Thank you.

**Senator LUDWIG**—I was interested to note your view in respect of the amount or types of cases where the enforcement orders are provided against participants in antidiscrimination

matters. Do you have any evidence or case studies, or can you point to me some cases, where that has occurred? I imagine it was happening, but I do not know the scale or size. It would act as a deterrent, of course. In the first instance, people may not choose to take litigation, notwithstanding the short time frame—the 28 days—and then obviously the view that they may lose litigation and award costs.

**Prof. Gaze**—Just to clarify the question, are you asking what proportion of people who do take a matter to court are successful in those matters?

**Senator LUDWIG**—I am looking for the proportion who are unsuccessful.

**Prof. Gaze**—I have been working on a fairly large research project on antidiscrimination matters. For that purpose, I sat down at the end of last year and worked through figures that have been compiled by the Human Rights and Equal Opportunity Commission on the success of every case that had gone to the Federal Court and the Federal Magistrates Court since the enforcement had transferred. In the sex discrimination cases, there would have been maybe 50 per cent or slightly more that were successful. In disability discrimination cases, it was under 50 per cent; it would have been around 30 per cent—I am sorry; this is my recollection. But in racial discrimination cases there were, at that stage, no successful matters. There has been one matter that has been successful, which was the McGlade v. Lightfoot case. So there are enormous discrepancies, depending on the ground. You would have to say that the success rates are best in sex discrimination, but they are not high at the best of times.

**Senator LUDWIG**—Is there any reason in your view that sex discrimination cases would more likely to be successful than other areas?

**Prof. Gaze**—This is largely speculation; it is a matter I discuss with my students and of course there is not really any published work on it. One has to speculate on psychology and social awareness. I suspect that as a society we are more aware of sex discrimination and that in some ways it is an easier case to argue. There is a lack of familiarity with disability discrimination issues, and they are very broad. There is a wide range of different issues that can come up. But there are ongoing problems in proving direct racial discrimination because of the ways in which courts have interpreted the burden of proof. That is one of the explanations. Unless you have extremely good legal assistance it is very difficult to make out a case of direct racial discrimination.

**Senator LUDWIG**—Is there any evidence to demonstrate how many of those cases that are either successful or unsuccessful in that area are then pro bono work, to be able to gauge the level of support that the area is currently receiving? Is it the case that the pro bono work might end up in the sex discrimination area rather than the more difficult, as you have said, disability area?

**Prof. Gaze**—I think that is an important question, and the answer is that I cannot really give an answer to that. I understand that in most sex discrimination matters, yes, complainants are represented. In most of the other matters, by the time they get to the Federal Court, I do not think there would be many complainants who actually try to do that unrepresented. It certainly would be higher in the racial discrimination area. I think there is a crying need for some specific research in this area. It is also fair to say that it would be advisable for the legal aid bodies and

the pro bono bodies to monitor that too. Short of carrying out a research project where you try to contact every person who has litigated, it is difficult. The court records may say they have been represented, but they will not give you the funding source for the representation. Getting that information is a matter of going back to all the parties and actually doing the checking.

**Senator LUDWIG**—The government is now considering the age discrimination legislation, and we might simply be adding another tool but no promises.

**Prof. Gaze**—That is also true, because there is provision for direct funding. It used to be under the Racial Discrimination Act, the Sex Discrimination Act and the Disability Discrimination Act. It is now section 46PU of the HREOC Act, which allows the Attorney-General to make grants of aid for legal assistance.

**Senator LUDWIG**—Yes. I wrote that down as a question I am going to put on notice to the department about how much funding is, where it is directed and how long it has been used for.

**Prof. Gaze**—The only figures I have ever seen about that funding are in the Senate committee's 1997 report, because, obviously, the committee was able to get some information on it. When we tried to update that information with the federal Attorney-General's Department, we just could not get an answer.

**Senator LUDWIG**—I will try as well.

**Prof. Gaze**—Thank you.

**Senator GREIG**—In your summary of recommendations, you argue for state and territory jurisdictions to provide protection against an award of costs against the applicant, particularly in antidiscrimination matters. You do not mention the same argument for the Commonwealth, unless I have misunderstood you.

**Prof. Gaze**—I think that was essentially because I was focusing on the state legal aid bodies as the mechanisms by which legal aid is delivered throughout the country. So, yes, in a sense I was arguing that that should apply to Commonwealth matters as well. There is quite a lot of variation between the states. As I said, the Queensland Legal Aid Commission has an antidiscrimination law unit which will provide advice and some representation. In New South Wales it is possible to get representation from legal aid in federal disability discrimination cases and also legal assistance to fund a private lawyer to take a legal aid matter, and an indemnity against costs being awarded within both the state and the federal antidiscrimination systems. In Victoria, no money at all is spent externally on antidiscrimination matters and very minimal advice is given within the Legal Aid Commission. I do not quite understand the mechanisms as to why those funding priorities are so different between the commissions. It is not possible to get that information from their published reports.

**Senator GREIG**—There is no government department or community sector that would not argue for more money for their various causes and for advocacy. Are you able to give us an idea in rough figures, from your perspective, from where you sit and from the work you do, of the kind of funding increase that would be needed to make the system adequate?

**Prof. Gaze**—I find that very difficult, because I have not dealt a great deal with the figures. To some extent, I think that it would be possible to ensure that a certain number of test cases would be funded each year. That need not be a very expensive exercise. At the moment the way the process is working is that there is very little of that sort of funding. Unless it is specifically assisted by a body like the Human Rights and Equal Opportunity Commission, there is no real opportunity through the legal aid system. One of the things that I would argue is that changing the funding criteria for antidiscrimination matters in order to enable them to be considered more on a par with other civil matters need not actually cost any money. I know everybody is competing for access to funds, but it seems to me that the current criteria under the Commonwealth guidelines for antidiscrimination matters impose a hurdle that is much higher than in other areas.

**Senator GREIG**—Roughly two, perhaps three, years ago the Senate helped with the creation and implementation of a federal magistracy which would include the hearing of discrimination cases. Is it your view that that system has better facilitated the investigation and prosecution of discrimination cases? The Senate reduced the application fee that was proposed by the then Attorney for the lodgment of those claims. Is it your view that that system is working?

**Prof. Gaze**—I am involved in a research project that has been running for about three years to actually answer that specific question. The final report is not written, so I cannot give a definitive answer, but I think you would have to say that it is patchy. For some people the system works better because for some people, if they have a strong claim, the ability to be awarded costs means that it is easier for them to attract legal representation on a 'no win, no fee' basis. For other people, who may have a more doubtful case—and, because racial discrimination cases have difficulty succeeding, a lot of those would fall into that position—or where the complainant is particularly lacking confidence, I think the mere fact that there is a court system there with the possibility of costs being awarded if you lose is a disincentive.

One of the other areas that I have been looking at is tracing the flow of antidiscrimination cases between the federal system and the state systems, because applicants have a choice, in race, sex or disability cases, whether to go under federal or state law. What that shows is certainly no flow back of cases into the federal system since that change occurred. The cases had flowed out of the federal system after the Brandy decision, when there were problems with enforcement. They flowed to the state systems. This was supposed to restore the enforceability of the federal system, but I do not think there has been an increase in case flow to the federal system. They are still going primarily to the state antidiscrimination systems.

**Senator GREIG**—Thank you. I look forward to your report.

**CHAIR**—You mentioned earlier that you felt the difference between sex discrimination cases and racial discrimination cases being pursued was the burden of proof. Could you elaborate on that? I would have thought that the burden of proof technically would have been the same in both cases, or is there some indirect aspect you are talking about?

**Prof. Gaze**—No, I am actually talking about direct discrimination. What the law requires people to prove is less favourable treatment on the prohibited ground, so that in sex discrimination you have to show that the less favourable treatment was on the ground of sex or a characteristic associated with sex. In fact a lot of the prominent sex discrimination claims

brought recently have been brought as indirect discrimination, so they have not had to pass that hurdle, but the courts have sometimes been susceptible to making fine distinctions about what is the actual ground of a distinction. That can be a problem in sex discrimination matters as well, but because so many are brought as indirect discrimination they tend to nevertheless not encounter that hurdle.

With racial discrimination matters, indirect discrimination has not been used very much and so cases tend to be brought trying to establish that there was less favourable treatment on the ground of race—for example, 'I was excluded from the pub because I was of a particular race.' The courts say that they will not draw an inference that that occurred in the absence of adequate proof by the complainant. So the courts have been quite reluctant to draw those inferences. In other countries—in the US, Canada and the UK—there are quite different structures of proof, where the courts have been prepared to assist, or the legislation assists, people to get over that hurdle. But if you do not actually have any particular statement from your respondent about why they did it, then you might be facing a real evidentiary difficulty.

**CHAIR**—So is that an issue of the legislation itself, or is it the way the courts have interpreted their role?

**Prof. Gaze**—In a way it is both. Given the way the courts have interpreted the legislation and their reluctance to draw those inferences, we need to be looking at possibly some amendments to the substantive legislation, because the racial discrimination provisions at the moment, as the case law shows, are not working well.

**CHAIR**—Thank you for your submission and your evidence this morning.

[10.10 a.m.]

**FARAM, Mr David John, Immediate Past President, Law Institute of Victoria**

**WOODS, Mr Mark Geoffrey, Chairman, Access to Justice Committee, Law Institute of Victoria**

**CHAIR**—Welcome and thank you for coming this morning. You have lodged submission No. 87. Is there any need for amendments or alterations or would you just like to make an opening statement?

**Mr Woods**—I would be happy to. The submission is fairly broadly based and that is not surprising, given the terms of reference of the committee. I will address a couple of remarks and follow the executive summary of the institute's submission. Firstly, we commend our local legal aid commission—that is, Victoria Legal Aid—for some innovative work that it has undertaken. It goes without saying that legal aid funding is not and never has been a bottomless barrel of money and therefore it is important for legal aid authorities to get the most out of the grants of money that they receive from the Commonwealth and state parliaments. The efforts of Victoria Legal Aid that I seek to focus on are what they have called their simplified grants process.

Hitherto, the legal aid system which involves private practitioners has worked on the basis that a potential client attends at the lawyer's office. The client outlines their problem and the lawyer then makes some sort of forensic decision as to whether they meet the guidelines for legal aid. All of that material is then bundled up, or was then bundled up, and sent to a centralised grants processing area of Victoria Legal Aid. Then a grants officer, who may or may not be qualified in law, almost second guesses the forensic decision which the lawyer has made. Essentially, there has been a double handling of all of this information for a number of years by two people, with no great evidence that there are any savings made or any frauds discovered.

So Victoria Legal Aid embarked on a program which involves the appointing of private practitioners to panels that are allocated according to areas of the law. After receiving training in the grants process, the private practitioner making the forensic decision as to whether a person is eligible for aid makes a recommendation to the legal aid authority, which is then obliged, unless there are fairly exceptional circumstances, to accept that recommendation. That has meant that the overheads in lawyers' offices for submitting and replying to queries from the legal aid authority are now eliminated. It means that at the other end—in the legal aid authority—some savings are made in the processing of those grants. The net result is that there is more legal work for each dollar that the parliament votes for legal aid. Victoria Legal Aid, no doubt, are making a submission to your committee, and therefore I will not look at the other internal matters. Suffice to say, from the point of view of the practitioners in the field, that has been a very important innovation during the course of the last couple of years.

The second matter we touch upon, not surprisingly, is the issue of Commonwealth-state funding and the Commonwealth-state dichotomy introduced several years ago. Whilst it is tempting to say, 'It has been in place now for some years; it is therefore here to stay,' the institute, I am afraid, cannot accept that it is a worthwhile dichotomy which is legally or

intellectually justified. What I seek to bring to the committee's attention are the very real problems that that causes out in the field for us lawyers who have to apply what we call an artificial distinction between federal and state matters.

The obvious examples have, no doubt, been pointed out to the committee during the course of its inquiries and deliberations. They are things like domestic violence, where, on the one hand, Commonwealth funding is available to deal with certain aspects of a family dispute but, because domestic violence legislation is essentially state based, that funding is not available for that particular type of problem upon a relationship breakdown.

But it is less obvious examples that I seek to draw to the committee's attention. Most child welfare legislation is state based, and in the Children's Court family division it is a fact that not all parents are eligible for funding where there is, on the one hand, an argument between them and the local state welfare department—in Victoria's case, the Department of Human Services—or, on the other hand, a dispute between parents and children. Because the state guidelines are, necessarily, tighter than the federal family law guidelines, in that type of family dispute the parents, not uncommonly, are not able to receive legal aid.

In the Indigenous community in Victoria there is a similar odd situation, where the Victorian Aboriginal Legal Service, which receives most of its funding from the Commonwealth, is in a position to undertake casework for one side of a dispute—be it a family dispute or a neighbourhood dispute—amongst Indigenous persons but, for obvious conflict reasons, cannot look after the other side. Those people—who, therefore, fall back on the mainstream legal aid system—do not receive funding, because their particular problem does not come within state guidelines.

In crime there is a similar situation. Importers of drugs of addiction will be eligible for aid, because of the more relaxed Commonwealth guidelines in relation to crime, whereas the smaller time trafficker, who often themselves have a drug problem, does not get legal aid, because they do not meet the more restrictive state legal aid guidelines. Social security fraud cases attract funding for defendants, whereas frauds based on state benefit schemes do not. Breaches of community based dispositions cases wherein a Commonwealth crime is involved will attract funding from the Commonwealth, whereas those who are on community based disposition orders of one description or another for the commission of state crimes may not be so eligible.

Married persons who are in dispute over property matters where their property is of a modest nature—that is, less than $100,000—receive funding by virtue of the family law guidelines, whereas de facto couples and same-sex partners who have a dispute over the same amount of money do not, because of the more restrictive state guidelines. Commonwealth civil cases are aidable if they are found to have merit and cannot be dealt with on a 'no win, no fee' basis by private practitioners. A good example is that is trade practices disputes. They will attract funding under the Commonwealth guidelines, whereas—at least in Victoria—the civil law guidelines do not permit any assistance for those who have a similar dispute under state legislation.

Cases in the Commonwealth AAT, if meritorious, generally attract funding for those who are financially eligible, but state appeals and cases conducted in the state administrative tribunals—in Victoria, called the VCAT, the Victorian Civil and Administrative Tribunal—do not attract that funding, because of the more restrictive civil law guidelines. It follows that the institute's

position is that, for all of those reasons—and the list is endless; I have just picked out a few examples—the idea that there should not be one pool of money appropriately provided by the Commonwealth and the state is really just an intellectual nonsense.

The third matter we touch upon is the issue of less serious crimes. We note that there have been some fairly significant innovations in sentencing dispositions, not only in this state but elsewhere, designed to divert people from the criminal justice system in appropriately less serious cases. But, unfortunately, they are all cases where the legal work that is required to get the person to the point at which they are eligible for those programs needs to be done before you get anywhere near a courtroom and, because they are not eligible for aid, these people either go without any legal assistance at all or are placing undue pressure on duty lawyer services to try to catch up and get the people to a scheme under which they are eligible.

That is a product of there being insufficient funding available for less serious crimes. Indeed, the state criminal legal aid guidelines can be summed up by simply saying, 'The naughtier you are, the more likely you are to get aid,' and that flies in the face of the policy position of most governments—certainly, the Victorian and Commonwealth governments—that if we can keep young people in particular out of the criminal justice system then we are more likely to make better citizens of them.

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

Finally, although we do not say this specifically in our submission, we have an enormous concern about the lack of legal expertise, particularly in rural and regional Victoria, available to those who are in the greatest need of assistance in certain areas of law. Unlike in the capital cities—and particularly the city of Melbourne, which is relatively well serviced by a variety of specialist community legal centres in areas of the law such as social security, disability support, debt harassment, consumer protection and that sort of thing—in rural and regional Victoria that sort of expertise just does not exist. It is not difficult to see the reasons why, as one who runs a moderate sized regional practice: it is simply not financially viable for us to have lawyers in the firm develop expertise in social security law, debt harassment law and all the rest of those areas that I mentioned. Likewise, there is not a sufficient number of people to justify community legal centres having lawyers who develop that field of expertise.

It seems to us that one of the suggestions that might be made to alleviate that problem is effectively a partnership between private lawyers, of which there are plenty in rural and regional Victoria, to undertake that sort of casework on an individually funded basis. That would mean that there was at least some modest financial incentive for the development of expertise in those firms to ensure that the people in those areas are able to access the services that their city cousins can, whilst at the same time not breaking the financial back of law firms in regional and rural Victoria.

**CHAIR**—Thanks very much. Can I start with a couple of questions on some of the last points you made. It was put to the committee in evidence three or four years ago that the fee cap only really affected some two per cent of cases. Are you saying that it needs to be adjusted? Can you give us some idea—maybe it is anecdotal—of the proportion of cases that might be affected now?

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

**CHAIR**—I would like to go to the parts in your submission, firstly, where you refer to the community legal education program for unrepresented litigants; secondly, where you talk about online provision of information; and, thirdly, where you mention a telephone information service. With respect to those three areas, can you give us some idea of how successful you think the programs are and what the gaps may be? It has been put to us, for instance, in respect of unrepresented litigants and online information provision, that the skill of legal representation is to have a one-to-one relationship with a lawyer. How are you overcoming that sort of gap in those two areas?

**Mr Woods**—I suppose the best way of answering is to compare what happens in Victoria to what happens in a scheme which has been operating successfully in Queensland for some time that I have been aware of. I am not sure whether I have the name of the organisation right, but it is an agency of Queensland Legal Aid which deals specifically with women's legal issues. Obviously because of the large size of the state, four or five years ago they introduced online real-time interviewing by having centres in various larger regional parts of Queensland with the appropriate technology. That enabled people to make an appointment to see a solicitor in that state, and the solicitor interviewed them face to face, albeit electronically. That way, the solicitor was able to gain a far greater understanding of the person's problem and the person was able to empathise far more successfully with the information that the lawyer was giving her; whereas, in Victoria we are stuck with a telephone system, which invariably does not allow pieces of information to be passed so that the lawyer can read it and it does not enable the lawyer to see the client to assist in the face-to-face meeting, which we all, I think, would concede is the best way of exchanging information.

The community legal education program is one which attempts to—certainly from my point of view—alert people as to their rights, and that is an admirable goal and one which serves its purpose. But, of course, not everybody has a legal problem at the time that they are being educated about the legal problem, so if they do not take all of the information with them, or they forget it, then the value of that legal education is lost. What it can be said to have done is to raise the awareness of both their rights and the existence of some services.

**Senator PAYNE**—I wanted to take up the point you made about less serious crimes and the issues that the institute is seeing in that area. It seems to me that we are almost talking about a catch-22 situation, which is that the assessment is made on the basis of the fact that somebody is likely to receive a less serious sentence or penalty and, therefore, will not be entitled to receive legal aid, but if they end up self-representing and face the normal demands of the court process then they may well end up with a sentence. Is that a picture that you are seeing being played out in the criminal courts in Victoria?

**Mr Woods**—It happens all too frequently. I will give you an example. In Victoria, a diversion program has been part of our criminal law landscape for just on 12 months, I think. It is a scheme which is designed to deal with generally first-time offenders, generally those who show some remorse and generally those whom the police believe are, with a little bit of encouragement and assistance, unlikely to reoffend. The state criminal law guidelines simply do not allow for a person to be represented in the traditional sense where they are likely to receive that result; but—you are quite right, Senator—conversely, the member of the public does not know about it unless a prosecutor is prepared to inform them of that assistance and what they have to do. The problem is that most of the work that is done to get the person on the program is done before they get anywhere near the door of the court. It is a process of negotiation and discussions, and it has a very real benefit for the person concerned because, as the law currently stands in Victoria, a person who is a part of the diversion program ends up with a result which is not reportable. So a kid who is 19 and has managed to assault someone in a hotel or something does not end up with the flashing red light of 'assault conviction'—

**Senator PAYNE**—You do make that point about criminal records, privacy issues, employment checks and things like that. The other issue which you raised in the civil law part of your submission, which is of interest to me, is the question of the lack of any real incentive to use ADR in settling disputes. You make the point in 4.2.24 in particular. How do you think we might look at options to encourage more use of ADR in those sorts of disputes and perhaps address the issues that you are raising in relation to those who are unrepresented or do not have a corporate pool from which to draw?

**Mr Woods**—David might have some comment on this, but it seems to me that whenever someone comes into my office for the first time with a civil dispute what they want to do to the other side does not bear mentioning. They really want to take them on and to economically, if not physically, beat them to a pulp. That is what they have in mind. It is the task of the legal practitioner to advise them that there are other ways of resolving disputes. We have moved from trial by conduct. We can move also from trial by judicial arbitration. The reaction that I get in my office from some of those people is either that I am soft and weak and am not prepared to fight or 'You've got to be joking!'

If the skill of the lawyer can be brought to bear on a dispute to move it out of the judicial arbitration mode of dispute resolution only after one or two or three visits, it seems to me that the handing out of some glossy brochures saying, 'Let's all sit around and have a bit of a chat about this,' is unlikely to have much impact on the person, given their state of mind at the time the thing that they are complaining about comes about. There is no substitute for giving those people the opportunity of good, sound legal advice right at the outset. It is not different to what we have experienced in family law or in crime: if you shovel a bit of money in at the front end to

fund that sort of individual education about the alternatives to litigation then the rewards will be reaped by having fewer people going to court.

**Mr Faram**—I would completely agree with those comments, but I will add a couple of thoughts. The bottom line is that there are effectively three services that I see are provided by lawyers, and the legal system generally is for people who are looking for legal assistance. The first is the provision of information. A lot of people look for information and, having made the inquiry and found out what they need to know, go away and resolve their issue or otherwise satisfy themselves that they do or do not have a legal problem. They and are then able to deal with it themselves.

The next level up is the provision of actual legal advice from a person qualified to give it to a person who seriously needs it. Going back to Senator Bolkus's earlier comments in relation to the provision of telephone information services, online delivery of legal information and those sorts of things, those systems work well, but we need to be in a position where people who need legal advice from a qualified legal practitioner can get it. Not unreasonably, the lawyer can expect some modest payment for the provision of that advice.

The third level is the services that lawyers in particular provide. It is where people need representation; they actually need to be represented in court. Going back to your comments in relation to civil matters, there is quite appropriately a big push in Australia at the moment for the adoption of ADR processes. It is recognised by everybody involved in ADR that it is cheaper and often results in a better result for both parties without the anxiety and the head-to-head confrontation involved in adversarial court processes and litigation.

However, the existence of ADR only ever works when you are looking at parties who are effectively on a footing of equal power; both parties have to want to go to ADR. So the availability of information about ADR is fine and the provision of ADR services is fine. One person wanting to go to ADR is terrific but it does not work unless the other party says, 'Yes, that is a good way of resolving this dispute.' At the moment, there is no way you can force a person to go to ADR. Our paper touches briefly on the relative power imbalance between individuals and corporations, who are just as likely to sit back and say no, knowing, for example, that John Smith in Shepparton is willing but simply unable to take them on. So Mr Smith's experience with the legal system is completely unsatisfactory and there is certainly no result produced for him.

**Senator PAYNE**—Finally, I noticed at the beginning of the submission, in the summary, a reference to indexation. I thought, 'That's hopeful—perhaps there is a suggestion in the body of the summary as to how we might go about looking at that.' But you quite explicitly say that you make no particular recommendations about the way in which indexation should take place. I am sure the committee would be grateful, if the institute had any flashes of brilliance, to receive your views on that matter.

**Mr Faram**—Can I suggest, at the outset, that CPI would be useful. You would be aware, I suspect, that last year we had a long-running argument with the state government about increases in fees for legal aid for criminal matters.

**Senator PAYNE**—You finally got some increase, didn't you?

**Mr Faram**—Yes, we did, and it was a substantial increase. But I would just like to tell you something about the numbers. There had not been an increase in the legal aid fee paid to lawyers prepared to do legal aid work in the criminal jurisdiction for 10 years, since 1992. In 1992 the fee was $450 and was subsequently increased by GST; that was the only increase that came through. Had it been increased by CPI, the figure payable to the solicitor for the same work would have been well in excess of $1,200, as I recall that. Although a very significant arrangement was made with the state government and a very significant increase in funding was made available by the state government, the fee paid now has gone from $450 to $580.

Although that very modest increase was, obviously, accepted by those lawyers continuing to operate in the field, it falls a long way short of what most people, I think, would expect to have been an appropriate fee rise over the course of a decade. The failure to index fees, particularly in country areas and, I assume, in the bush—both Mark and I practice in regional Victoria—has had the consequence of many lawyers simply opting out of doing legal aid work. Those practitioners that still do legal aid work do it because they are philosophically attracted to the area, but, in our view, they cannot be expected to continue to make what in effect becomes a very substantial pro bono contribution to the workings of the justice system. They are working and running these files at a very substantial and real economic loss to their business, but they do it nonetheless.

**Senator PAYNE**—Thank you. I think that is a fair point.

**Mr Woods**—I would like to add to that. Senator Payne, you asked about how that might be achieved. It seems to me that there are three way in which one can look at what is loosely termed 'indexation', which I take to mean a regular modest increase in fee levels, so as not to require massive protests and so forth every decade or so. The first, as David suggests, is simply to use the CPI. That is the means of indexing upon which most, but not necessarily all, court scales are based. The second is to establish a legal aid fee scale as a benchmark now, and then say that it is going to be X per cent of the existing court scales and index that according to CPI.

The third is to have, as we do in Victoria in state based court systems, a body made up of representatives of the government, the courts and the legal profession which says what increase is appropriate for that particular scale now. The advantage of that system, of course, is that if there is some significant change in practice or procedure which requires either more work or less work to be done to complete a particular legal task then the committee can take that into account rather than simply blithely saying, 'Inflation has gone up by two per cent or three per cent and therefore we will increase it by that.' It seems to me there are those three methods that can be looked at. I am not much of a bean counter, so I cannot say which is the best, but they seem to be the three alternatives.

**Senator PAYNE**—I knew that if I asked I would draw something out. Thank you.

**Senator LUDWIG**—Is there a report that provides how much money is expended in the Law Institute of Victoria Legal Assistance Scheme?

**Mr Woods**—Yes. I will briefly explain the scheme. About seven or eight years ago the young lawyers section of the institute produced a report called *Bridging the gap*. It surveyed the legal profession in the state, the courts and registries and certain community groups. It said that it is clear that there is an abundance of goodwill out there in the profession which is prepared to be

harnessed to undertake casework on a pro bono basis for those people who need it; it is simply a matter of getting the two together.

The institute invited its members to participate in the register, which listed practitioners by their area of legal expertise, their years of experience, whether they spoke languages other than English and that sort of thing. As a result, the institute employed a manager and an assistant to receive requests for pro bono casework from individual members of the public or from community legal centres who had a problem they could not handle and thence invited a particular lawyer whose skill profile seemed to match the problem that was advised. Then they would get on and do the work.

Essentially, that is what the Legal Assistance Scheme is all about. Since 2000 or 2001—I think I am right in saying that—the scheme has received its funding for administrative overheads and so on from the public purposes fund, which is part of the interest on solicitors' trust accounts administered here in Victoria. The institute entered into an agreement last year or the year before with PILCH in Victoria and the Victorian bar to centralise those pro bono activities in one centre. PILCH, under contract to the institute and the bar, are now responsible for administering that scheme as well as the work that PILCH itself does and the pro bono efforts of the Victorian bar. It means it can all be done at one point. I do not have the figures with me, I am afraid, but their success rate in terms of matching casework to solicitors and barristers prepared to undertake the work is exceptional. It is very, very hard.

**Senator LUDWIG**—What I was trying to appreciate was the size of the contribution by the Victorian Law Institute members in respect of pro bono work through the work of the Law Institute of Victoria's Legal Assistance Scheme. That was the nature of the question, but I do thank you for the advice about how the scheme operates. I had read the PILCH submission and they did not refer to you but referred to your scheme, and so it was also helpful to understand the nature of the relationship that now exists between all of you. I think coordination is an important issue as well for better delivery.

**Mr Woods**—In direct answer to your question, I cannot give you a figure. What I can say is that the job is done just as if the person were a paying client. It is always very difficult, of course, to ask members of the institute firstly to do something for nothing and secondly to give you a report which says that. An interesting statistic is that contained in a report by a gentleman by the name of David Bruce, who was commissioned by the former Victorian state government and the former federal Attorney in 1999 or thereabouts, which looked at the issue of the pro bono contribution of the profession in Victoria. He assessed it at about $15 million a year.

**Senator LUDWIG**—The other issue was whether you had recently surveyed your members to demonstrate how much pro bono work they may or may not be doing. There is a purpose to this, and perhaps I can get to that as well. There has been some suggestion that, in terms of Commonwealth government contracts for legal services, a proportion or certain amount is required by solicitors or barristers to be dedicated to pro bono work as a consequence of achieving that original contract. I am curious about what you think about that.

**Mr Woods**—I will ask David to talk about surveying the profession, which we do on a fairly regular basis. But in answer to your question about government contracts, it is something which has occurred here in Victoria. At the time that it was proposed by the Attorney here, there were

two schools of thought. The first school of thought was that it was the introduction by the back door of a pro bono requirement of the profession. In other words, instead of directly regulating the need to do pro bono work, as they have done in the United States for example, the government would use its economic power as a large consumer of legal services to insist upon it being done by at least those firms who want to do government work. The other school of thought said, 'Hang on a tick, the government is a large purchaser of legal services in Victoria. Like any other large purchaser of legal services in Victoria, it's got the right to set the terms of its contract.'

There continues to be a divergence of thought amongst the profession as to whether that is appropriate or inappropriate. Those who say it is inappropriate often have interesting arguments: they say, 'All right, doesn't it give the government the opportunity to decide that there are some sorts of legal work done pro bono which it doesn't think should attract any credit?' If the state government, for example, decided that it was absolutely in favour of wind farms, then if firms undertook a series of challenges in planning tribunals saying, 'We don't want wind farms here,' could the government say, 'We're not going to allow planning appeals to be part of the credit process'? Is that appropriate when we have an independent legal profession? That is the sort of argument which has developed. But it is a fact now, and ultimately I suppose those arguments would take place if there was a suggestion that the Commonwealth might do likewise.

**Senator LUDWIG**—Where did the Law Institute of Victoria sit in respect of the argument when it was introduced in Victoria? Did you argue for it or against it, or did you leave it up to each individual member?

**Mr Woods**—It was not a matter about which we took a particularly strong policy position as I recall, Senator. As a representative organisation recognising that there were two schools of thought, which were both quite legitimate in their own right, we did the brave thing and did not pronounce on a policy basis.

**Senator GREIG**—I have just one question. In your submission, gentlemen, you talk about the innovative work of Victorian Legal Aid in ameliorating problems that have been created by lack of funding. You also talk about the training programs for unrepresented litigants. In the context of that, if you can demonstrate that these issues—caused by Commonwealth funding cutbacks—can be circumvented, if not prevented, is there not the danger that you are rewarding bad behaviour or providing comfort to a government looking for opportunities to point to where these particular cutbacks have been able to be circumvented by alternate programs?

**Mr Woods**—With respect, you are quite right—and there is the same argument with pro bono work. The more pro bono work that is done by the profession, the less incentive there is for any government to increase legal aid. But I think that some of the work that is being done in the training area by Victoria Legal Aid does not quite fit into that category. It is not training where a person is, in effect, getting second-best justice because they are being half taught how to do something themselves. Victoria Legal Aid have for some time run excellent programs on divorce applications, traffic prosecutions and those sorts of cases where the ordinary paying member of the public would not necessarily decide they need a solicitor but what they do need is some assistance to understand what the hell is going on in the forum they are going to find themselves in. The programs are hugely popular and the people who give the instruction are well regarded. So people come to court in circumstances where they would not ordinarily need to go to the

expense of a lawyer and they are able to properly present their case. They can understand the terminology that is used, the practice that is going to go on, the limits to what they can say in court and all those sorts of things.

That obviously meets an unmet need, and it is crucial that those sorts of programs continue and indeed flourish. I cannot speak for Victoria Legal Aid, but I am certain that their resources are limited and that there are a number of other tribunals or fora that they would like to run those programs in but they simply do not have the money. Those cases should be contrasted with the sort of litigation for which an ordinary member of the public—who could afford it—would in fact engage a lawyer. Justice John Faulks of the Family Court, who has chaired in person the court's inquiry into litigants, has come to the conclusion that you have either got to get the person a lawyer, make them a lawyer or change the system, and no amount of instruction at a particular point in time in the law and the legal process will equip a person to properly litigate a family law matter to the nth degree.

**Mr Faram**—If I could just add, where Mark finished, that as a result there is a very substantial additional burden to the Commonwealth in terms of funding the courts to run trials that are—almost by definition—always longer if they are run by self-represented litigants than if they are run by properly qualified counsel.

**CHAIR**—Thank you very much, and thanks for your evidence and your submission. They are very helpful.

[10.55 a.m.]

**LYNCH, Dr John, Assistant Director, Courts, Department of Justice**

**PARSONS, Mr Tony, Managing Director, Victoria Legal Aid**

**CHAIR**—I welcome the representatives from the Victorian government and Victoria Legal Aid.

**Mr Parsons**—Perhaps I could open by apologising for the late submission of our written submission. This document had to go through cabinet. That process being what it is, it took more time than we anticipated, so we were only free to give it to you 24 hours ago. It might assist the committee if we provide some brief comments.

**Dr Lynch**—I will give a very brief outline of the submission that was distributed this morning. The submission outlines the Commonwealth's involvement in the post World War II provision of legal aid. You will see from the submission, or you may even recall, that the Commonwealth established a significant network of Australian legal aid offices in the mid-1970s. That was perhaps the first major foray by the Commonwealth into legal aid. The ALAO assisted persons with legal problems under Commonwealth law and persons for whom the Commonwealth had a special responsibility—such as social security recipients—regardless of whether the legal matter came under federal or state law.

In 1976, the Standing Committee of Attorneys-General agreed that the states and territories would take over the Australian legal aid network as a going concern in the then to be created state based legal aid commissions, under a cooperative federalist model. The Commonwealth funding to the legal aid commissions was maintained under the new legal aid commission model. Under the funding arrangements, the Commonwealth agreed to pay 55 per cent of total legal aid funding and the states and territories paid 45 per cent. The funding was indexed annually. Legal aid commissions had discretion to allocate funding according to local legal needs.

In 1996 the Commonwealth gave notice of intention to terminate those funding arrangements and move towards the current purchaser provider model with effect from 1 July 1997. At the time the Commonwealth announced that it would also be reducing national legal aid funding by $100 million over three years. Under the purchaser provider model, Commonwealth funds were allocated exclusively to matters arising under Commonwealth law, rather than at the discretion of the local state based legal aid commissions. In 1999 the Commonwealth announced the restoration of $64 million of funding over four years to the national legal aid pool. Funding would be allocated to individual jurisdictions according to a funding formula developed by the Commonwealth Attorney-General's Department. I should point out that none of the additional $64 million went to Victoria.

The paper sets out principles which the Victorian government would like to see adopted by the Commonwealth in the funding and the distribution of legal aid funding. These would recognise the pre-1997 Commonwealth funding responsibilities—that is, to matters arising under

Commonwealth law and to Commonwealth persons—and restore to legal aid commissions the ability to determine their own funding priorities according to local legal needs.

The paper presents two options. The first option would see the full restoration of Commonwealth funding to the national legal aid pool. Ongoing funding would be indexed and a new national distribution model would be developed. The second option, which I stress is not preferred, would see the retention of the purchaser-provider model but would expand the availability of funding to a broader range of matters and persons. The thrust of the Victorian government's proposal is intended to restore funding and create a more equitable legal aid system. Perhaps at this point I will hand over to Mr Parsons to talk more about the operational side of the current funding arrangements.

**Mr Parsons**—This submission contains four elements that are critical of the current system. I will briefly take you through those elements. They arise through the 1997 arrangements and the 1999 arrangements that the Commonwealth imposed on the sector. The first issue is the reduction of funding from the 1997 arrangements. The second is the limits imposed in 1997 on the kinds of cases that that funding could be applied to. The third issue is the funding distribution formula adopted in 1999 for national distribution of Commonwealth money. The fourth is a criticism of the current arrangements of the Department of Immigration and Multicultural and Indigenous Affairs's legal aid contracts for provision of legal aid services to in-custody immigration clients.

First, the submission points out that in 1997 there was a significant funding cut at the Commonwealth level, a removal from the national pool of funds for legal aid of some $100 million over four years. That has had a substantial impact on the legal aid sector, both in Victoria and nationally. The impact for Victoria was severe. It included the almost complete abolition of legal aid for civil matters so that now grants of legal aid are very rarely made for matters such as discrimination, consumer protection, tenancy law, social security law, contract law and personal injuries. Some of those matters have been picked up by the private profession on a 'no win, no fee' basis, but substantial areas of law, particularly poverty related law, have not been picked up.

The bar in criminal matters has been raised as a consequence of those funding cuts. Legal aid used to be provided to people facing cases if those cases had some potential to adversely affect that person's future employment opportunities. That is no longer the portal for legal aid in criminal matters, but a real likelihood of jail is. Some states do not fund even criminal matters comprehensively. Some states do not fund summary crime at all. Of course, the system suffers because all courts are complaining about the burden of self-represented litigants.

The second issue that arose in 1997 was the restriction placed on the application of the reduced Commonwealth funds. The rule became that Commonwealth funding could only be applied to a limited range of Commonwealth law legal aid services. That has effectively prevented Victoria Legal Aid from responding to the legal aid needs of Victorians. It has also resulted in discrimination between residents of particular states. For instance, today Victoria Legal Aid has a very strong capacity to fund family law matters, whereas other states, such as Western Australia and Tasmania, on a regular basis have to say to applicants for aid for family law matters: 'I'm sorry. Your application meets the means test, the merits test and the guidelines test, but we just do not have the money to fund you.' So if you are a Victorian with a family law matter you are in luck, but if you are in Western Australia you may well be in trouble.

The restriction prevents commissions from effectively addressing the Commonwealth's own legal aid priorities. The current major Commonwealth legal aid priority is the protection of children whose custody, welfare and interests are affected by family disputation, and the protection of members of that relationship subject to domestic violence. The arrangements, however, only permit commissions to assist applicants in Family Law Act matters. Inevitably in those situations there are corresponding state law issues that need to be addressed, often including intervention order applications under state law. That service cannot be provided by Commonwealth funds. Often the Department of Human Services is involved in care and protection applications for the children of a relationship. Assisting people in those proceedings cannot be done using Commonwealth funds, so commissions using Commonwealth funds can only partially address the priorities of the Commonwealth itself, because of those arrangements.

The third critical element of the submission is in respect of the funding distribution formula adopted in 1999. That formula, we submit, is offensive in principle and erroneously executed. The issues in principle are that the funding distribution formula used in 1999 was based on applications received by legal aid commissions, so it was based on legal need that was met, rather than on any analysis of unmet legal need. The formula also involved the application of two weighting factors that, we submit, were totally inappropriate. The first was a weighting for suppressed demand. The philosophy behind that weighting was that in 1995, 1996 and 1997 the publicity in some jurisdictions about the drastic cuts to legal aid was so severe that the demand for legal aid in some jurisdictions was suppressed. It was an entirely speculative exercise that that was the case. To apply a demand suppression factor to only three of the eight jurisdictions was also entirely speculative and to apply the weighting according to 10 per cent was entirely speculative.

The third offensive element in principle of the funding formula was that of the average case cost. The average case cost element beggars belief, in terms of its logical foundations. It runs according to this: if in a particular jurisdiction a legal aid commission has to pay a higher average case cost to buy the service for the legal aid applicant, then logically that commission can only afford to purchase fewer legal aid services. If a commission can only purchase fewer legal aid services it must have a lower level of demand, which therefore justifies lower levels of funding. That is the way the average case cost factor was applied in the 1999 funding formula, and it is a nonsense.

But worse than the problems with the formula in principle, it was erroneously executed. Victoria Legal Aid this year undertook a rigorous analysis of the formula applied in 1999 and we found that the population and percentage of women used in the formula was misallocated to the formula, such that populations of men, rather than women, were actually put in the funding formula. Of course, women attract the majority of family law legal aid grants of aid, so they have a particular weighting in the formula, but the numbers that went in were populations of males not females.

The other flaw in the execution of the model was the application of data for non-English-speaking background populations in the community. A Commonwealth Grants Commission formula was used. Every other funding distribution model in the country, that we can determine, uses the Australian Bureau of Statistics formula. The formula that was used was faulty. It did not recognise appropriate populations of non-English-speaking background people in the various jurisdictions, so the distribution of the funds was skewed because of that basic mistake.

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

By way of summary, fourthly—and almost finally—I mentioned the management of legal aid contracts for assisting immigration clients in detention centres. Those contracts are controlled by the Department of Immigration and Multicultural and Indigenous Affairs. They should not be. There is an enormous conflict of interest. Victoria Legal Aid tendered successfully for one of those contracts. We are regularly confronted with the situation where we attend our clients in detention centres, they ask us what the problem is and we say, 'The department of immigration is trying to throw you out of the country.' Then they ask: 'Who is providing money for your legal services?' and we have to say, 'The department of immigration.' It is an appalling conflict of interest. That money should be administered by the Commonwealth Attorney-General's office at the very least. People accuse us of providing Third World justice with that kind of conflict.

Finally, we make some positive suggestions in the submission about national directions. The state of Victoria takes the view that legal aid nationally does not know what the current situation is across Australia in terms of legal need, and the legal aid sector nationally has very little direction in terms of future strategic engagement with the legal aid needs of the Australian community. The Commonwealth Attorney-General's Department houses the Family Law and Legal Assistance Division, FLLAD. FLLAD are essentially charged with the development of Commonwealth policies on legal aid and the administration of Commonwealth-state legal aid funding agreements. But there are significant gaps in leadership and national policy direction for legal aid. This submission argues that a national legal aid council be properly resourced to undertake a number of national projects, including to address deficiencies in coordination and integration of services and resource management; to undertake a national assessment of unmet legal need and legal demand and to identify gaps in legal aid service provision; and to assess and address sector-wide problems such as private practitioners withdrawing from the legal aid marketplace, the increase in self-represented litigants and the growing cost of litigation.

Such a council could identify opportunities to appropriately integrate different programs, such as programs run by legal aid commissions, community legal centres, Aboriginal legal services and pro bono programs and could identify and reduce duplication where it is found to exist. Most importantly, such a council could collect and analyse meaningful data on the legal aid system and act as a clearing house for, and publisher of, detailed information on the operation of all aspects of the Australian legal aid system. Not much national legal aid policy is currently being driven by empirical data. Such a council could develop national benchmarks on uniformity, consistency and access to justice. These roles, to a very small extent, are currently being investigated and undertaken by a group called National Legal Aid, which is the informal association of the eight Australian legal aid commission directors that meets three times a year. I understand that you are hearing from the current chair of National Legal Aid, Norman Raeburn, this afternoon. That is our submission in summary.

**CHAIR**—Thanks for a pretty comprehensive submission. I want to start with one of the points you made: the Rush-Walker study. Your submission seems to be a quite comprehensive and compelling demolition job on that study and the directions taken since then. You have said that the writers, the consultants, acknowledged flaws in their work. Was that acknowledged in writing?

**Mr Parsons**—No, but that would be easy to obtain. The Rush consulting group and John Walker undertook the initial work. Mr Walker currently works for the Victorian Department of Justice, so we have been fortunate to have had ready access to one of the researchers. The Family Law and Legal Assistance Division of the Commonwealth Attorney-General's Department is now well aware of the flaws in the current model.

**CHAIR**—You say it is flawed and that some basic information was incorrect. You also say it was doctored. What do you suggest we recommend as the way ahead with respect to that?

**Mr Parsons**—A very simple Commonwealth Grants Commission model would be a far better start, because it would be based on well-known empirical data about population, poverty, Family Court activity, geographical size and cost of service delivery in particular jurisdictions—that is an issue with states such as Queensland and WA that have to service vast geographical territories. The Commonwealth Grants Commission, without too much difficulty, should be able to provide a better model than the one we have at that moment. National Legal Aid in fact commissioned the Grants Commission a year and a half ago to develop a simple model. They have done that for National Legal Aid. That is one model that is available. It may not be the complete answer, but that would be the best approach, from my submission.

**CHAIR**—I will move on to what you call the Commonwealth-state dichotomy, at 5.3 on page 12, where you explain the divide between the Commonwealth and state responsibility in a normal family law dispute. I find that intriguing and I am sure the professionals would find it frustrating. Somewhere in your report you suggest that the cost of administering this formula, this divide, is something like five per cent. Is it that much?

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

**CHAIR**—Do you get involved in situations like the one in point 5.3 of your submission?

**Mr Parsons**—We face the ridiculous problem of service delivery to clients where, if we are going to be absolutely scrupulous about the application of the Commonwealth funding agreement—and we try at all times to be—we actually have to say to a client, 'The solicitor that you have built up a relationship with, the one that you have learnt to trust, the one that is running your major matter in the Family Court is not funded to go to court for you to get an intervention order to stop the domestic violence, so you have to go to another lawyer to provide that kind of service.' That affronts every precept of appropriate service delivery to clients, and we do not do it. We refuse to disillusion clients in that way when no other legal practice in the country would treat a client so poorly, but it is very difficult. But it is very difficult because, at the end of the

day, our accounts are still audited by the Victorian Auditor-General and we still have to sign off to make sure that we are executing our side of the Commonwealth agreement effectively and with integrity. So we end up dividing the resource to have that particular lawyer in the office between the state and the Commonwealth. It is just unnecessary administration to provide a better service for the client, and therefore those are dollars wasted on administration that could be used to purchase legal services.

**CHAIR**—On page 11, in your third dot point, you say:

… expenditure of Commonwealth revenue is, in fact, so restricted by Commonwealth imposed policies and guidelines that not all Commonwealth revenue to VLA is expended.

What amount of money are we talking about and how long has that been going on?

**Mr Parsons**—I will show the committee a very simple graph that I have prepared. It indicates that since 1998 VLA's Commonwealth revenue reserves have been growing. Victoria Legal Aid, more than any other commission in Australia, save perhaps for the Legal Aid Commission of the Australian Capital Territory, runs a rigorous client debt recovery program and collects substantial income each year from collection of client debt, interest on investments and legal costs. The pink line in the first graph demonstrates the growth of VLA's Commonwealth reserves from 1998-99 to the present.

The blue line on that graph demonstrates the growth in VLA's self-generated income over the same period, which is essentially client debt recovery: asking clients who might not have income but might be asset rich that, when they sell their family home, they repay the money VLA expended on their behalf in their case. It is an interest-free loan. We do not compel people to repay it but when they sell that piece of property, we put our hand out. So what is happening is that we are spending the money the Commonwealth gives us but, by using effective business processes, we are rigorous in collecting money we expend on clients that we can later spend on other clients in need. The fact of the matter is that, in the course of the last five years, we have built up a $20 million-odd reserve of Commonwealth funds. I want to spend that money. You could never say that Legal Aid is meeting unmet legal need in the state of Victoria. The fact that the Commonwealth micromanage how we can spend their money means that we struggle to do that; we struggle to spend the money that we efficiently and rigorously collect from the community who can afford to repay it.

We now have on the books a comprehensive PDR service, which will open in January. We have called this roundtable dispute management. Victoria Legal Aid has been one of the slowest commissions to pick up an in-house, effective PDR service for family law clients. Every other legal aid commission in Australia provides primary dispute resolution to one extent or another. VLA, for philosophical and financial reasons, has been slow to pick up that program but now we recognise that we have the money and why should the Victorian community be deprived of that kind of service if we are able to provide it? So we are implementing the service. The Commonwealth Attorney-General thinks it is a wonderful service on paper; we propose to make it a wonderful service in reality. It will consume those Commonwealth reserves over the next three to four years. So we have plans for that funding. It is a great pity that, over last five years, because of the constraints of the Commonwealth agreement, we have not been able to get those services out to the community more quickly than is currently the case.

**Senator PAYNE**—I would like to clarify what you were just saying to Senator Bolkus. You said you had expended the funds that you received from the Commonwealth but over and above that, in the accumulation of own-source revenue through your debt collection process from clients of the VLA, you have accumulated significant sums of money.

**Mr Parsons**—The reserves, that is right.

**Senator PAYNE**—Yes, the reserves. But you are precluded from spending those reserves the way you would like to because of the Commonwealth agreement.

**Mr Parsons**—That is right.

**Senator PAYNE**—What does the Commonwealth agreement say?

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

**Senator PAYNE**—Was there an opportunity for you to make an application to the Commonwealth to seek to spend those funds and did you do that?

**Mr Parsons**—Constantly and regularly.

**Senator PAYNE**—And the response was 'no'?

**Mr Parsons**—Yes.

**Senator PAYNE**—And the need for alternative uses for those funds has resulted in the establishment of this PDR scheme?

**Mr Parsons**—That is right.

**Senator PAYNE**—Thank you for explaining that. We have had an opportunity to skim read your submission, but, obviously, not to go into it in as much detail as I might have liked. I think I have some understanding now of VLA's relationship with the Commonwealth. What is VLA's relationship with the state government? Do you have a specific funding arrangement with the state government?

**Mr Parsons**—No. It is an arrangement where we apply to the state on an annual basis clearly indicating programs and projects that we have identified as having a high priority and identifying whatever budgetary pressures we might be under at the time. So it is an annual budgetary process that we go through.

**Senator PAYNE**—Is it essentially a negotiation? Do they knock you back? Do you have to go back again?

**Mr Parsons**—Yes. We are an independent statutory authority but for administrative purposes we are located with the other Attorney-General portfolios in the Department of Justice. So we go through the expenditure review committee process like every other agency and department. Some years we win and some years we do not.

**Senator PAYNE**—Are there specific gaps that you can point to in the provision of legal aid for state law matters as a result of that process where you are not getting the sort of funding you would like?

**Mr Parsons**—We are currently under significant pressure because of the growth in demand for legal aid services in criminal law. We are meeting that increase in demand. We are not sure what is driving it, but there has been a significant increase in the population of police in recent years, so that might have something to do with it. We are facing—

**Senator PAYNE**—You mean more police are catching more people.

**Mr Parsons**—Yes. They are putting more people through the courts or charging people with the more serious kinds of offences and therefore—

**Senator PAYNE**—It qualifies under the guidelines.

**Mr Parsons**—Yes, it comes under our guidelines. So there is increasing pressure, but we are currently meeting those pressures from current budget provisions. If the pressure continues over the next two or three years, we will go to the state and seek their assistance.

**Senator PAYNE**—Where does that leave people who are facing less serious criminal charges? Are they able to access criminal legal aid under the Victorian system?

**Mr Parsons**—No. Unless there is a reasonable prospect of jail or other high-end penalty such as a suspended jail sentence, they do not qualify for legal aid. They may get assistance from a duty lawyer at court—we have a network of duty lawyers across the state that provides representation, currently in around 50,000 cases a year—but the duty lawyer services are prioritised. If the cells are full, people are in custody, then the duty lawyer will be assisting them before they help someone with a careless driving charge or a second offence shop theft charge, for instance.

**Senator PAYNE**—So, in that case, they would end up unrepresented or self-represented.

**Mr Parsons**—That is right.

**Senator PAYNE**—Has Victoria Legal Aid or the Victorian government done any assessment of the number of people who end up facing serious penalties because of the difficulties of navigating the court process?

**Mr Parsons**—No. I am unaware of any such analysis. But judges and magistrates will generally quickly assess whether a person is at risk of jail and almost invariably will stand the case down and suggest that that person speak to the duty lawyer, get some legal advice. Sometimes litigants do not want assistance and want to run the cases themselves, and so courts

will deal with those cases. But magistrates and judges are generally greatly assisted by having people who look like they are going to jail having lawyers, and they will often direct them to the duty lawyers in those circumstances.

**Senator PAYNE**—It might be an interesting analysis to do, all the same. Has the VLA had any access to the Commonwealth expensive criminal cases fund?

**Mr Parsons**—Only in a beneficial sense in that in 1999 Victoria Legal Aid returned $5 million of its Commonwealth reserve to that fund. We accessed it in 1997-98 when we had a very expensive Commonwealth criminal trial run in this state—Beljajev, a matter of some notoriety. That is the only occasion that I can recall our ever accessing that fund.

**Senator PAYNE**—Would you suggest that such a fund operate in the next set of agreements?

**Mr Parsons**—I think it is crucial, particularly for the smaller states. For instance, the Northern Territory can find itself confronted with cases that cost a million dollars, and one such case would use up its entire Commonwealth grant. So the Commonwealth certainly needs some mechanism to support commissions that do not have resources. I would expect the Commonwealth, if it is keen about having its laws properly prosecuted in the states and territories, to provide that kind of support.

**Senator PAYNE**—One aspect of your submission relates to the PDR service. It is very interesting and I would be pleased to learn more about it, at least from the committee perspective. You employ 22 specialist family law solicitors. Are they in-house for the VLA?

**Mr Parsons**—Yes. They are located in Queen Street and our 11 other offices.

**Senator PAYNE**—So how do you as an organisation determine what the appropriate balance is between having legal aid work performed by in-house solicitors and that which you contract out?

**Mr Parsons**—We contract out as much as we possible can in family law. The problem we find is that fewer and fewer firms are prepared to do the work. For instance, five years ago in the outer western growth corridor of Melton, 13 firms were doing family law work. In 1999, they undertook something like 35 new grants for legal aid. Now there is one firm in Melton doing legal aid work, and last year they did two grants of legal aid.

So regrettably a lot of firms are withdrawing from the marketplace. There are two reasons for that. One is the money that legal aid pays and the other is the very large amount of bureaucracy around the granting of legal aid in family law matters. That level of bureaucracy of reporting, after many, many stages in the process of a piece of litigation, is imposed by the Commonwealth under the Commonwealth agreement. Practitioners, whilst they are often willing to do legal aid work at a heavily discounted rate, tire very quickly of over-bureaucratic requirements by public sector organisations, so lots of them are leaving the field. We had to put significant specialist family law staff on in a number of regions to deal with that. In particular, suburbs in the west—and the eastern suburbs around Ringwood and those parts—unfortunately were noting a substantial decline in private professionals who were willing to do the work.

**Senator PAYNE**—Has the VLA done statistical analysis of the anecdotal evidence that you referred to in relation to Melton?

**Mr Parsons**—Yes, we have.

**Senator PAYNE**—Is it available to the committee?

**Mr Parsons**—Yes, it is.

**Senator PAYNE**—We would appreciate it if you could provide that.

**Mr Parsons**—I will happily provide that.

**Senator PAYNE**—Thank you very much. In your answers to Senator Bolkus you talked about the level—of about five per cent, I suppose you would say—that administrative costs reach to operate. Is it just the Commonwealth side of things?

**Mr Parsons**—Just the Commonwealth.

**Senator PAYNE**—How does that compare with the administrative costs of your state legal aid provision?

**Mr Parsons**—I would have to do the calculation. I have not done it. I can give you the global indication that about eight per cent of all our revenue is spent on administration and the remaining 92 per cent goes into legal services, but I would have to do the specific breakdown on the state. I would be very happy to provide that figure to the committee.

**Senator PAYNE**—That would be of interest. I assume that on an ongoing basis you endeavour to keep administrative costs to a minimum so as to return the maximum amount to legal aid provision?

**Mr Parsons**—That is our statutory obligation—to be efficient and economic.

**Senator PAYNE**—The Victorian Auditor-General would have a view if you were not doing that.

**Mr Parsons**—Indeed he would. We can say, hand on heart, that we do that effectively.

**Senator PAYNE**—Thank you, Mr Parsons.

**Senator LUDWIG**—Do you know whether or not the Rush-Walker model is going to be relied on in the future?

**Mr Parsons**—I would sincerely doubt that. The offices of the Attorney-General's Department recognise—if not vocally recognise—that it has significant flaws. I would be very surprised to see them rely on that model again.

**Senator LUDWIG**—Do you know whether or not they have commissioned any new work?

**Mr Parsons**—They are looking at a number of models. I believe they have asked the Grants Commission to do some work for them. I believe they have done some revamping in their own way of the Rush-Walker model but I am not sure that they have presented or prepared anything that they have actually made any decisions about in terms of applications for the new funding agreements.

**Senator LUDWIG**—That was my next question. Have they involved you in the development of any models for legal aid funding?

**Mr Parsons**—Everything that Victoria Legal Aid and National Legal Aid have done in analysing the old model and developing new models has been provided to the Commonwealth. They are aware of all our work. National Legal Aid will never reach a unanimous view on a funding distribution model, because a funding distribution model is always going to involve winners and losers. No-one wants to go to their board and say, 'I have just agreed to a model that is going to reduce the funding of our state legal aid commission—and here is my resignation.' We rely on the Commonwealth to show leadership in this area. We want them to show leadership by adopting a model based on solid empirical data; not the smoke and mirrors of the Rush-Walker model of 1999.

**Senator LUDWIG**—Have they proposed any model or included you in the discussion for any model?

**Mr Parsons**—We have been involved in extensive discussions about models but, having given them all our work and having had a number of discussions about models, we have said to the Commonwealth that it is up to them to make the decision and provide the leadership in this area.

**Senator LUDWIG**—I was more interested in the other way—of the Commonwealth providing information to you about what model they might be looking at.

**Mr Parsons**—They have given us drafts of some of their preliminary work with the Commonwealth Grants Commission and some of their preliminary work with the Rush-Walker model. They have also committed to having discussions with us before the end of this calendar year about funding under the new agreements, which are due to be signed off by the end of this current financial year. I am hoping that by Christmas I will be able to go to my board and say that the Commonwealth have adopted this formula or they are proposing to adopt this formula and this is the benefit or otherwise for this legal aid commission.

**Senator LUDWIG**—If that view should firm up—in other words, the model to be adopted—before the committee reports, could you undertake to provide to the committee a copy of that and your views in respect of that model once it becomes public?

**Mr Parsons**—Certainly.

**CHAIR**—There is one last question from me. You mentioned earlier that, as a consequence of greater emphasis on law and order type campaigns, there may have been more cases going

through the courts or more people being prosecuted. It was put to us yesterday that we should consider the concept of a legal aid impact statement when legislation is passed through parliament, to try to anticipate the legal aid needs of any particular legislation and its implementation. Has that been considered by the commission or the Victorian government in any sense?

**Mr Parsons**—One of the primary roles of the Department of Justice in its relationship with this independent statutory authority, VLA, is to ensure that, when legislation has some impact on us, that impact is assessed and measured. There have been recent changes in the justice sector in Victoria that have had an impact on Victoria Legal Aid. For instance, a number of elements of a road safety initiative implemented by the state government have had an impact on the VLA in terms of the numbers of applications for legal aid for road safety matters that actually involve the risk of jail—third offences, .05 cases, dangerous reckless driving, those kinds of offences. The VLA has been compensated fiscally to take account of that impact. It is a very sensible proposal. Obviously legislation can have ripple effects and it is very important that those ripple effects be taken into account so that the needs can be best met.

**CHAIR**—In that context, have you been able to focus on Commonwealth legislation, for instance, in the last five or six years that might have had the effect of raising the need for access to resources?

**Mr Parsons**—Raising the bar! I could undertake that analysis. I am sure that on a case by case basis there has been a substantial contribution by legal aid commissions to the development of legislation by the Commonwealth. That has had a cost effect. In particular, legislative changes to the Family Law Act, legislative changes to the social security provisions and legislative changes to the migration controls have had spin-offs for the legal aid commissions.

Legal aid commissions are generally well consulted by the Commonwealth on reviews of legislation, so we have the opportunity to respond to proposed legislative programs. On most occasions, however, when those legislative proposals become law, even though there might have been an identified impact on commissions, they have not been compensated. So the funding agreements since 1999 have been very, very fixed. There has been very little variation over the four years.

There has been an input by the Commonwealth for PDR services that were not part of the original agreement and there has been some income from the Commonwealth to meet their Australia Online program. Legal aid commissions provide some telephone advice and information services for callers to the Commonwealth hotline. But other than those two programs I do not think there has been any other financial variation to the agreements. So, whilst there might be an awareness of the impact on commissions, it has not translated to more resources.

**CHAIR**—If you can come back to us with some of that information on the impact of some of those changes, that would be great.

**Mr Parsons**—I would be happy to do that.

**CHAIR**—Thank you very much for your evidence and your submissions.

[11.39 a.m.]

**BIONDO, Mr Salvatore, Community Development Officer, Fitzroy Legal Service**

**BROWN, Ms Naomi Lyndall, Appointed Representative, Community Legal Centres Association (Western Australia) Incorporated.**

**SMITH, Ms Sally, Project Worker, Federation of Community Legal Centres (Victoria)**

**CHAIR**—I welcome representatives of the Federation of Community Legal Centres, the Fitzroy Legal Service and the CLC Association of WA. You have lodged submissions 50, 48 and 93. Do you need to amend or alter them?

**Mr Biondo**—No.

**CHAIR**—Who would like to start off with an opening statement?

**Mr Biondo**—I would. Thank you for the opportunity to appear here today. The bulk of my comments are contained in the submission, but I would like to highlight some aspects. I will begin by going through some specific recommendations we would like to make. Firstly, it is vital to re-establish the cooperative partnership arrangements that existed between state and federal governments prior to 1997, which allowed for flexible planning and internal legal aid funding allocation. Secondly, there is an urgent need to address the dire financial and physical circumstances faced by many community legal centres across Australia, largely arising out of cost increases and a virtually stagnant real funding allocation. Thirdly, there is a need to improve access to justice across the national landscape, building on and extending our existing services, as well as establishing new offices and programs to meet unmet legal need. Rural, regional and family law areas are of critical concern.

My general comment is that in our view the original vision aspiration for the establishment of a national system of legal aid across Australia which enhanced access to justice has largely collapsed. Our legal aid system is grossly underfunded and incapable of meeting community legal needs. The government's financial support, while welcome, remains tokenistic. It seemingly ignores the vital functions these organisations play in protecting our justice system and democratic principles.

Legal aid commissions and CLCs are barely able to provide a human facade to an inhuman legal system. CLCs and legal aid commissions have struggled to manage under the weight of increased community demand, reduced levels of government support and increased managerial demands. Access to free legal aid has been replaced by myriad conditions, shifting guidelines, financial caveats and exclusions that cover the provision of aid with the thick and sometimes impenetrable veneer of bureaucracy—some of this was covered by a previous speaker. Presently legal aid is increasingly characterised by burdensome funding pressure and state and federal government disputes over financial allocations and how they are used.

With the growing crisis in legal aid, there has been mounting pressure on CLCs to do increasing amounts of casework on the cheap. The systemic and community legal education functions of CLCs are being increasingly supplanted by a deluge of casework from a legal aid system that cannot cope, and we are expected—often in substandard physical and employment conditions—to do what legal aid used to do. Our efforts are increasingly being subsidised by the significant efforts of private practitioners, who are unfairly being asked to take on increasing amounts of pro bono work. Those who do legal aid work at a reduced fee scale, to cover the diminishing and insufficient government contribution, often do so at under market rates. In our view, pro bono is a poor substitute for an adequately funded legal aid system.

One government review after another has supported the benefits of a well-funded network of legal aid services, only to be met with indifference or, at best, meagre levels of additional financial support. Most of us would be in agreement that our community deserves better than this. From our position the measure of civility has regressed, democracy has weakened and the rule of law has been undermined. It remains unclear whether the demise of the ideals and the vision of legal aid is a reflection of the respect in which fair and equitable access to justice is held or whether it is a reflection of legal aid's inability to defend itself.

Many of us have come to believe that, in the eyes of government, justice is at best a non-issue—and not a big enough issue. The fundamental tenets of a fair trial, equitable access to justice and innocence before guilt have become, in our view, laughable propositions. On a daily basis, we observe the massed forces of the state confronting powerless individuals. Is equal justice merely about a duty lawyer sharing five minutes of their time in a court foyer with a client whom they have never met? The real issue is about the sort of vision we have for the role of legal aid and access to justice in our Australian justice system. The early days of community legal centres and the commitment to legal aid in its various incarnations was, in part, rooted in this vision. Is it time to reinvigorate this debate with some substance? I am wondering whether this current inquiry, supported by the body of work contained in the 10 previous inquiries over the last decade, may actually be able to deliver what the community deserves.

**Ms Smith**—I am a project worker with the Federation of Community Legal Centres, which is the peak body for the 47 community legal centres in Victoria. We thank the committee for the opportunity to give evidence today. I will firstly make a couple of points about legal aid, before turning to the funding crisis facing community legal centres. Our current mixed model legal aid system, comprising legal aid commissions, community legal centres and private lawyers, is widely acknowledged as one of the most effective and efficient models in the world. Review after review has confirmed the efficient and effective delivery of services, yet the system is in crisis with current legal aid funding well below that available in 1987. This is despite a dramatic expansion in laws and an increasingly complex legal system.

There is an urgent need for the Commonwealth government to increase legal aid funding to address the current crisis in access to legal aid and justice for the disadvantaged in our communities. Adequate funding for legal aid is a fundamental responsibility of government. We cannot continue to shift the costs of injustice onto individuals, local communities and social service providers and risk democratic principles and institutions. The Commonwealth-state funding divide should be abandoned and replaced by a return to a cooperative partnership model based on a cost sharing arrangement. At the very least, more flexibility between Commonwealth and state matters and in legal aid guidelines is needed, to increase workability. Some form of

legal needs analysis and legal aid impact statements should be implemented, to ensure that legal aid funding is proportionate to the legal need.

I now turn to community legal centres. Community legal centres are facing a funding crisis. While the Commonwealth has allocated some new funds to CLCs, almost all of this has gone to new activities, leaving existing centres to fall further and further behind. In 2001-02 almost half the community legal centres in Victoria received less than the level of funding accepted as equivalent to three full-time positions. This is despite the high level of demand and the need for centres to provide a range of legal services to disadvantaged communities and to provide legal advice and information, community legal education, community development and law reform.

The shortfall in funding means that centres are unable to offer wages comparable to the private sector or the public service. For example, at full-time rates a principal solicitor with at least five years experience earns on average $46,200 in a community legal centre, compared to $75,000 to $110,000—and increasing to $180,000—in private practice. This is compounded by the fact that most centres cannot even afford to employ full-time workers, resulting in most solicitors being employed on a part-time basis and earning well below $46,200. The low salaries paid by CLCs are further eroded by the need for lawyers to repay HECS debts and are compounded by the poor standard of resources and the overwhelming demand for legal assistance.

The condition of centres' offices is so notoriously bad that in 2002 a competition for the worst office was held. The stress on community legal centres is further compounded by the limited availability of legal aid. Centres report receiving many inquiries for assistance from people who have reached their legal aid cap or who have a legal matter for which legal aid is not available or who do not meet the means test despite being unable to afford a private solicitor. As a result, centres experience considerable difficulty in attracting and retaining qualified staff. Centres often receive no applications for an advertised position, and for many centres it takes six months, 12 months or even 24 months to recruit new staff.

The Commonwealth government needs to urgently address the CLC funding crisis by working towards baseline funding for centres, in line with the National Association of Community Legal Centres budget submission. In addition to securing baseline funding for community legal centres, the Commonwealth government also needs to allocate additional funding for new community legal centres in areas of need. There are still areas in rural and regional Victoria and outer metropolitan Melbourne without access to a community legal centre. For many people in these communities there is no access to justice.

In conclusion, community legal centres deal daily with people facing significant barriers to justice: women who have left violent relationships and are seeking residency of their children, homeless people and people with mental illness facing imprisonment for unpaid public transport fines, people in prison seeking contact with their children, people from culturally and linguistically diverse backgrounds wrongly prosecuted over Centrelink debts, people with disabilities experiencing discrimination in the workplace, and young people being harassed for using public space. For many people interaction with the justice system comes on top of other complex needs and their own disadvantage. It can be the final tipping point unless assistance is available. Without an urgent injection of funding for legal aid and community legal centres, for many of these people there will be no access to justice.

**Ms Brown**—Thank you for this opportunity to give evidence today. I appear before this Senate inquiry as an appointed representative of the Community Legal Centres Association of Western Australia. The reason I appear in Victoria on behalf of the Western Australian peak body for community legal centres goes to the crux of the terms of reference of this inquiry. The fact that the committee is not resourced to visit all states and territories, let alone rural, regional and remote areas, highlights the issues of access outlined in our submission. Our recommendations are aimed at developing national legal aid principles, involving a coordinated approach by governments, communities and key stakeholders, and undertaking an assessment of the unmet needs of the people facing disadvantage in the community and lifting the restrictions that apply to Commonwealth legal aid moneys being spent on Commonwealth priorities.

The issues of access to justice raised by this inquiry are best illustrated through a client's story. The issues in this story are real; however, they are presented as an amalgam of stories so as to preserve client confidentiality. Here is Jennifer's story. Jennifer is an Indigenous woman living in a remote Western Australian town. She has two children under 10 years of age. Jennifer has a hearing impairment. Her children are the subject of ongoing proceedings in the Family Court of Western Australia. There are significant child safety and welfare issues involved. Jennifer needs to have a welfare report prepared for her children. The Family Court and the court counselling services do not visit the town where she lives; however, they go to a town in the region four times per year.

Between court circuits, Jennifer saves enough money to buy the three bus tickets for her and her children to travel for 10 hours during the wet season to get there. The family have to stay at the local women's refuge as they have no money for a hostel. Jennifer does not have legal representation in court as Legal Aid has a conflict of interest and there are no private lawyers in town to accept a grant of aid. There are no Auslan interpreters available. Jennifer's story illustrates clearly the impact that the current legal aid and access to justice arrangements are having. It consolidates many of the main points made in our written submission. I draw the committee's attention to the other case studies and the recommendations made in the submission by the Community Legal Centres Association of Western Australia, which demonstrate the great need for and the gaps in achieving true access to justice in our community.

**CHAIR**—Thank you very much. Ms Brown, in your submission you identify the greatest need for legal aid services in WA as being in the Kimberley region. I wonder, in that context, how do you handle—given the geographic population spread in WA—those outlying areas? Is it duty solicitors who are often doing that work, or is it via videoconferencing?

**Ms Brown**—It is quite dependent on the needs of the individual community. Those recommendations actually came out of the Western Australian association's submission to the joint review of community legal centres. It was endorsed by the joint review report that came out from the community legal centres and legal aid at Commonwealth and state level. There are a number of different initiatives that Western Australian community legal centres in particular have used, as well as legal aid officers, to try and assist people who are living in rural, regional and remote areas. Those initiatives are very much dependent upon what is needed in that community. For example, the Geraldton Resource Centre—you will have to excuse my knowledge of distance; Geraldton is approximately 1,000 kilometres north of Perth—in conjunction with legal aid, is training workers from within Geraldton Resource Centre. It is also training paralegals in outlying areas through videoconferencing facilities. There is a partnership

between legal aid and community legal centres, and this means that the knowledge is retained by people living and working in a remote or outlying community.

There are duty lawyer services that are offered through both the Aboriginal Legal Service of Western Australia and legal aid to some outlying towns where there is no court available. But there are still problems with that because in many towns there is not a magistrate who sits all of the time. The magistrate will visit on circuit and in between times many minor committal matters and intervention orders are heard by justices of the peace. The person may or may not have had the opportunity to speak face to face with someone prior to that, because the duty lawyers will only visit the town at the time of the Magistrate Court's circuit. So it is similar to the issues raised by Sam: you are still meeting the person at the court door. For many people who are from different Indigenous cultural and linguistic backgrounds, as well as other culturally and linguistically diverse backgrounds, that is very difficult. There is also not necessarily an opportunity to identify the need and get an interpreter, and there may well not be an interpreter that is available in that language in that area anyway.

**CHAIR**—The interpreter is something that you have also raised, Mr Biondo. It is almost like the forgotten part of this debate is the migrant or the Indigenous need to access interpreters. What assistance are you getting from government to handle interpreter needs? Both of you could answer this, I suppose.

**Mr Biondo**—I will commence, and Sally might add to it—if you wish. In Victoria, over the last few years, we have had a grant allocated to us—I mentioned that in my formal paper—and this year it is $60,000. We administer it; it is divided up amongst all the eligible legal centres. The Fitzroy Legal Service, which represents a population that has about 36 per cent of overseas born or non-English-speaking people, gets $1,600 to provide interpreting services. It provides nothing for community legal education activities or for other forums and sessions we might be holding. It is barely enough to run some cases in court.

**CHAIR**—That is for both Commonwealth and non-Commonwealth matters?

**Mr Biondo**—As I understand it, it is.

**CHAIR**—There is a question that came up from Ms Smith's submission—that is, the level of baseline funding for CLCs. You have done a review in WA so you might be able to answer my question now, or maybe you could take this on notice: are there any recommendations as to what levels of funding CLCs should get or what they should get funding for? What should be in a baseline funding program?

**Ms Smith**—The National Association of Community Legal Centres has produced a budget submission which goes into quite a lot of detail about the funding of community legal centres and the need for baseline funding and what that should be calculated on, so I would refer you to that. The federation has also just produced its own budget submission for Victoria, so perhaps we could provide you with a copy of that.

**CHAIR**—I think we are going to get more evidence on that tomorrow. Mr Biondo, on page 27 of your submission you refer to restrictions on assistance with social security and AAT matters. It seems to me, and I suppose I am drawing this from your submission, that it would make it

enormously hard for social security beneficiaries or potential beneficiaries to pursue their rights through the system. How are you handling these sorts of restrictions?

**Mr Biondo**—I cannot impress upon you enough how complex social security is. At Fitzroy we are generally very dependent on the welfare rights unit that has been established in Victoria. Many other community legal centres also refer to that unit for advice. A small group of individuals who venture into this area are dotted around the community legal centres. It is fairly specialised and we make do using each other's skills and specialisations. We often refer to other people who have greater capacities in those regards. It leaves people in the lurch a fair bit.

**CHAIR**—To what extent do you find that these matters are funded by the Commonwealth government? We are talking about Commonwealth laws.

**Mr Biondo**—I would have to take that on notice.

**CHAIR**—Thank you.

**Senator PAYNE**—I want to start with a question to Ms Brown about the Western Australian submission. This refers to a specific issue. On page 13 of the submission is a reference to law by telecommunications/family law access gateway issues. The submission makes the not unreasonable point that 'access to working telephones in confidential locations, access and ability to utilise Internet facilities and working computers' is not in fact universal. It is a challenging premise from which to begin. According to the submission, the CLCs referred to were using the resource creatively and appropriately, apparently. What does that mean more specifically? How have you made that funding work?

**Ms Brown**—My understanding is that the community legal centres that took the funding for that project used it in a variety of ways. They did try to deliver the service that was required and they did that to the best of their ability. They were basically waiting on calls to the office for the solicitor to answer on family law matters, and if those calls did not come through they used that person's time—or the time of the people who were doing that job if the position was split between two people—in a way that benefited the community. I know that an evaluation was done by community legal centres which took that funding on board to see how the funding was used in different community legal centres. On the whole, it was used in response to community needs. I would have to provide the particulars of that information on notice. However, those centres did provide the service that was required, but it was not required in that way. If someone required something face to face, as opposed to over the telephone, there was no point someone sitting in an office and getting one call a week or a call every two weeks. There has been an analysis by the government of the call costs, although I do not know what they are off the top of my head. There was a large cost per call because of the limited number of calls that came through on that service.

**Senator PAYNE**—I would be interested in any further detail about that that you could provide to the committee. Perhaps you could take that on notice and expand on the specifics. So it has been evaluated by the Commonwealth. Is the Commonwealth continuing to fund those CLCs with that money?

**Ms Brown**—My understanding is that it was set up as a pilot program and that was funding was then extended for another year. I am not sure whether it goes beyond that or to the triennial funding agreements.

**Senator PAYNE**—I was wondering where it fits in.

**Ms Brown**—I am not sure about that, so I would need to take that on notice as well.

**Senator PAYNE**—We can pursue that too. I am interested in your practical experience of matters relating to the family law cap in particular. Both of your submissions make reference to those, in greater and lesser detail respectively. What sort of experience do you and your solicitors have of one party to a matter gratuitously extending the exercise to ensure the other party runs out of legal aid because the cap is reached?

**Mr Biondo**—I will give a very general answer. We are unable to provide family law help to any great extent at Fitzroy Legal Service, which is amongst the largest community legal centres in the country, because we cannot afford the lawyer to do that. We have people who have skills in family law who give some very general advice, and we refer people on. There is a lot of anecdotal discussion about the capping situation. In the initial stages of the cap, I recall quite clearly that we had many people approaching us for assistance, and many agencies who had also been approached by people who had reached their caps had significant problems. There was a report produced by the Salvation Army in about 1998 or 1999 on the impact of legal aid cuts in the family law area and the impact of the caps. So some basic research has been done.

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

**Senator PAYNE**—I appreciate that. I am trying to get to the bottom of the this. A number of the submissions refer to this issue generally without a lot of specificity around what brings people to that point. Almost all of the submissions say, 'Wipe out the cap because it is having this deleterious effect.'

**Ms Smith**—There has been a study done—I think it was in 1999—which recorded six case studies of women who applied for legal aid in family law matters involving domestic violence and other issues. That is referred to in my submission. Perhaps we could provide you with a copy of that research.

**Senator PAYNE**—That would be interesting.

**Mr Biondo**—I think the Family Court would also be able to provide you with more information on what happens when people reach the cap in their jurisdiction.

**Senator PAYNE**—I know what happens when people reach the cap, but the issue I am trying to get to the bottom of is that a number of the submissions make assertions about opposing parties mercilessly exploiting the process so that the other person's legal aid opportunities are removed. It is not just that it is a complex process. I understand that it might have attendant domestic violence, sexual assault and a range of other issues, including possibly bankruptcy—and we will go to those issues—but there is also actual exploitation of the process, which the court itself ends up wrapped up in. It is referred to generally in a whole range of submissions, including yours, and I just wondered what your on-the-ground experience was.

**Ms Brown**—I understand that those sorts of issues are relevant in Western Australia as well. I recall talking to a community legal centre about the fact that, at every point along the legal process, there was some sort of barrier to going forward. The intention was expressed by one party to the other party, the woman, that the reason he was putting up these barriers was that he knew her funding was going to run out.

**Senator PAYNE**—That is exactly the sort of problem I was trying to get to the nub of. It also means that there is a lawyer on the other side who is participating in that sort of behaviour as well.

**Ms Brown**—I can take that on notice if you like. That case study comes from Western Australia. If we can, should we provide some more?

**Senator PAYNE**—Yes, absolutely.

**Senator LUDWIG**—There is an issue that I am trying to resolve in my own mind. Victoria Legal Aid mentioned on page 11 of their submission that they were going to open a new PDR service called Roundtable Dispute Management. In your submission you mention that, in your view—and these are my words—community legal aid is not always the best avenue to take in family matters because most people find it very difficult to reach mediation or mediation settlement. In your view, do the initiatives that are then put forward by Legal Aid always fit in with the view of the community legal centres or do different priorities sometimes emerge? Is that one of them—the fact that Victoria Legal Aid is looking at PDR services, whereas your submission seems to indicate that it is not one of those areas where it would effectively be utilised? In other words, money channelled into that early area will not provide a significant outcome or benefit.

**Ms Smith**—We would say that, in cases that involve domestic violence or child abuse, PDR often is not appropriate. I think fifty per cent of family law matters involve allegations of family violence and child abuse. A very large percentage of the matters that community legal centres deal with also involve those issues. So for those clients PDR is going to be inappropriate.

**Senator LUDWIG**—Do you discuss those sorts of priorities with the VLA? If you are saying one thing, yet there is a new initiative being developed in this area, it seems to be at odds to me.

**Mr Biondo**—The formal links have not existed since the Cooper review decided to change around the board structure in Victoria, where legal centres were much more intensively involved in the process. The pressures on Legal Aid are in some ways very similar and in other ways very different from ours. They deal a lot more with family law and they are looking at ways in which

they can handle that. There are moves in other states which they have looked at and considered, which we have not had an opportunity to do intensively. If we were to discuss things with them, we would be able to express our point of view, but on this matter I cannot recall any extensive discussion with legal centres.

**Senator GREIG**—Mr Biondo, in your submission on behalf of Fitzroy Legal Service you argue that access to legal services via the Internet is ineffective. I would be interested to hear a bit more about why that is. Is it a question of the technology or of people not being familiar with the technology? If that is the case, do you think there might be an opportunity, if it were resourced and funded, for some kind of videoconferencing, where people in remote or regional areas might be able to communicate with someone on a more interpersonal level across technology rather than trying to navigate their way through a web site?

**Mr Biondo**—On the technology continuum, the first option would always be a live person to talk to, with an interpreter. Many of our clients have enough difficulty navigating their way around written pamphlets, let alone having the strength to walk in and talk to a lawyer. If the technology were available, because of the particular nature of the problems that people might have, I think videoconferencing might provide access in rural and remote areas. The Internet would provide some basic information for workers in agencies to access and distribute. Videoconferencing may have some suitable applications. My colleague from Western Australia may have a different point of view. I think there are some general accessibility problems with the Internet. Some of our people are in a chaotic state; they just would not get there.

**Senator GREIG**—You argue also for 24-hour access to legal advice. Were you thinking there of one-on-one or some kind of phone line counselling assistance?

**Mr Biondo**—At a bare minimum, telephone accessibility would be a great assistance to people who might be in police custody, say. It is very difficult to get a lawyer at 10 o'clock on a Friday night or two o'clock on Saturday morning. People are not aware of their rights. You do not know what people's circumstances are, and they should be entitled to a legal adviser. There are schemes established in the United Kingdom for the provision of lawyers in police stations. There are schemes that provide telephone advice in Australia. We used to run a scheme—and I think there might be others—where we provided it on an emergency basis to young people who were in need, until it got defunded by state government.

**Senator GREIG**—When was that?

**Mr Biondo**—That was in 1994, under the Kennett government.

**Senator GREIG**—Has that funding been resumed, or is there any indication thereof from the current government?

**Mr Biondo**—No, there was an express change of priorities. I think there was a failure to understand that there was an adversarial system in existence. Just as the police have their expertise that they can call on, people whom they bring in also need to get some basic advice about their rights. There was not much of an understanding.

**Senator GREIG**—As a Western Australian I was interested to read in your submission of your advocacy for better legal service provision in the areas of Wanneroo and Joondalup. I am wondering why you nominated those two areas.

**Ms Brown**—The areas nominated for the increase in access to community legal centres, particularly, came out of a number of studies that were conducted as part of the joint review of community legal centres by the state and Commonwealth legal aid organisations. They were a couple of areas that came out. There were a number of studies that were done, including surveying of community legal centres and their clients and a study by an organisation called URS that looked at a number of factors pointing to social disadvantage. They were the areas that came out of the whole range of consultations and studies.

There were three in the metropolitan area—north, north-east and south—and also the Kimberley, Gascoyne, Peel and a fourth place, which I have forgotten, in rural, regional and remote areas. Those identified areas came out of a whole range of consultations that culminated in the joint review document coming out. If you would like to have access to those particular statistics and consultations then I am very happy to take that on notice and provide those to you. I do not think the range of consultation papers and the URS consultant's report, which looked at particular factors of social disadvantage, were provided to the committee, but I am very happy to provide those.

**Senator GREIG**—I would like to see that. I am curious on the basis that, as you know, Joondalup and Wanneroo are adjoining suburbs. Does that indicate a desperate need for services in those areas?

**Ms Brown**—My understanding is that it was one area—it was Joondalup/Wanneroo. So it is one region; it is the northern area of the city. The closest legal aid office to that area is actually in Perth, so there is no access. The closest community legal centre is about 15 kilometres away—it is quite difficult to get there by public transport—and they already cover eight local government areas. So there is a great need in the expanding corridors in the metropolitan areas of Perth that have been identified.

**CHAIR**—And there is a high proportion of recent migrants in those areas too, isn't there?

**Ms Brown**—That is my understanding. I am not familiar with the particular demographics, but that is one of the indicators of social disadvantage that URS looked at in trying to determine where the areas of unmet need were.

**Senator GREIG**—You gave an example of an Indigenous woman from the Kimberley coming to Perth for a family law matter. Do you also find that you are struggling with cultural issues there? We heard during previous Senate inquiries into mandatory sentencing, for example, about some of the cultural difficulties of people leaving their communities, leaving their areas, staying in strangers' homes or refuges in the city, as well as cultural difficulties in family relationships within Indigenous communities—women challenging men for access to children and that kind of thing. Is that also something that you find you need to address in terms of advocacy, education and assisting people with access to justice?

**Ms Brown**—I think that is really important, and that is picked up in the part of the submission that talks about particular issues for Indigenous women. One of the issues that is drawn out in there is the fact that, for example, in the case of this woman going to Perth to get a welfare report, there were no Indigenous court counsellors. There is not necessarily a process to decide whether, if the counsellor is male, it is appropriate for the woman and/or her children to talk with that person about, for example, issues of sexual abuse. If you are looking at the systems, there is discrimination against not only Indigenous people but also people of culturally and linguistically diverse backgrounds. These sorts of questions are not even looked at: how are we going to get this story; is there an appropriate way of actually getting the story about the issues in the family; do we have an understanding of how this family works? That is drawn out in the submission when we talk about issues for Indigenous women. The women I spoke with in Western Australia in relation to that were very strong about saying, 'There need to be services that are culturally appropriate,' and that includes access to legal aid services as well. There are no Indigenous liaison officers attached to Legal Aid, not even in remote areas where there are a wealth of Indigenous cultures—there are for Aboriginal legal services; but there are not for legal aid services.

**CHAIR**—Mr Biondo, you spoke about the exodus of legal practitioners from legal aid work. Is that really happening or are we finding that there are new ways being developed by the profession to assist? For instance, I note that in Adelaide something like half of the bar has been involved in doing pro bono work related to asylum seekers—and that is something that is new. Something like 52 per cent of firms surveyed did less legal aid work in 1998 than in 1994-95. Does that mean that 48 per cent are doing more?

**Mr Biondo**—My comment there I think was touched on by the director of Legal Aid when he spoke about people refusing to do legal aid work in the family law area because of the bureaucratic nature of what they have to deal with. This is something we hear of very often. I think there is a general growing awareness of pro bono and good works that can be done there. My general view on that is that, as good as it is, it is a return to an older charitable type model. It is no replacement for a well-funded statutory scheme that has standards that can deal with things much more impartially, where there are no commercial conflicts and cab rank rules are not an issue. People are moving out of legal aid—they cannot make a living. Many lawyers that we deal with just cannot make a living. In our local area there were a lot more people doing family law who have just dropped out of doing legally aided family law. It is an exodus really.

**CHAIR**—Thank you. I thank the three of you for your submissions and your time this morning.

[12.25 p.m.]

**ELTRINGHAM, Ms Libby, Legal Officer, Domestic Violence and Incest Resource Centre**

**FLETCHER, Ms Joanna, Law Reform and Policy Lawyer, Women's Legal Service Victoria**

**SEEAR, Ms Kathryn Leigh, Community Lawyer, Women's Legal Service Victoria**

**VESSALI, Ms Sarah, Principal Lawyer, Women's Legal Service Victoria**

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

**Ms Eltringham**—The Domestic Violence and Incest Resource Centre has put in a joint submission with the Women's Legal Service Victoria, and I am here representing that service today.

**CHAIR**—Your submission has been numbered 27. Do you need to amend or alter it at all or you would just like to start with an opening statement?

**Ms Seear**—I have an opening statement.

**CHAIR**—Go ahead.

**Ms Seear**—Chairman Bolkus, members of the committee: I would like to begin by extending a very warm thank you to the committee for having invited our organisations here today. We are pleased that the committee is investigating an issue central to the lives of many Australian women. As solicitors and workers who deal with disadvantaged and damaged women on a daily basis, we believe it is wonderful that today we have an opportunity to make some of their voices heard.

Our submission is the collective work of the Women's Legal Service Victoria, a state-wide specialist community legal centre; the Domestic Violence and Incest Resource Centre; and the Victorian Women's Refuges and Associated Domestic Violence Services. At Women's Legal Service Victoria, we specialise in issues relating to relationship breakdown and violence against women. Our clients are typically women who are eligible for legal aid or who are on the borderline of the eligibility criteria. Regularly we see women who have exhausted their legal aid funding. DVIRC and VWRADVS are support and research organisations; they frequently deal with women who have escaped or who are trying to escape situations of domestic violence.

I will begin by giving a very brief background into the unique situation that women separating or divorcing their partners find themselves in. Research has shown that women experience significant financial difficulties following separation. Many women, and consequently their children, become permanently financially disadvantaged following separation or divorce. It is our submission that women are a particularly vulnerable sector of the community. I ask the

committee to bear these factors in mind when considering our submission today into legal aid and access to justice. In the short time available, we wish to focus on three particular points raised in our written submission. I wish to discuss briefly, firstly, the levels of legal aid funding; secondly, the impact of current funding arrangements; and, thirdly, the impact of the current arrangements upon women.

For a number of reasons it is our submission that the current levels of legal aid funding are inadequate, particularly with regard to family law and domestic violence issues. The current maximum or cap available in family law matters is $10,000. In our submission, this cap must be raised. We find that the maximum amount available is often quickly exhausted and our clients can then find themselves in a position where their solicitor is no longer willing to act for them. In one case we saw a woman whose legal aid funding was exhausted during a trial in the Family Court. On day 5 of a 21-day trial her legal aid funds ran out. On day 6 she turned up to represent herself, having to cross-examine witnesses, including expert witnesses. We regularly see women signing consent orders that are not in their best interests because they cannot afford legal advice and/or representation or because their solicitor has withdrawn from the case.

In our submission, there is a significant relationship between the current level of legal aid funding and its impact upon certain organisations. In our experience, we find that the pool of private solicitors willing to accept legally aided family law matters throughout Victoria is constantly dwindling; we find that it is cheaper to give legally aided files to less experienced solicitors; and we find that there is almost a complete absence of firms willing to do pro bono work in family law matters. This being the case, there is a significant flow-on effect to community legal centres. We are under increasing pressures to meet the demands of women who cannot afford private solicitors, who cannot obtain legal aid and who cannot secure a pro bono solicitor. Many of the women whom we cannot assist simply fall through the cracks.

Finally, I would like to briefly mention some of the ways in which the relationship between legal aid funding and gender is of particular concern to us. In our submission, more grants of legal aid are made available in criminal law matters, and therefore to men. More money is offered per matter because criminal cases are seen to have more serious consequences than family law cases. The potential consequences in some family law matters are, in our view, sufficiently serious as to warrant funding. We are also concerned that women who are the victims of domestic violence will resort to self-representing in the Family Court and in state family violence matters where legal aid funding is not available. We would propose the introduction of a pilot project, similar to Project Magellan, which is discussed in some detail in our written submission. The evaluation of that project was overwhelmingly positive. We would propose that a pilot project be introduced, whereby the usual legal aid guidelines be altered in cases involving allegations of domestic violence, especially where children have witnessed such violence or where there is a risk that they may continue to witness violence.

We also seek to tender a list of recommendations and other information to the committee, and a folder has been prepared for each of you today. There are 11 recommendation in all. We also note that we have provided one copy of our publication called *Trial by legal aid* to Senator Bolkus, and this is the publication mentioned by Mr Biondo earlier today. Once again, we thank the committee for the opportunity to present our concerns today.

**CHAIR**—Thank you for the submission and for your presence this afternoon.

**Senator GREIG**—In some regards, you might have answered my fundamental question. In terms of the gender bias of men being granted legal aid more often than women in matters of criminal law, if I understand you correctly, is that because women engaging in the court system are more likely to do so within the Family Court than in the criminal courts?

**Ms Seear**—Yes. The 2001-02 annual report from legal aid shows that 77 per cent of matters for which men were granted legal aid were for criminal law matters; for women, just over half the matters that they were granted aid in were family law cases. So that then projects to a result whereby something like 23,000 men were granted aid in the 2001-02 year compared to just over 13,000 women.

**Senator GREIG**—In your submission you suggest that the Family Law Act 1975 could be altered in relation to section 360A of the Crimes Act; in the state of Victoria judges have unilateral power to grant legal aid in cases and that ought to be considered at a Commonwealth level. In that context, do you think that a legislative provision to that effect could be entertained federally? Would that be your primary argument for redressing imbalance in relation to gender bias in legal aid application?

**Ms Seear**—I think it is one of the many things that should be considered. Our view is that family law funding should be a priority at a Commonwealth level, and that is one of the ways in which that could potentially be redressed. There needs to be a philosophical shift in the sense that family law matters are particularly serious. People tend to think of them in a way that is different from criminal law matters. There seems to be a general view that criminal law matters have a very significant consequence if somebody is found guilty of an offence. But, in our view, there are very serious consequences for clients we see in family law matters—women who lose their children; children who are being subject to sexual abuse or child abuse—and there is simply not the money available to fully investigate those matters. A number of our recommendations that I will hand up to the committee deal with many of these issues. Some of the proposals were covered in our submission, and some of them are additional, but certainly the example you raised is one of the ways in which we think those issues could be redressed.

**Ms Vessali**—In relation to the case study that was mentioned briefly in our oral submission—where the woman was forced to self-represent during the 21-day trial—the end result of that trial was eight years post separation, where the children had lived with her since separation. She lost the children and residency was changed to the father. The potential results of losing legal aid at that stage and having to self-represent are quite devastating.

**Senator GREIG**—You argue for raising the cap on the $10,000 legal aid funding for Family Court matters and you talk about how quickly that money is consumed in cases. Is there not the danger, though, that if the cap were increased—let us just say doubled to $20,000—you would still have the same scenario: the money would still be consumed quickly, perhaps for vexatious purposes?

**Ms Seear**—My understanding is that, at this stage, there is a stage of matter funding limit in family law matters so that each stage of the proceeding has a maximum that is allocated. We would suggest that that remain in place but that perhaps each stage of the matter be increased. We see clients on a regular basis who are facing vexatious litigants—people who take them back to the Family Court time and again weeks or months after final orders are made and a new

application is issued—and there is certainly a risk of this. But I do not think that that is any reason for avoiding funding for women who do need it. If a woman is facing a vexatious litigant there is an even greater need for her to have financial assistance.

**Senator GREIG**—Is there any evidence to suggest that the cap, as it exists or as it might be altered, in some ways encourages or facilitates resolution prior to taking the matter to court? If there is an understanding or an expectation that the money or the legal redress might not be as adequate or as appropriate as it might otherwise be there might be some kind of pressure for people to resolve their issues outside of the court system, as most do.

**Ms Seear**—I am not aware of any evidence or any research in that respect. We see a number of clients who are legally aided and whose cap is exhausted because the other party knows that the woman is legally aided and only has a certain amount of money that she can access. We regularly see cases where a man has access to significant financial resources. I know of one case where a man was able to spend upwards of $150,000 on his own legal fees whereas the woman was subjected to the $10,000 cap. He knows that and he knows that sooner or later her funding will be exhausted. So in fact in our experience it has been the reverse. It is a disincentive rather than an incentive to settle, where you have a difficult opposition.

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

**Senator PAYNE**—In the documents you have just handed up, you make a recommendation about increased recognition in the application of legal aid's guidelines for PDR—that PDR is not appropriate where there has been family violence, which I understand. In their submission, the Victorian government talk about what they describe as a new and very comprehensive family law PDR service called roundtable dispute management, which offers clients a non-adversarial pathway to resolve their family law dispute. Are you familiar with their proposal?

**Ms Seear**—I am somewhat familiar with it. I think Ms Vessali may be more familiar with it than I am. However, I am familiar with it.

**Senator PAYNE**—They have indicated to us this morning that it is one way of dealing with a reserve of Commonwealth funds that they think might be useful. What is your centre's view on that?

**Ms Vessali**—Because of the nature of the clients we see, the vast majority of our clients have a history of family violence and abuse of some sort. In that situation there are very few cases where we would consider requiring the woman to attend some form of PDR would be appropriate. There are reality issues of a power imbalance. Whether or not the mediator will be thinking about that, the woman just cannot mediate on a level basis with the perpetrator of the violence against her, against the children or against both of them. In terms of it being an effective use of Commonwealth funds, I suppose our submission at this point would be that we are seeing private firms pulling out of legal aid in huge numbers. We refer women out to private

firms if they are eligible for legal aid and, as such, we keep a database of firms that will take clients on. I regularly receive faxes or letters from these firms saying that they are no longer doing legal aid and to please not refer any more clients to them. We would argue that if there are excess funds they would potentially be better off going to raise the cap and to raise the funding available to allow private firms to continue doing legal aid commercially so that they can survive as well.

**Ms Fletcher**—In relation to access to justice, that is probably a particular issue in the country. As far as I know, there are no solicitors in Gippsland around the Sale-Traralgon area that will accept family law work. The nearest community legal centre is probably in Dandenong.

**Ms Vessali**—We also hear regularly from the Gippsland Community Legal Centre. It refers women to us for family law matters because it cannot find solicitors out there to do legally aided family law.

**Senator PAYNE**—Thank you. I appreciate the update.

**CHAIR**—I have been going through some of your material. You commend Victoria Legal Aid on some of its initiatives. Could you prioritise some of those initiatives for us? Could you also tell us whether Victoria Legal Aid has developed specific guidelines for the granting of legal aid in cases involving domestic violence?

**Ms Seear**—From memory, one of the particular things we may have mentioned in our submission is the number of publications Legal Aid is putting out. Victoria Legal Aid publishes a booklet called *You and Family Law* and, unfortunately, I think I have neglected to provide you with a copy of that booklet today. We give that fairly comprehensive booklet to clients. It contains very basic information about the entire family law system and it is published in a number of languages. We see clients from a number of cultural backgrounds who do not have English as their first language.

**CHAIR**—Which ethnic backgrounds are coming to you these days?

**Ms Seear**—In the information we have provided to you I have given you a copy of our annual report. I am not sure if those statistics are in there in terms of a breakdown, but they come from a very diverse range of backgrounds. There are a lot of Turkish, Vietnamese and Chinese women. We see a whole array of women.

**CHAIR**—I will stop you there.

**Ms Seear**—In terms of the Victoria Legal Aid guidelines for family violence, some of the issues are addressed in our recommendations and may not be touched on fully in our submission, but there are some guidelines in place at the state level for funding for intervention order matters—in Victoria, family violence orders are called intervention orders. We have made some recommendations in the information just handed to you for an alteration of those guidelines. We believe that they are a little too restrictive but there are certainly guidelines in place whereby women can be funded for intervention order matters as either the applicant or the defendant in terms of such an order. However, we are concerned about that and our concerns are addressed in the material we have given you.

**Ms Fletcher**—The legal aid guidelines also recognise the presence of family violence as a special circumstance for which aid may be granted when the person does not otherwise satisfy the criteria, or for an extension of funding over the cap. We would probably have some questions about the consistency and application of the special circumstance provision, although we do rely on it quite often when we seek aid for barristers' fees.

**Senator PAYNE**—I cannot quite find this in your submission but you mentioned that it might be appropriate to have a Magellan Project style approach to domestic violence issues, over and above the concept of child abuse. How do you envisage that that might operate?

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

**Senator PAYNE**—Thank you very much. I appreciate that detail.

**CHAIR**—The final question I have is in respect of the cap. We seem to be getting mixed messages about how pernicious it may very well be. On the one hand we are told that it is only two per cent of cases but on the other hand we are told that even that could be a big number. You raised the cap as an issue. Is it a frequent problem in your operation?

**Ms Seear**—Yes. We regularly see women who have exceeded the cap. In the example I gave earlier, we had at least one case in which a woman was cut off during a trial as a result. We regularly see clients who have exhausted their funding. As I mentioned earlier, particularly in circumstances where the opposing party is taking them back to court on a number of occasions, the cap is exhausted very quickly. We have discussed in a little detail the flow-on effects of that, in terms of private firms pulling out. It is certainly a very big issue for the clients that we see. We are a state-wide organisation, so we obviously have queries from a number of clients. Our services are in demand and we see it all the time.

**Ms Eltringham**—There are case studies in the document *Trial by Legal Aid* of women running out of legal aid funding in the middle of Family Court hearings. These are real stories that were collected a couple of years ago in Victoria.

**CHAIR**—Could you further identify these incidents as being more prevalent in cases where there is domestic violence or where there are abuse or custody type issues, or is it just across the board in family law matters?

**Ms Eltringham**—One of the things that domestic violence services would argue or submit is that sometimes the family law system is part of continuing the abuse—the vexatious litigant

approach is used to continue to maintain power over a woman and to continue to make life difficult for her. That is a significant thing for many of the women that we work with. We acknowledge that it is still a small proportion of family law cases that have to go through to contested hearings, but family violence is a significant factor in the cases that do go up, and that it is often used as a means of controlling a woman or trying to keep tabs on her. We see that quite a lot through the services that we work with.

**Ms Vessali**—There is also a flow-on effect on the Family Court. Having such a high percentage of self-representing litigants—many of whom are women, because they are unable to access legal aid any further—affects the Family Court. The Family Court is trying to operate with limited resources, and those resources are used up by the self-representing litigants. The court can cope with only so many people in that situation. It affects not only the people who have to go through it but the court system as well.

**Ms Seear**—In the information we have provided to you we make some points about the success of Project Magellan. There is an example in that report of a case wherein a woman involved in Family Court proceedings had legal aid terminated at the beginning of a trial. As a result, she represented herself and, because of her self-representation, the ensuing case became extremely long and drawn out. It ended up being one of the five most expensive cases in Project Magellan. There was a consensus at the end of the project that it may have been more financially viable for that woman's legal aid to be continued, rather than to have the flow-on effect of wasting Family Court resources and so forth.

**Ms Eltringham**—A lot of the services we work with—Victorian domestic violence services, women's legal services and community legal services—have recently made submissions to the parliamentary inquiry into the presumption of joint residency. One of our concerns is that, if changes are made such that that presumption proceeds, that will make this problem even worse and that there will be a vast increase, again, in the need for representation for women contesting custody. We are especially concerned about women who experience domestic violence. That could become part of another battle that they will have to fight in the Family Court to preserve their own safety and the safety of their children, and that will create another demand on the system and pressures on women that will be untenable.

**CHAIR**—Thank you very much for your submission, the extra material and your evidence this morning. It has been very useful.

**Proceedings suspended from 12.51 p.m. to 2.06 p.m.**

**MATTHEWS, Ms Winsome, Spokesperson and Founding Member, National Network of Indigenous Women's Legal Services**

**MILLER, Ms Leanne, Board Member and Founding Member, National Network of Indigenous Women's Legal Services**

**CHAIR**—Welcome. You have lodged submission No. 90 with the committee. Does it need to be altered or amended at all?

**Ms Matthews**—We would like to submit two additional articles, one being the *National Network of Indigenous Women's Legal Services Network* booklet, which was not attached to the original submission, and also a table on funding levels of Indigenous women's programs and family violence prevention legal units across Australia, and the difference between those. That is a four-page article.

**CHAIR**—Thank you. Would you like to make an opening statement?

**Ms Matthews**—The impact of colonisation still reverberates in neo-colonial forms, especially with regard to the first nation women—Australian Indigenous women—within a historic scenario of discrimination which has mutated to a disadvantaged landscape where Indigenous women strive to maintain and sustain their traditional practices as women in these times. Nothing has changed, in our view. Society still upholds the discrimination, bias and prejudice from Australian history.

The National Network of Indigenous Women's Legal Services reiterates the following points from our submission, which I will now summarise. The under-resourcing of Indigenous women's legal services—in particular, the Indigenous Women's Program, family violence prevention, legal service units and the National Network of Indigenous Women's Legal Services, to be known as the network. The network received philanthropic assistance and government seeding grants in 2001. These measures have helped to strengthen the network, providing assistance to establish a governance framework and some infrastructure, including the enhancement and expansion of Indigenous women's legal services and the provision of those services to our women.

The network has built unity among Indigenous women working in these legal services—towards assisting our people to deal with and address the issues surrounding their legal disadvantage. The network provides an essential point of contact not just for the Indigenous women's legal services but also for Indigenous women working in community legal services across the country. It is a valuable resource to non-Aboriginal practitioners, policy makers and the Australian legal fraternity.

Issues for Indigenous workers in rural, regional and remote areas revolve around access to solicitors in quality legal firms, along with the quantity of time to be consulted and advised appropriately by legal aid solicitors who speak only English. In terms of customary law practices intersecting with the Australian legal system, this is a setting where language and gender become prime concerns.

To give a quick scenario, in some remote towns there is no legal service. Legal providers, such as legal aid and the Aboriginal Legal Service, fly in half an hour prior to court commencing. They barely have enough time to speak with their clients and obtain a brief about the charges and to explain what options are available to them. Often they are advised to plead guilty. These people are not just adults. There are also teenagers who do not have an understanding of the Australian legal system and what their rights are within that context. A plea of guilty is often the easier option for the solicitor, given the lack of time and resources to do anything more. This issue has been constantly raised, with no sign of assertive action or change.

Our submission requests a coordinated and intensified effort by the Commonwealth Attorney-General's Department and the state Legal Aid Commission to address the identified legal needs of Aboriginal and Torres Strait Islander women. On both fronts, the Australian Commonwealth Attorney-General's Department and the Aboriginal and Torres Strait Islander Services need to demonstrate leadership to Indigenous women by entering into negotiations with the network to commence discussions on developing policy change to qualify the Australian legal system as being fair and just for all its citizens. That is all I have to say at this stage.

**CHAIR**—Ms Miller, is there anything you want to say at this stage?

**Ms Miller**—Nothing at this stage.

**CHAIR**—You propose a national review to determine legal aid needs for Indigenous women. You recommend HREOC and the ATSI Social Justice Commissioner. Are you not recommending ATSIS be involved in that review?

**Ms Mathews**—At the time of this submission being written, ATSIS was not known to the network; it was unclear what ATSIS's role would be. The network were negotiating to do business with ATSIC but were unclear about the transfer from ATSIC to ATSIS. So there would be the inclusion of ATSIS as a necessary component of that review.

**CHAIR**—You talk about non-profit legal services. You state that the non-profit mainstream services are not accessible to Indigenous women.

**Ms Mathews**—Yes.

**CHAIR**—We were in Port Augusta yesterday, and we heard evidence that, although the legal services may not satisfy the need, they do try to make themselves accessible. What problems are you highlighting, or thinking about, when you say that they are not accessible?

**Ms Mathews**—Predominantly it is that racism still prevails amongst a majority of these services. We have had witness of that in the inaugural development of the Indigenous women's program in WA. That legal service took two years to develop a service, and they took most of that time up consulting but believing that once the blacks were in that would be the end of it. Racism is still an issue that prevails amongst these services. Even though they are legal practitioners and are there to hold up the human rights of people, racism is still a whole area in question.

In relation to the need for access being more equitable, apart from racism still prevailing it is about the confidence that our women have to talk to non-Aboriginal people and sometimes to men about the peril and horrendous circumstances that they encounter. It is also about how the women can be perceived as being at fault, when it is a lack of bicultural competence amongst the non-Aboriginal people who think they are providing a service to Aboriginal women.

**CHAIR**—Racism is a big call.

**Ms Mathews**—Too right.

**CHAIR**—What do you base that on?

**Ms Mathews**—I base that on the historical context of the value of Aboriginal women as always being less than that of men and how that has transcended into this time. When we look at the condition of Aboriginal communities we see that predominantly it is men who are put up as our leaders, yet the condition of our communities or their betterment is traditionally the role of women. In these modern times we have been put at the back. We expect change in this country, not just from a political view but also from a community view, yet we still do not have the right players in place.

**CHAIR**—If your prerequisite for access is through Indigenous women who are qualified as lawyers, it could take quite a while.

**Ms Mathews**—We have Aboriginal women who are qualified as lawyers. The opportunity for them to gain employment in legal services does not exist. The majority of them sit up in corporations or in government as policy writers.

**CHAIR**—But, when we are talking about Indigenous women and their contact with the law, we are talking about a pretty big problem.

**Ms Mathews**—That is exactly right. This issue has been heralded in public forums for over 30 years but only in the past five years has family violence even made it on the board. Yet Indigenous women have been talking about it for more than three decades.

**Senator PAYNE**—Can you elaborate further on what exactly you have in mind about the policy interface you refer to in your submission under the heading 'Recommendation 2'?

**Ms Miller**—That is in relation to government engaging with the former Aboriginal and Torres Strait Islander Commission. We believe that that department has no real contact with workers under IWP, a Commonwealth funded program; has only got direct links with Aboriginal legal services; and has very limited women's issues justice programs in operation.

**Senator PAYNE**—How do you see that approach helping the access to justice issues for Indigenous women?

**Ms Matthews**—That will help Aboriginal legal services to be gender inclusive. Traditionally they have been exclusive to the point where service will not be provided to a woman if there is a potential that her husband may be a client in the future. So it is about raising confidence—

**Senator PAYNE**—Can I stop you there? Isn't it also the case that one of the issues is that legal advice is more than likely to have already been provided to the husband on other criminal defence issues and things like that?

**Ms Matthews**—That is correct, but there is also a flip side to that. Where there is the potential of that husband becoming an Aboriginal legal service client, that woman will be denied service. That is factual.

**Senator PAYNE**—Do you have some specific examples of that?

**Ms Matthews**—There have been a number of examples of that in rural New South Wales, especially in relation to the Walgett violence prevention unit and the difficulty they had in provision of service prior to the establishment of that unit.

**Senator PAYNE**—This is an issue which as a member of this committee I have been thinking about in the context of this inquiry. If you can provide us with some specific examples of where the potential is the issue, rather than an actual conflict, that would be very helpful for us.

**Ms Matthews**—We can provide that.

**Senator PAYNE**—Thank you. Access to services—broadly speaking but particularly legal services, as they are what we are focussing on today—is coordinated at the federal level for Indigenous Australians and Indigenous women. From your perspective, how would you better coordinate it? How would you ensure that there was a system in place that enabled Indigenous women to get the sort of access they have every right to?

**Ms Matthews**—There are a lot of the trends occurring now post royal commission into Aboriginal justice issues I did not talk about being the Chairperson of the New South Wales Aboriginal Justice Advisory Council—

**Senator PAYNE**—I am a New South Wales senator, so we are on common ground.

**Ms Matthews**—I am aware of that. We have taken the position that it is about the localisation of authority and the power being given back to the people. There are a few principles by which Aboriginal people are now well placed to identify what their problems are but also the solutions to those problems and how government should be facilitating the resourcing of such. This is a view we take in New South Wales. We are looking at community justice groups being established across the state to become the point of reference for the community and also policing and criminal justice authorities about legal issues and conditions in those communities.

In the Northern Territory and Far North Queensland they have been extremely successful with their community justice groups. The community of Yuendumu in the Northern Territory have extended their community justice groups to also have a traditional high court and a senate to deal with local issues, particularly the legal matters of the people. They have expanded to also look at the legal context of other social issues that they are confronted with. That is as much as I can tell you about the Northern Territory. It is a move that is rising amongst Aboriginal communities, and community justice groups in New South Wales have a legislative base under the alternative justice process, which is complementary to the circle-sentencing initiative.

**Senator PAYNE**—So that I can get an idea of where your organisation fits in the scheme of things, what exactly do the National Network of Indigenous Women's Legal Services do? How are you funded, for example? What is your membership? Whom do you represent?

**Ms Matthews**—We represent all the national Indigenous women's programs across the country, as well as the ATSIC funded family violence prevention legal units. We also always have our membership open to Aboriginal and Torres Strait Islander women who work in legal services. Women who work in ALS are eligible for membership of the network. We came about through the 1996 last-minute funding allocation of the Labor government, which placed a whole heap of money into the National Network of Women's Legal Services, which are predominantly mainstream and non-Aboriginal. They were given that money to strike an Indigenous women program because of the evidence and findings of the *Equality before the law* report, which showed the vast disadvantage that Indigenous women were suffering.

The development of the Indigenous women's unit was about locating specialist skills and abilities within these mainstream services. It had a state-wide mandate to address the Indigenous women's legal context—that is, looking at service provision, cultural awareness and Aboriginalising particular aspects and policies so that we could have a good and equitable provision of service. Predominantly it has a large schedule of community education and it was about going out to communities and developing community legal models of how people could engage with the localised legal systems but by which their issues could also be identified. There have been a number of forums and gatherings which Indigenous women have attended where their issues have been raised and identified—even their frustration of saying, 'This is stuff we spoke about 30 years ago and it is still continuing.' So it is about taking it to the next level of how we generate action. We are poorly funded as a national group that has horrendous and perilous issues to deal with.

**Senator PAYNE**—Where does that money come from?

**Ms Matthews**—That money comes from the Commonwealth family law and legal aid division, so it comes out of the Commonwealth Attorney-General's Department. We have attained other money to enhance our position and to expand our network through philanthropic grants. The Myer Foundation and the Reichstein Foundation are two organisations that have supported us quite well. We were able to develop the network to a position where it could become incorporated so that we could get real change happening, as there was a lack of infrastructure for Indigenous women and for their policy and political lobbying avenues.

The other thing that we offer back to the Network of Women's Legal Services is our Aboriginality and our expertise in trying to define a bicultural or cultural competency in their service provision while making sure that their cultural protocols were adhered to when they were making community visits and also empowering them about how to visit and engage with women in communities and with communities overall. Our remote and rural people—the women who work in those locations—have the added tension of dealing with law men and their right under customary law.

So it is quite a diverse field of action that we all participate in: from a very modern scenario at the Victorian office, which is planted right here in the city of Melbourne, to, say, Fitzroy Crossing, which is out in the community, or Walgett, which is another quite remote area. We are

pretty much talking about those locations where traditional law is still strong—and I am talking more about where the patriarchal systems of law of custom is active—and the struggle that our own women have in addressing those issues.

Whilst there has been success along the lines of Aboriginal women's spirituality and culture, nothing is written in a policy standard. There are other advantages to be taken from Aboriginal women's business in terms of what we do in our communities. We do it for next to nothing, yet lots of politicians and leaders get plenty of kudos from the change that we generate. It is time now to be more equitable in what we do—for people to come and have a look at the condition of Indigenous women in this country from a legal perspective and the struggle that they have in a barely resourced environment to make the changes.

Our units have been nominated for international and national human rights awards because of how substantial that work has been. Predominately the issues that we deal with are family violence, family law and very minute criminal matters. A lot of the criminal matters that we do deal with are from a position of poverty where women are in custody for stealing food or for overpayments on Centrelink benefits. We are also looking at embedding an Indigenous perspective into current areas of investigation and review, because of how absent it has been. Often you get an Aboriginal perspective that is predominantly represented by the Aboriginal Legal Service which never upholds the perspective or legal needs or concerns of Indigenous women.

**Senator LUDWIG**—Where did the idea for the budget submission come from? Who was that directed to? Have you had any feedback in respect of the submission?

**Ms Matthews**—Could we get back to you with the reply to that?

**Senator LUDWIG**—Yes. It is a very good submission. What I was concerned about was whether it ever actually got to where it was supposed to go so they could take it into consideration. That was one of the issues that seemed to surround it. It is a federal budget submission, and obviously it contains some substantive issues that require addressing. I was trying ensure that it actually got to where it was supposed to go and that you got a response or at least an acknowledgement that you have made it—

**Ms Matthews**—Yes, it was acknowledged—I remember this now; we talked about it a long time ago.

**Senator LUDWIG**—and a recognition of the issues contained within it.

**Ms Matthews**—I think that, if there was a recognition of the issues, we would have got the funding grant. One of the things we have been told consistently is that there is just not enough money in the Attorney-General's Department to enhance current activity or to introduce a new scheme. So it comes back to the Commonwealth government's budget priorities: how much of a priority are the needs of black women in this country, especially when we are dying at the hands of our own community through violence? In New South Wales alone, 52 per cent of murders are those of Aboriginal women who have been beaten to death. When we have women missing from the picture and children in peril, the Aboriginal race will be on the brink of extinction if this is allowed to continue—and who wants to be part of that?

**Senator LUDWIG**—Not I. The other area I was interested was whether the National Network of Indigenous Women's Legal Services has a relationship with the Victorian Aboriginal Legal Service.

**Ms Miller**—They run a women's justice program and they have just recently taken out membership.

**Senator LUDWIG**—Then your organisation is open to members who want to join, similar to PILCH, which is a clearing house and which has participants who then join that organisation and contribute either financially or in kind.

**Ms Miller**—Similar, yes.

**Senator LUDWIG**—You mentioned that the Office of the Status of Women was one of the grantors.

**Ms Matthews**—Yes.

**Senator LUDWIG**—When was that grant made? Do you recall how much it was for?

**Ms Miller**—It was the last financial year. It was for a national program called Our Strong Women, which was launched by Senator Vanstone. It has concluded. I believe it was for something like $80,000.

**Senator LUDWIG**—Has there been any follow-up?

**Ms Miller**—There has been a report sent to that office. I am happy to provide it to this committee.

**Senator LUDWIG**—That would be helpful. Is it by application to that office?

**Ms Miller**—Yes, it is, in the national granting.

**Senator LUDWIG**—Has there been a fresh application?

**Ms Miller**—In returns—

**Senator LUDWIG**—I mean from your organisation in respect of the Office for the Status of Women.

**Ms Miller**—No, we have not applied. We have actually applied to state governments.

**Senator LUDWIG**—I was curious about how many state governments you had applied to and what your success rate was like.

**Ms Miller**—I am happy to get that evidence for you.

**Senator LUDWIG**—That would be helpful.

**Ms Matthews**—I would add to that that the program has been extremely successful. We have a fabric of women now rebuilding in communities which is very strong and which is, in that, starting to generate support for one another. That has been one of the main areas that we as women ourselves have had to combat because of the lack of support that women themselves are giving one another in communities when the violence is actually occurring. We are building up the fabric of women back in communities so there are stronger support networks. That is imperative for this work as well.

**Senator GREIG**—In your submission, you talk of what you argue is the need for Indigenous family violence prevention legal services. I am wondering to what extent that has or has not been covered in the Prime Minister's recent initiative addressing family violence in Indigenous communities and what kind of consultation there was or has been between the federal government and your service and other services who have been working in this area for a long time.

**Ms Matthews**—Predominantly, most consultation has been occurring through a project officer out of ATSIC. The network has been supporting her in her work to look at strengthening the network but also to see the relevance of a significant partnership between these family violence prevention units and the Indigenous women's program. It must be stated that the auspicing of those violence prevention units has been taken up by Indigenous women's programs and state or territory women's legal services. I think that is a demonstration of our commitment and a demonstration that such programs are necessary, because we cannot be everywhere as a legal service in relation to violence that is experienced.

We supported the project officer in ATSIC. We needed to form a relationship because it was so difficult to obtain funding out of ATSIC. That relationship has proved fruitful, as we were able to obtain a $60,000 grant from ATSIC to look at strengthening the network. We have looked at the national landscape for the provision of legal services for Indigenous women and at how to encapsulate that to create the network that we have today. The reason we do that is that we all have a vast experience of the gender bias that exists in Aboriginal affairs. That is very prominent in legal services, and you should not have to be told too much about that. The very fact that victims of violence are unable to attain justice out of an Aboriginal legal service is one clear indication. I have forgotten the rest of your question.

**Senator GREIG**—I was asking about the Prime Minister's announcement.

**Ms Matthews**—In all honesty I would say that what he would be announcing are the programs that have been up and running for the past three years. There has been no extension of that program. There is nothing in the pipeline that we are aware of, and we are people who keep our fingers on the pulse of this stuff. I would only say that the Prime Minister's announcement would be of what has already been developed and is proving successful. What we need is for that to be expanded. So if he is going to talk about expansion, good on him.

**Senator GREIG**—Does is help, though, when the Prime Minister, through an announcement, puts an issue on the public agenda which has not been there before?

**Ms Matthews**—Too right it does. I was invited as a so-called expert to Prime Minister's summit around domestic violence in Indigenous communities, as he referred to it. There is a problem right there: we do not deal with domestic violence in our families; we are dealing with family and community violence. That refers to a broad spectrum of events that all people now need to get their heads wrapped around, because domestic violence is not something that occurs in our communities; it is family and community violence. It is intergenerational, it is same gender, it encapsulate suicide and homicide and it also encapsulates the vast spectrum of dysfunctional community syndrome—which is about the rape and killing of elders and children. This is how bad family violence is. It is not about the power imbalance between a man and woman.

We needed the Prime Minister to understand that. I felt that in that summit he understood that. I was also empowered by what he mentioned in Cape York—how it is about the localisation of this stuff. It is about identifying the issues locally and addressing them locally. If I felt good about anything from that summit it was the fact that he was able to reiterate those words, because that is what is making the difference in empowering the local people. This is their problem; we have to put them in a position where they can change it. Yes, it is always helpful when the Prime Minister comes out and demonstrates leadership, because then people start to wake up. That is what we need in this country: people to wake up to the day-to-day peril that black women and their children are living in—it is beyond third-world conditions.

**Senator GREIG**—You say in your submission that the Commonwealth ought to make an exception to legal aid funding for Indigenous family law issues and you explain that current legal aid funding is directed through ATSIC. We heard in earlier submissions today and in written submissions that legal aid funding is available for family law issues but only to a cap of $10,000. Are you talking about the removal of the cap for Indigenous family law issues? Is that what you are getting at?

**Ms Matthews**—It is about the removal of the cap because of how dynamic family law issues in Aboriginal communities or families are. We have to remember that we are an ancient people who still vibrate against what our traditional practices are. The caring for and rearing of children is women's business. Our women are being tricked by men who are saying things like: 'Look, that child is on my pension. He has my surname; he is my child.' Women are believing that. So it is about education and it is about being real about how well a family law system can address the family law needs of Aboriginal people when we have that backdrop of traditional practice.

I sat on the *Out of the Maze* working party, and we tried to include a lot of the traditional issues—and there is stuff that will give recognition to that. It is about how prepared we are as a society to put Aboriginal women back into their rightful positions of authority, because if we did we would not half the problems we are talking about here. I know that. I have seen communities rise up where women have taken control and the peril has disappeared. Why is that? Why can the women rise up there, when the women here are still oppressed and wondering what to do? What is going on?

It is not just about legal disadvantage of women; it is about the overall role of Aboriginal women in society and about how disregarded, underestimated and simply not considered we are. A politician once said to me, 'How come the women have got all the ideas and the men have got the money?' I said, 'That is your problem.' Women have vast generosity. We have facilitated for

a very long time in this country. We have facilitated for the politicians of this country. We have been generous. When are you going to give it back? When are you going to pay us back? When are you going to give us a go? I am serious.

**CHAIR**—Thank you very much for your submission and your evidence.

[2.36 p.m.]

**GUIVARRA, Mr Frank, Chief Executive Officer, Victorian Aboriginal Legal Service Cooperative Ltd**

**HAIRSINE, Ms Katharine, Research Officer, Victorian Aboriginal Legal Service Cooperative Ltd**

**CHAIR**—Welcome. Your submission is No. 67. Does it need to be altered or amended at all?

**Mr Guivarra**—It does. I have fresh copies.

**Ms Hairsine**—The amendments are basically that a bibliography and footnotes for some of the data were lacking, and one of the figures was incorrect.

**CHAIR**—Would you like to start with a statement? Then we will move to questions.

**Mr Guivarra**—Thank you. The services provided by the Victorian Aboriginal Legal Service are available to all Indigenous people in Victoria. Before VALS was established in 1973 Indigenous people's access to pro bono services and other legal programs was minimal. Initially VALS's main objective was to help overcome the disadvantage that unrepresented Indigenous people faced when going to court. Over time, VALS has extended its services. As well as criminal law, it now includes civil and family law, research and community legal education. Providing civil and family law services means that VALS is better able to respond to the needs of Indigenous women. Women are not involved as much in the criminal justice system but have greater needs for family and civil legal services.

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

One of the ways in which VALS creates trust with its clients is by employing Indigenous client support officers. Four client support officers are based in Melbourne and another six are located around the state at Heywood, Mildura, Morwell, Shepparton and Swan Hill. Client support officers act as a bridge between Indigenous clients and the predominantly non-Indigenous legal practitioners. They also perform important functions such as giving general legal advice, liaising between police, courts and clients, visiting clients in police custody or prison and helping to arrange transport for court appearances. The importance of client support officers is borne out by an ATSIC office evaluation and audit report which found that there is a role for Indigenous field officers that adds value to the delivery of legal services to Aboriginal

clients in ATSILS, particularly in the areas of keeping the client informed about what is happening with the case and responding promptly to clients when they have contact with ATSILS for information or help.

VALS is a community controlled organisation managed by a board made up entirely of Aboriginal people. This ensures that the organisation is responsive and answerable to the Indigenous community. As VALS is the main legal service provider to Indigenous peoples in Victoria, it follows that access to justice by Indigenous peoples is directly affected by the quality of service VALS offers. Several factors currently affect the quality of service negatively. Firstly, the Indigenous population in Victoria is increasing faster and is considerably younger than the rest of the population. This means that there are more Indigenous people coming into the 15- to 30-year range, which is typically when offending levels are higher. At the same time, the government is getting tougher on crime. This means there is a growing demand for VALS services. In fact, in the last five years the case load has increased by nearly 20 per cent. Secondly, the funding levels have fallen in real terms.

So we have a situation where there are more Indigenous people and more Indigenous people going to jail, with the vast majority using VALS as their legal service provider—yet VALS has to do important more work for less money. While adherents to economic rationalism may think this is good—more work for less money—it does not do much in tackling the inequities that affect our Indigenous people. Most of VALS staff work for the organisation because they are committed to improving access to justice of Indigenous people. However, working long hours in a stressful work environment with very low rates of pay is not sustainable in the long term. This means that staff turnover is high. This point was emphasised in ATSIC's OEA report which stated:

> The demonstrated cost effectiveness of ATSILS service delivery is achieved at a high cost of low morale and high turnover among ATSILS practitioners who work in a very demanding environment without adequate financial and logistic support and remuneration. There is a strong case therefore for ATSIC or the Commonwealth Government to increase funding to ATSILS to improve staffing levels and service delivery to clients.

Access to justice means representation by an experienced solicitor who has had adequate time to prepare the case and gain the client's trust, not just a facade of representation by an appointed but inexperienced or overworked lawyer.

**CHAIR**—Thank you very much. You have raised a few issues there. On page 7 of your submission you raise the issue of competitive tendering. How will that policy change what happens at the moment? You say, for instance, that LAC currently outsources three-quarters of its work and, therefore, the OEA report recommendation would have the effect of ruling out LAC as a potential tenderer. What do you anticipate occurring under the new competitive tendering arrangement?

**Mr Guivarra**—We have very minimal information on the competitive tendering arrangements. We received a one-page document on the ATSIC board decision, but that is about as much as we know. The ATSIC state office, as late as two weeks ago, had no information to give us in respect of competitive tendering. We are virtually flying blind at the moment.

**CHAIR**—You tell us that you think the implementation of such policy may not be beneficial to Indigenous clients. What fears do you have, and why do you have them?

**Mr Guivarra**—Our fears are that the competitive tendering process is profit driven and that our people will not get the service they so rightly deserve. If they are going to be billed by the clock, so to speak, it will be more or less, 'I'm watching the clock; I'll take instructions; next please.'

**CHAIR**—Earlier on in your submission you say that your client base has increased by 18 per cent. What has led to that 18 per cent increase?

**Ms Hairsine**—There has been growth in the Indigenous population. From the 1996 census, the major increases are in the age groups ranging from eight years to 19 years. So they are starting to creep into VALS client base now. Also there does seem to be a 'tough on crime' emphasis at the moment. For offences where in the past they might have received a smack on the backside and been sent home, younger offenders especially are now not receiving cautioning and are coming into the system. For example, just recently someone was charged for wilful damage for pulling up a rose stake and destroying the rose in the process, which was costed at $14. We are starting to get cases coming into the system that seem quite minimal.

Also, recommendations arising from the inquiry into Aboriginal deaths in custody are really coming into force. We now automatically receive from the Victoria Police notification every time an Aboriginal person comes into custody, and we will make contact with that person. They might choose then to proceed with VALS as the main service provider or they might choose to go somewhere else. But that contact at the initial stage, I believe, also leads to people being represented by VALS. So several factors lead to that: the police practice, the tougher on crime approach and the increasing Indigenous population.

**CHAIR**—In providing your service—you would have heard the previous witnesses—to what extent do you cater for Indigenous women and the law? Do you have any specific programs for them? Do you keep stats on their rate of accessing your service as opposed to that of Indigenous males?

**Ms Hairsine**—We break down all our statistics into statistics on men and statistics on women. At the moment, as it says in the submission somewhere, 85 per cent of people who access criminal justice services are male, but 55 per cent of people who access our services for family law and civil law cases are female. One of the issues that I think was raised by the previous witness is the conflict of interest that arises when someone has already had representation by the Victorian Aboriginal Legal Service. For instance, if you have a family law case where the husband has already had representation by VALS it means the woman cannot be represented by VALS. But VALS will ensure that representation for that woman is provided by another legal service provider, and VALS will fund that. It means that the woman does not go without representation—but it will not be by VALS, and that means people like client service officers. Also, having Indigenous staff in the organisation can make it easier for people to use the service.

We got funded by the Department of Justice for an Indigenous women's justice coordinator. That came out of community meetings just with Indigenous women. They said that they really felt there was a lack of information about different programs and projects that were out there.

They knew that things were happening with family violence but they did not feel they were being consulted. They did not know where to go for different kinds of help with problems. The idea for the forum was that, once every three or four months, Indigenous women would come together and have a chance then to talk about different issues that concerned them and to build networks across Melbourne and across Victoria. It is also for providing feedback from VALS, because the women raise questions such as, 'Family violence is a big issue—can you tell us what is happening for Indigenous women?' and we can then bring that advice back to the forum and say, 'This is what's happening at the moment.'

The other thing that happens is that we try to get someone in to talk about different issues—at the last forum there was a community education person from Job Watch who talked about the kinds of things that might occur in the workplace and how Job Watch can help et cetera—to try to get an awareness of the different organisations that are out there to support Indigenous women but that are not being accessed. All the statistics show that the mainstream organisations, like the Human Rights and Equal Opportunity Commission and Job Watch, are not accessed by Indigenous people, and there are really low rates of access by Indigenous women. That is one of the projects that we have.

**CHAIR**—A lot of your issues would flow from rural Victoria. How do you provide legal services to Indigenous women in those circumstances where you may have, for instance, a conflict of interest? Or, even in the absence of a conflict of interest, how do you spread your legal aid services to accommodate women in those circumstances?

**Mr Guivarra**—Very thinly, but we do have a brief-out budget. So, if there were no conflict of interest—or even if there was a conflict of interest—the matter could be briefed out to a private practitioner and funded by VALS.

**CHAIR**—Thank you.

**Senator PAYNE**—Mr Guivarra, on page 8 of your submission, under the heading 'Performance of current arrangements', you make a reference to funding issues. We know that LACs are on triennial funding now, but as I understand it from your submission ATSILS have been given funding for only six months of 2003-04.

**Mr Guivarra**—That is correct.

**Senator PAYNE**—Could you describe for the committee the impact of a funding arrangement like that on your management?

**Mr Guivarra**—It has a great impact, because we do not know what is happening. We were funded from 1 July to 31 December. It is now 12 November—

**Senator PAYNE**—And you have had no advice?

**Mr Guivarra**—and we have had no advice about whether our funding will continue from 1 January.

**Senator PAYNE**—Which department manages that?

**Mr Guivarra**—That is managed by ATSIS.

**Senator PAYNE**—So the proposition put to you has been the development of a new funding allocation method—

**Mr Guivarra**—That is right.

**Senator PAYNE**—and you are still waiting for that.

**Mr Guivarra**—We are still waiting for it.

**Senator PAYNE**—How long have you been waiting for that?

**Mr Guivarra**—Since we received the letter of offer in late June, early July. We are still waiting.

**Senator PAYNE**—So the letter of offer that was sent to you in late June, early July pertained to the 2003-04 financial year?

**Mr Guivarra**—It did.

**Senator PAYNE**—Did it arrive after the end of the last financial year?

**Mr Guivarra**—No, it was the last week in June.

**Senator PAYNE**—Positive luxury.

**Mr Guivarra**—Yes.

**Senator PAYNE**—If, in the progress of this inquiry, which is not due to report until early next year, you receive—hopefully before 31 December, one imagines—further advice in relation to the new funding allocation method, I am sure that the committee would be grateful for any information that you could provide us on that.

**Mr Guivarra**—I most certainly will.

**CHAIR**—Even on Christmas Eve.

**Senator PAYNE**—Perhaps you will hear something from them on the 24th. Thank you. I am particularly disturbed by that aspect of your submission. Just in relation to the family law conflict issue that Senator Bolkus raised, in your submission regarding family law matters you talk about the ever-increasing need for family law services and VALS opening 284 new family law and child protection matters in the last financial year. We have heard evidence—certainly I hear it anecdotally as a senator in New South Wales—about women in Indigenous communities who try to access Aboriginal legal services and find that their partner or spouse is already a client of the Aboriginal Legal Service and on many occasions find themselves unrepresented. You say you brief out. How often would you do that? How often do you think women may end

up unrepresented in Victoria as a result of that conflict issue? I know that there are other reasons for which they may end up unrepresented.

**Mr Guivarra**—In every instance where there is a conflict of interest the matter is briefed out. It may be sent to Legal Aid or to a legal practitioner.

**Senator PAYNE**—Can you tell me what proportion of your family law clients are women?

**Ms Hairsine**—I am sorry, I do not have the figures here but I could send them through to you.

**Senator PAYNE**—If it does not require too much forensic examination.

**Ms Hairsine**—I should have brought them with me. I would like to add something to the previous answer about the conflict of interest. A lot of women feel that if there is a conflict of interest we will not represent them. Anecdotally, a lot of women within the community do not think that they can get representation from the Aboriginal Legal Services.

**Senator PAYNE**—That is a very interesting point. There is certainly a perception issue that comes through for me.

**Ms Hairsine**—Yes. Anyone who came to us would not be unrepresented. In the past we also made funding applications to set up a separate women's annexe. That would have got rid of that conflict of interest but we were unsuccessful in that application. There definitely are women who would not apply to VALS because they assume that they would not get representation, even though they would.

**Senator PAYNE**—Thank you. Going back to the funding issue but from a different perspective, your submission also notes that the peak body which represents the ATSILS has had its funding reduced.

**Mr Guivarra**—It did not have its funding reduced; its application for funding in the 2003-04 financial year was declined.

**Senator PAYNE**—Right. How do they continue their operations? Are they supported by the Aboriginal legal services?

**Mr Guivarra**—At this stage they do not. All the staff were made redundant. They share an office with the Queensland peak body but most of the work is done by yours truly as the chairman of the organisation.

**Senator PAYNE**—Wearing another hat?

**Mr Guivarra**—I wear three or four different hats.

**Senator PAYNE**—I understand. Thank you for that and thank you very much for your submission, which I found very interesting.

**Senator GREIG**—In your submission you talk about the high recidivism rates among Aboriginal youth in Victoria. In the Senate inquiry into mandatory sentencing a few years ago, we heard that part of the reason for that in some jurisdictions was a youth cultural thing about gaining kudos by being redetained or further prosecuted. Is that a youth cultural factor that you also are experiencing here in Victoria?

**Mr Guivarra**—No, I am not aware of that. We are currently undertaking a project on police cautioning in Victoria, and some of our findings have been very interesting. The rate of cautioning in some police districts is 90 per cent or more, whereas in other areas it is not so great. One of the reasons police give in respect of cautioning is that, if the person has had a previous conviction or they make a 'no comment' interview, the matter then proceeds to summons or charge. That builds up the percentage figures of people coming back into contact with the justice system.

**Senator GREIG**—The explanation you gave then is more about some of the cultural practices with police sections in various metropolitan regional areas.

**Mr Guivarra**—It is, yes.

**Senator GREIG**—In your submission you also spoke of the high rates of incarceration of Indigenous women. Can you give us some of the systemic reasons behind why you believe that to be the case? What is it that is entrapping more Indigenous women in the legal system than other women?

**Mr Guivarra**—There are varied factors. A lot of it revolves around the poverty trap: shoplifting, social security fraud and stuff like that. Drugs have also been a factor for a high percentage of the people incarcerated.

**Senator GREIG**—When you talk of social security fraud, do you mean deliberate deception or Centrelink overpayments?

**Mr Guivarra**—Centrelink overpayments and people not notifying. They are saying, 'There's the money; it's great,' and then, all of a sudden, they are caught and they cannot pay. It is the nonpayment of fines and stuff like that; they cannot make restitution, so the person has got to be locked up.

**Senator GREIG**—So there are Indigenous women in prison currently because of their inability to pay back Centrelink overpayments?

**Mr Guivarra**—I am given to understand that is correct, yes.

**CHAIR**—Thank you very much for the submission and your evidence this afternoon; it has been really helpful.

[3.03 p.m.]

**REABURN, Mr Norman S., Chair, National Legal Aid**

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

**Mr Reaburn**—I am also director of the Legal Aid Commission of Tasmania.

**CHAIR**—It is very tempting to embark upon an estimates hearing with you in front of us, but we will go to submission No. 81 instead.

**Mr Reaburn**—I will try to not slip into the mode.

**CHAIR**—And I will try not to do the same.

**Senator PAYNE**—I promise not to.

**CHAIR**—Do you need to amend or alter submission 81?

**Mr Reaburn**—No.

**CHAIR**—Would you like to make an opening statement?

**Mr Reaburn**—I would like to make a very simple opening statement. Our submission is fairly straightforward. National Legal Aid is the title we give to the meetings of all the directors of legal aid commissions in Australasia. We meet for the purpose of swapping war stories, exchanging developments and best practice ideas and being able to provide the basis for national comment and response on a national basis when it is needed. The directors meet three times a year and spend a couple of days together—one day focusing more on directions and strategic matters and another day focusing on bits of business and current happenings around the legal aid world.

We are supported by a range of specialist committees and working groups that operate under directors and report to us. Again, it is the same thing: we endeavour within those committees to get representation from all, or as many as possible, of the commissions. We have specialist committees that work in the fields of family law, criminal law, community education, national statistics and assignments benchmarking, and we have ad hoc committees as the occasion might demand. This year, for example, we have been asked to respond to a whole range of new initiatives in family law. The basic work on those responses has been done within the specialist family law committee and then, where necessary and if appropriate, final gloss is put on it through consideration by directors before it is sent by whoever is occupying the chair at the time to the appropriate body.

For our submission to this inquiry, we set up a special ad hoc committee. It comprised representatives from six legal aid commissions, so the material you have in our submission is the

considered response of all of us. We have identified there the kinds of services we provide and we have identified what we perceive as being some of the gaps and issues that are facing us. I suspect the most sensible thing is to let you put the questions and identify the areas that you have particular concern about and that you would like me to amplify.

**CHAIR**—Thank you, and thank you particularly for a really comprehensive submission which I am sure could lead to questions for quite a few hours—but we will try to prioritise. One point that you do raise in your submission in a number of places is the concept of being flexible enough to accommodate legislative changes and the flow-on effect of those changes. Can you elaborate on what you think governments can reasonably do to anticipate the flow-on effects of such changes? Should there be a formal process? Should there be a formula for linking legal aid with this?

**Mr Reaburn**—If I remember correctly, the Senate committee's last inquiry into legal aid made a recommendation along those lines—that often legislative change had an impact on the need for legal aid services and that there ought to be, in cabinet submissions that are proposing legislative change, a legal aid impact statement that gives the opportunity to identify that potential. An interesting example has just come through. You will be aware of the changes to the proceeds of crime law. One of the issues that the recent legislative changes finally resolved was that question about persons who were accused of crimes and who had had assets seized using up all the assets in legal costs before the trial was concluded.

The solution involves the legal aid commissions. That solution was worked out in consultation with us, so this is not an occasion where I am complaining about something. What was worked out in consultation with us was the way in which the money that we expend in implementing the solution contained in that legislation is then capable of being returned to us. So it is a piece of legislation that has an impact upon the level of services that we might be expected to provide and the cost to us, but which contains a provision enabling us to recover that cost.

Other legislative changes—for example, the superannuation changes to the Family Law Act—have increased our costs. But we have not been given any additional resources to meet those increasing costs. We now have to pay for reports to be obtained on valuations of superannuation and on the kind of basic material that needs to be put to the court in order to enable superannuation to be split. But there was no special increase in Commonwealth funds to legal aid commissions to match that increased level of disbursements. We told the Commonwealth that it would happen. The Commonwealth said that there would be a little flurry at the beginning and then it would stop because it is not really necessary. It has not stopped and it will not. Those are indications of that. It does have an impact on us and we are expected to pick it up. In things like the family law changes we have no option but to pick it up.

**CHAIR**—Still on family law, in your submission you also refer to the Griffith University Law School study on the link between legal aid and self-representation. There are probably two points in relation to that. The study comes up with the finding that there is a very extensive relationship. Does it point to other factors? Secondly, on page 13 of your submission you refer to the disparity in success rates for legal aid funding depending on which registry one goes to. How would you tackle that sort of problem? You say that there are evident differences between registries in both their relative success rates in applications and in the reasons why applications are unsuccessful—dealing with Commonwealth law.

**Mr Reaburn**—When the report uses the term 'different registries' it means registries in different jurisdictions, for legal aid purposes. So it is not as though they are saying that the Brisbane registry will get one result but the Toowoomba registry will get another result; they are saying that this is what happens in Queensland but something else happens in New South Wales or South Australia, for example. In a sense, the research that lay behind the report was registry based but the registries were in different jurisdictions. The whole point is that if you are operating in a legal aid jurisdiction, where the demand for family law assistance is greater than the funds available to meet it, you are going to get a higher level of rejections.

Those rejections may be based on a gradated means test or—as they are in Tasmania—on a response to the applicant that says: 'I am very sorry. You have passed the means test, your case has merit and you have met all the Commonwealth's tests, but we don't have enough money today to look after you, so you weren't successful.' It will vary in different places, depending on the overall level of funding. That is what that means.

As far as the connection is concerned, the report is interesting. It found that there were three principal groups. There were people who wanted to represent themselves anyway. It did not matter what their situation was, they would want to represent themselves. This often arose out of a personal animus or obsession. There were also people who had had dealings with Legal Aid but who had had their aid refused. Sometimes that was because Legal Aid made a merit decision, and sometimes a merit decision means not enough money, and sometimes a merit decision means the case really does not have any merit and taxpayers' money should not be spent on it. Finally, there were the people who did not approach Legal Aid because they knew they would not get through the means test or because they had heard that Legal Aid did not have a lot of funds and they probably would not get aid so what was the point of even trying? Each of those groups is fairly significant. I have a copy of that report here and I am happy to give it to the committee.

**CHAIR**—You were reading my mind.

**Mr Reaburn**—I do not think you have a copy.

**Senator PAYNE**—I have a couple of questions. You would have heard from the previous witness, and we have been discussing this off and on all day, the question about the adequacy of representation for Indigenous women, particularly with what I will only call family and community violence issues from now on, and other matters. Your submission refers to that. It would be fair to say that we have heard evidence from both sides of that coin. ATSILS go to great lengths to ensure that women do receive representation, even if they are briefing out, but we hear anecdotally and in evidence that ATSILS that already have these clients, the spouse or partner, in a family law or violence action cannot represent the woman in particular. You make only a brief reference to that. Would you like to flesh that out a little?

**Mr Reaburn**—We refer to it. For the commissions that operate in jurisdictions that have high Indigenous populations, it is becoming a matter of increasing concern. Whenever we are asked, and however we can—and sometimes that is by proper protocols with the ATSILS and things of that kind—we try to take briefings out and to make ourselves available as an alternative provider. However, a couple of National Legal Aid members are finding that in their jurisdictions it is their view that the ATSILS are so underfunded, given the volume of work they

are expected to deal with, that it is becoming an increasingly heavy burden on the Legal Aid Commission and it is starting to place the Legal Aid Commission's funding under severe strain because of the volume of work coming to the Legal Aid Commission that cannot be undertaken by ATSILS. We are concerned that, whatever else is happening, ATSILS are being squeezed very tightly. We also face the particular issue that you asked me about, although obviously not in relation to Indigenous people. For example, both parties to a family law dispute may come to us and we can only assist one of them. Sometimes we would rather assist by being the child representative. In a funny sense, that is a more pivotal role. However, we frequently end up funding both parties and the child representative but our in-house lawyers are only able to represent one of those parties.

Behind that outsourcing issue is the fact that there does not seem to be a clear picture at the Commonwealth level of what they are doing with legal aid. The program that legal aid commissions handle comes through the Attorney-General's Department. The CLC program largely comes through the Attorney-General's Department, and the Indigenous women's program—one of your previous witnesses—is part of that Attorney-General's Department CLC program. The Aboriginal legal services are funded through the Aboriginal organisation, which is a different departmental structure under a different minister. The legal assistance in just about all immigration matters comes through the immigration department—so that is another department and another minister. There is clearly no Commonwealth strategic overview of what is involved in legal aid or where they want to go.

The best example of that is that under the Attorney-General's portfolio programs that portfolio says, 'Commonwealth funding is for Commonwealth matters; that is, legal issues that arise under Commonwealth law.' Under the Indigenous funding for Indigenous legal services it is totally different. It says, 'No, this is funding for Indigenous persons, no matter what kind of legal issue they might be facing.' So there is a totally different strategic approach. It may be that it is appropriate to take totally different strategic approaches in dealing different sectors of the community, but we do not see any suggestion that that has actually been considered and put into a policy framework.

**Senator PAYNE**—So I cannot extrapolate from what you have said that the NLA is therefore suggesting that it is all taken into A-G's, for example?

**Mr Reaburn**—No, I am not saying that at all.

**Senator PAYNE**—What you are suggesting is that there should be more coherence around what is happening.

**Mr Reaburn**—Yes.

**Senator PAYNE**—Have you been consulted in relation to the review of the matter type guidelines which is currently happening?

**Mr Reaburn**—Yes.

**Senator PAYNE**—Senator Bolkus was asking about changes in the law presenting further financial challenges to your organisations. I imagine that looking at the change in matter type guidelines would present the same challenge.

**Mr Reaburn**—It would, and we have made that point.

**Senator PAYNE**—Did you get a response?

**Mr Reaburn**—Yes, the response was, 'Gee, sorry, guys; there's a budget.' We actually do quite a lot of consulting with the Attorney-General's Department. They normally attend each of our meetings for part of the meeting. Whoever is chair of National Legal Aid talks frequently to the Attorney-General's Department people, and they talk regularly to all of us individually. I would not want any comment I made about a lack of overall strategic coherence within the Commonwealth approaches through different departmental structures to legal aid to imply a criticism of the extent to which we are talked to by, and the extent to which we talk with, the department responsible for our program.

**Senator PAYNE**—I have two final questions. One is the question of persistent litigants, which also goes some way towards the question of the cap in family law; that is, where persistent litigants are operating at a level to purposely reduce their respondent's capacity to utilise their legal aid access. According to the submission, you are talking to the Family Court about this. As I made the point this morning, there is always going to be a lawyer on the other side of that process who is assisting in the extension of the legal activity and the persistent applications to the court. The problem I see with having such persons declared vexatious, or whatever term you want to use, is that down the line—particularly in a family law matter in relation to residence issues and things like that—you make it much harder for them to access the court on legitimate grounds. Is that a matter of concern to the NLA?

**Mr Reaburn**—What is of concern to the NLA is that the Family Court puts up with so much rubbish, to put it very bluntly. The Family Court puts up with too much rubbish. There are circumstances where things are being driven by hostility and a desire to be a plain nuisance. We can see that that is what is going on. Why can't the Family Court see that that is what is going and just truncate the thing?

**Senator PAYNE**—What do they say if you put that proposition to them?

**Mr Reaburn**—They say that that is inconsistent with the proper perception of a judicial function—that the court is open and the court has to take the business that comes to it. These are not necessarily the exact words that any officer of the Family Court has put to us, but this is the position that they take. In the context of an exercise that is going on about self-represented litigants, we are talking to the Family Court. We are making the point that a lot of self-represented litigants are in fact people who we would not give assistance to because we regard their position as having no merit. We could not bring ourselves to spend taxpayers' money on supporting something that we regarded as having no merit, yet the court is prepared to entertain it and spend taxpayers' money on it. As a consequence of that we then have to spend taxpayers' money assisting somebody else to defend it or involving a child representative, and of course all the child representatives are paid for out of legal aid.

It is a real concern, and the questions are not easy. I have put it to you very bluntly, but I appreciate that the question is not an easy one. The processes by which the court might create a slight choke point at the entry in order to try to filter some of this out is not an easy task, but we would like to see them try and we would like to see them try a little bit harder.

**Senator PAYNE**—It is a real issue in terms of the evidence that we have received in submissions and verbally today, although I must say it lacks specificity. Witnesses have said that there is a real problem with the cap because vexatious litigants on the other side are doing it on purpose to whittle down a respondent's access. We have not got a lot of specificity there but hopefully we will get a little bit more.

**Mr Reaburn**—I do not know that that is such an enormous problem.

**Senator PAYNE**—I am trying to get to the bottom of it because it is actually vexing me.

**Mr Reaburn**—As directors, we all have a discretion to exceed the cap. I have done it myself a couple of times in the last—

**Senator PAYNE**—We still hear examples of matters being stopped on day 5 of a 21-day trial because funds have expired. So a director has made that decision, have they not?

**Mr Reaburn**—A director would have made the decision not to exceed the cap, if that is what is happening. I do not have personal knowledge of any cases like that—I am not suggesting there are not any—except to the extent that they were sometimes reported when I was a commission member of various commissions in the nineties. Cases like that would get reported to us. But as a director I do not have personal experience of that kind of thing. You will sometimes use the cap to shut something down that has no merit on either side, so the person whose cap you have imposed is going to complain about it because they are not going to accept they do not have merit.

I will give you an even worse example, of a case involving a woman who had a bad accident and is a paraplegic. The children are with her ex-partner. He regularly and consistently fails to comply with the orders giving her contact and access to the children. There have been several contravention proceedings already of which he has taken no notice. What is the court—and I am not criticising the court in this instance—going to do? The children are with him. The children are comparatively young. They cannot send the children back to the mother because the mother cannot look after them. They cannot say, 'Let's put him in jail,' because then what happens to the children?

The court has, in effect, thrown its hands up. I know that this is not going to go anywhere. Nobody is going to be able to do anything that will force this man to comply with the orders. The case gone over the cap and I have pulled the plug on it, because although she is right to complain and she has justice on her side, the fact is that I have to weigh up the fact that I am spending taxpayers' money futilely. That is hard—really, really hard. So sometimes cap decisions are quite complex.

**Senator PAYNE**—I never imagined they were simple. Thank you.

**Senator LUDWIG**—I noticed in your submission you effectively say, if I have it right, that the funding for legal aid is grossly inadequate. What do you say the answer is then if there are limits to budgets, there are limits to what government can spend and there are limits to practically everything we do? If that is the position we are now in, and given that there was also a significant cut because of the new model of some $33 million in 1996, what do we now do?

**Mr Reaburn**—There are a range of things that we can do. Some of them can be done within Legal Aid; some of them can be done elsewhere. Every director in National Legal Aid gets up on 1 January every year and says, 'What can I do this year that will take a slice of the dollar out of overheads and put it into direct service delivery?' We are all involved in that kind of exercise. We can focus more and work harder to try to make sure that we are being as efficient with the taxpayers' dollar as we can be.

The second thing that we can do is to look at alternative programs. The Commonwealth has been supporting and encouraging primary dispute resolution in family law. I am going to put my Tasmanian hat on for a minute and boast a bit. We started a special primary dispute resolution program in family law as a consequence of the Commonwealth offering us the opportunity and some funds to do it—funds outside the normal legal aid grant. We are now running a PDR program that is running very close to the rate of one PDR per 1,000 people. There are about 470,000 people in Tasmania. We ran 440 or so PDR conferences in the last financial year and we had a success rate—if you count either all issues resolved or all issues substantially resolved—of 91 per cent or 92 per cent. We provide those at about half the price. The average unit price is about half the average unit cost of going to the Family Court. The results of these conferences are taken at the end and lodged in the Family Court as a consent order. Doing that is included in the average unit cost. We can support programs like that that find alternative ways to resolve the issues that come before us.

You can look at a legal aid commission and say, 'A legal aid commission is a machine for giving money to lawyers,' or you can look at it and say, 'A legal aid commission is a part of the welfare structure of the community; it is devoted to resolving and solving problems and disputes, with a bias towards using legal methods in doing so.' The Commonwealth made that shift in its head when it encouraged us and wanted us to set up things like telephone advice lines and community education, which are designed to stop the problem happening in the first place, because that is the best way of doing it. You can look at programs like primary dispute resolution—alternative ways of dealing with issues. We can encourage the kinds of things that the previous witness talked about: police cautioning programs and police diversion programs. Through our involvement with the system, we can encourage these things; through our involvement with the system, we can encourage greater efficiency in the system. If I do not have to pay a lawyer to go down to four adjournments, then the money that I would have used for four adjournments is money that I can allocate to helping somebody else. If the system is efficient my ability to use the legal aid dollar efficiently is enhanced, so we can make contributions to that.

Finally, we could ask whether the system itself is not actually part of the problem. I like to give the example of the comparison between a major criminal trial towards the end of the 18th century and a major criminal trial today. Major criminal trials towards the end of the 18th century occurred on a single day. That was the deal. If you began the trial, you did not knock off until you had finished it, and the hanging was three days later. It was that kind of exercise. Nobody wants to go back to that, but have we gone too far in the other direction?

**CHAIR**—You don't get hung before the trial!

**Mr Reaburn**—A major criminal trial now is capable of going for months, and you have to ask in a lot of instances when you watch these things: why is it that this has to last for months? It seriously does not. The government and organisations involved in the criminal justice system have made attempts at different times in the past to try and deal with the big complex criminal trial, but it is an issue that runs right across the whole system.

**Senator LUDWIG**—In addition, you indicated that the lack of legal aid funding may lead to an increase in self-represented litigants or litigants in person. Is the report you relied on to make that connection available?

**Mr Reaburn**—I have just provided a copy of it.

**Senator LUDWIG**—Pro bono services are not the answer to inadequate legal aid funding. That is one of the substantive things that I have drawn from you. Where do you say pro bono fits in? Does it fit in at all? Is it a matter that should be pursued or does it detract from the overall model?

**Mr Reaburn**—I will give you an indication: every time a private lawyer in Australia does some work for legal aid, there is a pro bono component in it because, God, we pay rotten rates! It is an extraordinary thing, isn't it, that when it comes to lawyers and doctors there is both a practice and a tradition of pro bono work that does not really exist in any other profession? I do not expect my grocer to slip me 20 per cent of my vegetables out of the goodness of his heart but, as a community, we expect doctors and lawyers to do that kind of thing. That is the fundamental reason behind the idea that says, 'Pro bono is not the answer.' If we are going to be serious about access to justice and giving the poor citizen a decent go in his or her interactions with the law, why should we be trying to do that based on the goodwill of professionals who are entitled to use their professional learning and skills to earn a living? That is what lies at the heart of it.

The fact is that a lot of lawyers like to do pro bono work. The government has made a whole range of efforts to organise and make sure that pro bono work is done efficiently and that resources go where they are most needed and things of that kind. But why would you expect pro bono work to take the place of what ought to be seen as a proper component of the system? At heart, that is what lies behind that comment in the submission.

**Senator LUDWIG**—On page 8 you indicate that an example of the consequences of failure to approach the situation in a cooperative and strategic fashion is the Commonwealth's decision to fund a regional law hotline separate to telephone advice services that already exist in commissions. You go on to say that this duplicates an existing service. Is it a direct duplication, or are these services separate in the sense of the advice they give? I understood that the regional hotline was a referral service. It was not a direct duplication in that it only referred matters on and in some cases—I think I am correct in saying—in any event, it referred back to Legal Aid for the outcome, whereas the legal service provided by the commission also provided advice. Is that accurate, or have I got that wrong?

**Mr Reaburn**—If you ring our hotline at the Legal Aid Commission of Tasmania, you will be answered by a lawyer. That lawyer is able to give you legal advice over the phone, assisted by a computer database of questions, legal material and stuff of that kind, or make an assessment of the kind of problem or difficulty that you are putting forward. They can refer you to either another government organisation or a community based organisation that deals with that kind of thing. Furthermore, they will be able to refer you to an organisation of that kind within your own community, if one exists; we have all that information and my people are trained to do that. If you call any other legal aid commission, you will get the same kind of thing—although you might not talk to a lawyer immediately. You are more likely to have your call answered by a paralegal or a person who is trained to sift and deal with straight information requests and things of that kind and then to pass advice matters on to lawyers.

The Commonwealth has never been keen to pick up on our offer to handle this kind of thing for it, and one reason for that, we understand, is that it thought we would just whip people straight off to lawyers, and that was not the direction in which the Commonwealth wanted to go. We do not whip people straight off to lawyers. That is not the way we function when dealing with community issues and telephone advice. Quite frankly, we have been telling the Commonwealth for a long time that we could do this exercise. We are even quite happy when picking up the phone to say, 'Commonwealth here', if that is what they want. We can tell which line it is coming in on and we could do that, at worst, for half the price. But we understand why it was set up separately and why it has continued to be separate.

**CHAIR**—Thank you very much for your submission and for your evidence this afternoon. I might just ring that line and see what I get.

[3.44 p.m.]

**COVERDALE, Mr Richard, Director of Publishing, Victoria Law Foundation**

**DUKE, Ms Aileen, Project Manager, Victoria Law Foundation**

**CHAIR**—Your submission has been numbered 64. Do you need to amend or alter that at all?

**Mr Coverdale**—No.

**CHAIR**—Would you like to begin by making a statement?

**Mr Coverdale**—Yes. The author of this submission, the executive director of the foundation, is currently overseas. We will attempt to respond to the components that we have some expertise in. Essentially, that will be around the first point, looking at supporting rural and regional areas. We will give a brief summary of two projects that the foundation is currently involved with. One is Rural Law Online, which I am involved with; and Aileen will speak briefly on the 'Law @ your library' project.

As a precursor to this, I should say that the current justice arrangements do not meet the needs of the community for legal assistance. The foundation is involved in a range of activities or projects that attempt to improve access to justice. A primary project which we are involved in is the production of plain language legal information—books, manuals, CDs, videos and so forth—that are directed to the general public and to professional areas. For example, we have produced a publication for primary producers on rural law, which was the precursor to the Rural Law Online project that I am involved with.

I will briefly summarise that project. It is essentially about providing an adjunct or support to the provision of direct legal advice support and should not be seen as being instead of the provision of direct legal support to individuals. But, having said that, it is important that people are empowered with information so that they can best make judgments themselves across a whole a range of areas of law. With the Rural Law Online project we recognise that farmers are increasingly dealing with more and more complex regulations and legislation and that they require information across a huge range of areas of law. The *Rural Law Handbook*, which we produced, attempted to respond to that but, because of the nature of legislation, it is probably fast going out of date. The advantage of a web based service is that it can be updated regularly.

The other thing the foundation prides itself on is that we are able to look at numerous formats or ways in which we deal with projects. In this instance we are working with RMIT in the web design, with Deakin University in content updating, and a range of other community sector, state government departments and individuals with expertise to update the information. We are also looking at expanding this project. It is a Victoria-specific project funded through the Legal Practice Board. We are looking to expand it to a national web site, and we currently have a submission with the Department of Transport and Regional Services to that effect.

Essentially the project involves three core components. One is a database covering a broad range of areas of law, which will continue to expand. The second component is an information referral service whereby people coming in with inquiries through the Internet will be referred to appropriate organisations or services. The third component is a discussion forum where people have an opportunity to respond to a range of legal issues, national and state. Obviously one of the issues we are looking at at the moment is water rights. That is basically a brief summary of Rural Law Online. Aileen will summarise the 'Law @ your library' project.

**Ms Duke**—Based on the belief that informed consumers make more effective use of the legal services, we have worked with library personnel from Victorian libraries and with the legal librarians network to develop the 'Law @ your library' project. The project is based on the LIAC model from New South Wales and has a tiered approach—which is outlined in your handout—which aims at providing people, via trained librarians, with legal information that ranges from brochures and plain language publications through to the more complex books and then to specialised legal information.

Because over 50 per cent of the Victorian population are registered library users, we feel that it is an efficient model that makes use of existing services, with some input in resources and training, to provide the community with a complementary service that assists them in making the decision about which legal services they can use that are provided in other areas. I do not think I can add more to that, but I could answer questions.

**CHAIR**—I will start with the online service. What sort of number of hits are you getting?

**Mr Coverdale**—At this point the service is being developed. We are still finalising the content updating and the web design. We hope to have it online in February or March 2004. Unfortunately, I cannot give you any stats on that. I can say that part of the impetus for this was the recognition that rural and regional communities have a higher usage of the Internet and we felt confident that it is likely to be a well used resource. We are still waiting for Bureau of Statistics information on exact use, but ACNeilson did a study in May 2000 and indicated that more than 41 per cent of Australians online reside in regional and country Australia—but those Australians are certainly a lot less than 41 per cent of the total population so, proportionally, it is significantly high.

**CHAIR**—There is some concern that legal advice needs to be more focused and needs to go back to the traditional solicitor-client relationship, given the peculiar circumstances that often apply to a particular individual. Given that, what do you do about legal professional insurance?

**Mr Coverdale**—There is perhaps a fine line between advice and information, but this service would be providing information. Essentially, the information will be written information on the web and it would have been tested and reviewed by a second party before being uploaded. In terms of providing individual advice, a component of the service will involve referring people to appropriate legal services—that might be a private practitioner in the closest country town, a financial counselling service, an accommodation service or whatever. A component of the web design is to look at how we can tier that so people can more or less self-refer. They would answer a series of questions and then go to another area, so it soon becomes clear as to which broad area they can be referred to. The Law Institute of Victoria has a referral program, and this web site will be linked to that as well.

**Senator PAYNE**—I gather that Rural Law Online is effectively targeted at farmers and farming communities?

**Mr Coverdale**—Yes.

**Senator PAYNE**—Does the foundation have any current activities or plans to look at non-farming regional and remote residents, who, judging from the evidence we have had here today, are facing significant challenges in accessing justice, particularly when they are in lower socioeconomic areas?

**Mr Coverdale**—Yes, we do. The difficulty, obviously, is who has access to a computer.

**Senator PAYNE**—That is right.

**Mr Coverdale**—So it is not a panacea for all the information ills in regional and rural Victoria.

**Senator PAYNE**—Are you confident that there is enough access to technology to make this successful at the primary producers level?

**Mr Coverdale**—Yes, and more broadly. But the primary focus is on primary producers. The content area that we cover ranges from things like social security law and family law—which are generic and relevant to all regional, rural and remote communities—to issues that are more specific for primary producers, such as fencing, the use of chemicals, stock transport and so on. We are hopeful and will target regional and rural Victoria broadly as the market, I suppose, for this service, but the material includes primary producers as a prominent group for the provision of information. It is not exclusive, basically.

**Senator PAYNE**—How will you evaluate whether it is a successful program?

**Mr Coverdale**—The obvious area is the hits that we receive on the web site, but we are also looking at the referral service and the extent to which that would be used and at a discussion forum and the extent to which people will take it up. That will indicate the interest in the site. We are not doing this independently. For example, we have the Victorian Farmers Federation and the Municipal Association of Victoria involved. Several organisations are involved in the reference group and those organisations would also be involved in promoting the service to rural and regional Victoria.

**Senator PAYNE**—Does the foundation do its own promotions of the service?

**Mr Coverdale**—Yes. We have a limited budget. We will be extensively using the services of other organisations that have direct contact with the groups that we are dealing with. That is one of the reasons why we are also interested in partnering with Deakin University, which has strong ties in regional and rural Victoria as well, and RMIT are developing those ties. We have a campus in Hamilton and one in Gippsland. Essentially, we will involve a range of networks, including the Rural Women's Network. A number of organisations have expressed interest and are keen to be involved in the project and to use it as a forum for raising concerns.

**Senator PAYNE**—I assume that the foundation sold the *Rural law handbook: a guide for primary producers*.

**Mr Coverdale**—Yes, that is right.

**Senator PAYNE**—It obviously does not have the same capacity to provide a return to the foundation. Is it funded only by the foundation, or does it have other financial support?

**Mr Coverdale**—The rural law handbook?

**Senator PAYNE**—No, the online project.

**Mr Coverdale**—We have received 12 months funding from the Legal Practice Board and, as I mentioned, we are looking to federal funding of an expanded web site. The infrastructure is there—well, it will be there once we have built it with the money we have received. Roughly a third of the content is Commonwealth law, so we are looking to the Department of Transport and Regional Services for funds to develop and upgrade legislation from other states. There are currently some resources to which we have access to enable us to develop it as a national site, but we obviously need to employ authors to expand it. We are also looking at possible sponsorship. We have been talking to Telstra Country Wide and the Rural Finance Corporation. In short, we have no assurance of funding after the end of the next calendar year, but we will be working very hard to gain it. Obviously, as with anything, it is difficult until people actually see it up and providing a valuable service before we can get interest in sponsorship and grants.

**Senator GREIG**—I think you are quite right when you say that Internet services are not a panacea for everybody. There are a lot of people who are not familiar or comfortable with IT in some rural and regional areas which have poor or nonexistent Internet access. What opportunities are there for the foundation to look at in trying to address other forms of education? We talked about the opportunity for your own promotions. Has the foundation the resources to help educate people about physically accessing the Internet—not just knowing that your services are available but knowing how to access them? From your discussion, I gather that it has not.

**Mr Coverdale**—We do not have the resources ourselves. But Telstra, for example, has put quite a bit of money into that network infrastructure with Skills.net and other programs. While that is great, the difficulty is that there has not been the content there for people to utilise. They can use it for Internet banking and other general information services but there has been a limit—I mean in terms of the law—in access to plain language, accessible information covering a broad range of issues that specifically have a rural and regional theme, and that is essentially what we are trying to provide.

**Senator GREIG**—Has the foundation also had the opportunity to look at providing its services and resources in other languages and/or through interpreter services?

**Mr Coverdale**—A number of the foundation's publications have been produced in other community languages. In the case of this web site, yes, there would be good reason to provide content in community languages, but at this point we simply do not have the funds to provide translations of the material that we have produced.

**CHAIR**—Thank you very much. Good luck with it.

**Committee adjourned at 4.03 p.m.**